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# The Business and Human Rights Review

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Summer 2016 | Issue 4

## A hard-edged business approach to ending modern slavery

An Interview with Andrew Forrest,  
Chairman and Founder of Fortescue Metals Group



### **Transparency In Supply Chains – business and the UK Modern Slavery Act**

Matthew Townsend, Claudia Watkins, and Hattie Hughes

### **A collaborative approach to ending slavery and human trafficking in Asia**

An Interview with Archana Kotecha

### **The transformative nature of respect**

Mark Hodge

### **Promoting the rule of law in post-conflict Liberia**

An Interview with Counselor Christiana Tah

### **Implementing the State duty to protect human rights in investment policy**

Andrea Saldarriaga and Andrea Shemberg

### **Cohesion between the international human rights and international investment regimes – is a standing court necessary?**

Angeline Welsh and Katrina Limond

# Foreword

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Andrew Denny, Partner, Allen & Overy LLP



*Business has a leading role to play in the protection of human rights, while States are stepping up regulation to encourage them to do so. As the global movement for greater transparency intensifies, who is prepared for the challenge?*

Many corporations today, both domestic and transnational, have large and complex supply chains which stretch around the globe. Amidst a growing recognition of the incidence of modern slavery and other human rights abuses worldwide, there is also greater understanding of the risk of exposure that many such corporations face to human rights breaches. Indeed, businesses are coming under ever-greater scrutiny in relation to human rights issues, not only from the media and non-governmental organisations, but increasingly from States themselves.

Recent developments in the US and Europe illustrate an increased use of disclosure and reporting requirements, and greater supply chain transparency, as a manner of regulating businesses. Such developments pose new challenges for businesses, as they impose a novel framework and increase exposure to societal and reputational pressures. Australian businessman Andrew Forrest discusses his reasons for tackling the risk of modern slavery in his company's supply chains and the outcome of that review at **page 5**, while my colleague Matthew Townsend provides an insight into the requirements of the UK's new Modern Slavery Act which will impact many large companies at **page 11**.

Various tools are being developed to provide data and guidance to businesses, and assist in effectively identifying, assessing, and managing human rights risks. There is a growing need for advisers who not only understand these legal developments, but the broader nature of supply chain risks and mitigation strategies. These developments underscore the growing recognition that business has an important role in the protection of human rights, although as Mark Hodge points out at **page 19**, this must go beyond a tick-box exercise and may involve sustained change within an organisation.

Concurrently, there remains a crucial role for States to play in implementing their duty to protect human rights, both at home and abroad. In this context, the experience of States faced with the difficult task of simultaneously encouraging foreign investment, and strengthening (or entirely rebuilding) the rule of law and respect for human rights in their jurisdiction, can prove instructive. Counselor Christiana Tah, the former Attorney-General of Liberia, provides a vivid illustration of this at **page 27**.

Looking to mitigate future challenges, Andrea Saldarriaga and Andrea Shemberg argue that now is the right time for States to implement their duty to protect human rights in the context of international policymaking at **page 33**. Indeed, the advantages and disadvantages of the various mechanisms available to address human rights issues in investor-State disputes continue to stimulate vibrant debate, as discussed further by Angeline Welsh and Katrina Limond at **page 41**.

Against a complex landscape, with the international community embracing a new 2030 agenda with the UN Sustainable Development Goals, a swathe of pledges on climate made in Paris at COP21 and with ongoing contested negotiations over the Transatlantic Trade and Investment Partnership, The Business and Human Rights Review continues to provide an important platform for diverse perspectives on these developments, and the impact they may bring.

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# A hard-edged business approach to ending modern slavery

## An Interview with Andrew Forrest, Chairman and Founder of Fortescue Metals Group

Andrew Forrest is the Chairman and founder of Fortescue Metals Group (Fortescue), the world's fourth largest iron ore producer. He is also the Chairman and founder of the Walk Free Foundation, an organisation committed to ending all forms of modern slavery by mobilising a global activist movement, generating high quality research, enlisting business and governments to drive change in those countries and industries where slavery is most prevalent today.

We asked Mr Forrest to explain why eradicating modern slavery is an issue for business and to share his insights on what it means to ensure that the complex, international supply chain of a leading company is free of modern slavery.



*As the founder and chairman of a listed mining company, how is it that you came to lead a campaign to end modern slavery?*

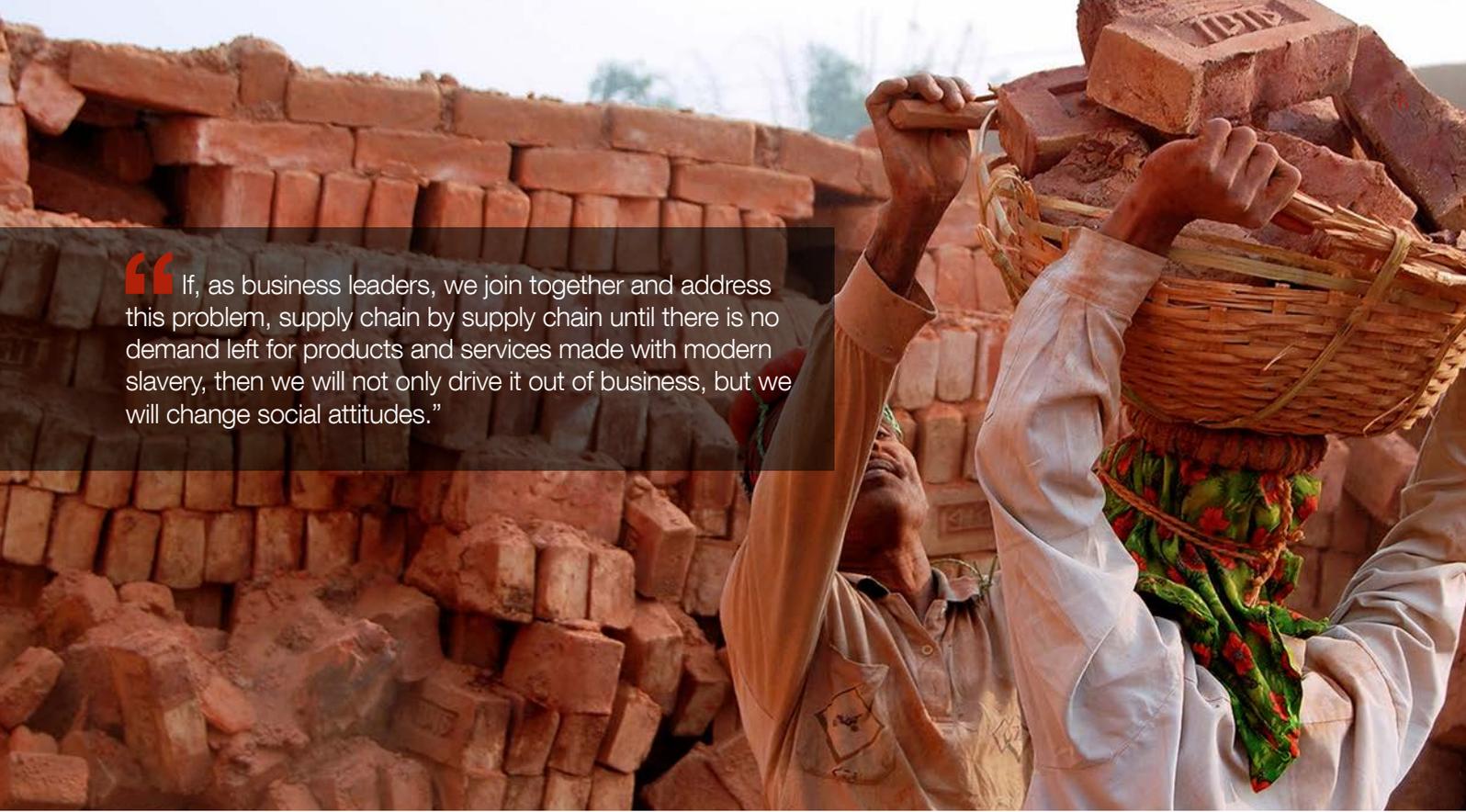
I first came across modern slavery through a personal experience that was deeply upsetting to my family. I then recognised the risk of slavery in the supply chain of my own company. This made me realise that slavery is not a relic of the past. There are more people enslaved today than at any time in history.

Modern slavery is a notoriously hidden crime with many faces. According to the Global Slavery Index, prepared by the Walk Free Foundation, there are an estimated 35.8 million women, men and children living in modern slavery today.<sup>1</sup> They are exploited through force, deceit and coercion and can

be found around the world in farms, mines, fishing vessels, factories and brothels. The case studies that we have gathered in the Global Slavery Index highlight that modern slavery is happening throughout the world, from Indian brick kilns where generations of families are enslaved, to Mauritania where people are still the full property of their masters, to farms in the UK and Australia and in fishing boats off the coast of Thailand.<sup>2</sup>

This also means that businesses around the world risk having modern slavery present in their supply chains: whether they are sourcing bricks from India, minerals from West Africa, produce from the United Kingdom or Australia or seafood from Thailand. Companies are most at risk when they do not directly control all aspects of their supply chains or are doing business in weak regulatory environments.

When I realised that modern slavery affects us all, I wanted to make a contribution to the fight against this crime. So I founded the Walk Free Foundation in 2012 with this goal in mind.



“If, as business leaders, we join together and address this problem, supply chain by supply chain until there is no demand left for products and services made with modern slavery, then we will not only drive it out of business, but we will change social attitudes.”

*You have said that you are running the Walk Free Foundation as “a hard-edged business”. Why do you think this is important?*

The Walk Free Foundation has been set up like a high-achieving, measurement-driven, target-oriented company. As a businessperson, I know the importance of metrics. In business, it is critical to start by obtaining the hard data; this equips you with the information you need to take informed decisions and allows you to drive and track progress as you implement change. When the Walk Free Foundation was founded in 2012, we quickly realised that metrics on modern slavery were poor to non-existent. So, we decided to publish the Global Slavery Index, the first report of its kind, to provide an estimate of the number of people in modern slavery in 167 countries and provide the data needed to make policy choices. Like a business, we are continuously improving our data so we can better understand where the problem is concentrated and improve our recommendations on how to end modern slavery.

The Walk Free Foundation has also created a community of eight million people campaigning against modern slavery. By creating a common platform backed by high quality research, the Walk Free Foundation movement has allowed the many organisations around the world that were

already working tirelessly to end slavery to achieve global reach and share their message. So far our recommendations have been adopted by 11 governments, the European Parliament and the International Labour Organization, eight global companies and at an historic event held at the Vatican in 2014 to mark the World Day for the Abolition of Slavery, the Catholic, Anglican, Muslim, Hindu, Buddhist, Jewish and Orthodox leaders came together and signed the Joint Declaration of Religious Leaders Against Modern Slavery. In partnership with Humanity United and the Legatum Foundation, we launched the Freedom Fund – a donor collaborative mechanism designed to mobilise the capital and knowledge required to end modern slavery. The Freedom Fund has liberated 4,761 people from slavery and impacted the lives of close to 110,000 people in India and Eastern Nepal. The momentum to end modern slavery is here.<sup>3</sup>

*Given the scale of the problem, how can businesses contribute to ending modern slavery?*

The private sector can be instrumental in ending modern slavery. For a start, businesses can identify and address instances of modern slavery in their direct operations. The next step is to look to their supply chains. However, eliminating modern slavery from supply chains is not easy and businesses need to work with their direct and indirect suppliers as severe abuses tend to happen

several tiers down, where businesses often have little visibility. Many tools are being developed to help companies in this process, such as the Walk Free Foundation guide to tackling modern slavery in supply chains.<sup>4</sup> My own company, Fortescue, has taken a number of steps to eliminate slavery in our business, which I will turn to later in more detail.

Another way businesses can contribute to ending modern slavery is by building partnerships with other industry players, government and civil society. A good example is the promising partnership in Bangladesh between 200 global brands and retailers, unions and civil society which has emerged from the aftermath of the Rana Plaza tragedy.<sup>5</sup> The Accord on Fire and Building Safety in Bangladesh is a legally binding agreement committing participants to improving working conditions and safety for workers in Bangladesh's garment industry.<sup>6</sup>

Combating the crime of modern slavery requires as many resources as possible and business can contribute both financial and non-financial support. Businesses can provide much needed data analysis on modern slavery, or contribute their technological know-how. Microfinance programs, technological innovations such as such as proximate data collection, geospatial imagery, and mobile direct pay of wages, are examples of innovations to tackle modern slavery that businesses can support in partnership with civil society and governments.

*Fortescue has made a public commitment to protect and promote human rights and, in particular, has stated that it has “zero tolerance” for modern slavery in its supply chain. How does Fortescue translate this commitment into practice?*

In 2012, Fortescue made the commitment to deal with slavery in its supply chain. Fortescue began by explaining the objective to suppliers and requiring their buy-in. By the end of 2013, Fortescue had a business-wide policy in place to prevent, detect and remedy instances of forced labour within its own operations, and the operations of its suppliers and business partners.

The foundation document for implementing Fortescue’s anti-slavery policy is Fortescue’s Code of Conduct (the Code),<sup>7</sup> which establishes the essential standards of personal and corporate conduct and behaviour expected of everyone who works for or with Fortescue including directors, employees, contractors, suppliers and business partners.<sup>8</sup> The Code was approved by the Board of Directors and is supported by a number of specific policies approved by the CEO. The Code contains Fortescue’s commitment to respect human rights and refers to the UN Guiding Principles on Business and Human Rights. Fortescue’s Strategic Procurement and Supply Chain Policy states that *“to meet our commitments... we will have a zero tolerance for modern slavery, forced labour and human trafficking in our supply chain”*.<sup>9</sup>

“ We recognise, respect and uphold the human rights of every individual, being at a minimum those protected by the Universal Declaration of Human Rights. We will actively seek to ensure we are not complicit in human rights abuses committed by others.

Fortescue is committed to respecting, and acting in a manner which avoids infringing on human rights. In this regard the company acknowledges the “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework (2011)”.<sup>10</sup>

*Extract of the Fortescue Code of Conduct.*

Since August 2012, Fortescue has adopted a number of procurement requirements to implement this commitment:

1. All existing suppliers and new suppliers are required to sign a statutory declaration certifying that they have undertaken investigation of their own labour practices and those of their direct suppliers to ensure they use no slavery or forced labour; that they have all necessary policies, procedures, investigations and compliance systems in place to ensure this continues to remain the case; and that they have taken actions and investigations to confirm the accuracy of these statements.
2. All Fortescue supply contracts include a clause on forced labour and slavery, requiring each Contractor to warrant that it has thoroughly investigated its labour practices and those of its direct suppliers to ensure there is no forced labour or slavery anywhere in the Contractor’s business or that of its direct suppliers; and that the Contractor has put in place processes, procedures, investigations and compliance systems to ensure that this will remain the case at all times.
3. Fortescue employs a Business Integrity Manager whose role includes evaluating the risk of slavery within Fortescue’s supply chain, undertaking audits where necessary and implementing corrective action in any identified cases of non-compliance.
4. Fortescue has established a range of mechanisms for a whistle-blowers hotline to confidentially identify breaches of the Code. The Code gives whistle-blowers the full protection of the Fortescue board, and unauthorised disclosure of the identity of a whistle-blower is a breach of the Code.
5. Where issues are identified, whether through reports from internal or external sources such as the media, these are quickly followed up at the highest level and steps are taken to address the situation.<sup>11</sup>





## *Fortescue Case Study:*

In 2012, I decided to conduct an investigation of Fortescue supply chains with the support of the board of directors. This was not an easy task. We spend over AUD6 billion a year for our projects and our complex supply chain is many tiers deep, comprising over 3,000 contractors and sub-contractors in 20 countries in Australia, Asia and Europe.

Our initial investigation revealed that some of the businesses we work with were at high risk of slavery, so decided to investigate further. We asked labour auditing experts, Verité, to attend the site of one of our major suppliers and investigate the labour and living conditions of their workers. I had a sense of foreboding that I may be an unwitting agent in the insidious practice of modern slavery.

The vulnerability identified in our supply chain was a labour hire company recruiting migrant workers from disadvantaged backgrounds. After more than 100 workers had been interviewed, we had to confront a fact emerging from Verité's audit: the practices of our supplier were creating conditions that allowed modern slavery to thrive.

At this single hire company we found:

- excessive recruitment fees, which in some cases exceeded the legal limit in the relevant countries;
- some workers needed loans to pay for recruitment fees and excessive interest rates were sometimes applied to these loans so that repayment required up to two years' work, during which time workers felt unable to leave their jobs or send money back to their families;
- workers were required to surrender their passports to their employer upon arrival in a new country, removing their ability to return home; and
- significant ambiguities in workers' contracts, particularly around overtime and leave, which left them vulnerable to exploitation.

Practices like this, and other forms of forced, bonded and child labour, exist in many countries and in many industries including construction, agriculture, textiles, hospitality, automobiles and electrical goods.

*How have Fortescue stakeholders, namely employees, supply chain, shareholders, and industry peers, responded to its commitment to eradicate modern slavery?*

Fortescue would not have been able to achieve as much as we have in our anti-slavery efforts without the commitment and active engagement of all our stakeholders from employees to suppliers. The success of a “zero tolerance” approach to forced labour and modern slavery is only ensured if it becomes the foundation on which a company engages with all its stakeholders, both internal and external.

