

5. REINFORCING HUMAN RIGHTS IN TRADE AND INVESTMENT

5.1 Key Issues

- Trade policy and trade instruments have long-been used as levers to try to improve social and human rights standards, but practice is inconsistent and could go further in encompassing all human rights, beyond the traditional focus on labour rights (section 5.2).
- Interest in the legal and practical relationships between foreign investment and international human rights has grown in interest over the past two decades, including with respect to investment dispute proceedings (section 5.3).
- As a starting point within either avenue for application, States first need to consider how best to integrate human rights expectations within their own domestic policies and strategies on trade and investment and ensure uniformity, before moving on to negotiate formal trade and investment agreements. Investment contracts between companies and States has also come into sharp focus in recent years for their at times prohibitive terms binding States' ability to change policy or regulation in line with evolving social or environmental realities, though some promising norm setting has been undertaken in recent years to establish principles for more responsible contracting (section 5.4).
- Underpinning much private investment are the various services offered by States, including export credit and financing. Positive developments have occurred in recent years to establish frameworks for these services, as well as encourage more visible human rights awareness within trade promotion activities (section 5.5).

5.2 International Trade Agreements

Linking human rights, particularly labour rights, with trade has a long history. More recently, particularly in light of the financial crisis, there has been renewed interesting in looking at the interplay between trade and social impacts – positive and negative. As a first and crucial step, the opportunity to integrate human rights awareness arises well before the formal negotiation phase of trade agreements. It arises at the time of domestic strategy setting and trade policy development. At the other end of the trade lifecycle is dispute resolution, where further coherence could be achieved, such as that highlighted by the UN High Commissioner for Human Rights when calling for the WTO's Trade Policy Review and Dispute Settlement mechanism to include an analysis of how protection or abuse of human rights might affect realisation of the WTO objectives.¹²⁵ Aligning human rights and trade outcomes faces practical and legal difficulty in successfully manoeuvring through the legal hurdles that prohibit trade distorting measures. This section however seeks to demonstrate the state of play in efforts to interject human rights awareness and considerations into the trade policy and agreements process globally. The Director-General of the WTO in 2010 asserted a similar message when he said:¹²⁶

For trade to act as a positive vector for the reinforcement of human rights, a coordinated international effort is needed. A coherent approach, which integrates trade and human rights policy goals, should be developed. Progress can no longer be achieved by acting in an isolated manner. Coherence should become our guiding principle in fostering development and human rights: coherence between the local and the global, between the world of trade and the world of human rights, between

¹²⁵ See UNITAR High Level Panel on Human Rights and Trade, "Statement by Ms. Navanethem Pillay, UN High Commissioner for Human Rights", Geneva, 27 September 2010. Available at:

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10380&LangID=E>

¹²⁶ WTO News, "Lamy calls for mindset change to align trade and human rights" (13 January 2010). Available at: http://www.wto.org/english/news_e/sppl_e/sppl146_e.htm

the WTO as an institution and the various organizations active in the field of human rights.

The International Labour Organisation (ILO) and International Institute for Labour Studies (IISD) recently published a detailed review of the social dimensions of bilateral and regional Free Trade Agreements (FTA's).¹²⁷ Similar to the proliferation of international investment agreements, the number of FTAs have dramatically increased over the past 25 years. Alongside that increase has been a growing focus on and inclusion of social and labour provisions in those agreements – 58 FTAs included labour provisions in 2013, up from 4 in 1995.¹²⁸ The ILO/IISD study found this trend has influenced national labour standards globally through: Firstly, the negotiations that take place before ratification of the trade agreement, with prospective partner States using their positions of leverage to raise other countries' social and labour policies and safeguards before acceptance of the deal; Secondly, through engagement and cooperation activities between signatory parties on labour issues once the FTA is signed, and; Thirdly, to a lesser extent, the creation and use of complaints mechanisms.¹²⁹ The labour provisions in FTAs have also evolved over the years. Where they once only called for effective enforcement of existing national law (regardless of whether that national law falls below international standards), many now require compliance with the 1998 ILO Declaration on Fundamental Principles and Rights at Work – though divergent approaches within these 58 FTAs referencing a range of ILO standards abound, which commentators note could lead to confusion and lack of consensus over the appropriate international benchmarks.

