

HUMAN RIGHTS, TRADE AND INVESTMENT MATTERS

The articles in this publication are intended to encourage debate and do not necessarily reflect the policies of Amnesty International.

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Preface

This collection of articles on trade, investment and human rights is intended partly to advance the debate on economic globalization and human rights, and partly to contextualize concerns that Amnesty International has raised in recent reports on the human rights implications of investment agreements between states and companies.

The last decade has been marked by a rapid increase in trade and investment facilitated by the World Trade Organization, by international and regional financial institutions, and by regional and bilateral trade agreements. The role of emerging economies, such as China, India, Taiwan, Malaysia and South Korea as major investors in developing countries, has created a new dynamic in so far as northern-based multinationals are now confronted with a fresh competitive challenge—how to compete against companies that have low labor costs, are not under effective legal constraints or reputational pressure to observe human rights standards, and have no qualms about operating in countries and contexts where human rights are routinely violated and where such violations form the back-drop to the companies' activities.

Amnesty International's foray into the field of investment and human rights reflects a wider critical focus on the human rights implications of foreign direct investment from a broad spectrum of bodies ranging from the UN High Commissioner on Human Rights to research institutes, think tanks and pressure groups. Of particular concern is the ad hoc nature in which international investment rules are framed, often without reference to international human rights law, as well as the lack of transparency of application of these rules and of mechanisms for resolving disputes. At the heart of Amnesty International's concerns is the individual whose rights are adversely affected by the investment, who does not receive adequate protection from the state to prevent violations from occurring in the first place, and who lacks access to justice and effective remedies for damage caused.

The first section of this journal focuses on the role of financial institutions in shaping standards. Gernot Brodnig asserts that while the leverage of the World Bank can be used to exert a positive influence on the outcome of specific human rights cases, what is required is the development of a comprehensive approach to human rights with much-enhanced in-house capacity. Andrea Durbin reflects on the review of the environmental and social performance standards of the International Finance Corporation (IFC), arguing that the opportunity has been missed to provide its private-sector clients with clearer guidelines and requirements for protecting human rights in their investments. Durbin accuses the IFC of hiding behind the fact that some shareholder countries of the World Bank, such as China, Saudi Arabia and India, do not favor addressing human rights.

Korinna Horta draws attention to the important function of Export Credit Agencies in underpinning Foreign Direct Investment, and argues for fundamental reforms to ensure that these publicly accountable bodies contribute to responsible investment. Paul Watchman, focusing on the role of commercial banks, asserts that while some of the world's leading banks are at last beginning to take human rights seriously, social impact assessments of projects financed by the banks are still very rudimentary.

The second section reveals the scope of the problem by exploring some of the connections between trade, investment and human rights. Luke Peterson draws attention to some of the structural defects of investment agreements that have the effect of inhibiting states from respecting and protecting human rights. James Kenworthy emphasizes how trade and investment are inextricably linked. Howard Mann discusses the possibility of creating a multilateral investment treaty among states in a way that is human rights friendly. Sheldon Leader examines the type of "stabilization clauses" that are found in private investment agreements between companies and states, arguing that such clauses could pose risks to human rights protection.

The third section explores the potential for integrating human rights into trade and investment agreements. Sandra Polaski illustrates how trade and investment agreements can become effective instruments for improving workers' rights, provided that governments have the political will to make this happen. Mila Rosenthal uses the example of a trade agreement between the United States and Cambodia to argue that international standards on labor rights can be reinforced via bilateral trade agreements.

The final section focuses on the legal accountability of companies for the impacts of their investment. David Weissbrodt welcomes the decision of the UN Human Rights Commission to appoint a Special Representative on Business and Human Rights. He argues that this has created an opportunity to advance the process of developing universally recognized standards for business with an effective implementation process to ensure adherence. Peter Muchlinski examines how litigation might offer remedy to victims who bring claims against companies for human rights abuses associated with their investments. He argues that despite the constraints on both victims and their lawyers, the legal community is making significant advances towards bringing human rights into the equation of corporate liability, in particular via class action suits.

The last word is left to Kevin Kolben, who calls on activists to leverage the inevitable increase in foreign investment flows to make improved respect for human rights a concrete reality. To do this, he argues, activists must shine the spotlight on individual corporate action, advocate for effective domestic regulation of foreign investment, and ensure that international agreements and institutions give governments the freedom to protect their citizens' human rights and natural resources.

Amnesty International is committed to pursuing this roadmap. We continue to expose corporate involvement in human rights abuses. We press national governments to regulate inward and outward investment to eliminate human rights abuses associated with business operations. We have begun to lobby national governments and international institutions to incorporate human rights protections into the rules and regulation of international trade and investment. We invite you to join us in this vital work. ●



INVESTMENT PROJECT FINANCE AS A LEVER FOR HIGHER STANDARDS

“This is the President of the World Bank calling . . .”

During the 2001 presidential race in Chad, the incumbent candidate, Idriss Déby, cracked down heavily on his opposition. Among the scores arrested was Ngarledji Yorongar, a prominent opposition candidate. One of the “crimes” for which Mr. Yorongar was charged—and tortured—was his opposition to the Chad-Cameroon oil pipeline. The \$4.2 billion Chad-Cameroon pipeline was, at the time of the original investment, Africa’s biggest investment project. The project brings together a consortium of oil companies and the World Bank Group, which supports the governments of Cameroon and Chad with financing to the extent of US \$200 million. When the World Bank’s then-President James Wolfensohn was alerted by NGOs about Mr. Yorongar’s arrest, he placed a phone call to President Déby and obtained Mr. Yorongar’s release. Mr. Wolfensohn’s actions highlight the dilemma of the World Bank: to what extent and in what capacity should the World Bank be involved in human rights? Did Mr. Wolfensohn and the World Bank save Ngarledji Yorongar, or did they cause his travails with their support for the Chad-Cameroon pipeline, or did they do both?

Gernot Brodnig, former Research Fellow at Harvard University’s Kennedy School of Government, uses the example of the Chad-Cameroon pipeline to illustrate that while the leverage of the World Bank can be used to exert positive influence on the outcome of specific human rights cases, what is required is the development of a comprehensive approach to human rights with a much-enhanced in-house capacity.

In recent years, the debate about the World Bank’s human rights responsibilities has increased in both intensity and nuance. The World Bank is facing growing internal and external pressure to incorporate human rights issues into its development agenda. Why else would the Bank’s president and an entire entourage of senior staff attend a seminar on human rights and development? Why else would the head of the International Finance Corporation (IFC) call for human rights to be integrated into the IFC’s work?¹

Despite these apparent shifts in thinking at the senior level, for oversight bodies, civil society organizations and affected communities, doubts remain about the sincerity of these commitments. After all, time and again, the World Bank has used its Articles of Agreement to make a distinction between economic/social human rights and political/civil human rights and to maintain a position that political and civil rights are outside its mandate. The fact also remains that the Bank is by and large tasked to process loans and grants, and has not invested sufficient human and financial resources to ensure the mainstreaming of human rights considerations.

On the other hand, the Bank has played an important role in pressuring governments and private companies to uphold certain environmental and social standards. Through its safeguard policies, specific human rights issues—such as compensation for involuntary resettlement or the rights of indigenous peoples—have become part and parcel of many investment projects and have influenced national policies and practices [see Durbin and Watchman articles]. These safeguard policies were given “punch” with the establishment of the quasi-judiciary Inspection Panel, which is entrusted to monitor their implementation. In addition, under the guise of “good governance”, the Bank has been slowly introducing political aspects in its lending operations.

How does all this play out on the ground, for example, in Chad? The Chad-Cameroon pipeline is not only a hugely ambitious undertaking,

projected to account for 45-50% of Chad's national budget, but is also a test case for the Bank's human rights commitments. During the Board's discussion of the project, the US representative called it a "defining moment in World Bank history", and one Bank official pledged that "Chad has to be different because we are staking our reputation on it".

These self-imposed high stakes and a relentless scrutiny from civil society have made the Chad-Cameroon pipeline a laboratory for social, governance and human rights issues. All in all, seven monitoring layers, including an Independent Advisory Group, have been put in place "to get things right". In a move toward transparency, several websites report various monitoring visits and are accessible to the public. Despite all these efforts, Mr. Yorongar and several other members of Chadian civil society brought a claim to the World Bank's Inspection Panel, alleging rights abuses caused by the project. While the Panel did not entertain human rights issues in detail, and rather called the situation in Chad "far from ideal", it was the first time that the Panel has ever explicitly touched on such human rights issues.

The Chad-Cameroon pipeline raises a number of human rights issues. First and foremost, it appears that to at least some degree, the World Bank's financing may help to shore up repressive regimes. This view gained considerable support when President Déby used part of the US \$25 million sign-on bonus with the oil consortium to go on a shopping spree for arms, presumably to keep his opposition at bay. At the same time, the Bank claims that this project has minimized this "fungibility" problem through the adoption by the Chadian Government of the Revenue Management Law and its Oversight Committee, which are to ensure that oil revenues are channeled into poverty-alleviation efforts, with an emphasis on the local population in the oil-producing region. Thus, the Bank was trying to move from "doing no harm" through the panoply of environmental and social safeguards to "doing good" in terms of promoting and contributing to economic and social rights.² While a number of questions about the effectiveness of the revenue management provisions and safeguards had been raised, generally, the public scrutiny and various monitoring mechanisms may have helped to reduce potential human rights violations.³ Much to the embarrassment of the World Bank, the Revenue Management Law and associated mechanisms were abolished in 2005, forcing a major rift between the Chadian government and the Bank.