At Fortescue, we still have a lot of work to do to ensure our supply chain is free from modern slavery. The challenge for all businesses is to understand and commit to tackling modern slavery and to ensure that their leaders are taking a proactive stance in ending it. While the impetus for a focus on supply chain responsibility can come from anywhere in the company, it is critical that senior management support is obtained to respond to this issue. We made sure early on that the Code which formed the basis for our anti-slavery commitments and policy frameworks was championed by senior management and communicated to all our employees, our board of directors and our suppliers.

*What is the biggest challenge you see for business in ensuring that modern slavery does not occur in their operations or those of their suppliers?*

The prevalence of modern slavery globally means the majority of businesses will be exposed to some risk of forced labour or modern slavery in their value chains. Modern supply chains are vast, multi-tiered and cut across many countries and jurisdictions. Worker exploitation is not always immediately obvious and high risk situations are not necessarily uncovered during standard factory inspections. Just as “zero tolerance” safety policies do not guarantee the absence of accidents, it is impossible to guarantee the absence of exploitation. What matters is that businesses identify and mitigate high risk situations consistently.

To effectively assess and manage the risk of modern slavery, businesses need good data on modern slavery. Reports such as the Global Slavery Index and the US Government’s Trafficking in Persons Report provide information on high risk countries and industries that allow companies to identify risks and target resources. But to dig deeper to identify the risks associated with particular suppliers, businesses need more detailed information. Organisations such as Labour Voices and Made in a Free World are starting to fill this information gap, but the challenge is to build on these initiatives so all companies have closer observation of their supply chains.

*How can commercial lawyers support businesses like Fortescue that are committed to eradicating modern slavery from their supply chains?*

Lawyers can play a key role in combating modern slavery, particularly in the commercial sphere. Governments are no longer waiting for businesses to take voluntary action and are introducing legislation requiring them to monitor and address modern slavery in their supply chains. This will affect businesses around the world. Lawyers need to be ready to advise their clients on their current obligations and prepare for future developments. An essential first step is to ensure lawyers’ continuing legal education covers this fast-changing area so lawyers are ready to advise their clients.

This is particularly important when a lawyer is advising clients in high-risk industries. For example, a company like mine operating in the mining industries with complex supply chains several tiers deep that cross multiple jurisdictions. Lawyers can advise on how to identify risks and implement anti-slavery policies to help their clients manage their legal and reputational risks.

1. 2014 Global Slavery Index, available at: <http://www.globalslaveryindex.org/>.
2. Ibid.
3. Further information on the Freedom Fund is available at: <http://freedomfund.org/>.
4. Tackling Modern Slavery in Supply Chains, A Guide 1.0, Walk Free Foundation, available at: <http://business.walkfree.org/>.
5. Accord on Fire and Building Safety in Bangladesh, Signatories, available at: <http://bangladeshaccord.org/signatories/>.
6. Introduction to the Accord on Fire and Building Safety in Bangladesh, Bangladesh Accord Secretariat (January 2015), at p. 3.
7. Fortescue Family, Our Code of Conduct, November 2012, available at: <http://fmgl.com.au/media/1866/code-of-conduct-november-201216-1.pdf>
8. Fortescue Family, Our Code of Conduct, November 2012, p. 4, at para. 2.
9. Fortescue Metals Group, Strategic Procurement and Supply Chain Policy, 2013, available at <http://fmgl.com.au/media/1893/100-po-pc-0001.pdf>.
10. Fortescue Family, Our Code of Conduct, November 2012, at p.11.
11. Fortescue Family, Our Code of Conduct, November 2012, p. 8, at para. 6.



# Transparency In Supply Chains – business and the UK Modern Slavery Act

Matthew Townsend and Claudia Watkins,  
Allen & Overy LLP and Hattie Hughes,  
Allen & Overy LLP Alumnus

*With thanks to Dina Fahmy, Trainee, for research assistance in preparing this article.*



In August 2014, eight men were rescued from a farm in Bedfordshire, England, following a police investigation into potential slavery. The arrests came shortly after the UK Home Office launched a national campaign targeting modern slavery in the UK, with a focus on forced labour in UK industries, from mining and manufacturing to tarmacking, hospitality and food packaging. In April 2015, 13 individuals were arrested in Peterborough for the exploitation of 46 potential victims (including children) as slaves.

Globally, slavery and human trafficking are acknowledged as a continuing problem, with the trade estimated to be worth a minimum of USD150 billion per year<sup>1</sup> primarily affecting the construction, agriculture, textile, security, food processing and packaging, hospitality and tourism sectors. It is estimated that over 35 million men, women and children were enslaved around the world in 2014, a rise of 23% from 2013<sup>2</sup>.

In an attempt to tackle this problem, the UK passed the Modern Slavery Act 2015 (the Act). The Act consolidates existing legislation which created the offences of slavery and human trafficking and increases the maximum prison sentence for these crimes, from 14 years to life imprisonment. It also supplements law enforcement measures with new civil orders and creates the position of an independent Anti-Slavery Commissioner. Crucially for businesses, following the entry into force of Section 54 of the Act and the publication of accompanying government guidance<sup>3</sup>, there are now new and far reaching reporting obligations on the presence of slavery and human trafficking in global supply chains.

## Background

The Act introduces two main offences concerning holding another person in slavery, servitude or forced labour and arranging or facilitating the travel of another person with a view to that person being exploited.

Briefly, slavery is committed where ownership is exercised over a person, servitude where a person is obliged to provide services imposed by coercion and forced or compulsory labour where a person is performing a service exacted from another under the menace of a penalty. Human trafficking is the arranging or facilitating of a person's travel for the purposes of exploitation. A person's consent to providing the goods or services does not preclude a determination that one of the offences is being committed under the Act.

One of the more striking aspects of the Act is the so-called "Transparency in Supply Chains" (TISC) obligation<sup>4</sup> which requires commercial organisations to prepare a slavery and human trafficking statement (the Statement) for each financial year. Organisations must report on the steps, or absence of steps, taken to ensure no

slavery or human trafficking offences<sup>5</sup> are taking place in their business or in any of their supply chains. The guidance clarifies that businesses are not required to guarantee that there is no slavery in a supply chain but, instead, to report accurately on steps taken or begun in relation to the supply chains or parts of them.

Preparing the Statement is a pressing issue. The first organisations which will have to publish their Statements are those with a financial year ending on or after 31 March 2016. They are expected to publish their Statement for the 2015/16 financial year "as soon as reasonably practicable" after the end of the financial year. This deadline for publication is set out in the guidance document. Although there is no definition of "as soon as reasonably practicable", the government encourages publication within six months of financial year end. However, the guidance also acknowledges that many organisations may wish to publish at the same time as their annual reports.

Businesses with a financial year end between 29 October 2015 (when the relevant part of the Act came into force) and 30 March 2016 will not be required to publish a statement in relation to that financial year of the organisation.




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*Around 12,000 organisations are likely to be affected*

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The transparency obligations apply to all commercial organisations (corporate bodies and partnerships, wherever incorporated or formed) which (i) carry on a business or part of a business in the UK (the Jurisdiction Requirement) and (ii) have a turnover above a certain minimum threshold (the Turnover Requirement).

Whether or not an organisation is considered to be carrying on a business is a question of fact and ultimately would have to be settled by the courts. However, the guidance states that a “*common sense*” approach will be taken to determining this issue.

The total annual turnover threshold is GBP36 million<sup>6</sup>. Turnover is to be calculated in accordance with the UK Companies Act 2006 (the total amount of revenue derived from all sources, after deduction of trade discounts, VAT and any other taxes). The turnover of a company carrying on all or part of its business in the UK should, for the purposes of determining whether it qualifies for the requirements, include the turnover of all of its subsidiaries (whether incorporated in the UK or elsewhere).

## *Preparing the statement*

Organisations captured by the Act’s TISC requirements must produce a Statement. The Statement must be in English, (although it may also be in another language, if appropriate) and should be succinct, confirming:

- the steps taken to ensure slavery and human trafficking are not taking place directly in the organisation itself or in any of the organisation’s supply chains; or
- that the organisation has taken no steps to confirm the existence of slavery or human trafficking.

The Act suggests information that the Statement may include, namely:

- a brief description of an organisation’s business model and supply chain relationships;
- an organisation’s policies relating to modern slavery, including due diligence processes and the training available and provided to those in supply chain management and the rest of the organisation;
- the parts of the business and supply chain most at risk and how the organisation evaluates and manages those risks; and
- relevant key performance indicators which would allow a reader to assess the effectiveness of the activities described in the Statement.



“It is important to note that the Act itself imposes no legally binding requirements on an organisation to conduct due diligence on its supply chains. The obligations are, on their face, concerned with reporting.”

The guidance includes suggestions on the additional information which an organisation may choose to incorporate into their Statement. These cover organisational policies, due diligence, assessing and managing risk, performance indicators and training. It suggests that actions taken can be explained in relation to specific countries. Organisations may wish to link to existing policies.

The Statement is expected to have senior-level support and senior members of the organisation must approve and execute the Statement. For companies, the Statement must be approved by the board and signed by a director. There must be a prominent link to the Statement on the company's website. Under the Act, a company need only report on its supply chains and does not have to report on the supply chains of all group companies unless a parent and its subsidiary companies each qualify in their own right and are each required to produce a Statement. In this case, an aggregated Statement covering all those entities can be produced. Where one Statement is produced for a parent and its subsidiaries, there must be a link to the Statement on the homepages of both the parent's and the subsidiaries' websites. If a company does not have a website, it must provide a copy of the Statement, within 30 days, to anyone who requests it.

However, the guidance is not prescriptive.

The specific content of the Statement is likely to differ between organisations as each determines a “*reasonable and proportionate*”<sup>7</sup> approach to reporting. The guidance also recognises that there is a certain amount of overlap between the matters which may be covered in the Statement and other obligations to report on human rights in non-financial reports, for example, the new reporting requirements on human rights in the EU Non-Financial Reporting Directive 2014.<sup>8</sup> This Directive, and the implementing UK legislation, will contain more general provisions requiring human rights disclosures in the strategic reports of eligible companies.

### *Determining relevant supply chains*

The Act does not distinguish between upstream and downstream supply chains but it is anticipated that the obligations will only go upstream, that is, in respect of goods and services being supplied to the organisation.

### *Implications*

It is important to note that the Act itself imposes no legally binding requirements on an organisation to conduct due diligence on its supply chains. The obligations are,

on their face, concerned with reporting. Failure to report attracts no legal penalty: in this case, the Secretary of State can apply for an injunction (specific performance in Scotland) to require the organisation to publish the Statement. However, given the increasing focus from NGOs and stakeholders on human rights compliance issues, pressure is likely to be brought to bear on those organisations which report that no action has been taken.

Opponents of the Act criticise it as not going far enough in tackling modern slavery. They argue that the Act is deficient as it fails to guarantee minimum standards of protection of victims' rights. Director of Anti-Slavery International, Dr Aidan McQuade, commented, in particular, on the TiSC: “*Businesses having to report on slavery in their supply chains is welcome. But surely the British Government should have the power to exclude any goods produced with the use of forced labour from entering into UK markets... It's good the government has put slavery on its agenda and certainly some changes are positive but there still a long way to go, particularly in aligning aid, trade and diplomacy on this issue*”.<sup>9</sup>

At present, there is flexibility on the content of the Statement. This will be critical in the early years of the regime when organisations may struggle to obtain the required information. There are numerous examples of environmental obligations which



necessitate obtaining product information from suppliers and where it has proved very difficult to obtain the information or carry out any reliable diligence. This is particularly so when dealing with jurisdictions which do not have equivalent obligations. Organisations may also need to commit significant resources to conduct due diligence at a level which satisfies its stakeholders and customers. As such, in the early years, we may see many Statements reporting on the actions that have been taken rather than giving a complete picture.

Director of the Institute for Business Ethics, Philippa Foster Beck, believes that it is

*“not fair” that larger companies are held responsible for the entire supply chain: “If every company had a responsibility to have this type of conversation, and the right to audit their prime contractors, and those within their prime contractors, et cetera, this would be a practical way of covering the whole supply chain. Then it wouldn’t only be the responsibility of say, Marks & Spencer or Waitrose right at the top to assess the whole supply chain, because I don’t think that is fair on them,” she says.*

The TiSC obligations are part of the growing trend of ensuring that businesses are accountable for the effects of their operations. The legislation has important

reputational impacts across all sectors and complying with the requirements may call for more than a “box ticking” exercise for organisations. Another consequence of TiSC is that organisations below the qualification threshold may also wish to comply in order to demonstrate their ethical standards. While compliance is likely to be a significant requirement for many businesses, it may eventually lead to a recalibration of the relationship between businesses and the NGOs which will be watching them so closely.

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1. ILO 2015 at: [http://www.ilo.org/global/topics/forced-labour/news/WCMS\\_375649/lang--en/index.htm](http://www.ilo.org/global/topics/forced-labour/news/WCMS_375649/lang--en/index.htm).
  2. Global Slavery Index 2014 at <http://www.globallslaveryindex.org/>.
  3. [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/471996/Transparency\\_in\\_Supply\\_Chains\\_etc\\_\\_A\\_practical\\_guide\\_\\_final\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/471996/Transparency_in_Supply_Chains_etc__A_practical_guide__final_.pdf).
  4. Section 54 Modern Slavery Act 2015.
  5. “Slavery and human trafficking” includes conduct which constitutes an offence under: (i) section 1, 2 or 4 of the Act, (ii) section 1, 2 or 4 of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 (c. 2 (N.I.)) (equivalent offences in Northern Ireland), (iii) section 22 of the Criminal Justice (Scotland) Act 2003 (asp 7) (trafficking in prostitution etc), (iv) section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (trafficking for exploitation), (v) section 47 of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 13) (slavery, servitude and forced or compulsory labour), or conduct which would constitute an offence in a part of the United Kingdom under any of those provisions if the conduct took place in that part of the United Kingdom.
  6. <http://www.legislation.gov.uk/uksi/2015/1833/contents/made>.
  7. At page 18 of: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/448200/Consultation\\_Government\\_Response\\_\\_final\\_\\_2\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448200/Consultation_Government_Response__final__2_.pdf).
  8. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0095&from=EN>.
  9. Anti-Slavery International Press Release, 31 July 2015.

# A collaborative approach to ending slavery and human trafficking in Asia

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## An Interview with Archana Kotecha, Head of Legal, Liberty Asia

The International Labour Organization estimates that nearly 21 million people are victims of forced labour worldwide, 90% of whom are exploited in the private sector. It further estimates that forced labour in the private economy is today worth USD150 billion in illegal profits per year. The Asia-Pacific region accounts for the largest number of forced labourers, 56% of the global total, which is equivalent to 11.7 million people.<sup>1</sup>

Established in 2011, Liberty Asia<sup>2</sup> aims to prevent human trafficking through legal advocacy, technological interventions and strategic collaborations with NGOs, corporations and financial institutions. Liberty Asia is made up of a group of professionals from different industries dedicated to a more effective, coordinated response to forced labour, focusing specifically on slavery and human trafficking.

We speak with Archana Kotecha, Head of Legal, about Liberty Asia's work.



*What inspired the founding of Liberty Asia and what makes it different from other NGOs?*

In Asia, there are hundreds of organisations fighting slavery and human trafficking. However, they lack collaborative resources, often working alone with little support. Liberty Asia has been seeking to address this limitation and provide a more effective, collective and systemic response to slavery in the region.

It does so in a number of ways, including by:

- facilitating the sharing of information, expertise, data and best practices with strategic partners through online platforms;
- gathering and sharing intelligence on slavery activities with the corporate community;
- championing legal reform and improving the understanding of victim identification and protection;
- building a stable communications backbone for victim support telephone hotlines in Asia to improve their capacity to support more victims and returnees; and
- developing slavery education and awareness programmes to encourage change in all sectors of society.



*You originally qualified as a barrister and worked for seven years as a corporate lawyer at KPMG and DLA Piper in London, before joining the UN Refugee Agency's Legal Protection Team and then eventually moving to Hong Kong and Liberty Asia. Given your background, how can commercial lawyers support NGOs and businesses in their attempts to remove modern slavery from supply chains?*

Much of my work at Liberty Asia is made possible by meaningful collaboration with law firms offering support on a pro bono basis. In addition to assistance on complex legal research, drafting and charity governance issues, commercial lawyers offer a fresh perspective on the enterprise of human trafficking, slavery and forced labour. We regularly engage with highly specialised areas of law such as anti-money laundering and anti-corruption. Working with commercial lawyers who specialise in these areas allows us to push the boundaries of what we can achieve and to learn the most effective means of streamlining trafficking and anti-slavery awareness through existing policies, controls and legislation.

Commercial lawyers have a client base of banks, financial institutions and large multinationals, many of whom have large and complex supply chains. Working with an anti-slavery organisation allows these lawyers to better understand the risks presented by slavery in supply chains and puts them in a better position to advise their clients on risks and mitigation strategies. This has an overall effect of improving awareness of these issues among corporates whilst also allowing them the opportunity to explore how best to strengthen internal controls to prevent, or at least significantly reduce, occurrences of trafficking, slavery or forced labour in supply chains.