These social and labour provisions in FTAs are not always or fully implemented however, and a number of innovative approaches have been developed over the years to realise the intentions of these safeguards in practice. One recent positive example is the "Agreement concerning Annual Reports on Human Rights and Free Trade between Canada and the Republic of Colombia", which requires that **Canada** and **Colombia** each draft an annual report for tabling in their respective legislatures on the effects on human rights in both countries of measures taken under the Canada-Colombia FTA.¹³⁰ The **European Union** has gone a step further than most by including an entire chapter within its recent FTAs devoted to achieving sustainable development through preferential trade arrangements. Measures include requiring sustainability impact assessments prior to negotiations, capacity building of partner countries, including civil society participation in implementation and monitoring, encompassing a wider sector coverage than many other FTAs, and operating a complaints mechanism.¹³¹

The **US–Cambodia** Textile Agreement is seen as one of the most successful examples of a conditional trade relationship based on engagement and using incentives to improve the social conditions in the trade partner's domestic human rights situation.¹³² Through the Better Factories Cambodia programme, the US agreed to progressively increase Cambodia's quotas on textile imports to the US as improved working conditions are achieved. Since 1999 the programme has grown to provide monitoring, training and advisory services to Cambodian factories. It has also become a model for similar programmes around the world under the "Better Work" initiative, in

¹²⁷ See ILO and IISD, "Social Dimensions of Free Trade Agreements", (2013). Available at: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_228965.pdf.

¹²⁸ Ibid, pg. 9.

¹²⁹ As the ILO/IISD study notes, there are a range of ways in which bilateral and regional FTAs seek to implement these labour provisions, mainly falling within two approaches. A large proportion place economic incentives or disincentives on FTA partners before and/or after ratification (known as conditional provisions) – mainly used in FTAs involving the **US** and **Canada**. More than half of those studied instead focus on political cooperation between FTA partners, social dialogue, technical cooperation and capacity building (known as promotional provisions) – mainly used in FTAs involving the **EU**, **New Zealand**, **Chile** and, notably, within agreements between South-South country partners.

¹³⁰ See: http://www.canadainternational.gc.ca/colombia-colombie/bilateral_relations_bilaterales/hrft-co_2012-dple.aspx?lang=eng

¹³¹ See generally: <http://ec.europa.eu/enterprise/policies/international/facilitating-trade/free-trade/> and http://www.ilo.org/global/standards/information-resources-and-publications/free-trade-agreements-and-labour-rights/WCMS_115822/lang--en/index.htm

¹³² See: http://betterfactories.org/?page_id=5082

countries such as **Jordan** and **Lesotho**. This kind of approach in engaging with private sector actors, as opposed to just the country partners to trade agreements in isolation, is particularly important in countries with limited enforcement capacity.

5.3 International Investment Agreements

As with trade policy, the opportunity to integrate human rights awareness and expectations within the investment priorities of States arises at the time of domestic strategy setting and policy development. Some positive practice has been occurring where States are setting international human rights standards and benchmarks within their domestic trade and investment strategies. **Canada** for example has a policy guide that expects its extractive companies to apply the IFC Performance Standards, Voluntary Principles and Global Reporting Initiative frameworks on non-financial reporting to all outbound investments.¹³³

The global web of international investment agreements today consists of roughly 3000 investment treaties, including bilateral investment treaties between two States, regional agreements, and investment protection provisions in free trade agreements, with roughly 70 new treaties signed every year.¹³⁴ International investment agreements help protect investors against the risk of expropriation and interference in their investments and provide investors access to international tribunals to seek compensation from States for non-compliance with the agreement's provisions. The SRSG considered the human rights implications of international investment agreements during his mandate.¹³⁵ He identified them as one area where States often fail to consider the implications on their policy-making abilities and their duty to protect human rights. The result is that States can unduly constrain their ability to respond to evolving social needs and conditions due to the confines of the terms of investment agreement.