Beyond the project, the Chad-Cameroon pipeline has helped to stir up the debate about the Bank's role and responsibilities in human rights. There is some hope that the lessons learned from this and other projects will lead to a more comprehensive vision of the intricate linkages between human rights and development, as encompassed in a rights-based approach to development. Such a vision and commitment should pave the way for a comprehensive human rights policy and its implementation. This, in turn, requires the development of an in-house human rights capacity. Only such a comprehensive approach would assure that human rights at the World Bank are not dependent on its President's phone calls. ●

Addressing Human Rights Risks: Too Risky for the World Bank

The World Bank Group is a public, multilateral development institution that provides loans and financial support to both governments and private corporations. It supports the private sector through its lesser-known but rapidly growing organization, the International Finance Corporation (IFC). Since its founding in 1956, the IFC has committed more than \$44 billion for private-sector activities in the developing world.¹

Not only is the IFC an important global financier in its own right, but IFC standards are increasingly being adopted by other major financial institutions. Through an initiative called the “Equator Principles”, commercial banks such as Citibank, Barclays and more than thirty other commercial banks (together responsible for arranging over 75% of international project finance) have agreed to adopt and follow IFC social and environmental policies [see Watchman article]. In addition, many export credit agencies use the IFC’s standards as benchmarks for their own lending to major infrastructure projects [see Horta article].

The IFC, in 2004, launched a process to revise its social and environmental “safeguard” policies, ostensibly intended to modernize them and address risks to the private sector. Instead, the revision process led to a proposal for more flexible approaches and discretion, signaling a major shift away from the previous safeguard policies based on protecting affected communities potentially at risk or harmed by an IFC-financed project and minimum standards that could be consistently applied to each project.

The new proposals address a range of issues from social and environmental assessment, to labor protections, to the rights of indigenous peoples, community health and benefits, and involuntary resettlement. Although broader in scope, the proposed policies are significantly weaker than the previous policies in certain areas, such as resettlement and the protection of indigenous peoples’ rights. The new policy proposals also represent a major shift away from safeguarding the rights and interests of affected communities—usually the poorest and most vulnerable groups potentially impacted by a project—toward the protection of the private-sector ‘client’.

Perhaps the largest gap in the proposed policies is the lack of a meaningful reference to human rights and recognition of international human rights protections.² This is surprising given that a stated rationale behind the revision process is to address risks to the private sector. By doing little to incorporate human rights protections, the proposed policies are in effect ignoring the risk to business of contributing to human rights violations, which is increasingly recognized as a significant risk factor for many companies doing business in the developing world.³

Andrea Durbin, an independent consultant on the social and environmental impacts of international financial institutions, describes how the World Bank could be missing its chance to promote human rights.

In recent years, many companies have had to confront the costs and liabilities of ignoring or, worse, being complicit in human rights abuses. Companies have faced high costs following local protests against their activities or major public-relations problems resulting from charges of human rights abuses. Many in the private sector are looking for more guidance and assistance on appropriate interactions with local communities and on what steps they can take to ensure human rights are protected.

Even the IFC's own internal ombudsman issued a report calling on the IFC to "systematically consider risks to human rights at the project level, take appropriate [and effective] steps to mitigate them and provide clearer guidance to clients on both these aspects".⁴

Nonetheless, the IFC has so far opted to hide behind the fact that many shareholder countries of the World Bank, including countries such as China, Saudi Arabia and India, do not favor addressing human rights.

Human rights organizations, such as Amnesty International, have called on the IFC to commit itself to the universal protection of human rights encompassing civil, political, economic, cultural and social rights, and clearly to recognize the rights of affected people directly and unambiguously in its new policies. This would include the rights of indigenous peoples and local communities to influence and to offer their consent to the various phases of project development.

Addressing human rights would also include an explicit right to information and transparency of information for affected communities, as well as an assurance of access to simple, fair and effective grievance mechanisms and remedies for affected parties.

Finally, the IFC should place more explicit emphasis on assessing human rights risks as well as monitoring and enforcing compliance with human rights. The IFC should include the use of independent audits via collaboration with the United Nations or regional and national human rights bodies, to help monitor human rights conditions.

Private companies need, and appear to want, more support and guidance on how they can better protect human rights in their investments. If the IFC does not fill that gap, others will. ●

Export Credit Agencies: Not-so-Innocent Bystanders in Environmental and Human Rights Abuse

In the far east of Russia, Shell's Sakhalin II oil and gas project is threatening the western gray whale with extinction and putting fisheries and livelihoods of local communities and indigenous peoples in jeopardy.¹ In south-eastern Brazil, Aracruz Celulose's new pulp mill and vast expansion of monoculture Eucalyptus plantations are displacing local and indigenous peoples, depleting water sources, and driving native plant and animal species into extinction.²

A little-known financial giant stands behind these and many other projects that are threatening plant and animal species and- the rights of local communities and of indigenous peoples- projects which are also contributing to global-scale problems such as climate change and biodiversity loss.

This giant is the collective financial power of the export credit agencies, commonly known as ECAs, of the world's industrialized countries. ECAs are public agencies whose goal is to support domestic private corporations in their foreign business ventures. Collectively, ECAs represent the single largest source of public funding for projects in developing countries or emerging markets. ECAs provide around \$50–70 billion of capital per year for medium and long-term transactions in support of corporate investment, in an array of loans, guarantees and insurance, all backed by taxpayers. A large portion of this \$50–70 billion supports industrial and large-scale infrastructure projects in politically and commercially risky environments in which the private sector often would not venture on its own without the protective cushion of public money.

As I write this, ECAs from Japan, the United States and the United Kingdom are considering support for Shell's Sakhalin II project, which, as stated above, is posing threats to the environment and human rights. Likewise, Finnish and other Nordic ECAs have been most active in supporting highly polluting and socially disruptive pulp mills and plantation forestry on land traditionally occupied by smallholders, as well as on the land of the indigenous Tupinikim and Guarani peoples in Brazil.

The world is dotted with oil pipelines, large dams, chemical plants, forestry and plantation schemes that only exist as a result of ECA support. One of the more prominent examples of an ECA-supported project is China's Three Gorges Dam, a project that requires the forcible resettlement of 1.8 million people. Amid growing domestic opposition to the project, China's State Environmental Protection Administration (SEPA) has recently begun to use its limited powers to halt the destruction caused by the world's largest hydroelectric power project, threatening to take the project operators to court.

Korinna Horta of the international advocacy group Environmental Defense argues that fundamental reforms are needed to ensure that export credit agencies contribute to responsible investment.

In Africa, US and French ECAs supported an international oil consortium led by Exxon-Mobil to build the Chad-Cameroon oil pipeline. This multi-billion dollar project has led to increased impoverishment and to serious public-health problems in the oil-producing region and along the pipeline route [see Brodnig article].

In addition to the political repression and human rights violations associated with many ECA-funded projects, ECAs also play a more direct role by supporting arms and military exports that often help to strengthen autocratic governments and fuel conflict.

When ECAs provide support for private-sector investment in developing countries, they usually require a counter guarantee from the government in the host country. As a result, support for a private investment turns into public debt in developing countries. ECA funding is now responsible for a considerable portion of the crushing debt burden afflicting many countries—about one quarter of total foreign debt of developing countries is owed to ECAs. Much of this debt should be considered illegitimate in so far as the investments it supports are tainted with environmental and human rights abuses as well as with corruption.

Corruption is a major problem. ECAs meeting regularly in the Working Group on Export Credits and Credit Guarantees (ECG) of the Organization for Economic Cooperation and Development (OECD) in Paris took a small step in 2000 in addressing corruption. They now require that companies sign a document stating that they will not pay bribes to foreign officials.³ This is clearly insufficient. While western leaders are calling on African governments to tackle corruption, press reports indicate that they put little pressure on their own ECAs to clean up their act. For instance, the UK ECA, the Export Credits Guarantee Department, has done little to investigate allegations that its client, the British subsidiary of the US energy giant Halliburton, has paid more than \$172 million in bribes during a large-scale Nigerian gas project. In response to greater public scrutiny, ECAs are now planning to discuss strengthened anti-corruption measures.

Starting in 1996, NGOs from the global South and North have joined forces to advocate transparency and rigorous social and environmental policies to be adopted by all ECAs.⁴ These efforts have generated notable pressure for change. According to the 2004 Global Development Finance Report, the flagship publication of development finance, NGO scrutiny and demands for transparency as well as binding environmental and social standards have led ECAs to move towards positive reforms.⁵

Indeed, in December 2003, ECAs meeting at the OECD adopted a set of recommendations known as the Common Approaches. These recommendations represent a step in the right direction, since they require ECAs to benchmark their own policies against those of the World Bank Group and regional development banks. As a result, many ECAs have now hired in-house environmental expertise. But the Common Approaches still contain far too many loopholes. For example, ECAs are not obliged to adopt minimum standards of environmental performance, and there are no requirements for consultation with affected people, even when projects are likely to have severe impacts on their lives. In addition, many ECAs continue to operate in great secrecy, refusing even to publish the list of projects they support.

Public funding for ECA-supported activities all too often contributes to the destruction of local livelihoods and the environment. Greater public awareness of ECAs is critical to achieving the fundamental reforms required to ensure that ECA support is limited to socially beneficial and environmentally responsible investments. ●

The Equator Principles: Raising the Bar on Social Impact Assessments?

Paul Watchman, partner at international law firm Freshfields Bruckhaus Deringer, asserts that while some of the world's leading financial institutions are at last beginning to take human rights seriously, there is a long way to go before social impact assessments reach the level of sophistication of environmental impact assessments.

In 2003, ten of the world's major project finance lending banks adopted a set of voluntary principles called the Equator Principles. These principles require the banks to ensure that those projects they finance—with a total capital cost of \$50 million or more—are developed in a manner that is both socially responsible and environmentally sound. By 2005, the number of financial institutions that had adopted the Equator Principles had risen to 30 banks and the Danish Export Credit Agency, together controlling over 75% of the project finance market. Given their dominant control of finance markets coupled with the need to syndicate loans for major projects, the Equator banks have the power to allow or to thwart almost every major project.