*Liberty Asia places an emphasis on using technology to provide new tools to address slavery and human trafficking. Why have you adopted this as a focus and what are some of your key successes so far?*

Due to the limited capacities of many NGOs and their primary focus on frontline work, they often lack the key tools and resources to enable them to capture information on victims that is critical for understanding the trafficking situation at a broader level. Such limitations prevent NGOs from being able to pinpoint areas where they could implement strategic programmes, independently or through partnerships, to target trafficking systemically. The technological platforms Liberty Asia has developed to date include:

1. a cloud-based **victim case management and data collection system** for anti-trafficking NGOs across the region;
2. a secure, online and free **document management system** allowing real-time access for registered users to upload and share confidential case information across borders with others; and
3. the “Freedom Collaborative”, an **online, interactive, collaborative platform** for the anti-trafficking community, providing users with a web and mobile space and dashboard to post and share relevant and urgent news alerts, exchange critical information about victim cases securely, obtain legal support and access a considerable library of resources.



*What local impact do you expect extra-territorial legislation, such as the UK's Modern Slavery Act, to have on slavery and human trafficking in the Asia-Pacific region, and how does this support local initiatives?*

The UK's Modern Slavery Act 2015 (the Act) is a tool of accountability that can be used by NGOs working in the Asia-Pacific region to hold corporates accountable for failing to ensure that their supply chains are clean. The local impact of the Act, and its value towards supporting local initiatives, will depend on how aware and knowledgeable local grass roots NGOs are of the Act and its remit, and on the ability of NGOs to access legal assistance to make use of its provisions. Empowerment of NGOs on the ground is essential to enable them to make good use of the protections offered by the Act.

Many instances of slavery that the Act seeks to address are likely to take place outside the UK. The Act's effectiveness will depend on how well foreign jurisdictions and the UK collaborate in its enforcement. If the existing California Transparency Act<sup>3</sup> is anything to go by, it will be critical to ensure information relating to slavery taking place on the ground is reported back to consumers, activists or others interested in pursuing litigation.

The effectiveness of the Act will also rest on resources deployed by corporates to train their staff and fine-tune their internal processes to allow for: (i) the identification of slavery, human trafficking and forced labour occurrences in the supply chain; (ii) the appropriate investigations and interventions to be made; (iii) preventive measures to mitigate the risks of supply chain slavery to be taken; and (iv) the same reporting requirements as those required by the Act to be imposed.

“The Act's effectiveness will depend on how well foreign jurisdictions and the UK collaborate in its enforcement.”

*What role can the private sector play to fight against slavery and human trafficking, particularly where slavery and human trafficking arise in businesses' supply chains rather than in their direct operations?*

The private sector is a key stakeholder in the fight against slavery. In addition to committing resources to training its staff on understanding slavery issues in the supply chain, the private sector must hold its suppliers accountable by implementing monitoring processes and controls such as supply chain maps and audits, whilst also providing opportunities to take corrective action.

Such processes must be underpinned by a culture that promotes learning on the subject and a clear reflection of the commitment to fight slavery in each company's code of conduct, as well as contractual arrangements with existing and new suppliers. The brand, reputational and regulatory risks that come with direct or indirect involvement with slavery in supply chains is extremely detrimental to a corporate.

Anti-slavery education and intervention is no longer a purely “corporate social responsibility” matter; it now has the backing of legislation. There are already pockets of best practice evident in different segments of the private sector, but for the sake of the millions of vulnerable individuals who become exploited in supply chain slavery, there is a real need for efforts to be stepped up to ensure best practice becomes the standard rather than the exception.





“Much of my work at Liberty Asia is made possible by meaningful collaboration with law firms offering support on a pro bono basis.”

*What are the five most important issues that need to be addressed over the next five years to make the maximum impact on ending slavery and human trafficking in Asia?*

1. *Low levels of victim identification* – Better use of existing resources to promote sustainable and the rigorous training of frontline responders, including key NGO actors, law enforcement, labour inspectors, immigration officials, health practitioners and other relevant participants. Where appropriate, the support of survivors must be enlisted as a means to reach out to vulnerable communities and to educate front-line responders.
2. *Inadequate use of the legal system and under-utilised laws* – Empowering stakeholders with the knowledge of laws that are available and that can be used as tools of accountability, for example, the Foreign Corrupt Practices Act,<sup>4</sup> the UK Modern Slavery Act and other such pieces of legislation that have extra-territorial effect. Furthermore, targeted legal training to government, corporations and other stakeholders will promote better use of existing laws.
3. *Lack of structured victim data capture and analysis* – Data plays a very important role in the fight against slavery. Better quality data will allow for a more measured and targeted response.
4. *Low involvement of the private sector* – More meaningful engagement across the private sector is needed. Corporations must improve their internal training on slavery awareness and their internal policies, controls and processes so that they are in a better position to respond to the growing risk of slavery in their supply chains. External suppliers must be required to abide by the same standards of conduct as those businesses that they supply. Financial business leaders and their teams must advise and guide on implementing strategies to incorporate slavery into their anti-money laundering, anti-bribery and anti-corruption programmes. There also needs to be improved communication and information about trafficking-related breaches of anti-money laundering and anti-corruption laws and regulations to decision makers in the banking and finance industry.
5. *Minimal collaborative resources for counter-trafficking field* – Broadening the impact of the counter-trafficking movement by providing instant communication channels between anti-trafficking NGOs and practical, relevant and collaborative resources that will close the gap between different organisations’ work and enable a more collective and strategic approach to targeting trafficking.

1. Profits and Poverty: The Economics of Forced Labour, International Labour Organization (2014).
2. A project under Share (Asia Pacific) Limited, a Hong Kong-registered charity.
3. California Transparency in Supply Chains Act of 2010.
4. The U.S.’s Foreign Corrupt Practices Act of 1977 (FCPA).

# The transformative nature of respect

Mark Hodge, Executive Director  
Global Business Initiative on Human Rights

Is there a risk that implementation of the UN Guiding Principles is being seen as a series of technocratic fixes, instead of an opportunity to establish new behaviours, innovate and solve problems? The Executive Director of the Global Business Initiative on Human Rights, Mark Hodge, identifies three key aspects of corporate respect for human rights in practice that require more attention from all stakeholders.



Most responsible actors – whether from business, government or civil society – agree that a world in which corporations in all geographies, in all sectors and of all sizes respect human rights is non-negotiable. And many concur with the idea that the UN Guiding Principles on Business and Human Rights<sup>1</sup> (UNGPs) are not intended to endorse business as usual, minimise expectations or drive a low-commitment compliance exercise. Experts recognise that corporate respect for human rights is a baseline expectation for conduct but few describe it as a tick-box exercise. Nonetheless, as Dr Jolyon Ford has recently emphasised, “*One emerging risk is that the BHR [business and human rights] narrative becomes primarily about narrow issues of technical compliance and reporting. If so, it will lose its power to drive broader, transformative strategic and commercial thinking.*”<sup>2</sup>

I agree. But what exactly is corporate respect for human rights? Is there a shared view about what respect should look like in practice? What matters – and what doesn’t – as more and more projects seek to track and judge progress in the implementation of corporate respect for human rights? What should business leaders be prepared for when commencing or seeking to deepen their human rights work?

To support dialogue around these issues, this article offers three observations based on our experience at the Global Business Initiative on Human Rights (GBI), engaging with hundreds of business leaders since 2009<sup>3</sup> on the topic of corporate respect for human rights. The observations are substantiated by examples of practice but this is not to suggest that all companies are actively grappling with these issues (or even thinking about respect for human rights along the lines elucidated here).

The three aspects of respect in practice that I believe need more attention from all stakeholders are:

1. *Implementing corporate respect for human rights requires companies to bring about widespread, complex and sustained change across the organisation.*
2. *Corporate respect for human rights involves a radical shift in a company’s relationship with the individuals and groups it impacts and interacts with.*
3. *Respect for human rights regularly involves problem-solving. The UNGPs lead companies to tackle entrenched and endemic human rights abuses and development challenges, including by catalysing peers and governments to take action.*

The Global Business Initiative on Human Rights is a global business organisation focused on advancing respect for human rights in a business context. GBI does this through cross-industry peer learning, outreach and capacity building, and informing the international policy agenda. The organisation is led by a core group of 19 corporations from different industries, headquartered in diverse countries and with global operations. <http://www.global-business-initiative.org>. Please note that this article does not represent the views of the membership or individual members.

Dr Ford has further noted that: “Across the BHR agenda (and international law), tension exists between seeking neatness and coherence, and being comfortable with open-endedness, plurality and innovation.”<sup>4</sup> This article promotes a vision of corporate respect for human rights that fits

into the latter perspective. This is not to make a case for one worldview to trump another. Neither should win out in my mind. The tension so eloquently expressed in this quote represents the best of the human rights movement and social change more

generally. But as more and more time, energy and money goes in to tracking, measuring, mandating and incentivising corporate conduct, we need to avoid losing open-endedness, plurality and innovation, and what this can deliver to rights-holders.

### 1. Implementing corporate respect for human rights requires companies to bring about widespread, complex and sustained change across the organisation.

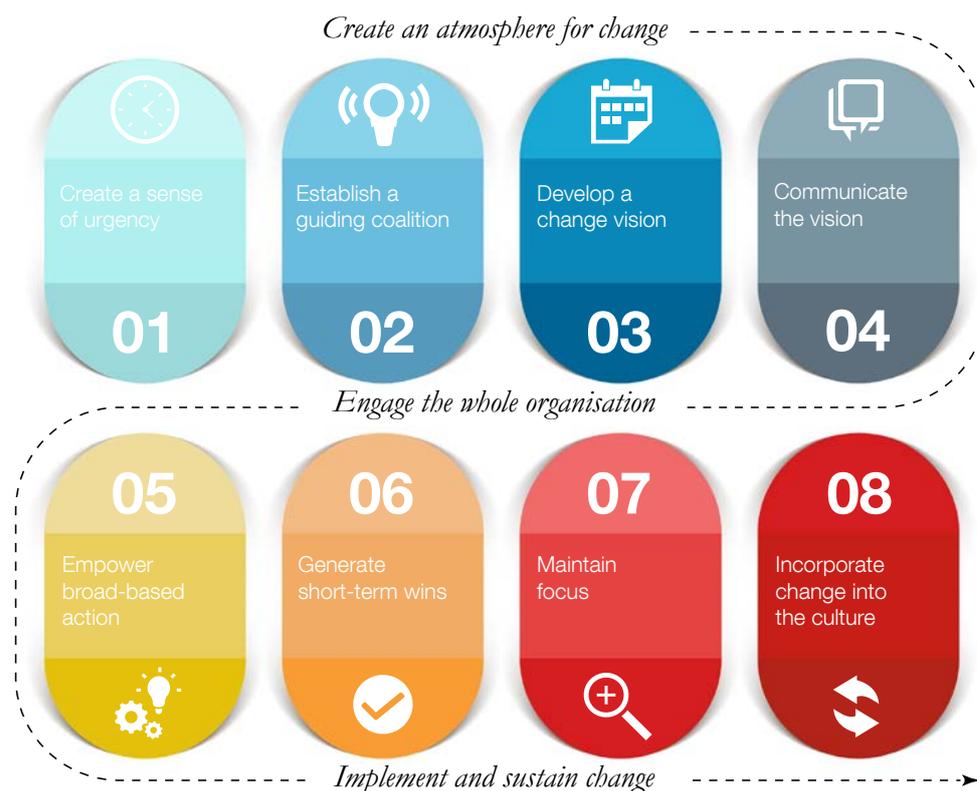
The basic steps companies need to take to meet their responsibility to respect human rights are clear – they need to make a policy commitment to respect human rights, undertake human rights due diligence and provide for or participate in remediation.<sup>5</sup> But beyond this simple formulation, the UNGPs set out a vision of corporate practice that is broad and far-reaching.<sup>6</sup> Some business leaders now recognise the need to apply the UNGPs in diverse – arguably countless and ever changing – sets of circumstances.<sup>7</sup> One does not implement the UNGPs as though they are a management system. Rather, a company needs to ensure that every aspect of doing business is consistent with the UNGPs. This can require changes in mind-sets, decision-making, behaviours, practices and cultures. In our experience, some changes can be minor

but important tweaks to existing systems and processes whereas other changes are broader. As Caroline Rees, President of Shift, recently noted: “Respecting human rights is not at root the stuff of checklists, tick-the-box exercises or compliance tools. It is first and foremost a culture and a way of thinking that needs to be part of each company’s DNA. Checklists can then play a supporting role, tailored to meet the need. They are not the starting point.”<sup>8</sup> Accordingly, the implementation of the UNGPs is often described as a wide-reaching change process or “journey.” But descriptors like “journey” or “work in progress” do not reveal the breadth and diversity of actions, lessons and challenges being addressed.

Drawing on the theories of change management and organisational change presents opportunities to better grasp what is taking place, and needs to take place,

inside companies seeking to operate consistently with the UNGPs. The literature and thinking is vast. However, in a seminal piece of work, Professor John P Kotter offers an eight-step process (see summary diagram) to support business leaders to overcome the numerous issues that can inhibit change, many of which companies confront in their efforts to implement corporate respect for human rights.<sup>9</sup> Issues identified by Kotter include “inwardly focused cultures, paralyzing bureaucracy, parochial politics, a low level of trust, lack of teamwork, arrogant attitudes, a lack of leadership in middle management, and the general human fear of the unknown.”<sup>10</sup> His eight-step process recognises the need to “defrost a hardened status quo” before introducing new practices, and to ground changes within corporate cultures to help “make them stick.”<sup>11</sup>

### Eight steps



The intersections between the real-world challenges of implementing respect and the challenges of achieving change within organisations are worthy of more thinking and multi-stakeholder dialogue, but Kotter's model (and others like it) can:

- **Offer an extra lens through which to consider how much progress is being made within a given company.**

Are companies early on in their journey and still focused on generating internal urgency, or are they beginning to consider how respect for human rights can be genuinely incorporated in corporate culture? Are efforts and success stories built on strong foundations? While some organisations do not move through change steps in a linear fashion "*skipping even a single step or getting too far ahead without a solid base almost always creates problems.*"<sup>12</sup> This is visible in the implementation of corporate respect for human rights. For example, companies that leap to contained "*wins*" (such as publishing a policy commitment or conducting human rights training) without regularly reinforcing the urgency to act, creating a company-owned change vision and establishing a cross-functional coalition of leaders to drive change forward, may become frustrated when deeper change does not take hold. The result can be an early flurry of activity accompanied by increased stakeholder expectation, followed by stalling momentum.

- **Add a layer of nuance to our understanding of the numerous human rights due diligence activities that business leaders often talk about, but that sometimes seem disjointed or even basic.**

For some stakeholders, the implementation and publication of a human rights impact assessment by a company might be the ultimate target. But business leaders are increasingly recognising the need to focus on work that enables broad-based action. Such work is not just about the product visible to external stakeholders or about one central team identifying and addressing all human rights impacts. Instead it is part of a journey to enable hundreds of employees and business

partners to adopt "*non-traditional ideas, activities, and actions.*"<sup>13</sup> Examples of this include The Coca-Cola Company's Human Rights Due Diligence Checklists or the work of companies like the Telenor Group and Holcim to build internal methodologies to conduct self-assessments or complete human rights impact assessments.<sup>14</sup> Other efforts that may seem minor but enable broad-based action include training and internal guidance and platforms/networks that enable internal good practice exchanges.<sup>15</sup>

- **Remind us that all change processes – like the journey to embed respect for human rights – take place in dynamic contexts that may be favourable or damaging to the rate of change.**

The most stark and obvious examples of this arise when companies merge, split, acquire or become acquired. But something as apparently mundane as an internal restructuring can lead to loss of momentum. These realities do not excuse slow progress or a company's adverse human rights impacts. However, recognising the importance of context to change efforts might lead to better strategic thinking about how to achieve respect for human rights in practice. For example, the business community might do well to address human rights impacts and risk in planning of corporate growth strategies (e.g., acquisitions or equity purchases might increase risk). Perhaps companies should consider how to change the rules of the game when it comes to market forces focusing on short-term performance and regular restructuring that can undermine consistency and longevity of sustainability efforts? The decision of Paul Polman, CEO of Unilever, to move the company away from quarterly profit reports<sup>16</sup> could be seen as an example of this. Beyond the business community itself, can regulators, investors and civil society think about how new requirements, incentives and frameworks can be concise and replicable while also reinforcing (and not distracting from) internal change efforts? The new UN Guiding Principles Reporting Framework<sup>17</sup> seems to provide a rare optimal solution in this regard. The use of "*smart questions*" that external stakeholders need transparent and honest responses to but that also

provoke meaningful internal dialogue and awareness is a positive innovation.

- **Inform opinions and dialogue about the expected results of applying leverage.**

A key idea within the UNGPs is that companies should, in certain circumstances apply leverage with suppliers, customers and business partners in order that they themselves prevent, mitigate and remediate adverse human rights impacts that they cause or contribute to. Many feel that the weight, size, reputation, and resources behind large corporations or visible brands should lead to swift and sustained change, for example in how a supplier conducts business. However, there is rarely an appreciation for the fact that each of these third parties – no matter how clear local law or contractual requirements are – need to embark on their own change processes to fully respect human rights. Compelling, guiding and supporting diverse enterprises in the value chain (each with their own unique commercial, cultural and societal contexts) to implement change will always be challenging, not least when the external drivers do not incentivise the intended change.