One of the rising areas of concern focuses on the general consent States give upon signing most international investment agreements to automatically accede to international arbitration forums to hear and settle any investment disputes. These clauses may bind Governments for years and even decades, preventing them from settling a dispute locally in a domestic forum. Moreover, industry practice generally designates the governing law from a selective list of legal systems on the perception that commercial law under these jurisdictions is clear and helpful in a dispute situation. The opposing view questions the appropriateness of applying foreign law to a dispute happening on the ground in the host state. As such, calls are increasing for an examination of what law to apply and how to to such agreements. In addition, the terms of the investment agreement may leave no possibility to interpret provisions in light of a State's human rights obligations, nor provide for appropriate obligations or responsibilities on the investor.

Even if investment agreements do contain such clauses, arbitrators within these forums have historically had little experience or expertise in human rights law or in balancing the tensions between investment and human rights protection. This will be a key area of future engagement by States and other actors in educating and building the capacity of current and future arbitrators to ensure the human rights implications of disputes are appropriately considered.¹³⁶ Arbitral proceedings have historically been conducted privately, with no open proceedings, in an international forum outside the state in which the disputed investment has been made. Recent

¹³³ See: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx>

¹³⁴ See: http://www.unctadxi.org/templates/DocSearch____779.aspx. Historically these agreements have been made between developed, capital-exporting States and developing, capital importing States, to ensure nationals of those developed States were legally and financially protected when investing abroad, though that balance is increasingly changing to a more south-south composition.

¹³⁵ See UN SRSG and IFC, "Stabilization and Human Rights" (May 2009). Available at: http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/publications/publications_loe_stabilization__wci__1319577941106

¹³⁶ The IA Reporter website has just launched an "Arbitrator Profiles" section, featuring comprehensive compilations of the caseloads of over 80 of the most active arbitrators. Access requires authorization. See further: <http://www.iareporter.com/categories/profiles>

developments indicate this historical and overriding lack of transparency within dispute proceedings may be changing in the coming years. The UN Commission on International Trade Law (UNCITRAL), one of the key arbitral forums and rule making bodies, after years of negotiations and drafting, recently shifted its approach in favour of transparency in dispute proceedings, providing for increased disclosure of information generated from initiation through to termination of the disputes.¹³⁷

States have only tentatively become more proactive in updating and better aligning their investment agreements and arbitration provisions with broader sustainability goals, including human rights.¹³⁸ In 2008 for example the OECD studied the inclusion of labour, environmental and anti-corruption issues in investment agreements, focusing on 39 countries and 291 international investment agreements or investment chapters in trade agreements.¹³⁹ It found that of these 39 countries, only 15 (**Australia, Belgium, Canada, Finland, Japan, South Korea, Luxemburg, Mexico, Netherlands, Poland, Sweden, Switzerland, U.S., Chile** and **Latvia**) included labour, environmental and to a lesser extent anti-corruption language in one or more agreements.¹⁴⁰ Alternative treaty models¹⁴¹ are being created to try to fill this gap, and many States are beginning to explore different investment regimes¹⁴² that better promote investments that support sustainable development. In 2012 for example, UNCTAD's Investment Policy Framework for Sustainable Development identified commitment to human rights as a core principle in designing investment agreements.¹⁴³

Many States seeking to update their investment agreement approach are tending to wait for current and historic investment agreements to run their course until expiry before replacing them, often taking decades. Some other countries however have chosen to review their existing investment agreement regimes with a view to renegotiation or full termination because they consider they have been unduly constrained by these agreements from changing their domestic law or policy according to the needs of their people or their environment, as well as their wish to be able to resolve disputes locally in the country in which the investment has been made. **Ecuador** has been the most prominent within this space, establishing a treaty audit commission to review its current agreements.¹⁴⁴ **Bolivia** and a number of other **Latin American** states,¹⁴⁵ as well as **South Africa**,¹⁴⁶ are also reviewing the content of their treaties with a view to cancellation or non-renewal.