Why are the Equator Principles important for human rights?

The significance of the Equator Principles for human rights is the requirement, in appropriate circumstances, for the social assessment of projects. Projects are labeled as Category A, B or C according to potential social and environmental impacts. For all Category A and appropriate Category B projects, an Environmental and Social Impact Assessment (ESIA) must be carried out, as well as for all projects in low- and middle-income countries as defined by the World Bank. The ESIA's are required to reflect the social and environmental standards ("Safeguard Policies") of the World Bank's private-sector lending arm, known as the International Finance Corporation (IFC) [see Durbin article]. These standards were subject to review and replaced by a revised set of standards early in 2006.

What is the "S" in ESIA?

The social impact assessments required by the Equator banks specifically include: compliance with the requirements of host country laws and regulations; applicable international treaties and agreements; socio-economic impacts; land acquisition and land use; involuntary settlement; and impact on indigenous peoples and communities. There are also requirements for meaningful consultation with groups affected by the project including, but not limited to, indigenous peoples and NGOs. An Environmental Management Plan (EMP) is also required. The EMP takes into account the consultation with indigenous peoples and NGOs and also addresses mitigation of adverse consequences, action plans to improve impacts, monitoring of effects and management of risks.

Although human rights are not specifically mentioned, they are implicitly part of the "S" in the ESIA because of the references to international law and the IFC Safeguard Policies. In a number of major projects such as the BP-led BTC pipeline, the Tangguh Liquid Natural Gas (LNG) project, and the Shell Sakhalin II LNG pipeline, an assessment of the human rights impacts on local communities has played a central role in determining the financing of these projects.

How to make the “S” matter

One of the principal weaknesses of the Equator Principles and their application by the Equator banks is the relative lack of experience, expertise and resources in the field of social as opposed to environmental assessments. Few Equator banks have in-house expertise. Citibank is the only Equator bank of which I am aware that has recruited expertise from the IFC or from export credit agencies. Likewise, there seems to be a shortage of independent consultants who specialize in the social ramifications of projects. Even the consultants who offer social assessment services have widely varying levels of competence and experience.

If the “S” is to be made to matter, the following eleven recommendations would need to be implemented:

- The IFC’s Safeguard Policies need to provide better and clearer guidance on social assessment than they provide at present. (At the time of writing, the Policies are being revised.)
- The IFC’s standards need to be expanded from the relatively narrow base of social policy issues (involuntary resettlement, cultural property, indigenous people, and child and forced labor) that they address at present.
- The Equator banks urgently need to agree on a platform of specific and binding policies on human rights, anti-corruption and other social issues.
- The Equator banks and project sponsors must recruit experienced social assessment personnel or obtain independent advice on social-assessment issues, such as human rights.
- The Equator banks and project sponsors must develop a structured and sustained dialogue with NGOs, and make use of their experience and expertise in human rights matters.
- The Equator banks must require project sponsors to cease the practice of excluding or limiting the development of human rights, health and safety, non-discrimination and employment rights through the use of stabilization provisions in inter-governmental agreements and host government agreements [see article “Amnesty International shines the spotlight on Foreign Investment Contracts”].

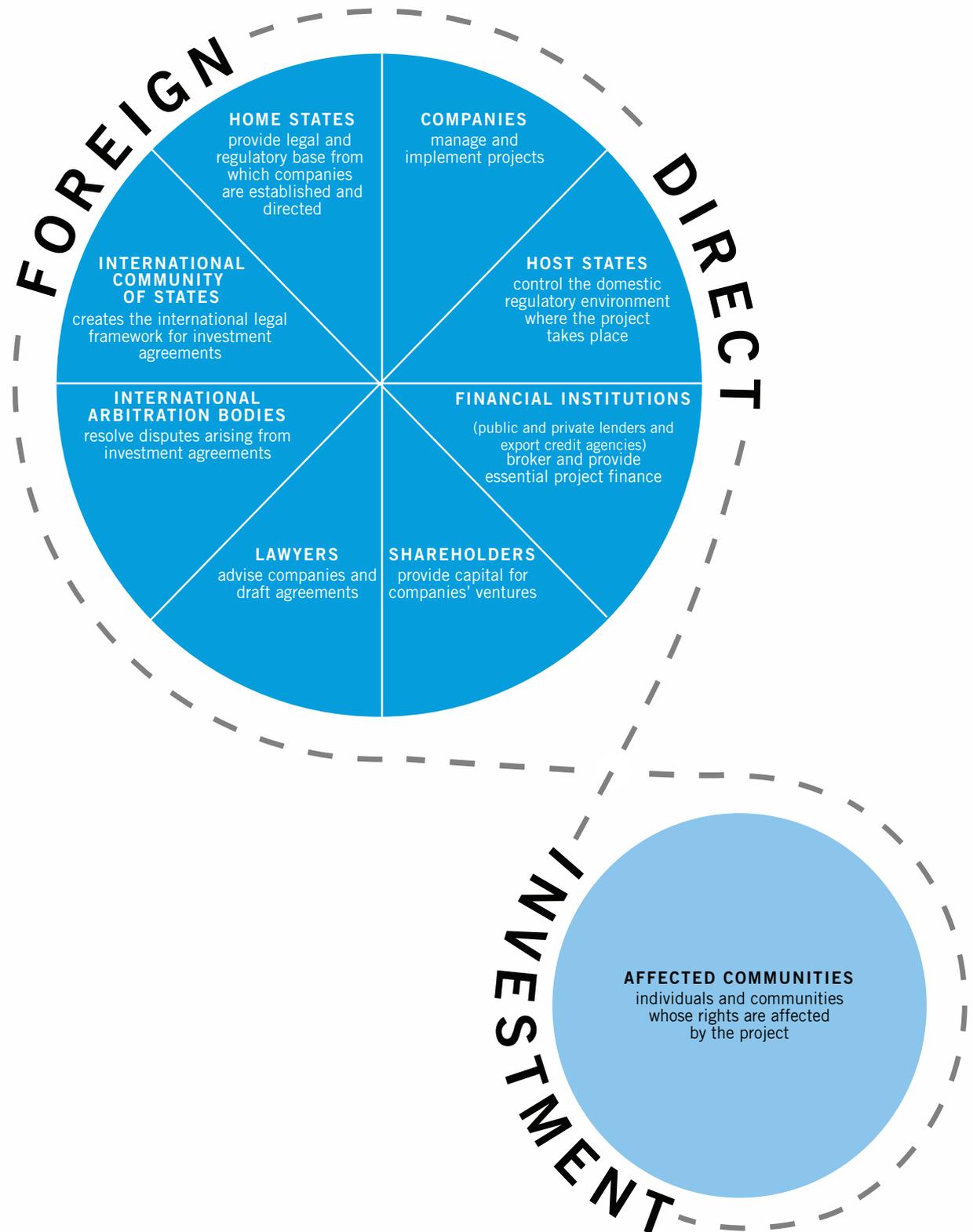
- The Equator banks must, as a matter of urgency, require project sponsors to provide acceptable and sensitive compulsory land acquisition and compensation procedures.
- The Equator banks must insist that project sponsors that have a need to hire security services ensure that security personnel are trained in due process requirements and respect for human rights.
- The Equator banks must encourage project sponsors to adopt human rights and anti-corruption protocols and understandings.
- The Equator banks should insist that project sponsors provide an independent person or panel, perhaps modeled on the IFC Compliance Advisor and Ombudsman, to whom third parties can make complaints.
- The Equator banks and project sponsors must acknowledge the fact that human rights abuses do not only arise outside the borders of the United States or the European Union.

Future challenges

NGOs and civil society should recognize how far the Equator banks have come in two years. The Equator Principles have been the catalyst for the development of major changes in the way in which project financing is done. A number of Equator banks have made serious advancements in developing sector-specific policies on areas such as the conservation of freshwater resources, forestry and mining. Other Equator banks are applying the Equator Principles, or a lighter version of the Equator Principles, to other areas of banking such as export and credit finance. In general, Equator banks even want to talk to NGOs, and to learn from their experiences.

The danger for NGOs and civil society is that in the pursuit of the unobtainable precautionary principle, the progress that has been made may be sacrificed on the altar of ideological rectitude. This is an outcome that may be acceptable from the vantage point of those in developed countries who seek perfection, but would be a tragedy for those people in developing countries, such as India and Indonesia, who may benefit from some of the world's leading financial institutions at last taking human rights seriously. ●

**Foreign Direct Investment –
the Key Actors**





CONNECTIONS BETWEEN TRADE, INVESTMENT AND HUMAN RIGHTS

Investment Protection Treaties and Human Rights

For several decades, governments and business interests have sought to draft a so-called Multilateral Agreement on Investment (MAI). Such an agreement would provide high levels of international legal protection for businesses investing in other territories. The MAI project has met with fierce public opposition from groups and individuals concerned with development, the environment, social justice and human rights.

Although both the OECD and the WTO have failed in their efforts to conclude a multilateral framework for protection of foreign investment, efforts have proven much more fruitful at the bilateral and regional level. Each year, literally dozens and dozens of bilateral investment treaties are concluded in negotiations that rarely garner any media attention or scrutiny from civil society groups.

Today, upwards of 2,400 bilateral investment treaties (BITs) have been negotiated, along with hundreds more free trade agreements (FTAs) containing some form of protection for foreign investments.

The steady growth of international investment protections—whether they are found in purpose-built BITs, broader FTAs, or in a yet-to-be-realized MAI—harbor clear implications for human rights.

As a rule, investment treaties are one-sided instruments. They are concerned with limiting the measures that may be taken by governments against foreign investors or foreign-owned investments. The treaties contain a series of rights for inward capital—protection against expropriation, guarantees of non-discrimination, and freedom to transfer funds out of a host state—but they lack any counter-balancing investor responsibilities.