The prospects of implementing and scaling corporate respect for human rights will benefit from greater reference to the challenging, fundamentally important and even inspiring process of organisational transformation. But dialogue about respect for human rights as a change effort is still relatively rare. Most forums, dialogues, questionnaires and other efforts (legislative or otherwise) lack this narrative. And many business leaders often talk about progress and internal projects without addressing the wider narrative of (inevitably imperfect) change, so progress seems piecemeal and lacking coherence.

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## 2. Corporate respect for human rights involves a radical shift in a company's relationship with the individuals and groups it impacts and interacts with.

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Arguably, the simple idea at the core of the UNGPs – putting the rights and voices of the most vulnerable at the heart of economics, commerce and enterprise – makes respect for human rights one of the most powerful and challenging aspects of the 21st century corporate sustainability agenda. The corporate responsibility to respect human rights is concerned with adverse impacts on human rights, or “risks to people.”<sup>18</sup> While it may be expedient to demystify human rights language and content, and use operational language for particular business functions and colleagues, senior leaders also need to confront two things. First, how human rights are defined and codified by the international community – including the substance, drafting history, and political struggles that drove or inhibited recognition of specific rights. Without this understanding “human rights” may become an empty label. Among other things, a key business case for adopting a human rights approach to addressing impacts on people – i.e. that human rights standards are global, normative, legitimate and well-defined – may be lost. Second, companies need to engage rights-holders in human rights due diligence. As Chris Jochnick, CEO of Landesa and former Director of Oxfam’s Private Sector Department has noted, “companies need to understand that the human rights movement is messy, it’s about power dynamics, people on the streets protesting, passionate expression, struggle, tension, and amplifying the voice of marginalized individuals demanding their rights.”<sup>19</sup>

Much of business culture, and “CSR” rhetoric still being promoted around the world, perpetuates a paternalistic, command and control, top-down attitude to what vulnerable or impacted populations want. Governments, and even at times civil society, can also contribute to this by claiming to know about, and represent, the interests of workers and local populations. Accordingly, the paradigm shift to always consider “risk to people” in corporate governance and decision-making should not be underestimated. It is simple only at an intellectual level. In practice, it requires an approach to doing business that may seem at odds with drives to increase margins, meet sales or production targets, benefit from first-mover advantage and generally outperform competitors.

While business practice remains somewhat nascent, there are some good examples of action in this area:

- **Thinking holistically and with reference to international standards:**

Companies are increasingly conducting corporate-wide human rights due diligence exercises. These involve extensive internal dialogue about all business processes and operations, and efforts to identify and address human rights impacts and dilemmas, including where stakeholders have not raised them. Increasingly, efforts are being made to ensure that all human rights and their international definitions are part of such work.<sup>20</sup>

- **Amplifying the voices of rights-holders:**

Some companies partner with local and international civil society organisations that can legitimately and clearly amplify the voices of rights-holders in corporate corridors and board rooms. There is a rich history of such partnerships in the labour rights movement, where companies engage the ILO<sup>21</sup> or enter into Global Framework Agreements with international trade union federations where investment into social dialogue at the factory-level is also reinforced.<sup>22</sup> Another example is the use of mobile technologies that enable workers in the supply chain to communicate workplace realities directly to brands, rather than confining worker engagement to audit processes, which have a contained time window (from one day to a few weeks maximum) and are often delivered via third party providers.<sup>23</sup>

- **Listening to, and engaging directly with, rights-holders in assessing human rights impacts:**

Senior executives and managers visiting factories, mines and operations and speaking to people is the most sensible and simple thing that we need to see more. Companies (especially in the extractive industry) have extensive experience engaging local communities and stakeholders, and doing so with sensitivity to ensuring a safe space for marginalised groups to express frustrations and propose solutions.<sup>24</sup> Some companies include interviews, surveys or facilitated open dialogue conducted by third parties as part of human rights impact assessments.<sup>25</sup> Others form local community committees to create an on-going structure for raising and addressing challenges.<sup>26</sup> The evolution of this work could involve NGOs and companies

collaborating on impact assessment whereby rights-holders engage and own aspects of the process and follow up actions. Oxfam’s Community-based Human Rights Impact Assessment Initiative is perhaps the clearest example of this to date.<sup>27</sup>

- **Challenging traditional commercial logic:**

Addressing human rights and engaging rights-holders may take time and require adjustments to traditional modes of doing business. Some companies communicate to suppliers that reduced pricing and speed of delivery should not come at the cost of undermining workers’ rights. Some business leaders are positioning their capacity to respect human rights and manage social licence as part of “quality” and the company’s value proposition to customers.<sup>28</sup> This line of inquiry might extend to companies paying extra for products or services, delaying project deadlines, or being prepared to walk away from business.

There is a long way to go in mainstreaming such practices, even among leading companies. For business leaders, putting human rights into human rights due diligence should increasingly be approached with urgency and as the art of the possible. Though (unfortunately) lacking any human rights lens Lord Browne’s (former CEO of BP) recent book *Connected: How companies succeed by engaging radically with society*,<sup>29</sup> offers business case data, examples and a framework for senior executives to think about this art. For those committed to a new, more inclusive vision of the global economy, this aspect of the UNGPs that puts people at the heart of business should be celebrated and promoted.

Whatever the angle, effecting the paradigm shift will require business, civil society actors and governments to engage in new forms of relationships and to collaborate (especially at a local level) on the delivery of due diligence, capacity building and access to remedies. It may even spur innovation around new models of employee and community ownership and governance, and alter how businesses and society define and then create value. It is not going to be comfortable, but the alternative is persistent distrust in business<sup>30</sup> and unhealthy power dynamics – a bad formula for everyone.

*3. Respect for human rights regularly involves problem-solving. The UNGPs lead companies to tackle entrenched and endemic human rights risks and sustainable development challenges, often by catalysing peers and governments to take action.*

In many situations it is extremely difficult or impossible to operate with respect for human rights if the business environment is plagued by governance gaps and human rights abuses that are connected to how a company creates value. So while an important foundation is to conduct human rights due diligence to identify and then stop causing or contributing to adverse human rights impacts, human rights due diligence is also about establishing and using leverage to prevent, mitigate and at times remediate adverse human rights impacts that are linked to a company.

This does not equate to a responsibility to solve every single issue (nor a liability if issues remain) but sometimes the best way to avoid things going wrong is to play an active role to ensure that things are done right.

There are many real-life instances in which the spirit and letter of human rights due diligence propels companies to be pro-active corporate citizens, address governance gaps and engage with problems that they will never solve alone. The more severe and widespread the human rights risks are, the more necessary it will be that companies' human rights due diligence involves innovation and the exercise of leverage with peers, competitors, business partners, civil society and States to address systemic challenges. By way of illustration:

- In 2012, Disney launched its International Labour Standards Supply Chain Investment Program aimed at “supporting innovative and impactful projects that help to improve working conditions, particularly in the global manufacturing sector”. Investments to date have been directed to “improving workplace environmental health and safety conditions, providing workplace training, supporting worker empowerment, addressing youth labour issues and promoting worker engagement in diverse geographies, including Brazil, India, Turkey, China, Indonesia, Mexico and Vietnam.”<sup>31</sup>
- Companies across diverse sectors that are now selling products in Myanmar have uncovered that the dominant distribution and retail outlets are roadside “tea shops” that regularly employ children who may or may not be in education. To operate with respect for human rights, companies are considering strategies and building partnerships to upgrade numerous, informal and potentially exploitative micro-enterprises and explore how children currently in the system can realise their rights including access to education and learning.<sup>32</sup>
- In Colombia, Cerrejón Coal implements human rights impact assessments, the Voluntary Principles on Security and Human Rights, a grievance mechanism, and other efforts to embed respect for human rights in operations. However, they also recognise that the operating context

requires proactive efforts and investment to address underlying and inherent human rights risks. As a response, the company has in place a Foundation System that addresses: Indigenous Development, Institutional Strengthening, Water, and Local Employment Generation.<sup>33</sup>

- Some situations require corporations to take leadership positions and be norm entrepreneurs. A topical example concerns government demands that technology companies and Internet Service Providers hand over customer data. Brad Smith, General Counsel and President of Microsoft, observed: “it has put us in a position where we’re standing up. We’re trying to think these issues through, and then speak out about the need for rules.”<sup>34</sup> Other examples of corporate leadership to change rules, norms and laws include the efforts of extractive companies to promote standards for public and private security providers, and the work of textile companies to address wages in the supply chain.<sup>35</sup>

Corporate respect for human rights is at least as much about sustainable problem solving in service to rights-holders as it is about a set of policies, procedures and requirements. The cumulative effect of thousands – versus the current scores or a few hundred – seeking to deliver fully on respect would be profound.



“ thinking about the transformative potential of the UNGPs need not, and should not, be confined to corporate respect for human rights. We urgently and desperately need meaningful change, innovation and genuinely new behaviours when it comes to States fulfilling their obligations and delivering on access to remedies for the victims of human rights abuse.”





## Conclusion

Five years ago, and for the first time in history, governments from all regions of the world unanimously endorsed a framework for addressing the adverse effects of globalisation and corporate conduct on the rights of vulnerable individuals and communities. We are a long way from realising this framework, but that is no excuse to prematurely declare failure or to artificially manufacture a story of success. Instead, we should embrace the sheer scope, size and complexity of the task to implement all three pillars of the UNGPs. That seems only fitting, given the scale and gravity of the challenge.

When it comes to retaining an expansive view of corporate respect for human rights, all stakeholders have a role to play. Business leaders should lead. Those beginning to initiate or re-invigorate commitments, and to work to address human rights issues, will need to confront the hard issues sooner or later. The more that companies – especially senior executives – internalise that corporate respect for human rights is a serious journey, the more chance there is of appropriate resources, mandates and support being put in place for long-term success. Businesses that are relatively advanced should be more vocal

about their understanding of corporate respect for human rights, and what it means in practice. This might start with being open about progress and challenges concerning: initiating and sustaining change; transforming the relationship between companies and rights-holders; and seeking to solve problems and apply leverage to address serious, often entrenched, abuses. By being pro-active in this regard leading companies can raise the bar in the business community, and inform regulatory and other initiatives.

Equally, governments, investors, civil society, expert advisers and others are needed to protect and achieve a meaningful vision of respect for human rights. Companies need partners and critical-friendships to move beyond business as usual. If such support is not forthcoming, even leading companies may not achieve the most transformative aspects of the UNGPs. Everyone, most importantly rights-holders, will be short-changed. Further, projects and initiatives (regulatory or otherwise) should seek to create an environment in which real change occurs. Questions to consider include: Can initiatives trying to pin down corporate respect for human rights also reinforce its transformative aspects? How can efforts

aimed at increasing commitment and disclosure accelerate internal organisational change? How can supply chain transparency requirements drive action and accountability closer to the root problems? Will efforts to understand performance reflect the quality of a company's relationships with rights-holders? How can regulatory requirements and indicators reward companies that embrace the messy process of using leverage to galvanise multi-stakeholder innovation, even though outcomes might be patchy?

Finally, thinking about the transformative potential of the UNGPs need not, and should not, be confined to corporate respect for human rights. We urgently and desperately need meaningful change, innovation and genuinely new behaviours when it comes to States fulfilling their obligations and delivering on access to remedies for the victims of human rights abuse. Maybe then we can dare to talk about the beginning of the end of economic growth and enterprise fully enabling and not undermining human rights. Maybe we can effect a step-change in creating a world in which global, national and local economies, are grounded in dignity for all.

1. Guiding Principles on Business and Human Rights, A/HRC/17/31, 21 March 2011, endorsed by UN HRC Resolution 17/4 of 16 June 2011.
2. Jolyon Ford, Business and Human Rights: Bridging the Governance Gap, Research Paper, Chatham House, September 2015, p. 2. [https://www.chathamhouse.org/sites/files/chathamhouse/field/field\\_document/20150922BusinessHumanRightsFordV2.pdf](https://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20150922BusinessHumanRightsFordV2.pdf).
3. Since launching in 2009, GBI members have met twice per year to address approaches, practices and dilemmas in relation to implementing corporate respect for human rights. Also, GBI has worked with local partners to engage several hundred private and state-owned companies in nine countries, including Brazil, the United Arab Emirates, Kenya, India, Indonesia and China.
4. Jolyon Ford, above n 2, p. 11.
5. Guiding Principle 15 reads: "In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including: (a) A policy commitment to meet their responsibility to respect human rights; (b) A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights; (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute", Guiding Principles on Business and Human Rights.
6. Among other things, principles 12 to 24 direct companies to consider all rights, all business functions, all operations, products and services, all operating environments and all business relationships. The UNGPs also clarify what criteria should drive judgments about appropriate implementation, such as severity, the need for due diligence to be ongoing, the degree of involvement in an adverse impact (causing, contributing or being directly linked), treating risk of involvement in gross human rights abuses as a legal compliance issue, meeting the spirit of international law when the national law standard is lower, and engaging in remediation.
7. By way of illustration, in GBI peer learning meetings in the past 24 months alone members have addressed the UNGPs in the context of: enterprise risk management; internal governance and accountability; sales-side due diligence; procurement; M&A; entry into new markets; divestments and decommissioning; internal tracking of progress and performance; plus numerous dilemmas related to specific geographies or rights-holder groups. This is only a microcosm of what businesses are beginning to address.
8. Caroline Rees Corporate Contradictions: Four stumbling blocks on the path to respect for human rights, September 2015, <http://shiftproject.org/article/corporate-contradictions-four-stumbling-blocks-path-respect-human-rights>, accessed on 13 October 2015.
9. John P Kotter, Leading Change, Boston, Harvard Business Review Press, 2012.
10. Ibid, p. 22.
11. Ibid, p. 24.
12. Ibid, p. 26.
13. Ibid, p. 23 in Fig 2-2. Kotter outlines that that empowering broad-based action involves getting rid of obstacles changing systems or structures that undermine the change vision; and encouraging risk taking and non-traditional ideas, activities, and actions.
14. Reflection based on various conversations with company representatives including The Coca-Cola Company, Holcim and Telenor Group. For Coca-Cola reference see <http://assets.coca-colacompany.com/ae/0b/a56c2d2646f88a09b749da959d5e/human-rights-self-assessment-checklists.10.2014.pdf>; for Holcim reference see <http://www.holcim.com/sustainable/social/respecting-human-rights.html>; and for Telenor Group reference see <http://www.telenor.com/sustainability/responsible-business/human-rights/mitigate/telenors-status-on-industry-dialogue-guiding-principles>.
15. Reflection based on engagement with GBI members. For an example of training and capacity building note the work of ABB described here: Business and Human Rights Resource Centre and Global Business Initiative on Human Rights, Respect In Practice: United Nations Third Annual Forum on Business and Human Rights: 1-3 December 2014, 25 Mar 2015, p. 12, <http://www.global-business-initiative.org/wp-content/uploads/2015/03/Respect-in-Practice-Report.pdf>, accessed on 13 October 2015. For an example of internal guidance see two booklets produced by Total S.A. aimed to "provide support for all of our employees worldwide, as they put our human rights commitments into practice." [http://www.total.com/sites/default/files/atoms/files/human\\_rights\\_internal\\_guide\\_va.pdf](http://www.total.com/sites/default/files/atoms/files/human_rights_internal_guide_va.pdf), accessed on 13th October 2015.
16. See Paul Polman, The remedies for capitalism, McKinsey and Company, [http://www.mckinsey.com/features/capitalism/paul\\_polman](http://www.mckinsey.com/features/capitalism/paul_polman), accessed on 13 October 2015.
17. See <http://www.ungpreporting.org>.
18. For a concise articulation of the concept "risk to business", see John Morrison and David Vermijs The "State of Play" of Human Rights Due Diligence Anticipating the next five years, London, Institute for Human Rights and Business, 2010, p. 13. See also Salient Human Rights Issues at <http://www.ungpreporting.org/key-concepts/salient-human-rights-issues>.
19. With thanks to Chris Jochnick for helping to reconstruct this quote from his remarks on a conference panel Business and Human Rights: Trends, Challenges and the Road Ahead, 23 April 2015, Washington D.C at American University's Law School in Washington, DC.
20. Reflection based on engagement with GBI members. For one example, note the work of Novo Nordisk described here: Business and Human Rights Resource Centre and Global Business Initiative on Human Rights, Respect In Practice: United Nations Third Annual Forum on Business and Human Rights: 1-3 December 2014, 25 Mar 2015, p. 10.
21. One example of such a partnership is the ARISE (Achieving Reduction in Child Labour in Support of Education) project focused on between the ILO, Japanese Tobacco International and Winrock International - <http://ariseprogram.org/en>, accessed 13 October 2015. For examples of other ILO private sector partnerships with the ILO see <http://www.ilo.org/pardev/partnerships/public-private-partnerships/factsheets/lang-en/index.htm>, accessed 13 October 2015.
22. See <http://www.global-unions.org/+framework-agreements-+.html> (website of Global Unions) for a list of over 100 companies who have entered into Framework Agreements with Building and Woodworkers International, Industri-ALL, the International Union of Food Workers, Public Services International, and UNI Global Union.
23. See for example, Good World Solutions report, Leveraging Mobile Technology for Worker Voice and Real-time Data: Lessons and Opportunities from ETI Members Experimenting with Mobile, October 2014 at <http://goodworldsolutions.org/wordpress/wp-content/uploads/2014/11/ETI-Members-+-Mobile-Tech-Oct-2014.pdf>, accessed 13 October 2015.
24. See International Council on Mining and Metals, Chapter 2: Engagement and Indigenous Participation in Good Practice Guide: Indigenous Peoples and Mining, London, 2010, <https://www.icmm.com/document/1221>, accessed 13 October 2015. See also International Council on Mining and Metals, Integrating Human Rights Due Diligence into Corporate Risk Management, London, 2012, in particular p. 20, <http://www.icmm.com/document/3308>, accessed 13 October 2015. See also, IPIECA, Indigenous Peoples and the Oil and Gas Industry, London, 2012, <http://www.ipieca.org/publication/indigenous-peoples-and-oil-and-gas-industry-context-issues-and-emerging-good-practice>, accessed 13 October 2015.
25. See, for example, Dost Bardouille-Crema, Sarah Cechvala and Cecilia Milesi CDA Field visit Operator: Total E&P Austral Argentina 23 February – 11 March 2015, 2015, <http://www.cdacollaborative.org/media/228869/CDA-Total-Austral-Argentina-Report.pdf>, accessed 13 October 2015. This is one of several such reports based on CDA's collaboration with Total S.A. including about operations in Bolivia, Myanmar, Sudan, Nigeria and Uganda.
26. For example BASF's Community Advisory Panels. For general information see: <https://www.basf.com/us/en/company/sustainability/responsible-partnering/community-advisory-panels.html>, accessed 13 October 2015. For a short case study about a BASF Community Advisory Panel in Nanjing, China see <http://www.global-business-initiative.org/wp-content/uploads/2015/03/1-EN-BASF-Full-Case-Final.pdf>, accessed 13 October 2015.
27. <http://policy-practice.oxfamamerica.org/work/private-sector-engagement/community-based-human-rights-impact-assessment-initiative/>, accessed 13 October 2015.
28. Based on discussion in GBI meetings, an emerging example of this is the thinking being done by individuals within major ECPM Company, Bechtel. Given this industry's role in design, construction and handover of major assets (mines, railways, airports, dams, oil facilities etc.) to customers, the question is whether handing over a healthy social licence can be increasingly seen as part of the value proposition to clients around quality.
29. John Browne et al, Connected: How Companies succeed by engaging radically with society, 2015, London, WH Allen.
30. For example, in the U.S big business is trusted less than 13 other institutional categories. Only Congress is trusted less. Source: GALLUP, Confidence in Institutions, June 2015, <http://www.gallup.com/poll/1597/confidence-institutions.aspx>, accessed 13 October 2015. However, the lack of trust in business is global. See, for example, Edelman, Trust Around the World, 2015, <http://www.edelman.com/insights/intellectual-property/2015-edelman-trust-barometer/trust-around-world>, accessed 13 October 2015.
31. See <https://thewaltdisneycompany.com/citizenship/act-responsibly/responsible-supply/ils/supply-chain-investment>.
32. Based on conversations with various companies currently operating in Myanmar.
33. <http://www.mmtimes.com/index.php/business/technology/14622-telenor-works-to-address-its-child-labour-troubles.html> and <http://www.nationmultimedia.com/aec/Classrooms-at-Telenor-teashops-30254095.html>. <http://www.cerrejon.com/site/english/sustainable-development-+-social-responsibility/cerrejon-foundations-system.aspx>, accessed 13th October.
34. Video Interview. Wall Street Journal, Microsoft's Top Lawyer: People Will Only Use Tech If They Trust It, July 2014, <http://blogs.wsj.com/digits/2014/07/23/microsofts-top-lawyer-people-will-only-use-tech-if-they-trust-it/?KEYWORDS=Brad+Smith>, accessed 13 October 2015.
35. See, for example, H&M's work on a Fair Living Wage. <http://about.hm.com/en/About/sustainability/commitments/responsible-partners/fair-living-wage.html>, accessed 13 October 2015.