¹³⁷ See UNCITRAL "Rules on Transparency in Treaty-based Investor-State Arbitration", October 2013. Available at: <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/pre-release-UNCITRAL-Rules-on-Transparency.pdf>

¹³⁸ See for example the Helsinki Process on Globalization and Democracy which held an Investment Seminar in **Finland** in April 2013 with About 50 high-level investment regime experts from governments, international organisations, academia, business and civil society groups to discuss sustainable development, poverty alleviation, and public policy making in relation to the international investment regime. Available at: <http://www.formin.fi/public/default.aspx?nodeid=47162&contentlan=2&culture=en-US>

¹³⁹ Kathryn Gordon, "Environmental, Labour and Anti-Corruption Texts in International Investment Agreements: A Large Sample Survey" (OECD, 2008). Available at: <http://ssrn.com/abstract=1719089>

¹⁴⁰ See further: ITUC, "Briefing note on Bilateral Investment Treaties". Available at: <http://gurn.info/en/topics/bilateral-and-regional-trade-agreements/bilateral-investment-treaties/background/tils-briefing-note-on-bilateral-investment-treaties>

¹⁴¹ For example the IISD Model International Investment Agreement. Available at: <http://www.iisd.org/investment/capacity/model.aspx>

¹⁴² See: OECD, "The Policy Framework for Investment" (2006). Available at: <http://www.oecd.org/daf/inv/investment-policy/pfi.htm>; and UNCTAD, "Investment Policy Framework for Sustainable Development" (2012). Available at: <http://investmentpolicyhub.unctad.org/Views/Public/IndexIPFSD.aspx>.

¹⁴³ UNCTAD, "Investment Policy Framework for Sustainable Development" (2012). Available at: http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf

¹⁴⁴ See further: "Ecuador Establishes Commission To Audit Investment Treaties", Wall Street Journal (October 2013). Available at: <http://online.wsj.com/article/BT-CO-20131008-712214.html>

¹⁴⁵ See further: IHRB, "The Elephant in the Room: Addressing International Investment Conditions to Improve Human Rights" (2011). Available at: http://www.ihrb.org/commentary/staff/elephant_in_the_room.html

¹⁴⁶ See further: <http://www.iisd.org/itn/2013/09/20/news-in-brief-13/>

5.4 Investor-State Contracts

Sitting underneath, and often tied to, the global network of international investment and trade agreements are the variety of contracts that States enter into with specific companies, for example through procuring goods and services, entering into public-private partnerships or for natural resource concessions.¹⁴⁷ Historically most investor-State contracts have exhibited little awareness of the fact that major projects can pose significant human rights risks and held few if any provisions addressing the significant human rights risks major projects can create. Even more concerning, clauses known as “stabilisation clauses” lock in regulation at the time of the agreement or specifically prohibit or limit regulatory changes in connection with investments, thus at times inappropriately constraining the State’s policy space and ability to update social and environmental regulations as needed throughout the life of the investment contract.

Investor-State contracts have been identified in recent years as a key lever States can use to require implementation of business and human rights responsibilities by the investors they partner with.¹⁴⁸ The SRSG developed the *Principles for Responsible Contracts* as an addendum to the UN Guiding Principles, setting out the steps that parties (public and private) to investor-State contracts can consider and how such issues can be reflected in contracts.¹⁴⁹ Interactive and accessible training is being developed to support education and capacity building,¹⁵⁰ and platforms are being developed to connect the various stakeholders at play, such as the LSE Investment and Human Rights Project.¹⁵¹

Contract transparency is also featuring as part of the growing focus on investor-State contracts. Transparency is increasingly seen as not only in the interest of the State, but also the companies involved. The SRSG calls for contract transparency in his *Principles for Responsible Contracts*, as have international bodies like the International Bar Association and the International Finance Corporation. The World Bank recently launched its “Open Contracting Initiative”, bringing together a coalition of diverse stakeholders from Government, business, NGOs, the media and others to catalyse enhanced contract disclosure and improve public participation. As reported by the International Institute for Sustainable Development, there have been a number of promising national and institutional developments in recent years regarding contract transparency:¹⁵² a set of principles for responsible agricultural investment, prepared by the World Bank, FAO, IFAD and UNCTAD, call for transparency in accessing land and making investments, and the UN Special Rapporteur on the right to food has made the same calls regarding land leases and purchases; the Extractives Industry Transparency Initiative (EITI) recently updated its Standard to require disclosure of licenses and production figures on a project-by-project basis; **Liberia** introduced in 2009 the Liberia Extractive Industry Transparency Initiative (LEITI) Act requiring all payments by individual