In the event of investor misconduct that impacts on the rights of individuals or groups in the territory where the investment takes place, the treaties offer little comfort to those victims—investor protections are not conditional on minimum investor responsibilities, nor do they provide any mechanism for challenging investor wrong-doing.

Simply because the treaties are silent on human rights does not indicate that they have no impact upon human rights. Most investment treaties contain an innovative dispute settlement mechanism that offers foreign investors direct legal personality under international law to mount disputes against their host government. Generally, governments give an “open invitation” in the treaty to submit to arbitration any investment disputes that should arise between themselves and a foreign investor of a state that is a treaty signatory.¹ These legal disputes may center upon a variety of alleged intrusions by host governments against foreign investors, including allegations that certain regulations, laws or policies have a significant negative impact upon the investor’s operations.

Luke Eric Peterson, editor of the International Institute for Sustainable Development's Investment Treaty News, argues that investment treaties are one-sided instruments and that the human rights community needs to become involved in the framing of investment agreements.

Arbitrations between investors and states are occurring in increasingly large numbers, thanks to the broad offers of arbitration contained in the treaties.² Some of the most high profile of these international lawsuits have arisen under the investment chapter of the North American Free Trade Agreement (NAFTA). Indeed, certain of these NAFTA claims have attained a degree of notoriety because they involved investor challenges to health or environmental measures imposed by a NAFTA government on a foreign investor.³

However, while NAFTA attracts the lion's share of attention, the majority of investor-state arbitrations take place under other international investment treaties—most of them obscure bilateral treaties. Moreover, while the NAFTA governments (Canada, Mexico and the United States) have committed to publicize all arbitrations arising under that agreement, arbitrations under bilateral treaties come to public attention much less frequently, as there are few transparency obligations contained in such treaties.

This lack of transparency in foreign investment dispute settlement is critical, because states may face disputes when their international commitments on investment protection come into tension with their international (and national) obligations to protect human rights.

Research by the author for the International Institute for Sustainable Development has highlighted one notable area where the two legal regimes may interact: privatization of drinking water concessions in developing countries.⁴

To date, some nine arbitrations arising out of foreign investments in the water sector have been lodged at the World Bank's investment arbitration facility, the International Centre for Settlement of Investment Disputes (ICSID).⁵ While the details of each dispute differ—and public information about some of them is limited—some of the cases do implicate sensitive regulatory questions relating to water quality, the pricing of water, access to water for those unable to pay, and the expropriation of public wells.⁶

Governments playing host to such foreign investments may be bound under international law to work towards achieving the full realization of the right to water for its population. So governments might find themselves in situations where regulatory measures taken in pursuit of that obligation might come into friction with broad protections contained in bilateral investment treaties designed to limit the types of regulatory and administrative treatment to which foreign investors may be subjected.⁷

A common investment treaty provision is an obligation to provide foreign investors with “full protection and security”. This undertaking obliges states to exercise “due diligence” in ensuring the protection of foreign investments. In a recent investment treaty arbitration against Mexico, a Spanish multinational company alleged that state authorities breached this undertaking, by failing to act as quickly and thoroughly as possible in order to “prevent or put an end to the adverse social demonstrations” that had dogged the investor’s controversial hazardous-waste treatment facility.⁸ In short, this was one of those common instances where critics and protestors exerted pressure on a controversial foreign investment project so as to cause inconvenience and loss to the foreign-owned business.

For its part, the investment tribunal faced a potential situation where it would need to determine whether the state had failed to guarantee “full protection and security” to the foreign investors. However, the tribunal noted that, in this instance, there was “not sufficient evidence supporting the allegation that the Mexican authorities, whether municipal, state or federal, have not reacted reasonably, in accordance with the parameters inherent in a democratic state, to the direct action movements conducted by those who were against the landfill.”⁹

The tribunal’s opinion was notable for offering a reference to “parameters inherent in a democratic state”, seemingly recognizing the obligation for a democratic state to ensure the right of protest. However, the tribunal gave no indication of how to balance this human rights obligation with the obligation to provide foreign investors with “full protection and security”. In this case, the claimant’s failure to provide sufficient evidence regarding the conduct of the Mexican authorities meant that the tribunal did not need to address this delicate subject further. Nevertheless, it is a question that may arise in subsequent disputes.

As it seems that investor-state disputes can raise certain human rights concerns, then clearly the human rights community ought to devote greater attention to the burgeoning international law of foreign investment.

Less clear is how investment tribunals will address those human rights concerns. Often, the applicable law governing investment treaty arbitrations will include “applicable rules of international law”, thereby opening the way for tribunals to consider a host state’s international human rights obligations. However, it is less clear that tribunals will fairly weigh these competing international legal obligations of states, or that they are equipped to undertake the sensitive balancing of investor protections and human rights.¹⁰

Often, arbitrators are drawn from the ranks of practicing investment lawyers, and will have a commercial arbitration background. Human rights specialists are rarely found on these tribunals, although a party would be free to appoint an individual with a human rights orientation as one of the three presiding arbitrators.¹¹

A more elementary challenge, however, is the fact that arbitrations almost always occur behind closed doors, rendering it difficult, if not impossible, to ascertain how human rights arguments are relevant to a given arbitration. While the final decision of the tribunal may be relied upon to reveal what the tribunal thought of any human rights dimension, these decisions are not always made public, and only under the ICSID system are decisions routinely published.

Given the potential for human rights issues to crop up in future investment treaty disputes, there is a need for human rights professionals to familiarize themselves with the features of the emerging international regime on foreign investment. Ongoing negotiations of new investment treaties, as well as arbitrations under existing treaties, may harbor implications for human rights.

While investment treaty arbitration suffers from a lack of transparency, there are some tools at the disposal of the public to track this field.¹² Likewise, there have been some efforts by concerned parties to intervene in ongoing investment treaty arbitrations, so as to bring human rights considerations to the attention of tribunals.¹³ Looking to the future, further initiatives will be necessary to educate and inform the human rights community about the growing relevance of foreign investment law to human rights. ●

International Trade and Foreign Direct Investment— Two Sides of the Same Coin?

An old maxim states that “investment follows trade and trade follows investment”. To make the connection between trade and investment in foreign markets, consider a typical scenario for foreign market penetration. **(1)** A producer in its home country may sell its products to so-called home country “intermediaries” (brokers) without realizing its products are going to be exported; **(2)** but over time the home country producer realizes there is a possible foreign market for its goods, and begins to export its goods directly to such markets; **(3)** then, if increasing sales suggest growth possibilities of such foreign markets, producers may act to promote their exports through so-called “multipliers”, such as distributors or agents located in a foreign country; **(4)** eventually, if sales to a market continue growing and even further growth is indicated, the producer may move to support sales in the foreign market by placing offshore sales and service facilities or inventory warehouses in the foreign market, or by setting up regional distribution centers—a type of foreign direct investment (FDI);¹ **(5)** should the producer conclude it makes economic and commercial sense to feed the growing foreign market, it may place assembly/processing facilities there, realizing even more FDI; and **(6)** finally, as competitive pressures build up in that market or in regional markets that can be accessed from it, the producer may logically decide to set up entire vertically integrated manufacturing, sales, service and marketing operations in the host country.

James L. Kenworthy, consultant in international trade and investment, explains how free trade agreements can facilitate foreign direct investment and, in some cases, can be used as leverage by one state to conclude a bilateral investment treaty with another state.

So what began as a trade-focused activity eventually evolves into an investment-based activity. But commercial history is also full of examples of the other side of the coin—trade following investment. For example, around 40–50% of products imported into the United States by US foreign direct investors come from their own subsidiaries and affiliates abroad. Moreover, foreign investment in a country more often than not creates exports abroad for the host country, either to the investor’s home country or to other third-country markets. This, in turn, tends to generate domestic investment to provide the necessary commodities, services or industrial inputs.

The motivations for FDI are basically twofold: either (a) to create, expand or defend market share in a host country or nearby countries or (b) to develop and control assured sources of supply of raw materials, primary commodities or inputs needed for production of goods. But, again, trade is key to that investment in that, if a foreign investor cannot sell its products in a country, it is not likely to invest there.

FDI is not a “zero sum game” between the investor and its host country. The most successful FDI is that which produces a synergy of results from the convergence of the goals, concerns and interests of both the investors and the host country—hopefully, a “win-win” result for both. But, in addition to market access, investors are concerned with the degree and nature of risk they confront in any given country, the business climate that prevails there, and whether or not the country will facilitate their investment. Risk may be commercial and/or political. Commercial risks may include: economic downturns resulting in higher costs or lower demand; bankruptcy or other impairment of suppliers and customers; and the competitive impacts of new technology. Political risks include: political/social instability including civil war, riots and destruction of property; and expropriation or other uncompensated seizure of the investor’s property.

The relationship between trade and investment is also reflected in a number of international agreements. While there is no overarching agreement covering FDI in general, there are a large number of regional or bilateral investment treaties (BITs) governing the respective rights of investors and host countries. There are also several multilateral economic integration and trade agreements that include provisions relating to FDI, and numerous bilateral tax treaties that focus on host countries’ taxation of foreign investment.