# Promoting the rule of law in post-conflict Liberia

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## An Interview with Counselor Christiana Tah

Counselor Christiana Tah is the former Attorney General/Minister of Justice (2009-2014) of the Republic of Liberia and previously held roles in the Ministries of Health, Justice and Finance during the late 1970s and mid-1980s.

Amongst her many functions as Attorney General, Counselor Tah regularly served as a member of the negotiating team for concession agreements between the Government of Liberia and foreign investors. She holds a graduate degree in law from Yale University, and a Master of Arts degree in Sociology and Criminal Justice from Kent State University, and served as a Professor of Sociology and Criminal Justice for more than 15 years in the United States while simultaneously practising law in the State of Maryland. She has now returned to private practice. She is currently engaged in international consultancy work.

We speak to Counselor Tah about her experience of human rights challenges facing Liberia, and the role of the government and the private sector in negotiating concession agreements which will benefit affected communities.



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*What were the biggest human rights challenges facing Liberia when you came to office?*

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In 2003, Liberia emerged from a very brutal 14 year old civil conflict. During this prolonged conflict, the rules of survival during the war became the prevailing rules for conducting business, social interaction, and the dispensation of justice. The roots of war were planted so deep that the rule of law in a civil environment seemed alien to citizens under the age of 30. Families were constantly on the move to safety, leaving no scope to establish permanent communities or develop the social controls, loyalty and commitment that provide a sense of togetherness and a feeling that one has a stake in society.

Very often, the perception is that once the gunshots stop, the war is over. Nothing could be farther from the truth. The vestiges of war, such as the lingering psychological damage from untold atrocities that have been witnessed or experienced, as well as the dismantled social institutions and the inevitable brain drain, often pose greater threats to human development, recovery and security than the destruction of physical infrastructure. After the war, many citizens who had been dispossessed of real property because they had voluntarily sought refuge in another location or had been forcibly displaced by advancing rebels were still grappling with the fact that the public sector reform intended to strengthen the justice system, including an improved grievance mechanism, still eluded them in the years after the conflict.

Not only did land disputes pose a serious obstacle to sustained peace in Liberia when I came to office, but also the rise in violent personal crimes such as mob violence, murder, armed robbery and rape; some of

which were clearly indicative of the lack of confidence in the formal justice system and the frustration that underlie the slow transition from poverty to an acceptable position on the socioeconomic strata.

During the war, the failure of the formal justice system meant people turned to traditional methods of justice to seek redress. For example, “*trial by ordeal*”, which involves the accused undergoing a test, such as drinking a poisonous concoction, to determine guilt or innocence, became more widespread during the war despite being outlawed by the Liberian Supreme Court in 1935.<sup>1</sup> The continued lack of confidence in the formal system to dispense justice meant that a surprisingly large number of people, including educated people, have continued to turn to informal and illegal processes, such as trial by ordeal and mob justice, to seek redress.

The end of the civil conflict and democratic election of a new government marked the turning of a new page for Liberia and expectations were high that desperately needed reforms would immediately follow the inauguration of the new government. During the reform process, the grievances of citizens were being handled by a weak legal system that had been left substantially dysfunctional by civil war. As a colleague

described the task facing government: it was like trying to drive your car while the mechanic is working on it. The disparity between the good intentions of government to reform and the practical difficulties in implementing reforms, along with the tension between planning for the long term and dealing with the immediate problems, was a huge challenge.

For instance, nearly the entire national police force was disbanded or deactivated in the years following the conflict. To rebuild the force, new recruits had to be enlisted, trained and orientated, creating a serious capacity gap. The objective was to build a force of at least 6,000 police officers by 2015 in order to serve Liberia’s population of approximately four million, but at the same time, recruits who lacked the requisite performance skills or had serious social maladjustment issues had to be weeded out of the police, which led to a higher than expected attrition rate. During this rebuilding period, the presence of the United Nations Mission in Liberia (UNMIL) provided some assurances for the physical security of Liberians.



*Given the budgetary and capacity constraints facing the Government, how did you prioritise actions to address these challenges?*

The Poverty Reduction Strategy (PRS) set out the Government's priorities for Liberia's economic development. Each agency in the justice and security sector developed strategic plans aligned with the priorities identified in the PRS. The PRS itself is based on four pillars: (1) expanding peace and security; (2) revitalizing the economy; (3) strengthening governance and rule of law; and (4) rehabilitating infrastructure and delivering basic services. The fact that two of the four pillars highlight peace, security, good governance, and rule of law reflects the fundamental importance of these issues to achieving the country's broader development goals.<sup>2</sup> The rule of law component of the PRS promoted collaboration and coordination among Liberia's justice and security institutions as a means of discouraging duplicity and conserving resources.

In 2009, the Ministry of Justice established a Task Force to address the problem of pre-trial detention and to assess the performance of the fast-track Magisterial Courts, which had been set up in the grounds of Liberia's largest prison. Following the war, 70 per cent of the estimated 2,000 people detained around the country were pre-trial detainees, most of whom had been detained for more than four years without a hearing. Ensuring these detainees, and those affected by their alleged crimes, were afforded due process was an important component of restoring confidence in the justice system.

Another Task Force was set up to convene a national conference on harmonising the formal and informal justice systems. This process involved the traditional leaders, the Ministry of Justice, the judiciary, civil

society, the Law Reform Commission and international partners. We were all of the belief that by consolidating resources we had a better chance of achieving our goals.

For instance, in anticipation of the drawdown of the UNMIL, the Government, in collaboration with the United Nations, developed plans for five regional justice and security hubs around the country to assume the tasks of UNMIL. To date, one hub has been completed and another two are being developed. These regional hubs were conceptualised to decentralise the management of the justice and security services, thereby providing greater assurances to Liberia's people located in rural areas. In addition to the formal justice services, it is intended that the hubs will provide access to Alternative Dispute Resolution (ADR), a programme that comports with the traditional customs and practices not involving ordeal; this service will enhance the efforts of the Land Commission, Liberian civil society organisations, the Norwegian Refugee Council, the Carter Center, and others, in the use of non-judicial methods, such as ADR, to resolve land disputes. Between 2005 and 2010, nearly 2,000 land disputes were resolved through ADR, easing the pressure on the overwhelmed judicial system.

Notwithstanding the problems of budgetary shortfalls, the Government and its international partners have continued to focus on the building of capacity in all components of the criminal justice system by recruiting and training police officers, immigration officers, prosecutors, magistrates and city solicitors.

*Since the end of the civil crisis, Liberia has seen a number of major investments commence in large scale agriculture, forestry and mining. How have these projects impacted on the human rights of Liberians – both positively and negatively?*

Since 2005, Liberia has negotiated and ratified several major agreements with foreign investors in the agricultural, mining and petroleum sectors. Liberia, as is common for developing countries, encourages foreign investment not only as a means of generating revenue, but also as a way of supporting overarching development goals by providing employment, developing infrastructure such as roads, clean water and electricity, and delivering basic services such as housing, education and healthcare in the concession areas.

While Liberia has seen an increase in the rate of employment and improved housing conditions in concession areas, disputes and delays have also arisen because not enough attention has been paid to the human rights risks. For example, communities affected by concession agreements have complained about "land grabs" (requests for additional land from private owners on unconscionable terms) or foreign investors showing disregard for cultural practices (for example, rituals pertaining to sacred burial shrines or removing trees used by communities for food and medicinal purposes). There have also been complaints of the verbal and physical abuse of workers in some concession areas. The Government's attention is regularly drawn to these issues as a result of rumblings or intermittent contumacy growing out of concession agreements executed within the past ten years.

In some cases these issues have arisen due to the differences in cultural nuances rather than a conscious violation of certain provisions of the concession agreements or local communities' rights by the concessionaire. Lack of familiarity with the Liberian context and failure to consult properly with local communities from the early stages of a project can lead to costly delays and ongoing challenges whereas involving the community on a consultative basis from the outset of the project will most likely reduce the number of issues that might arise during its implementation.

“Following the war, 70 per cent of the estimated 2,000 people detained around the country were pre-trial detainees, most of whom had been detained for more than four years without a hearing.”

“ Before sitting at the table with the concessionaire to commit resources (especially land), both the Government and the affected communities should be satisfied that the outcomes of the project will be more beneficial than not for the communities and the country.”

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*Were these impacts foreseen at the time of negotiating the investment contracts with investors and, if so, can you give an example of the practical and/or legal protections that the Government put in place to manage the human rights risks?*

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One of the lessons learned over the past ten years is that human rights risks should carry the same significance as financial risks during negotiations as they intersect, and human rights risks have the tendency to produce similar negative impacts to financial risks if not managed properly. In other words, when negotiating a concession agreement financial consideration should not be seen as more important than human rights. However, the conventional approach to peacebuilding has been to quickly rebuild the infrastructure and the economy without prioritising the damage to human capital. Pressure to collect funds, sometimes in the form of signature bonuses, to meet urgent government obligations, such as the payment of salaries for teachers, nurses or police officers to avert strikes, protests and other forms of civil disruption means that considerations of human rights risks are often deferred.

One of the fundamental flaws is that consultative meetings held with affected communities prior to the commencement of negotiations are rather perfunctory, and often lead to more questions than answers.

Prior to negotiations, the Government should properly ascertain the assets available for the prospective concessionaire and the impact on local landowners. Affected communities should then be provided with accurate information, through public education, on what government intends to do and how the communities will be affected negatively and/or positively by the concession agreement. Affected communities should be given time to give feedback and to provide informed consent to a project; alternatively, the Government should be proactive in soliciting feedback where a response is delayed. Finally, before sitting at the table with the concessionaire to commit resources (especially land), both the Government and the affected communities should be satisfied that the outcomes of the project will be more beneficial than not for the communities and the country.

Even where there has been some effort to properly manage human rights risks at the beginning of the process of contract formation, these good intentions and the spirit of negotiation may be negated by

weaknesses in the enforcement mechanisms. A particular issue that arises when a concession agreement includes provisions for the benefit of third parties, such as health care and education to affected communities or obligations with respect to resettlement, is how are those rights enforced, given that the beneficiaries are not direct parties to the agreement? In his article for the second edition of the Review, Dr. Youseph Farah, in discussing this issue, correctly observes that, under the circumstances, “such third party beneficiaries may find it more difficult to make those contractualised human rights meaningful and effective, even if benefits are bestowed on them in the investment contract”.<sup>3</sup> In the case of Liberia, although the inclusion of health, education and housing provide direct benefits to residents of the affected communities, the failure on the part of the investor to comply with the provision is viewed as a violation against the State as a contracting party and it is the State that enforces compliance, not the third party beneficiaries.<sup>4</sup>

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*The UN Guiding Principles emphasise the difference between the duty of the State to protect human rights and the responsibility of the corporates to respect human rights. Given some of the impacts you described above, what has been the role of the State and the private sector in remedying human rights impacts?*

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In addition to addressing human rights risks in investment contracts, a key role of government is to ensure compliance with the terms of the contracts while maintaining appropriate neutrality. The inability or unwillingness of the State to enforce its contractual rights to ensure that benefits accrue to third party beneficiaries and the tendency of politicians (irrespective of the branch of government) to get involved in the implementation of the agreement can undermine not only the good intentions of negotiators, but also the well balanced contractual provisions. Once an agreement is compromised by politicians promoting proprietary interests, then there is the tendency for concessionaires to take advantage of the Government’s vulnerability

and to request an early review of contractual terms, particularly fiscal terms. Any government that allows its back to be placed over the barrel is in no position to enforce protections for the rights of citizens under the agreement, or even those rights guaranteed under its national laws.

Given the challenges that exist in Liberia’s post-conflict environment and the limited resources of the national police, concession agreements allow investors to use private security forces to protect their investments and workforces. In contrast to the provisions requiring investors to provide social services on behalf of the Government, investors’ private security forces are not empowered to carry out full police functions. Instead, an investor’s security force is limited in that it

may initiate a process involving arrest, interrogation, detention and other forms of law enforcement work, but must defer to the State authorities within 24 hours and when requested by the national police. Because the likelihood of human rights abuse is great in this sector, the Government retains as much control as it can over the operational aspect of private security functions. These provisions attempt to strike a balance between investors’ legitimate security concerns and the need for the State to protect the rights of those detained. The national police and the Ministry of Justice must remain untainted and uncompromised when overseeing investors’ use of private security forces.

“Liberia has come a long way since the end of the civil crisis and although challenges remain, the Government has undertaken institutional reform intended to provide protections for basic human rights.”

*Liberia has made progress on a number of fronts to better protect the human rights of Liberians. What do you think are the most important changes over the past seven years?*

Liberia has come a long way since the end of the civil crisis and although challenges remain, the Government has undertaken institutional reform intended to provide protections for basic human rights. For example, to complement the rebuilding of the national police force, the Government is now working on a new Police Act. A key element of this Act is to establish a civilian oversight board to receive and investigate complaints from civilians against police officers, and to guide the police towards being a professional, instead of a political, institution. If the Act is passed in keeping with the spirit and intent behind it, it will be a major achievement for the rule of law in Liberia.

As described earlier, most concession agreements executed in the last decade have included greater environmental and social protections. In addition, the paternalistic character of the old agreements has been replaced by a paradigm that provides for greater involvement of affected communities in management of community development funds and service delivery. In 2013, the Liberian legislature ratified an Act to establish the National Bureau of

Concessions (NBC), which is broadly intended to monitor and enforce the requirements of the various concession agreements. To date, the NBC's ability to perform this role has been hampered by a lack of capacity and an inadequate budget for operational expenses; however, it is an important institutional step to create greater oversight of the sector.