¹⁴⁷ These investor-state contracts are particularly common for large agricultural projects, large infrastructure projects (to construct roads, railways, ports, official buildings, dams, etc.), and exploration and exploitation of natural resources (oil, gas, minerals, water, forestry resources). Contract terms typically address issues that are uniquely in a government’s power to grant and regulate, such as indemnifications, authorisations, taxation, protections from expropriation, local content requirements, and granting access to land.

¹⁴⁸ See IHRB and GBI, “The State of Play in Business Relationships”, Chapter 10: Respect for Human Rights in Investor-State Relationships (2012), which highlights a number of ways in which private investors and the States they contract with can use the business relationship to improve human rights due diligence processes and outcomes. Available at: <http://www.ihrb.org/publications/reports/state-of-play.html>. Other groups researching extensively on the issue include Global Witness, the International Institute for Environment and Development (IIED), the International Institute for Sustainable Development (IISD) and Revenue Watch.

¹⁴⁹ UN SRSG, A/HRC/17/31/Add.3, “Principles for Responsible Contracts: Integrating The Management of Human Rights Risks Into State-Investor Contract Negotiations: Guidance for Negotiators”. Available at: <http://www.ohchr.org/Documents/Issues/Business/A.HRC.17.31.Add.3.pdf>

¹⁵⁰ The UN OHCHR will be launching new multimedia training materials for integrating human rights risk management into investor-State contract negotiations here: <http://www.ohchr.org/EN/Issues/Business/Pages/Tools.aspx>

¹⁵¹ See further: <http://www.lse.ac.uk/humanRights/research/projects/theLab/trainingTrailer.aspx>

¹⁵² See: Investment Treaty News, “Going public to improve investment in agriculture”, October 2011. Available at: http://www.iisd.org/pdf/2012/going_public_improve_investment_ag.pdf

companies and operating contracts and licenses to be published and reviewed on the LEITI website; **Ghana** is now publishing contracts in the oil sector, and countries such as **East Timor, Peru, Ethiopia** and **Ecuador**, are making certain contracts public; and a number of countries including **Sierra Leone, Ghana** and **Liberia**, require large investment projects to be ratified in parliament, providing a layer of public scrutiny.

An important issue on the horizon within this space – and one that will require much careful thought, engagement and development – will be the matter of how to craft and incorporate community considerations within such contracts and how to involve communities in the agreement process. Such tripartite agreements have been tried for example in mining deals in **Australia** and **Canada**. As companies move to standardise their practices with indigenous communities, incorporating their consent into formal documents, a new body of work will develop around incorporating free, prior and informed consent (FPIC) formally into or alongside these investor-State contracts.¹⁵³

5.5 State Services and Support for Business

The UN Guiding Principles recognise that there are a range of agencies, either formally or informally linked to the State, that may supply or provide services to businesses. These include: export credit agencies, official investment insurance or guarantee agencies, development agencies and development finance institutions.¹⁵⁴

The OECD “Common Approaches” relating to States’ Export Credit Agencies (ECAs) have been subject to an updated set of recommendations since June 2012 that request member States to benchmark against either the World Bank Safeguard Policies and the IFC Performance Standards when undertaking their own due diligence before supporting companies with export credits.¹⁵⁵ This covers some human rights content, but it should be noted that World Bank and IFC standards, whilst useful benchmarks, are geared more to the extractive and infrastructure sectors than to new technologies, such as ICT. ECAs are still searching for appropriate human rights benchmarks for newer business sectors or those traditionally not associated with the large projects supported by development finance institutions. Notably, in the OECD Common Approaches, there is a recommendation that States also take into consideration any statements or reports made by their National Contact Points under the OECD Guidelines on Multinational Enterprises. The de facto consequence of these new measures will be to bring human rights due diligence increasingly centre stage into the work of ECAs. For example, a meeting in **Canada** in October 2013, focusing specifically on human rights, was attended by ECA representatives from over 20 States.