As FDI has surged over the last two decades, host countries have become more focused on resolving prospective investor concerns and ensuring their own goals for FDI through the creation of BITs. Some 155 countries are parties to one or more BITs.² The BITs differ among the various countries but, over time, common provisions have developed for the admission and treatment of FDI. In particular, they set out the rules under which a country may expropriate foreign-owned investment, and they set out internationally accepted rules for prompt, effective and adequate compensation when expropriation or other such seizures occur. BITs also contain agreed-upon procedures for dispute resolution between investors and host countries (or between host countries and the investor’s home country), which generally involve international arbitration of investment disputes under one or more international conventions for the resolution of disputes. BITs may also serve other objectives. For instance, the U.S. Department of State’s internet site for BITs states that the U.S. BIT objectives are to: “(a) protect U.S. investment abroad, (b) encourage countries to adopt market-oriented domestic policies that treat private investment in an open, unbiased and transparent manner, and (c) support the development of international law standards consistent with these objectives”.³

More recently, a number of regional economic integration and free trade agreements (FTAs) have included extensive provisions relating to the treatment of FDI as part of overall preferential-trade relationships. In some cases, FTAs supplement and improve upon the treatment of FDI in order to enhance the preferential-trading environment—for example, the North American Free Trade Agreement. In other cases, they substitute for the lack of BITs among the parties to the trade arrangement. Indeed, in some cases, a home country may apply its trade negotiating leverage to require conclusion of FDI-related provisions in a potential trade agreement when there has not been prior agreement or success in negotiating a BIT. Or, as in the case of the Andean countries' FTA negotiations with the United States, a failure to agree on investment provisions, or the lack of a country's readiness for a BIT based on unresolved pending FDI issues, may undermine efforts to negotiate an FTA.

While there is no basic, overarching multilateral agreement governing FDI, efforts have been made in both the Organization for Economic Cooperation and Development (OECD) and the United Nations Commission on Trade and Development (UNCTAD) to create an acceptable multilateral agreement—but both have failed. The GATT-sponsored Agreement on Trade-Related Investment Measures (TRIMs) contains rules regarding the effects of FDI-related requirements of host countries on international trade. The agreement prohibits certain measures, often associated with FDI promotion and incentives, that distort and negatively impact international trade, such as export subsidies, import restrictions, minimum export and local content requirements. So far, efforts within the WTO to conclude a broader, more comprehensive agreement governing FDI have been unsuccessful. ●

A Conversation on a Model Investment Agreement with Howard Mann

Howard Mann, Senior International Law Advisor to the International Institute for Sustainable Development (IISD), sheds light on IISD's efforts to make foreign investment consistent with sustainable development principles.

What forms the basis

of international investment law? International investment law today is derived from three main sources of international law. The most prevalent is bilateral investment treaties, known as BITs—there are now over 2,400 BITs in existence. The second major source is investment chapters in regional or bilateral free trade agreements, which are becoming increasingly common as different regions move to develop regional trade arrangements. The third source is the WTO's General Agreement on Trade in Services (GATS).

Investment law addresses two related issues: the rights of investors to make an investment in a foreign state, and the special rights of investors after an investment is made in a foreign state. The right to make an investment varies between the agreements, from very limited to very extensive. The rights after an investment is made are generally more consistent between the agreements, and provide foreign investors with a set of rules that limit how host states can regulate or otherwise interact with them. They also provide a remedy, in most cases, to enforce these rights through what is known as investor-state arbitration.

What is the Model International Agreement on Investment for Sustainable Development? I co-authored IISD's Model International Investment Agreement for Sustainable Development, which was launched in April 2005.¹ This Agreement was developed to address the imbalances created by how international law currently privileges the rights of foreign investors over other stakeholders in the international investment process. It redirects international investment agreements (IIAs) away from a simple set of investor rights and government obligations to an inter-connected set of rights and obligations for investors and governments alike, with additional recognition of the role of civil society and local communities in this mix. No existing IIAs do that.

The Model Agreement arose from a critical realization that IIAs are not about private relationships between an investor and host state, but are now a fundamental part of the international law on globalization. We approach it from that perspective.

What does the Model Agreement on sustainable development have to do with human rights? The Model Agreement relates to human rights in both a general and a specific way. First, by ensuring a balance between stakeholder rights, it ensures that the rights of one actor do not prevail over others as a matter of legal principle. At a more specific level, the Model Agreement requires foreign investors to respect both local law and key elements of international human rights law. It then allows for breaches of these obligations to be acted on by individuals and civil society groups, both in international arbitrations and in civil suits in the host

state of an investment or in the home state of the investor. It also provides for civil society to be able to make specific complaints to government authorities, who must make public responses to such complaints. In short, respect for human rights by foreign investors is articulated as a key component of investment that supports sustainable development. It is very much part of the concept, rather than an adjunct to it.

What possible advantage would the Model Agreement have for states and investors? Surely, investors must be very resistant to this idea since they have been largely custom-designing the rules on investment law? The advantage for states is that it would provide a much clearer balance of the respective rights and obligations between states and foreign investors. This is essential in this area of law today. There would also be much greater clarity on the rights of investors, as the formulation we use pulls back from the very expanded view of investor rights that several arbitration decisions have set out.

For investors the answer is more complex. We believe, however, that foreign investors who are serious about long-term commitments to the states in which they invest should be prepared to look seriously at this Model Agreement. If they do so, they will find there is little that is new. We simply package together, for the most part, a series of social and environmental principles that they already apply as part of good corporate practice. In short, the most prominent new feature is the comprehensive packaging, not the actual ideas the Model Agreement contains. There is also a more pragmatic issue for corporations: the existing directions of international investment law continue to hit roadblocks and generate significant public and governmental concern in many countries. If this area is to continue to be an important part of international law in the longer term, it must respond to those concerns in a balanced and effective way. The existing approaches do not, in our view, have a long-term future. If our opinion is correct, the choice may be between a balanced regime or, ultimately, no regime at all.

What do you think are the most urgent changes needed in the international investment regime? The critical need is to establish a balance between investor rights and the rights and needs of other stakeholders in the investment context. This can only be done by clear and unambiguous language in a new style of international agreement. This is the cornerstone of IISD's Model Agreement. One can argue about many of the details, but we believe that the fundamental principle is unassailable: it is never a good thing to have rights without obligations.

A second critical issue in changing current directions is forcefully to address corruption issues. We look too often at foreign governments as the main culprit, but it is clear that these governments rely upon the active involvement of investors and active or tacit condoning by home governments. Human rights, development and sustainability objectives cannot be fully achieved in this context. International investment law must take up this challenge and ensure that foreign investors cannot rely upon contracts or investment agreements (host country agreements) that are obtained through corrupt means. It has completely failed to do so to date. Indeed, investment arbitration tribunals have allowed investors to benefit from rights under international agreements even when they have knowledge of the corruption that lay behind the making of the investments. This is unacceptable.

Finally, the whole regime must be moved from the secretive, behind-closed-doors approach it has now become to an open, transparent regime—from the negotiation phase of the agreements, through implementation, to dispute settlement. International investment law must mature as a regime. It must end its reliance on organizations and dispute settlement processes that were designed for other purposes, and are ill-suited to supporting international investment law in its role as a critical part of the law on globalization.

This all sounds like a big set of tasks, reshaping the international investment regime, addressing corruption and making the processes transparent. Are you optimistic that international investment can change in a positive way to integrate concern for human rights and sustainable development?

Yes, I am optimistic that positive change will occur. We have already begun to see a better articulation of certain investor rights, and an awareness of the need to balance them against the rights of others. We have also seen some transparency begin to creep into the system, including some open arbitrations and the acceptance in two cases to date, with a third likely in the very near future, of amicus curiae briefs from civil society groups.² Changes considered unthinkable five years ago are now firmly rooted in the regime. ●

AMNESTY INTERNATIONAL SHINES THE SPOTLIGHT ON FOREIGN INVESTMENT CONTRACTS

Over the past few years, Amnesty International has been researching the investment contracts signed between companies and host states that underpin foreign direct investment (FDI) projects to identify the human rights impact of these agreements. The research has revealed that these contracts can pose serious risks to human rights protection in the host state. Amnesty International's main finding is that the way these contracts are negotiated, drafted, passed into law and enforced can threaten the host states' ability to fulfill its obligations under international human rights law. Furthermore, these contracts can limit the domestic accountability of companies for their human rights impacts.

Amnesty International hopes that by identifying the risks foreign investment contracts pose for the promotion and protection of human rights, it can promote the development of standards and practices that will guarantee respect for human rights in the context of FDI.

Amnesty International published its first report on the human rights impacts of foreign investment contracts in May 2003. This report, *Human Rights on the Line: The Baku-Tbilisi-Ceyhan Pipeline Project (BTC)*, argued that the legal agreements underpinning the project systematically undermine mechanisms to protect human rights that have been established under international law.

Human Rights on the Line found that, in effect, governments were “contracting out” of their human rights obligations because the project agreements impose conditions on the governments of Azerbaijan, Georgia and Turkey that constrain them from living up to their human rights obligations. To their credit, the BTC consortium of oil companies led by BP responded to some of the concerns expressed in this report by drawing up a “Human Rights Undertaking”—a legally binding agreement recognizing the force of international human rights law over these investment agreements.

In September 2005, Amnesty International published *Contracting Out of Human Rights: the Chad-Cameroon Pipeline Project*. Similarly, this report exposed the risks to human rights created by the foreign investment contracts underpinning the project in both Chad and Cameroon. The report, among other things, calls on the governments of Chad and Cameroon as well as the ExxonMobil-led consortium to amend the contracts to eliminate such risks in the context of the project.

Amnesty International is expressing its concerns about foreign investment contracts to a number of host governments and investing companies. It has also been engaging with home governments, international financial institutions such as the International Financial Corporation, export credit agencies, commercial banks, corporate lawyers and others to accomplish its goal of bringing about standards and practices to guarantee respect for human rights within investment contracts. Amnesty International believes it is fundamental for the promotion and protection of human rights worldwide that they are respected in the context of FDI.

A Conversation on Stabilization Clauses with Sheldon Leader

Sheldon Leader Professor of Law and a member of the Centre for Human Rights at the University of Essex, explains how stabilization clauses pose a threat to human rights.