Liberia has also domesticated certain international treaties that affect the human rights of citizens such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Right, the Convention Against Torture, the Convention of Eradication of Discrimination Against Women and the Convention on the Rights of the Child, just to name a few. Liberia has also in the past 10 years established and strengthened several transparency institutions such as the General Auditing Commission, the Liberia Extractive Industry and Transparency Initiative, the Public Procurement Concession Commission, and the Liberia Anti-Corruption Commission.

In addition to national efforts, Liberia has subscribed to international sectoral oversight initiatives such as the United Nations' Kimberly Process Certification Scheme to prevent conflict diamonds from entering the mainstream diamond market. More recently, Liberia ratified the Voluntary Partnership Agreement with the European Union (EU) under the FLEGT programme. These bilateral trade arrangements between EU and non-EU timber producing countries require the certification of timber exports to the EU to ensure that logs come from legal sources.

The problem has been that political interests have sometimes trumped the good intentions that underlie the enactment of such laws and creation of such agencies, resulting in poor performance due to lack of funding, lack of capacity, and/or lack of coordination. While these actions represent positive steps towards international best practices, it is imperative that the Government reflects these commitments by amending its national laws and regulations, and exhibiting more commitment and sincerity in its enforcement actions.

1. Liberian Law Reports Volume 4, page 299.
2. See <https://www.imf.org/external/pubs/ft/scr/2012/cr1245.pdf>.
3. The Business and Human Rights Review, Spring 2013, Issue 2, page 11 <http://www.allenoverly.com/SiteCollectionDocuments/Business%20and%20Human%20Rights%20Review%20-%20Issue%202%20Spring%202013.pdf>.
4. Copies of concession agreements are published and available through the Liberian Extractives Industry Transparency Initiative website (<http://www.leiti.org.lr/>). Since 2005, the government has developed provisions across sectors to address issues such as employees, health care, housing, safety, and the protection of the environment during and after activities under the agreement.

# Implementing the State duty to protect human rights in investment policy

By Andrea Saldarriaga and Andrea Shemberg  
Co-leads of the LSE Investment & Human Rights Project

Now is the right time to focus our minds on what States should be doing to implement their duty to protect human rights (DtP) in the context of investment policymaking. A number of national action plans (NAPs) are being developed to chart implementation of the UN Guiding Principles on Human Rights (UNGPs) including in the U.S., Germany, Switzerland, Belgium, Mexico, Chile, Indonesia and Malaysia. The UK government is in the midst of revising its existing NAP. At the same time, momentum is growing worldwide for meaningful reform of investment policy at the domestic and international levels,<sup>2</sup> and the world has embraced a new agenda on sustainable development, the Sustainable Development Goals (SDGs), which will need to be fuelled in part by an increase in foreign direct investment (FDI).<sup>3</sup>



FDI is already a significant portion of the global economy and is used as a tool to propel development.<sup>4</sup> The UN Conference on Trade and Development (UNCTAD) 2015 World Investment Report projects that global FDI flows will reach USD1.4 trillion in 2015, increasing in 2016 and 2017.<sup>5</sup> Additionally, FDI accounts for *“more than 40 per cent of external development finance to developing and transition economies”*.<sup>6</sup>

However, FDI projects sometimes make the headlines for the wrong reasons. From allegations of land grabbing and physical displacement of communities and indigenous peoples without appropriate protections, to environmental devastation, support for armed conflict and grave human rights abuses, connections are drawn between adverse human rights impacts and business activities linked to some FDI projects.

Embedding the protection of human rights into the full range of State policies and practices that support, facilitate, promote and regulate investment should therefore be a key dimension for States to consider when implementing their DtP. Additionally, providing legitimate and effective opportunities for the remediation of human rights-related harms that occur in the context of investment should be regarded as an integral piece of investment policy, especially because they contribute to a stable environment for investments.

Yet the currently published NAPs, as well as the discussions around NAPs in several jurisdictions, are notable because where they address the FDI context, they do so only partially. There may be a number of obstacles that constrain a coherent implementation of the UNGPs in the FDI context.

One obstacle may be the lack of communication within and among government departments that have a role in investment policymaking regarding business and human rights. Special Representative Ruggie has often described the horizontal policy incoherence that is so common in government.<sup>7</sup> Those departments within States that are responsible for or that relate to FDI are often far removed from business and human rights discussions. Additionally, those within States working on business and human rights, including the implementation of the UNGPs, frequently do not have access to sufficient tools or resources to fully consider the relevance of the UNGPs for the various policies and practices that contribute to governing FDI. Engaging in investment policy discussions often also requires technical knowledge that may not be

common among those who have expertise in human rights domains.

This is not to say that investment has been completely off the radar of the business and human rights agenda. The UK NAP contains various commitments relating to the context of FDI, including the commitment to:

*“...ensure that agreements facilitating investment overseas by UK or EU companies incorporate the business responsibility to respect human rights, and do not undermine the host country’s ability to either meet its international human rights obligations or to impose the same environmental and social regulation on foreign investors as it does on domestic firms”*.<sup>8</sup>

The newly adopted Colombian NAP also includes various commitments relating to foreign investment. For example, the NAP commits the Government to initiate a multi-stakeholder dialogue to consider the relationship between investment and human rights that informs the development of an investment strategy, among other steps.<sup>9</sup>

Additionally, some governments have instituted interesting innovations in the area of DtP and investment policy; for example, Canada has tied its Organisation for Economic Development (OECD) National Contact Point process to export credit

support<sup>10</sup> and, in certain investment contexts, U.S. securities regulations now require corporates to report on their human rights due diligence.<sup>11</sup>

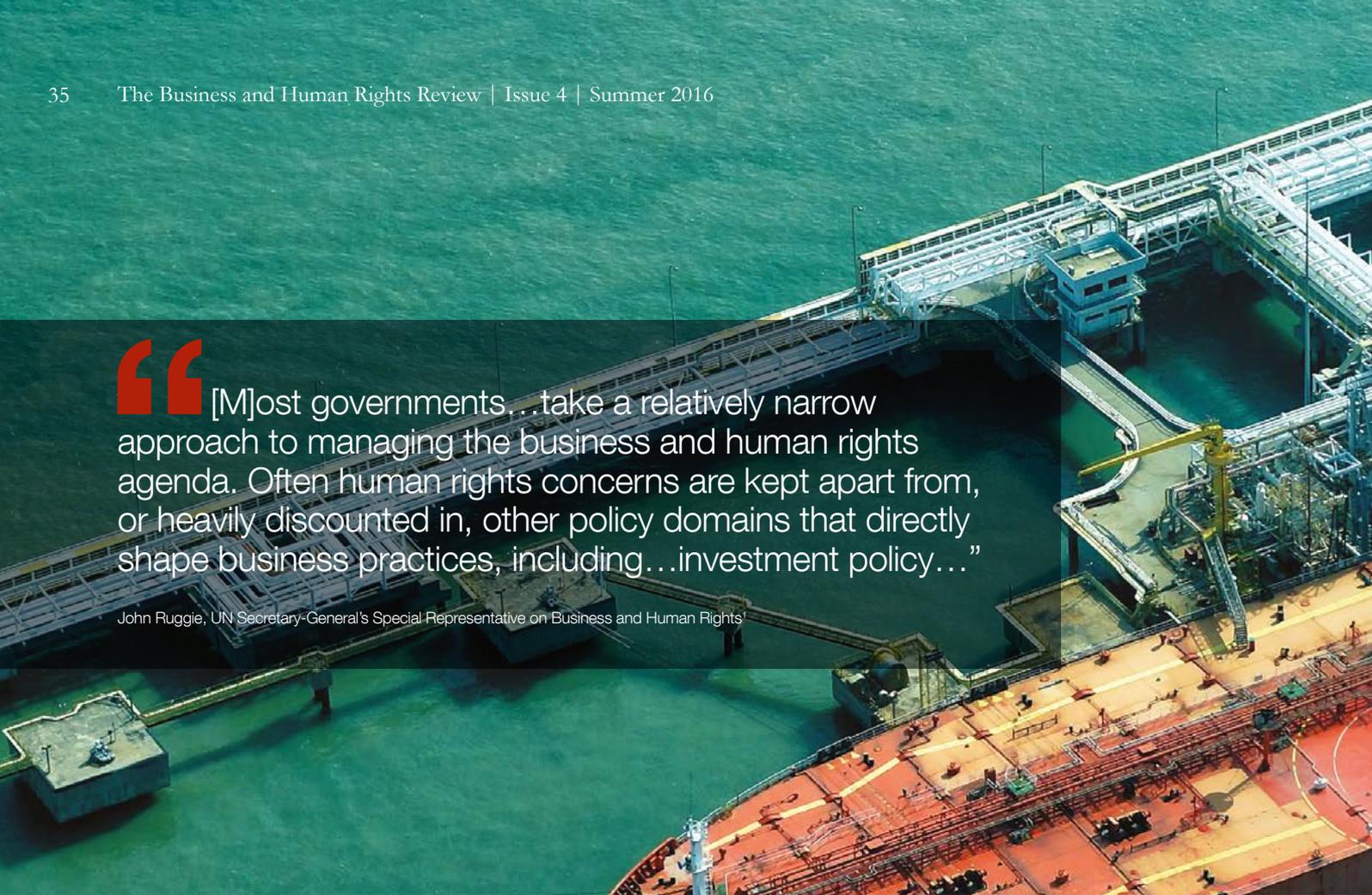
On the other hand, human rights have been playing an increasingly important role in the context of discussions around international investment agreements (IIAs) and investor-State dispute settlement (ISDS). In fact, the continuing negotiation of the Transatlantic Trade and Investment Partnership (TTIP) between the U.S. and the EU has brought out a number of concerns about international investment agreements and ISDS. These include concerns about the State’s ability to regulate to protect human rights and the public interest and the lack of transparency in ISDS. These concerns echo those already expressed in other latitudes that have prompted a sustained call for reform of IIAs and ISDS.

In other countries, for example South Africa, the question of human rights and the ability of the government to regulate in the public interest have been central to the decision to revise and terminate some IIAs.<sup>12</sup>

Implementing the DtP, however, requires more than isolated policy changes. It requires a coherent approach that focuses on key human rights issues across the spectrum of State functions that relate to FDI. State functions that are usually isolated from human rights issues, such as investment promotion agencies and investment coordinating bodies, would be engaged. This approach can help States reap the full benefits of FDI while preventing and mitigating the adverse impacts on people and the environment and ensuring access to remedy when these impacts occur.

So what key issues should States focus on when integrating human rights across investment policy? The Guide to Implementing the UNGPs in Investment Policymaking, published this March by the LSE Investment & Human Rights Project, has identified six such issues. These are described briefly below.





“ [M]ost governments... take a relatively narrow approach to managing the business and human rights agenda. Often human rights concerns are kept apart from, or heavily discounted in, other policy domains that directly shape business practices, including... investment policy...”

John Ruggie, UN Secretary-General's Special Representative on Business and Human Rights<sup>1</sup>

## 1. Make the management of human rights risks an integral part of investment policymaking and a key component of investment protection

A business enterprise's human rights risks are any risks that its operations may lead to one or more adverse human rights impacts.<sup>13</sup> As noted by Professor John Ruggie, formerly the UN Secretary-General's Special Representative on Business and Human Rights (SRSG), “[l]ocal communities' reactions to these impacts can quickly escalate from complaints to protests and road blockades, raising the risks of the company or its security providers using heavy-handed tactics that can lead to even more serious impacts, such as injury or even deaths”.<sup>14</sup> In 2010 the SRSG reported on a Goldman Sachs study of 190 projects operated by major international oil companies. The study showed that start-up time for new projects nearly doubled in the previous decade due to “technical and political complexities”.<sup>15</sup> An independent analysis of a sub-set of those projects, also reported on by the SRSG, found that:

“...non-technical risks accounted for nearly half of all risk factors faced by these companies, with stakeholder-related risks constituting the largest single category. One international oil major...estimated that it may have experienced a USD6.5 billion value erosion over a two-year period from stakeholder-related risks”.<sup>16</sup>

Risks to human rights can therefore lead to serious consequences for the companies involved – as well as for the communities themselves, governments and broader society. As human rights risks pose serious challenges to the stability and sustainability of investment activities, managing such risks should be an integral part of how States and companies approach the protection of investments. Specifically, this should influence how States view legal tools designed to protect investors, including IIAs.

Incentives and necessary requirements for managing social and environmental risks, including human rights risks, are increasingly seen as enablers for the smooth operation

of business and a key part of a good investment climate. Embedding the management of human rights risks in the regulatory framework applicable to investment can help States to realise the full range of the economic and social benefits of inward investment, while minimising potential adverse impacts. Examples of steps States can take are:

- (a) including requirements and incentives for investors to engage in human rights due diligence in IIAs;
- (b) requiring investors to include human rights impacts in their social and environmental impact assessments and management plans, supported by research based on engagement with people likely to be impacted by the investment; and
- (c) where not possible in the legislative framework, requiring that State-investor contracts include such impact assessments and management plans.




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## 2. *Ensure access to effective remedy for people adversely impacted in the context of FDI projects as an integral part of investment policymaking*

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Ensuring access to effective remedy is an essential component of the State DfP. A 2014 study commissioned by the Office of the High Commissioner for Human Rights (OHCHR) found that the “*present system of domestic law remedies [for business and human rights cases] is patchy, unpredictable, often ineffective and fragile.*” The study also highlighted the very low number of business enterprises prosecuted in national courts for their alleged involvement in gross human rights abuses.<sup>17</sup>

In the context of FDI, ensuring access to remedy can be especially challenging for States because such cases may involve a cross-border element. For example, the alleged adverse human rights impact may relate to material actions or decisions that took place outside the jurisdiction. According to the OHCHR, “[c]ross-border

*cases give rise to a particular set of difficulties for domestic law enforcement bodies, prosecutors and victims... These comprise legal challenges (such as establishing personal and subject-matter jurisdiction, identifying the correct set of legal rules to apply to the case and problems relating to enforcement) and many practical and logistical issues associated with gathering information and the availability of witnesses.*<sup>18</sup> These difficulties are exacerbated in weak governance contexts. Victims of alleged human rights abuse are therefore left more vulnerable where cross-border elements are involved, as may often be the case in the context of FDI.

The cross-border nature of FDI can also make investors vulnerable to the risk of host State partiality, in particular in weak governance contexts. Over the past 60 years, international investment law has developed

to mitigate these vulnerabilities through a network of over 3,000 IIAs. IIAs provide broad investment protections and access to ISDS, in an effort to guarantee efficient and objective enforcement of investor rights. However, no such similar legal developments have been made to ensure access to remedy for individuals and communities adversely impacted by international investment activities.

States should ensure that access to remedy is an integral part of investment policymaking. This will help States to consider policy solutions to mitigate against the unique vulnerabilities created by FDI of both investors and individuals and communities potentially adversely impacted by investment activities.

“ States should ensure, therefore, that investment policy and regulatory measures provide adequate investor protection, while not interfering with the State’s bona fide efforts to implement policies, laws, regulations or other measures in a non-discriminatory manner in order to meet its human rights obligations.”

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### *3. Pursue economic growth and investment goals, while ensuring that the policy and regulatory framework for investment provides the State adequate domestic policy space to meet its human rights obligations*

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States meet their legal obligations to respect, protect and fulfil human rights by using a wide range of measures including setting policies, passing and implementing laws and regulations, putting in place administrative measures and adjudicating through judicial and non-judicial processes. Joint research carried out by the SRSG and the International Finance Corporation<sup>20</sup> found that State-investor contracts are in some cases drafted in a way to unduly constrain the policy space of the State, even regarding

measures to meet its human rights obligations, such as labour law, environmental protections and the like. The SRSG expressed similar concerns about IIAs and ISDS. While domestic law provisions can also unduly constrain policy space, there is a greater chance of this in the case of foreign investment. In foreign investment both State-investor contracts and IIAs may be applicable, and access to international arbitration may also be offered. States should ensure, therefore, that

investment policy and regulatory measures provide adequate investor protection, while not interfering with the State's bona fide efforts to implement policies, laws, regulations or other measures in a non-discriminatory manner in order to meet its human rights obligations. The text of current and future State-investor contracts and IIAs should be given particular attention in this respect.

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### *4. Clearly set out the expectation that outward investors respect human rights; and manage the expectations of inward investors and of the communities and individuals directly impacted by investment activity*

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UNGP 2 provides that home States should “set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations”. UNGP 2 also describes the range of measures that can help States set out their expectation. These include non-regulatory actions such as incentivising investors to demonstrate their commitment to respect human rights in foreign contexts; providing access to contextual information about the human rights challenges in the host State or conditioning governmental support, financing, insurance or guarantees on the investor's commitment to managing human rights-related risks.

Considering inward investment, States would be wise to consistently set out and reinforce two messages to inward investors.

First, States should put investors on notice that they have a duty to protect human rights and will use their policy space to meet this duty. Secondly, States should express their expectation that investors meet their responsibility to respect human rights as they carry out activities in the State's jurisdiction. State conduct that conveys these two messages clearly and consistently, including through regulatory measures, has two major advantages. It will help the State manage the investor's expectations – a subject often relevant to State-investor disputes under IIAs – thereby helping to avoid or defend against investors' claims. Additionally, such clarity is useful for investors and will facilitate their management of human rights risks in investment projects, helping to foster a more stable investment climate. Those investors

who are striving to respect human rights will look favourably upon State conduct that facilitates their responsibility to respect.