Development finance institutions have also been in discussion during 2012 and 2013 about when and how to request specific human rights due diligence – noting that IFC Performance Standard 1 recognises that a bespoke human rights impact assessment might be needed in specific circumstances. Even prior to this, progress in collaboration in the form of a set of principles signed by 16 **European** development finance institutions seeking to harmonise their ESG standards in investment activities was seen in 2009 with the “EDFI Principles for Responsible Financing”, benchmarking the UN Declaration on Human Rights, ILO Core Conventions, and IFC Performance Standards.¹⁵⁶

¹⁵³ See for example the work on “impact benefit agreements” (IBA) and “community controlled ESIA (environmental and social impact assessment)” (CCIA). Ginger Gibson and Ciaran O’Faircheallaigh, “IBA Community Toolkit: Negotiation and Implementation of Impact Benefit Agreements” (2011). Available at: http://gordonfoundation.ca/sites/default/files/publications/IBAToolkit_web.pdf

¹⁵⁴ Guiding Principle 4, ‘The State Business Nexus’.

¹⁵⁵ Working Party on Export Credits and Credit Guarantees, “Revised Council recommendation on Common Approaches on the environment and officially supported export credits” (OECD Trade Committee, 2007); updated by the OECD Working Party on Export Credits and Credit Guarantees, “Recommendation of the Council on Common Approaches for officially supported Export Credits and Environmental and Social Due Diligence”, June 2012. Available at: <http://www.oecd.org/tad/xcred/oecd-recommendations.htm>

¹⁵⁶ See further: <http://www.bio-invest.be/en/component/downloads/downloads/15.html>

A smaller number of States have also sought to integrate human rights into official trade missions promoting States' businesses around the world. The **Netherlands** now has this as a routine requirement for all missions to consider human rights implications and to brief businesses and Government ministers accordingly. The **UK** did similarly in relation to **Myanmar**. **Finland** involved human rights NGOs in a joint trade mission led by both its Trade and Development Ministers to **Tanzania** and **Zambia**. Other than these three examples, few home States have integrated awareness of business and human rights issues into trade missions, with the result that business can be left with the impression that States care more about economic concerns than other legitimate issues, such as human rights. Trade promotion will undoubtedly remain a competitive field between States, but respect for human rights should not. The goal should be for States to agree common approaches and provide sources of expertise to inform business, in particular small and medium enterprises, of potential human rights risks and impacts.

5.6 Summary Note

States regulate and enable trade and investment in their territories. Respect for human rights can be catalysed within trade and investment agendas through integration of human rights awareness and due diligence expectations within States' national strategies and policies on trade and investment. Doing so would provide more uniformity when moving to the formal investment and trade agreement negotiation phase between two or more States. International trade and investment agreements offer important opportunities for States to safeguard human rights, as well as the chance for such safeguards to be incorporated into subsequent contracts between States and investing businesses. However, policy makers and practitioners have only recently begun to fully consider these opportunities, as well as the risks of failing to provide for sufficient policy and regulatory space within such agreements. As such, capacity building and further awareness raising throughout the investment and trade chain is key: for State negotiators and legal and finance advisers to international trade and investment agreements; the State and company negotiators and legal and financial advisers to individual investor-State contracts; and for the arbitrators mediating international investment and trade disputes. Greater contract transparency in a number of States can also offer important clarity about how human rights can be integrated in the investment process.

Export Credit Agencies and trade missions, as State services for business, offer a related opportunity to integrate awareness of business and human rights into State's frontline dealings with businesses. Requiring export credit agencies to undertake their own human rights due diligence before providing support to business (particularly SMEs) should be the goal, as should developing a common approach amongst States to providing information and expertise on human rights to businesses on trade missions around the world.