Do the private investment agreements signed by states and investing companies pose problems for human rights? Yes. I have been working during the last few years on contracts between the host state and the investing company relating to a specific project. These agreements have been given all kinds of labels, but for ease, let's call them Host Government Agreements, or HGAs. A central aim of these contracts is to provide security, both financial and physical, for the investor's property. To secure its assets, the investor is sometimes provided by the HGA with special policing powers. But the powers it grants are drawn so widely that the state, in signing up to such an agreement, is in danger of violating its obligations under international human rights law. These obligations require the state to ensure that companies respect the human rights of those who are affected by their actions, and to offer an effective remedy, including compensation, for damages.

There is often a three-cornered tension in these situations. The host state is anxious for inward investment and the economic growth that this promises; investors are focused on protection of their returns; and people in towns and villages might suffer at the hands of both. In this complex environment, where the stakes are high, the protection of the human rights of the population from the detrimental effects of investment is usually overlooked, ignored or considered low priority. For that very reason, the challenge for human rights lawyers is to identify the provisions in investment agreements that have a negative impact on human rights, including the prevalent use of apparently innocent terms such as "stabilization clauses".

"Stabilization clauses"? Can you explain what these are and what problems they may pose to human rights? These are provisions, usually in the HGA, that aim to ensure the investment is not negatively affected by changes in the law of the host state or from other governmental acts taken under the law. These provisions, along with the rest of the contract, apply for the lifetime of the investment, which can last several decades. Along with insulation from changes in the law, some clauses can also require that existing laws and regulations be interpreted so as to not add to the cost of doing business. This carves out an exception to the way the law would operate elsewhere in the country—where ideally the state can find a balance between the need for environmental, health and safety regulations and commercial interests. Where stabilization clauses are in place, the state may be contractually obligated to give priority to the commercial interests of the investor—in lieu of more pressing public-interest concerns.

The penalty for a state violating a stabilization clause can be a hefty bill for compensation to the business for any extra costs that the company incurs for compliance with new laws. Stabilization is sometimes justified by investors as a protection against political risk, but the net effect of these clauses is itself political. It may have the effect of distorting the priorities of a state's governing decisions towards favoring commercial interests over human rights, despite the international legal obligation to place a priority on human rights.

Can you give an example where stabilization clauses may have caused human rights violations? For example, the building of the Chad-Cameroon pipeline has raised problems of dust control, posing a health hazard for villages through which project vehicles have passed. This was a difficulty aggravated by the speed with which operations have been carried out, the pipeline having been completed a year before the deadline. If the regulatory authorities were to have demanded that work be slowed or stopped until this problem could be dealt with in the interests of the local population, then the consortium might well have been able to demand compensation for the delay to its operations.

The result of this is that a host government is put in a vice. On the one hand, it carries on having obligations to protect the health and safety of its citizens, some of which flow from its international commitments on these matters. On the other hand, it must pay compensation if it carries through on its duties to its citizens by making these companies comply with new, higher standards. In this way, a price tag is attached to its human rights obligations.

This has taken the notion of political risk a step too far. Host states should not bear a financial risk when pursuing the implementation of their international human rights law obligations.

Do these stabilization clauses exist in all host government agreements?

It is difficult to provide you with an estimate of the percentage of host government agreements containing broad stabilization clauses because these agreements are viewed by many as commercial arrangements, and are often kept confidential by governments. This is so even if they actually create part of a legal regime governing an investment and have potentially wide-ranging effects on a population. However, I can say that generally governments of poorer states, faced with a consortium or group of large multinational companies at the bargaining table, would be more likely to agree to such clauses.

Is it possible to amend stabilization requirements to make them more human rights friendly? To date, there is one significant attempt that I know of. It is the Human Rights Undertaking that is legally binding on members of the consortium concerned with the Baku-Tbilisi-Ceyhan pipeline linking the Caspian and Mediterranean Seas. The Undertaking is a legal promise by the consortium that they will not use the HGA to defend itself when a host state is bona fide applying an international obligation that applies to it in the areas of human rights, environment, or health and safety. This leaves the stabilization clause intact for some purposes, but removes it when rights are at stake.

But if investors do away with broad stabilization clauses, what can make up for the risk they are taking by investing in some countries where there is instability or minimal rule of law? Foreign investors fear unexpected and unreasonable changes in host state laws that potentially interfere with investment. A solution to this problem is for investors to engage in more planning with host states and adopt measures that increase publicity and transparency. Further, instead of using stabilization clauses, host states can incorporate stability guarantees for all inward investment in domestic legislation, rather than with each investor separately through the use of stabilization clauses in contracts. Where local institutions are weak, it is possible to work out dispute settlement mechanisms that combine foreign and local inputs. There is also an important role for international financial institutions and arbitration bodies in setting standards and providing guidance as to how to draft stabilization clauses in a way that respects human rights. ●

A UN PERSPECTIVE ON HUMAN RIGHTS, TRADE AND INVESTMENT

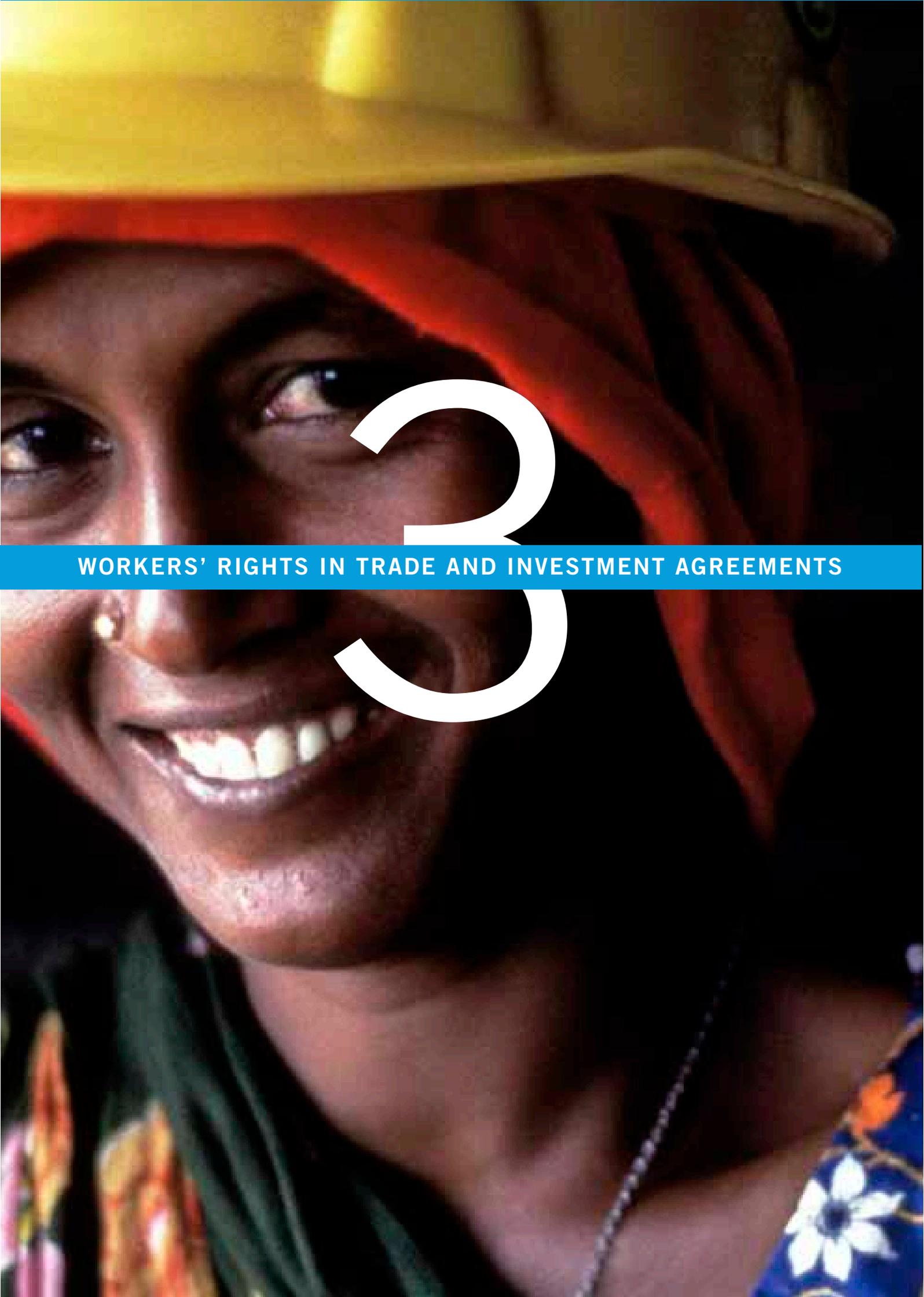
In a report by the UN High Commissioner for Human Rights on the topic of human rights, trade and investment, attention was drawn to the human rights implications of international and domestic investment regimes.¹

The report challenges the common assertion that foreign investment can promote growth and development in all contexts and that an automatic correlation exists between increased investment and the enjoyment of human rights—particularly economic, social and cultural rights, and the right to development. In its critique, the report addresses the roles and legal obligations of individuals, governments and investors with respect to human rights and investment, as well as the impact of investment agreements, investment liberalization and privatization, on the promotion and enjoyment of human rights.

The UN High Commissioner contends that foreign investment has the potential to assist overall social, economic and political development and advance the enjoyment of international human rights, but only if properly regulated. The report emphasizes that the ability of investment to serve as a positive force to promote the enjoyment of human rights depends significantly on the actions of the governments involved. Specifically, under international law, host governments must regulate investment and enter into investment-related agreements in a manner consistent with their international human rights obligations. Host governments must also maintain the flexibility to promote cultural diversity and to implement special measures to protect vulnerable, marginalized, disadvantaged or poor people, including the provision of social safety nets.

Host governments must also ensure that their domestic and international investment laws include investor duties in addition to standard investor rights. Domestic and international agreements must contain provisions requiring investors to act in accordance with a host state's overall development goals and human rights obligations.