States should also adequately address the expectations of communities and individuals who may reap positive benefits and/or who may suffer adverse impacts from investment. Unmet expectations of positive impacts, as well as unexpected adverse impacts, can lead to tensions between investors and communities. As described in key issue 1 above, these tensions, in turn, can lead to serious problems for investors such as work stoppages and even violence.

States should ensure that their role to manage the expectations of communities potentially impacted by investment is integrated throughout investment policymaking.

#### *Steps States can take to set appropriate expectations could include:*

- (a) ensuring that legal and administrative requirements and incentives provide consistent messaging regarding the State's duty to protect and the investor's responsibility to respect;
- (b) providing information and facilitation assistance to inward investors in their efforts to engage with communities who may be impacted by the investment; and
- (c) putting in place requirements for community engagement prior to the implementation of investment projects that are in line with international standards, including, where relevant, free, prior and informed consent.

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### 5. *Transparency: improve transparency across State functions that relate to investment*

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States should disclose information when the public interest is impacted. Ensuring that investment policymaking and the implementation of policy for inward and outward investment is transparent, in particular where people's human rights are potentially impacted, is therefore an important step for States in implementing their DtiP. Transparency includes the availability and accessibility of information – meaning that it can be obtained without legal and administrative barriers, financial

obstacles or discriminatory denials of access – as well as the openness of decision-making processes. It is a necessary element for accountability of States and business enterprises in meeting their duties and responsibilities to respect human rights.

Transparency across the State functions that relate to investment can also contribute to an enabling and stable environment for inward investment. Increased transparency in all facets of investment policy and regulation improves trust between

government, investors and the public and can improve the State's reputation among investors, which can improve its attractiveness for FDI and even its own access to credit.

States can look at, for example, the openness of processes to reform investment regulations, the availability of information regarding licensing and permitting processes, the publication of State-investor contracts and the transparency of investor-State disputes.

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### 6. *Conflict and post-conflict areas: institute special measures for investment in conflict-affected and post-conflict areas*

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The UNGPs and their addendum report "*Business and human rights in conflict-affected regions: challenges and options towards State responses*" highlight that conflict-affected areas are contexts in which the worst human rights abuses often occur and where there is a heightened risk of business involvement in gross abuses of human rights.<sup>21</sup> The UNGPs and the addendum report point to the fundamental role of home States in

supporting both investors and host States to ensure that investors are not involved in human rights abuses.

In post-conflict areas, where peace building, reconstruction and reconciliation efforts are underway, there is a particular risk for investors that the investment activities can create obstacles, heighten tensions or challenge such efforts. Home State efforts to support investment in post-conflict

situations should assist investors to help them ensure their activities do not pose risks to post-conflict reconstruction and reconciliation efforts. States emerging from conflict can work to ensure coordination among those authorities administering transitional and reconciliatory processes and those working to attract and regulate inward FDI.

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## Conclusion

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Importantly, the key policy documents of global and multilateral institutions on investment policy reinforce many of the key issues outlined above. Indeed, the 2015 OECD Policy Framework for Investment and the 2015 UNCTAD Investment Policy Framework for Sustainable Development both address the benefits of more active management of social and environmental issues and for the need for companies to act responsibly, including with respect to human rights.<sup>22</sup> Additionally, the new Rules and Convention on Transparency in Investment Arbitration agreed by the UN Commission on International Trade Law in late 2014 aim to improve transparency in ISDS.<sup>23</sup>

The focus of the key issues outlined here is also consistent with a trend identified by the latest UNCTAD World Investment Report – namely that States are increasingly playing a stronger role in sustainability issues.

This trend is marked by States creating stronger social and environmental rules, more actively promoting sustainable development and placing more emphasis on the role of company responsibility for impacts on people and the planet. The UNCTAD Investment Policy Framework for Sustainable Development indicates that this trend signals "*a renewed realism [among States] about the economic and social costs of unregulated market forces*".<sup>24</sup>

Playing a more active role in regulating the economy does not mean discouraging investment. Indeed, the 2015 OECD Policy Framework for Investment indicates that, on the contrary, this active role is precisely how a State can ensure investment drives broader value creation and sustainable development:

*"While it is the role of businesses to act responsibly, governments have a duty to protect the public interest and a role in providing an enabling framework for responsible business conduct... This point goes to the heart of the Policy Framework for Investment: to the extent that governments provide an enabling environment for businesses to act responsibly and meet their duty to protect the public interest from potential negative impacts of business activities, they are more likely to keep and attract high quality and responsible investors, minimise the risks of potential adverse impacts of investments, and ensure broader value creation and sustainable development".*<sup>25</sup>

As more States work to implement the UNGPs or develop their NAPs, a cohesive vision of investment policy with a focus on key issues across the spectrum of State functions that relate to investment should help to achieve progress not seen to date.

1. John Ruggie, UN Secretary-General's Special Representative for Business and Human Rights, Keynote Address, 3rd Annual Responsible Investment Forum, New York, 12 January 2009.
2. See UNCTAD 2015 World Investment Report and Investment Policy Framework for Sustainable Development (IPFSD). Consider also the processes undertaken by countries to revise their international investment agreements (IIAs) including Indonesia, South Africa and India and the debate at the European level prompted by the negotiation of the Transatlantic Trade and Investment Partnership (TTIP).
3. According to the UNCTAD World Investment Report (WIR), FDI is fundamental for helping to close the financing gap to achieve the newly agreed Sustainable Development Goals. FDI will therefore be at the top of many countries' agenda as they pursue those goals. See Sustainable Development Goals 1 ("*End poverty in all its forms everywhere*"), 2 ("*End hunger, achieve food security and improved nutrition and promote sustainable agriculture*"), 7 ("*Ensure access to affordable, reliable, sustainable and modern energy for all*") and 10 ("*Reduce inequality within and among countries*").
4. FDI in this article is used to mean "*cross-border investment by a resident entity in one economy with the objective of obtaining a lasting interest in an enterprise resident in another economy. The lasting interest implies the existence of a long-term relationship between the direct investor and the enterprise and a significant degree of influence by the direct investor on the management of the enterprise*" (OECD Factbook 2013: Economic, Environmental and Social Statistics, <http://www.oecd-ilibrary.org/sites/factbook-2013en/04/02/01/index.html?itemId=/content/chapter/factbook-2013-34-en>).
5. UNCTAD, World Investment Report 2015, United Nations Publication (2015), at p. ix.
6. UNCTAD, World Investment Report 2015, United Nations Publication (2015), at p. iii.
7. See, for example, John Ruggie, UN Secretary-General's Special Representative for Business and Human Rights, Keynote Address, 3rd Annual Responsible Investment Forum, New York, 12 January 2009.
8. Good Business: Implementing the UN Guiding Principles on Business and Human Rights, HM Government, September 2013, at p. 12, para. (vii).
9. Colombia Avanza, Plan de Acción de Derechos Humanos y Empresas, 9 December 2010.
10. Canada's Enhanced Corporate Social Responsibility Strategy to Strengthen Canada's Extractive Sector Abroad (2014).
11. Burma Responsible Investment Reporting Requirements, US Department of State 2013.
12. See, for example, Republic of South Africa Bilateral Investment Treaty Policy Framework Review, Government Position Paper (2009), available at: [pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/090626trade-bi-lateralpolicy.pdf](http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/090626trade-bi-lateralpolicy.pdf).
13. The Corporate Responsibility to Respect Human Rights. An Interpretative Guidance, available at [http://www.ohchr.org/Documents/Publications/HR.PUB.12.2\\_En.pdf](http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf).
14. Rachel Davis and David Franks, Costs of Company-Community Conflict in the Extractive Sector, CSRI at Harvard Kennedy School (2014), available at [http://shiftproject.org/sites/default/files/Costs%20of%20Conflict\\_Davis%20&%20Franks.pdf](http://shiftproject.org/sites/default/files/Costs%20of%20Conflict_Davis%20&%20Franks.pdf), p. 6.
15. Business and human rights: further steps toward the operationalization of the "protect, respect and remedy" framework, UN Doc A/HRC/14/27 at para. 71, available at [http://www2.ohchr.org/english/issues/trans\\_corporations/docs/A-HRC-14-27.pdf](http://www2.ohchr.org/english/issues/trans_corporations/docs/A-HRC-14-27.pdf).
16. *Ibid.*
17. Jennifer Zerk, "Corporate liability for gross human rights abuses: towards a fairer and more effective system of domestic law remedies," study prepared for OHCHR, p. 7, February 2014, available at <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>.
18. OHCHR, Progress report of the United Nations High Commissioner for Human Rights on legal options and practical measures to improve access to remedy for victims of business-related human rights abuses, UN Doc A/HRC/29/39 at para. 25, available at <http://www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx>.
19. See UNCTAD, IIA Issues Note, Recent Trends in IIAs and ISDS, No. 1, February 2015, p. 1, available at: [unctad.org/en/PublicationsLibrary/webdiaepcb2015d1\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf)
20. "Stabilization Clauses and Human Rights", May 2009, available at <http://www.ifc.org/wps/wcm/connect/9feb5b00488555eab8c4fa6a6515bb18/Stabilization%2BPaper.pdf?MOD=AJPERES>.
21. See UNGP Principle 7 and UN Human Rights Council, UN Doc A/HRC/17/32; Business and human rights in conflict-affected regions: challenges and options towards State responses, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie (27 May 2011), available at <http://www.ohchr.org/Documents/Issues/TransCorporations/A.HRC.17.32.pdf>.
22. 2015 Policy Framework for Investment, OECD, available at <http://www.oecd.org/daf/inv/investment-policy/PFI-pocket-edition.pdf>.
23. See Julia Salansky, The New UNCITRAL Rules and Convention on Transparency, August 2014, available at [blogs.lse.ac.uk/investment-and-human-rights/portfolio-items/transparency-in-investment-treaty-arbitration-and-the-un-guiding-principles-on-business-and-human-rights-the-new-uncitral-rules-and-convention-on-transparency/?portfolioID=4601](http://blogs.lse.ac.uk/investment-and-human-rights/portfolio-items/transparency-in-investment-treaty-arbitration-and-the-un-guiding-principles-on-business-and-human-rights-the-new-uncitral-rules-and-convention-on-transparency/?portfolioID=4601).
24. IPFSD, available at [http://investmentpolicyhub.unctad.org/Upload/Documents/POLICY%20FRAMEWORK%202015\\_WEB\\_1.pdf](http://investmentpolicyhub.unctad.org/Upload/Documents/POLICY%20FRAMEWORK%202015_WEB_1.pdf) at p.16.
25. 2015 Policy Framework for Investment, OECD, at p. 36.

# Cohesion between the international human rights and international investment regimes – is a standing court necessary?<sup>1</sup>

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As the United Nations Guiding Principles on Business and Human Rights (**UNGPs**) recognise, international investment law and international human rights law do not exist in isolation. There is potential for these two international law regimes to overlap in the context of an investor-State dispute. One of the ways in which human rights issues have arisen is where a State has sought to defend the actions it has taken on the grounds that it was required to so act to fulfil its human rights obligations.



Given that investment treaty claims can call for the determination of human rights issues and other important questions of public policy, this article looks at whether international arbitration is the appropriate forum for investment treaty disputes or whether a standing court would be more appropriate. This issue is pertinent in light of the European Commission's draft investment chapter for the Transatlantic Trade and Investment Partnership between the EU and the U.S. (TTIP)<sup>2</sup> which has been the subject of recent negotiations with the U.S.<sup>3</sup> The Commission has proposed establishing a new investment court system comprising a tribunal of first instance with 15 jointly appointed judges (five U.S. judges, five EU judges and five judges from third-party countries) and an appeal tribunal with six jointly appointed judges (two U.S., two EU and two from third-party countries). We consider also whether cohesion is possible by other means.

### *The UNGPs recognise potential overlap between international investment and human rights obligations*

States seeking foreign investment may enter into international investment agreements (IIAs), which provide guarantees to foreign investors. These guarantees generally include that:

- the State will pay prompt, adequate and effective compensation in case of expropriation of the investor’s investment;
- the investor’s investment will be given “*fair and equitable treatment*” (FET); and
- obligations or commitments entered into by the host State in connection with a foreign investment will be brought under the protective “*umbrella*” of the IIA (a so-called umbrella clause).

The UNGPs formulated by Professor John Ruggie and endorsed by the UN Human Rights Council in 2011 recognise that States’ international law obligations in the form of international investment protection and human rights obligations do not exist in isolation:

- States must protect against human rights abuses within their territory by third parties, including business enterprises (UNGP 1);
- when entering into IIAs, States should maintain adequate domestic policy space to meet their human rights obligations (UNGP 9); and
- States are required to provide adequate access to remedy for those affected by human rights abuses (UNGP chapter III).

Some commentators have expressed concerns that a State’s investment obligations may limit, or have a “*chilling effect*” on, a host State’s ability to regulate in order to comply with its international human rights obligations.



### *Human rights may arise in international investment arbitrations*

Certain investment treaty disputes turn on the tribunal’s evaluation of regulatory measures taken by the host State, notably in the fields of water and sanitation, public health, environmental protection or indigenous rights. For example, in *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic*, Argentina argued that its actions were a justified exercise of its duty to safeguard the supply of water.<sup>4</sup>

A number of other investment treaty cases have involved the actions of a host State which arguably engaged the human rights of their citizens, even if the host State did not advance a human rights defence.<sup>5</sup>

For example:

- In *Azurix Corp. v Argentina*,<sup>6</sup> the parties entered into a long-term concession contract for the distribution of potable water and the treatment of sewage. Following problems with water quality, Argentina enacted measures to protect public health and encouraged water users not to pay their water bills.<sup>7</sup> In response, the investor brought a claim in arbitration, alleging expropriation and breach of the FET standard.



- Philip Morris commenced arbitrations against Uruguay and Argentina challenging regulations introduced by both governments requiring plain packaging for tobacco products, measures which the States say were implemented with the aim of promoting public health. Philip Morris argued that the plain packaging requirement arbitrarily and unjustifiably restricts businesses from using their brands and trade marks to sell their products, in breach of expropriation and FET protections under the relevant IIAs.



### *Is international arbitration an appropriate forum?*

IIAs usually provide investors with the right to bring an arbitration directly against a State if that State violates the protections contained in the IIA. The use of arbitration (a process which evolved as a dispute resolution mechanism for private parties) for disputes between investors and States has recently been the subject of criticism. This so-called legitimacy crisis has arisen out of a concern that the regime favours investors and does not do enough to safeguard the public interest by: (i) allowing the State sufficient policy space to take action, for example, to protect human rights; and (ii) being transparent and open to public scrutiny.

In June 2015 a group of UN experts publicly expressed their concern about the potentially negative impact of IIAs on human rights.<sup>8</sup> Legitimacy criticisms that could be applied to the use of international arbitration as a forum for disputes involving human rights issues include:

- First, unlike judges, who are appointed usually on fixed terms to represent the public interest and develop jurisprudence, arbitrators are appointed on a case by case basis either by parties or through arbitral institutions. Arbitrators are also able to act as counsel and arbitrator in different proceedings, some fear with the consequence that they cannot be truly impartial and independent in determining disputes, for example when determining as an arbitrator the same issue in one case as argued as counsel on another case. To quote Brigitte Stern (arbitrator) “*The soccer World Cup is coming soon. Would it be acceptable that the player is also the referee?*”<sup>9</sup> Tribunals suffer from a lack of diversity – of the 34 ‘most in-demand’ arbitrators listed by Chambers & Partners for 2015, only two are female.<sup>10</sup> In addition, critics complain that arbitrators have a tendency to take on too many cases, delaying the delivery of awards;

- Secondly, international arbitration is perceived to restrict the extent to which non-parties such as non governmental organisations or civil society can participate. Given that civil society is the beneficiary of any State action to safeguard human rights, arguably interventions by third parties in order to articulate the rationale for, and the impact of, State action could assist the tribunal in determining any human rights issues which may arise. However, amicus briefs remain limited in number.<sup>11</sup> Tribunals have also taken differing approaches to assessing the relevance of human rights to permitting amicus interventions, and rarely have submissions made by amici curiae appeared to have been determinative:

- In *Suez/Vivendi v Argentina*<sup>12</sup> the tribunal permitted amicus curiae submissions on the grounds that the matter at issue (water distribution and sanitation) concerned “*basic public services to millions of people*” and might raise “*complex public and international law questions, including human rights considerations*”;<sup>13</sup>

- The tribunal in *Bewater v Tanzania*<sup>14</sup> permitted five NGOs to file a joint amicus brief. It recognised their submission as “*useful*” and noted that they “*informed the analysis of claims*”. However, the tribunal did not specifically consider the NGOs’ argument that foreign investors engaging in projects related to human rights should have “*the highest level of responsibility to meet their duties and obligations*”<sup>15</sup> nor on whether the Tanzanian government’s actions were justified under human rights law to ensure access to water for its population;<sup>16</sup>

- More recently, the tribunal in *Borders Timber v Zimbabwe*<sup>17</sup> dismissed petitions by the European Centre on Constitutional and Human Rights and indigenous communities of Zimbabwe to act as amici curiae in proceedings impacting indigenous communities in Zimbabwe.