The report points out that, where investment regimes are successful, the effects of investment on the enjoyment of human rights can change over time, leading to progressive improvements in times of prosperity but regression when investment flows decrease, particularly where states pursue policies of investment liberalization without also establishing appropriate social safety nets. Home and host states must realize, the report argues, that even when the effects of investment are positive, the benefits may be short-lived or unstable. Thus, states must regulate investment responsibly, in a sustainable manner that utilizes the resources generated by foreign investment for the long-term well-being of all segments of the population.



WORKERS' RIGHTS IN TRADE AND INVESTMENT AGREEMENTS

Linking Trade and Investment Agreements to Improvements in Labor Rights

Foreign direct investment and trade liberalization can have significant repercussions for workers' rights—for better or for worse. They can help developing countries insert themselves into the global economy and reach larger markets, creating more demand for their labor and allowing workers to leave low-income occupations, such as subsistence agriculture, and move up the income ladder. Jobs in foreign-invested firms are often better than the available local alternatives. However, while these positive outcomes have been achieved in some countries, many other developing countries have had far less optimal experiences. Overseas sweatshops and plantations where workers are forced to work up to 80 hours each week, in unsafe conditions and with minimal pay, are also a common feature of the global economy. All too frequently, foreign-invested firms are among the sweatshop operators, particularly in export agriculture and in labor-intensive industries such as garments, footwear and toys.

As trade barriers have been reduced via the WTO and bilateral free trade agreements, foreign investors feel more secure that they will be able to export what they produce back into wealthy country markets, and have therefore become more likely to invest abroad to take advantage of lower labor costs. Because this means that more and more jobs in industrialized countries are at risk, and because information from distant workplaces is increasingly available, governments in the developed world have come under pressure to use trade and investment agreements to protect labor rights in foreign workplaces. This pressure stems both from developed-country workers and unions who resist what they see as unfair competition from exploited foreign labor, and also from human rights campaigners and the public, who are appalled by images of workers toiling under harsh conditions and by reports of workers who are fired or physically harmed for trying to form unions. In recent years, some governments have responded to activists' efforts by including basic protections for labor rights in trade agreements and bilateral investment agreements. Policies in this area are relatively new, with the oldest such policy instruments dating back only twenty years.

The first labor rights clauses were linked to preferential market access programs that rich countries granted to poorer countries to hasten their economic development. These non-reciprocal benefits were created in the 1970s by the United States, the European Union and other wealthy countries under the Generalized System of Preferences (GSP), a part of the global trade system now housed at the World Trade Organization. Partly in response to the favorable tariff treatment provided for developing-country exports into rich markets, foreign direct investment flowed into those countries' export sectors. In 1983, under pressure from human rights campaigners, the United States required beneficiaries of a new preference program for Caribbean countries to ensure respect for workers' rights in their country. The following year, this requirement was extended to all recipients of the US GSP program. Subsequent preferential market access programs for Africa and Andean countries also required respect for labor rights as a condition of eligibility.

Sandra Polaski of the Carnegie Endowment for International Peace illustrates how trade and investment agreements can become effective instruments for improving workers' rights, provided that governments have the political will to make this happen.

The European Union first included labor standards in its own GSP in 1995. In response to a long campaign by European labor unions, the European Union decided to deny preferences to countries that permitted the use of forced labor, suspending benefits to Myanmar (Burma) as a result. In 1998, the European Union introduced an incentive plan extending additional tariff cuts to developing countries that demonstrated compliance with the conventions of the International Labor Organization (ILO) covering freedom of association and collective bargaining, non-discrimination in employment, forced labor and child labor. The application process for the benefits was difficult, however, and the margin of additional preference was small: few countries applied. In 2002, the European Union increased the margin of preference for the special benefits, to double the GSP tariff reduction from its normal rate of 3.5% to 7%. A few countries, including Moldova and Sri Lanka, have received the special benefits. The European Union also decided that any beneficiary country could be denied eligibility for basic GSP benefits for systemic violations of any of the ILO core labor standards—thus extending its requirements beyond violations of forced labor.

A further innovation linking trade with labor rights occurred in 1993, when the United States incorporated a requirement that labor rights be respected as a condition of the North American Free Trade Agreement (NAFTA). Subsequently the US has included labor provisions in all free trade agreements that it negotiated, including agreements with Jordan, Chile, Singapore, Australia, Morocco, five Central American countries and the Dominican Republic. In 2002, the US Congress mandated that executive branch negotiators must include labor rights provisions in all future trade agreements. The United States also pioneered a novel incentive-based approach in a bilateral textile agreement with Cambodia [see Rosenthal article]. Canada and Chile too have included labor provisions in some of their bilateral trade agreements. Although the European Union has introduced commentary in support of core labor standards in many of its bilateral and regional free trade agreements, it has not yet included enforceable labor rights provisions in any negotiated trade agreements.

The United States has also included labor rights clauses in some bilateral investment treaties (BITs). The current US model BIT requires that each country that signs such an agreement must “strive to ensure” that it does not weaken or derogate from its domestic labor laws as an encouragement for foreign investment. To date, such provisions are subject to consultations between the signatories, but have not been made enforceable.

As a result of all of these initiatives, there is a growing body of experience and a range of approaches on how to link labor rights with both trade and foreign direct investment agreements. Most existing labor provisions provide coverage—as a bare minimum—for the right of freedom of association, the right to form unions and bargain collectively, limitations on

child labor and a ban on forced labor. Provisions differ as to whether national laws or ILO Conventions shall be used to establish the level of protection for workers' rights. Participating countries are required to protect the agreed-upon labor rights in their own territory; none of the agreements creates a right of enforcement by one country within another country. However, many of the labor clauses do create some capacity for supra-national review and the possibility of penalties if a country is alleged to have failed to carry out its commitment to protect labor rights. The most rigorous agreement in this respect, the US–Jordan Free Trade Agreement, creates a right for either country to withdraw trade benefits if the other violates its labor rights obligations under the agreement. This withdrawal of negotiated trade benefits is sometimes referred to as “sanctions”. Less rigorous penalties exist in other US trade agreements, under which a party that fails to protect its citizens' labor rights may face a fine of up to US \$15 million, which would then be spent in the territory of the delinquent party, under the supervision of the trade partner, to remedy the deficiencies. The penalties, whether in the form of trade sanctions or fines, are meant to create a deterrent to systemic violations of labor rights. In contrast to the deterrent approach, the US–Cambodia textile trade agreement provided a positive incentive [see Rosenthal article]. Experience suggests that positive incentives may be a very effective approach.

Ultimately, whether any of these labor provisions succeed in protecting workers' rights depends on the active oversight and implementation of the terms by one or more of the governments involved. Some of the existing arrangements provide the possibility that the public can raise concerns through petition processes, although government authorities make the final decision as to whether to proceed. While labor provisions of trade and investment agreements can become effective instruments for improving respect for workers' rights, this will only happen if governments have the necessary political will. ●

The Cambodian Trade Agreement: A Human Rights Race to the Top?

Mila Rosenthal of Amnesty International USA uses the example of a trade agreement between the United States and Cambodia to argue that international standards on labor rights can be reinforced by bilateral trade agreements.

Amnesty International believes that an international system of standard-setting and enforcement is needed to ensure that competition between countries for inward investment does not lead to violations of human rights, and to ensure that companies cannot avoid complying with international human rights standards by moving across national boundaries. Along with many other voices, Amnesty International has been actively supporting the development of the UN Norms for Business in order to accomplish this [see Weissbrodt article]. Our hope is that international regulation will counteract the “race to the bottom” that now results in the poor working conditions found throughout much of the global economy, as national governments often believe that they can attract more foreign direct investment with cheap, unregulated labor, with workers in most cases lacking the legal framework and protection to organize themselves freely into trade unions in order to negotiate for improvements.

In the meantime, however, even within the current system, the wealthiest countries have the potential to exert enough power to improve conditions. An interesting example of how this could work has emerged in the last few years, in the unusual provisions of the US–Cambodia Bilateral Textile Trade Agreement, which seems to have contributed to improved labor conditions in Cambodia, and may have given the country a competitive advantage in producing garments for the international market.

In its textile trade agreement with Cambodia, the United States agreed to allow increased amounts of textiles to be imported from Cambodia if Cambodia implemented “a program to improve working conditions in the textile and apparel sector, including internationally recognized core labor standards”¹ [see box “Workers’ rights are human rights” for further description of international standards]. The agreement was originally negotiated for a three-year term, from 1999 to 2003, and was subsequently extended until the end of 2004. Through the agreement, the United States not only granted an initial quota to Cambodia, but also pledged to increase the quota by 14% each year that working conditions in Cambodian factories were found to “substantially comply with such labor law and standards”.² The US included these labor rights provisions partly as a reaction to increasing public anti-sweatshop and anti-globalization activism. The political leverage exercised by the US labor movement—which in Cambodia’s case primarily reflected the concerns of the US textile and garment workers union, UNITE—was influential in achieving these provisions. When the agreement was negotiated, these provisions were without precedent and appeared to herald a new era for a more rights-respecting international trade regime [see Polaski article]. By incentivizing improved conditions, the Cambodian agreement created the regulatory framework for a “race to the top”.

The Cambodian agreement focused on textiles because of an anomaly in the international trade regime, which allowed countries such as the United States to control textile imports through select quotas from different countries rather than treating all trading partners on the same

terms. With relatively low capital investment and without a need for highly skilled workers, textiles were seen as a good entry-level manufacturing opportunity for poor countries to enter the global market. These characteristics of the textile market allowed the United States to grant quotas selectively to developing countries so as to promote political alliances and export-led economic development.

When the Cambodian agreement was signed, conditions in the country's factories were generally regarded as very poor, on a par with similar conditions in other countries such as China, Bangladesh and El Salvador. As in many other countries, most of the factories in Cambodia were owned by Taiwanese and Hong Kong enterprises, and most of the workers were young women from the countryside. Cambodia agreed to the strict provisions of the trade agreement because the country, one of the poorest in the world, was almost entirely dependent on foreign aid and the goodwill of foreign donors.