The tribunal concluded that: (i) the applicants lacked independence, as they appeared to support the State’s position;<sup>18</sup> and (ii) international human rights law has no relevance, because the parties had not put forward human rights arguments and there was no express human rights reference in the IIA choice of law provision.<sup>19</sup> If more broadly followed, this could limit the circumstances in which human rights-focused amicus submissions are permitted, because: (i) in general amicus applicants will favour one party’s position; and (ii) human rights are very rarely referred to in choice of law provisions in IIAs; and

- Finally, IIAs generally do not establish clear-cut, coherent rules, capable of being followed on a predictable basis, but rather a set of broadly framed ideals that may be given different and conflicting meanings when interpreted by different arbitrators.<sup>20</sup> Where human rights are at issue, this feature of arbitration arguably does not sit comfortably with the requirement for States to ensure adequate and consistent access to remedy in the field of human rights. Furthermore, arbitration awards are final and enforceable under the New York Convention (although the New York Convention provides that enforcement may be refused, if this would be contrary to the public policy of the country where enforcement is sought,<sup>21</sup> including<sup>22</sup> potentially if contrary to human rights protections). Avenues of challenge to award are typically limited. Application for annulment under the ICSID Convention<sup>23</sup> is limited to circumstances in which the tribunal was not properly constituted, manifestly exceeded its powers, that there was corruption on the part of a member of the Tribunal, a serious departure from a fundamental rule of procedure or that the award failed to state reasons.<sup>24</sup> Without an appellate mechanism, unhelpful decisions cannot be overturned, and there is less likelihood of consistency.



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### *Is a standing court the solution?*

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The proposal of a standing investment court is intended to address many of these legitimacy concerns levelled at international investment arbitration. We have considered how the European Commission's TTIP proposal could address these concerns:

- Such a body could address legitimacy concerns, for example, by appointing tenured judges, ideally through representation from developed and developing states and trade/investment and public policy backgrounds,<sup>25</sup> that are State appointed<sup>26</sup> and not able to act as counsel in any pending or new investment protection disputes under TTIP, or any other agreement, or domestic law during their tenure. The European Commission's draft TTIP investment chapter provides that judges for the investment tribunal of first instance (a standing court) must have demonstrated experience in public international law and would not be permitted to act as counsel in any international or domestic investment dispute.<sup>27</sup> A standing court may also provide for time limits for determination of a dispute, potentially offering a more affordable option for parties. The European Commission's draft TTIP investment chapter imposes a fixed retainer for judges and requires the investment tribunal of first instance to issue a provisional award within 18 months of the date of submission of claim, which becomes final 90 days later if neither party appeals.<sup>28</sup>

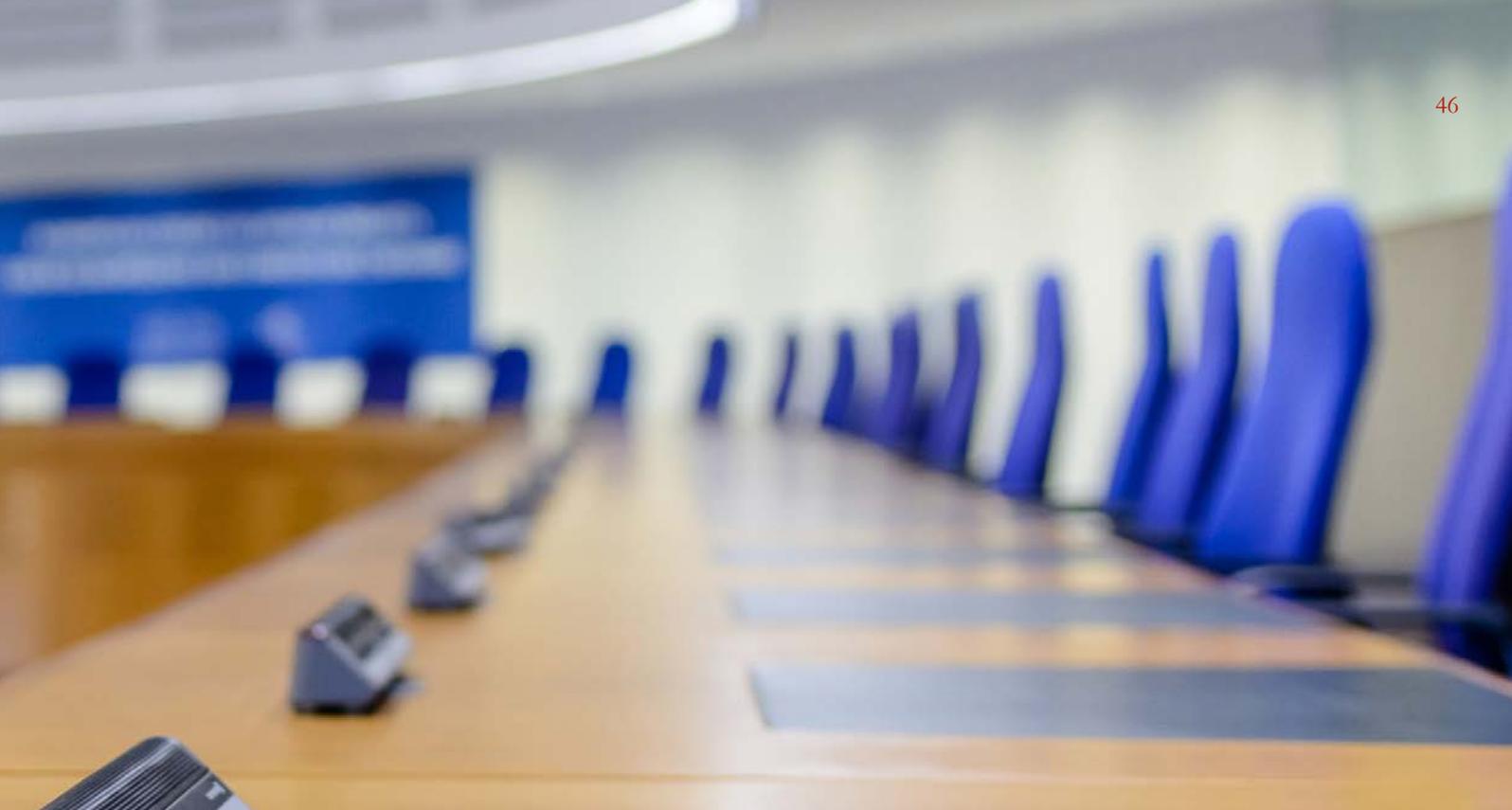
- A standing court could increase consistency of approach to third-party participation and submissions. The European Commission's draft TTIP investment chapter provides that the investment tribunal of first instance shall permit any natural or legal person with a “*direct or present interest in the result of the dispute*” to receive copies of procedural documents, submit a written statement in intervention, attend the hearing and make an oral statement.<sup>29</sup>
- It could produce consistent and predictable jurisprudence on issues arising in investor-State disputes, including on human rights. It could also address concerns relating to challenge of awards. For example, the European Commission's draft TTIP investment chapter provides for a right to appeal and indicates that generally appeal proceedings should not exceed 180 days from the date of notification.<sup>30</sup>

On the other hand, a standing court is not without its own difficulties, including the following:

- Parties to an arbitration will lose their autonomy in selecting arbitrators, as disputes before an investment court will be randomly allocated to the permanent judges (there will be one EU judge, one U.S. judge and one judge from a third-party State, who will act as chair). The appeal tribunal will comprise of six individuals (two EU, two U.S. and two

third-party State), and the chair will always be drawn from one of the two third-party State members, who will both act as President and Vice President. This arguably gives the two third-party State members a great deal of influence over international investment disputes.

- Concerns have been raised that the investment court system will be biased in favour of States. States may push for individuals known for their pro-State or pro-public policy views to be appointed as judges.
- The prohibition on judges acting as counsel during their tenure may restrict the pool of individuals willing to act as judges. In addition, the strict ethical and professional requirements for judges (*who “shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a Party or disputing party, or fear of criticism”*)<sup>31</sup> may both deter individuals from becoming judges and give rise to a large number of challenges against judges.
- Giving parties the option to appeal awards, on broader grounds to those currently provided for under the ICSID Convention,<sup>32</sup> may result in disputes being dragged out, and parties being forced to incur additional costs to defend an appeal. Critics point back to the early days of the World Trade Organisation Appellate Body, where parties appealed 100% of panel decisions.



The Commission's draft TTIP investment chapter is an internal EU document, tabled for discussion with the United States. It has faced, and likely to continue to face several rounds of negotiation (and likely knock on amendments). But the standing court proposal is not likely to disappear. The European Commission has indicated that it intends to work together with "other like-minded countries", in parallel with the TTIP negotiations, to set up a permanent international investment court, with a view to the investment court replacing all investment dispute resolution mechanisms contained in EU agreements, Member State agreements with third countries and international investment agreements concluded between third-party countries.<sup>33</sup>

More immediate solutions to building bridges between international investment arbitration and human rights have also been suggested and should not be dismissed:

– Some commentators suggest that cohesion could be achieved prior to investment disputes coming to a head, for example by investors being required to undertake human rights due diligence prior to investment (and adjusting their expectations accordingly).<sup>34</sup> The working draft of the International Bar Association's Business and Human Rights guidance for Bar Associations recommends that investment agreements between host States and investors (generally entered into

for large infrastructure projects, e.g. water and sanitation systems) reflect human rights,<sup>35</sup> for example, by parties using the UN Principles for Responsible Contracts (annexed to the UNGPs) during contract negotiations to ensure that parties have adequate resources to address human rights risks, allocate responsibilities and include mitigation mechanisms in the project documents.

- Others suggest that human rights protections should be incorporated directly into IIAs, by way of exceptions permitting States to breach investor protections in order to regulate to protect key public interests, including human rights.<sup>36</sup> Certain IIAs already contain such protections, for example, carve-outs for human rights, measures taken to protect public health<sup>37</sup> or the environment.<sup>38</sup>
- It has also been suggested that arbitrators should be more open to applying human rights arguments, for example by consulting human rights experts or agencies<sup>39</sup> and incorporating human rights through treaty interpretation.
- Some tribunals have turned to human rights jurisprudence to inform their interpretations of investor rights. For example in *Tecmed v Mexico*<sup>40</sup> and in *Azurix Corp. v Argentina*<sup>41</sup> the tribunals referred to the test set out by the European Court of Human Rights in *James and others v UK*<sup>42</sup> for guidance as to whether the host State's

regulatory actions were proportional to the public interest that the host State purportedly sought to protect. Tribunals could further apply human rights jurisprudence to find a balance between a State's human rights obligations and investor rights. For example, it has been suggested that investment arbitration tribunals should borrow the 'margin of appreciation' doctrine, from the European Court of Human Rights, to determine whether a State's actions fall within its recognised margin of appreciation as a sovereign State, and whether any resulting interference with an investor's rights is sufficiently justified.<sup>43</sup>

The range of solutions proposed shows a growing recognition of the importance of protecting human rights in the international investment law context. A UN Intergovernmental Working Group seeking to build a binding treaty to regulate the activities of transnational corporates in relation to human rights law met for the first time earlier in June 2015 and will meet again in October 2016. As discussions continue, it will be interesting to see which dispute mechanism the Working Group seek to incorporate into the treaty, and, if such a treaty comes into fruition, how it affects cohesion between international investment protection and human rights protection.

1. The views and opinions expressed in this article are those of the authors and do not reflect the position of Allen & Overy LLP.
2. EU Commission draft text of TTIP Investment Chapter made public on 12 November 2015, available online at [http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc\\_153955.pdf](http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf) (last accessed 30 November 2015).
3. Negotiations continue - the EU and the U.S. concluded their 14th negotiation round in July 2016 - and it remains to be seen how TTIP negotiations will be affected by the BREXIT vote.
4. *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic*, ICSID Case No. ARB/03/19.
5. For a further discussion on the extent to which IIAs restrict States' rights to regulate in the interests of human rights and whether States may rely on a 'defence' of human rights in response to investor claims, see the article by Ignacio Madalena and Diogo Pereira in edition 1 of Allen & Overy LLP's Business & Human Rights Review. Allen & Overy LLP's First Business & Human Rights Review, autumn 2012, available online at <http://www.allenoverly.com/SiteCollectionDocuments/BHRRAutumn2012Issue1.PDF> (last accessed 5 November 2015).
6. *Azurix Corp. v Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006.
7. *Ibid.*, para. 283.
8. Press Release, Office of the High Commissioner for Human Rights, *UN experts voice concern over adverse impact of free trade and investment agreements on human rights*, 2 June 2015 <http://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031&LangID=E> (last accessed 5 November 2015).
9. Ross, Alison (2010) *Brigitte in Brazil*, *Global Arbitration Review*, Volume 5 – Issue 3, 5 July, <http://www.globalarbitrationreview.com/news/article/28494/brigitte-brazil>.
10. <http://www.chambersandpartners.com/15649/1245/editorial/2/1>.
11. In 2013, tribunals permitted interventions by amici curiae and received substantive amicus submissions in only 1% of known arbitrations at ICSID (the International Centre for Settlement of Investment Disputes). S. Schadendorf, *Human Rights Arguments in Amicus Curiae Submissions: Analysis of ICSID and NAFTA Investor-State Disputes*, TDM Vol 10 Issue 1.
12. *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic*, ICSID Case No. ARB/03/19.
13. *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic*, ICSID Case No. ARB/03/19 (formerly *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic*), Order in Response to a Petition for Transparency and Participation as Amicus Curiae of 19 May 2005 (available at ICSID's website on [www.worldbank.org/icsid/cases/ARB0319-AC-en.pdf](http://www.worldbank.org/icsid/cases/ARB0319-AC-en.pdf)).
14. *Biwater Gauff (Tanzania), Ltd. v Tanzania*, Award, ICSID Case No. ARB/05/22, 24 July 2008, paras. 370-391.
15. *Ibid.*, Amicus Curiae Submission, 26 March 2007, para. 53.
16. *Ibid.*, paras. 96 and 98.
17. *Borders Timber Limited and ors v Republic of Zimbabwe* ICSID Case No. ARB/10/25 and *Bernhard von Pezold and ors v Republic of Zimbabwe* ICSID Case No. ARB/10/15, Procedural Order 2, 26 June 2012.
18. *Ibid.*, paras. 49-56.
19. *Ibid.*, para. 59.
20. SD Franck, *The Legitimacy Crisis in International Arbitration: Privatising Public International Law Through Inconsistent Decisions* (2005) 73 Ford LR 1521.
21. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article V(2)(b).
22. As the Italian courts at least have recognised, *Allsop Automatic Inc. v Tecnoski snc*, Court of Appeal of Milan, Italy, 4 December 1992, XXII Y.B. COM. ARB. 725.
23. The ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States is a multilateral treaty formulated by the World Bank and ratified by 150 contracting States, providing a dispute resolution forum for investors and States.
24. ICSID Convention, Article 52.
25. Fan Kun, *Expansion of Arbitral Subject Matter: New Topics and New Areas of Law*, Paper at Queen Mary School of International Arbitration's 30th Anniversary Conference, 19-21 April 2015, p. 18.
26. Schill, *International Investment Law and Comparative Public Law – an Introduction*, OUP (2010) p. 8.
27. Section 3, Articles 9 and 11 of EU Commission draft text of TTIP Investment Chapter made public on 12 November 2015, available online at [http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc\\_153807.pdf](http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf).
28. Section 3, Articles 9-10 and 28 of EU Commission draft text of TTIP Investment Chapter made public on 12 November 2015, available online at [http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc\\_153807.pdf](http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf).
29. Section 3, Article 23 of EU Commission draft text of TTIP Investment Chapter made public on 12 November 2015, available online at [http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc\\_153807.pdf](http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf).
30. Section 3, Article 10 of EU Commission draft text of TTIP Investment Chapter made public on 12 November 2015, available online at [http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc\\_153955.pdf](http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf).
31. Annex II, Article 2 of EU Commission draft text of TTIP Investment Chapter made public on 12 November 2015, available online at [http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc\\_153955.pdf](http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf).
32. As defined at footnote 22 above.
33. Reading Guide to Draft Text on TTIP, 16 September 2015, available online at [http://europa.eu/rapid/press-release\\_MEMO-15-5652\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5652_en.htm).
34. Simma, *Foreign investment arbitration: a place for human rights?* I&CLQ 2011 60(3), 537-596.
35. *IBA Business and Human Rights Guidance for Bar Associations*, 2014 Working Draft, p. 37.
36. E.g. Article x.07, Chapter XX of Consolidated CETA Text, 26 September 2014, available at: [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf) (last accessed 5 November 2015).
37. E.g. model IIAs of Uganda, Canada and Switzerland.
38. E.g. model IIAs of USA and Norway.
39. Tamar Meshel, *Human Rights in Investor-State Arbitration: The Human Right to Water and Beyond*, *The Journal of International Dispute Settlement*, vol. 6, no. 2, 2015, pp. 26-27.
40. *Técnicas Medioambientales Tecmed, S.A. v United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, para. 122.
41. *Azurix Corp. v Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 311.
42. *James and others v the United Kingdom*, App No. 8793/79, 1986 ECHR 2, 21 February 1986.
43. Burke-White and von Staden *The Need for Public Law Standards of Review in Investor-State Arbitrations*, pp. 718-719 in Schill, *International Investment Law and Comparative Public Law* (OUP, 2010).







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