The Cambodian Labor Code underwent substantial revision to meet international standards. However, the question remained of how improvements were to be undertaken and enforced. After the first year of the agreement, the United States agreed only to increase Cambodia's quota by 9%, primarily to recognize that Cambodia had ratified core International Labor Organization (ILO) conventions and registered a labor federation.³ The United States would not have relied on Cambodia's poorly resourced and corrupt labor inspectorate for an assessment of improvements.

The question of how Cambodia could credibly verify the improvements that met the terms of the agreement was not answered until the third year of the agreement, through the establishment of an unprecedented third-party monitoring system by the ILO. Despite its inexperience with factory-level monitoring, the ILO brought enormous credibility as a UN agency and an independent arbiter of labor rights, drawing on its strength as a representative of governments, employers and workers. The ILO monitoring program, now called "Better Factories Cambodia", agreed to train inspectors to undertake regular visits to participating factories, using a checklist to evaluate how the factory was complying with the Cambodian Labor Code.⁴ Workers and managers were interviewed separately and confidentially, and monitors also reviewed payroll records and other documents.

The Cambodian Ministry of Commerce required factories to allow monitoring in order to be granted export licenses, so all garment factories in the country agreed to participate. The ILO began to compile its monitoring results and to release public quarterly "synthesis reports" on conditions across the sector, which could be used cumulatively by the US government to evaluate whether a quota increase was justified. Additionally, the transparency of these reports could be used to put pressure on individual factories to improve conditions.⁵

Because the reports on individual factories were made public after follow-up inspections, an additional result of the monitoring was that some foreign buyers used them to help identify factories with better conditions. Some buyers asked the factories directly to disclose their ILO monitoring reports after the initial visit, as a condition of doing business. For some multinational apparel brands that had been hit by sweatshop allegations and that were trying to reduce labor rights violations in their supply chains, the ILO's monitoring program offered the possibility of identifying improved factories from which to source their products. Both Gap and Nike, for example, publicly stated their support for the ILO program.⁶ A December 2004 World Bank survey of fifteen large US and European buyers ranked Cambodia's garment industry highest for labor standards.

Cambodia's garment industry, and its workers, still face numerous challenges. Recent synthesis reports include findings of violations in the sector, some serious. The January 1, 2005 expiry of the global quota system for textiles allows many multinational companies to stop sourcing from many different countries and concentrate on fewer suppliers. The end of quota has already contributed to a significant increase in China's share of the world's apparel production, drawing jobs away from many smaller producing countries. So far, there is some evidence that Cambodia's reputation as a relatively higher-standard production destination will retain and continue to draw foreign buyers, and thus keep in business the direct foreign investors who own the factories. For example, from January to April 2005, Cambodian garment exports to the United States increased by 11%.⁷ It is still too soon to tell whether this trend will continue. Despite the end of the trade agreement with the United States, though, Cambodia and the ILO have now agreed to extend the ILO monitoring program until 2009.

In human rights terms, there are some interesting lessons to be learned from the Cambodia experiment. Labor rights are only one aspect of human rights and, of course, trade can affect a country's ability or willingness to promote and protect many different rights of its citizens, including economic and political rights. According to the Office of the High Commissioner for Human Rights, "Human rights law is neutral with regard to trade liberalization or trade protectionism. Instead, a human rights approach to trade focuses on processes and outcomes—how trade affects the enjoyment of human rights—and places the promotion and protection of human rights among the objectives of trade reform."⁸ The Cambodia agreement touches on only some of the concerns raised by the Office of the High Commissioner for Human Rights about trade and human rights in general. In other areas of human rights concern, Cambodia is a poor role model. As Amnesty International and the US State Department have documented, serious human rights violations, including torture and politically motivated killings, continue to be reported against a background of political instability, while a weak and corrupt judicial system remains a serious obstacle to human rights protections. Additionally, the particular historical currents that created the Cambodia agreement are unusual. However, the positive results for labor rights from the Cambodia agreement illustrate the principle that internationally enforceable standards, enforceable in this case through bilateral regulation, can potentially improve labor rights, taking the first step in a "race to the top". ●

WORKERS' RIGHTS ARE HUMAN RIGHTS

International human rights standards include many provisions that apply to workers. The international labor standards to which governments have agreed are defined in the Universal Declaration of Human Rights (UDHR) and in the Conventions of the International Labor Organization (ILO).

In 1948, the United Nations General Assembly proclaimed the UDHR as a common standard of achievement for all people and all nations. The UDHR states the rights that belong equally to every person. These include such labor rights as the right to work and the right to just and favorable conditions of work and just and favorable remuneration (article 23); freedom from slavery (article 4); and the right to form and join trade unions (article 23). These rights are further enumerated in international agreements, such as treaties and covenants, which have been ratified by the governments of many countries. Examples of these agreements include the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which contain labor rights provisions.

The International Labor Organization, a specialized United Nations agency, has 175 member states—most of the countries in the world. In 1998, the ILO identified four “core rights”—the most fundamental labor rights. These are the right to freely associate in trade unions and bargain collectively; freedom from child labor; freedom from slavery or enforced labor; and freedom from discrimination in employment. Every ILO member country is responsible for integrating these standards into their national laws. The ILO monitors how countries adopt labor laws and it reports on whether countries are upholding these international standards, especially the core rights and the right to freedom of association. Through this country-level monitoring, as well as capacity-building to help countries improve their ability to pass and enforce labor law, the ILO helps to move countries towards greater labor law compliance. However, the process is slow moving, and the ILO's powers are limited. Compliance with ILO Conventions depends on the goodwill of states, as the primary responsibility for enforcing labor law lies with governments.



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TOWARDS HUMAN RIGHTS STANDARDS FOR FOREIGN DIRECT INVESTORS



UN Special Representative on Business and Human Rights Faces Monumental Challenge

The subject of business and human rights has been put firmly on the agenda of the United Nations as a result of the adoption of a resolution on “Human Rights and Transnational Corporations and Other Business Enterprises” by the UN Commission on Human Rights. In this resolution, the Commission requested the Secretary General to appoint a Special Representative for two years to undertake the following tasks:

- to identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;
- to elaborate on the role of states in effectively regulating and adjudicating the role of companies with regard to human rights;
- to research and clarify the implications for companies of concepts such as “complicity” and “sphere of influence”;
- to develop materials and methodologies for undertaking human rights impact assessments of the activities of companies;
- to compile a compendium of best practice of states and companies.

The 2005 appointment of Professor John Ruggie to this position will help carry forward the momentum generated by the UN Human Rights Norms for Business (the Norms)—a comprehensive list of the human rights obligations of companies put together by an expert body of the UN Sub-Commission on the Promotion and Protection of Human Rights. The Norms can be expected to pave the way for establishing clear future standards for company behavior regarding their impacts on human rights.

Since the unanimous approval of the Norms in 2003 by the UN Sub-Commission on the Promotion and Protection of Human Rights, there has been a paradigm shift in the debate on the human rights responsibilities of companies. The question of whether there should be an international framework to hold companies directly accountable is now on the political agenda. Some national government representatives and organizations representing larger businesses resisted any international standards that went beyond voluntary guidelines. They also argued that non-state actors could not be held directly responsible under international law for promoting and protecting human rights. In their view, international standards for companies would detract from the legal responsibility of states to hold to account all third parties operating on their territory.

Non-governmental organizations (NGOs), on the other hand, were emphasizing that many states were failing in their responsibility to hold companies accountable for their human rights misconduct, either because of corruption, incapacity of legal institutions, lack of access to justice for victims, or the desire not to antagonize powerful investors. Many NGOs, as well as a number of companies committed to corporate social responsibility, supported the Norms as the most comprehensive statement of relevant international principles. Some NGOs felt that the Norms did not go far enough in defining a strong implementation and enforcement framework.

Professor David Weissbrodt, a former member of the UN Sub-Commission on the Promotion and Protection of Human Rights, urges the UN Special Representative to give credence to an international framework of human rights standards for companies.

For more information on the UN Norms and the UN Special Representative on Business and Human Rights, see www.business-humanrights.org.

During 2004 and early 2005, the public debate and political discussion within the UN Commission on Human Rights was highly polarized, revolving largely around the contentious issue of the proposed implementation framework. This polarization obscured the fact that there was little disagreement about the actual substance of the Norms. Many companies have been using them as a benchmark to identify gaps in their policies and as part of their risk management. For example, the Business Leaders Initiative on Human Rights (BLIHR) comprises ten leading companies applying the Norms to their business practices and considering the implications of key concepts such as “sphere of influence”, “materiality” and “complicity”.

Now that the initial heat has been drawn out of the debate by the decision to appoint a Special Representative of the Secretary General to look into the whole issue of business and human rights, many previously critical business people are coming to accept the good sense of the substance of the Norms. They recognize that the Norms will increasingly be used by their stakeholders to set baseline expectations of their behavior. The debate has helped to raise the profile of business impacts on human rights to rank alongside the environment as a key “externality” that companies are expected to factor into their business decisions.

What has become clear is that the work undertaken by the UN Sub-Commission from 1999 to 2003 and by the UN Commission in 2004–2005 has put the issue of business and human rights firmly on the map of both business and government. Although there is no cross-sector consensus yet, either on the human rights responsibilities of companies or on the most appropriate means to enforce them, the Norms represent the most precise and sophisticated attempt to mark out a framework for this and are therefore likely to inform the work of the UN Special Representative.

While there are those in business and government who would wish the Norms away, the reality is that so long as companies use them, and so long as they form the basis of civil society’s expectations of company behavior, they will have credibility. This is likely to be enhanced as they are used by other NGOs, by trade unions and by the socially responsible investment community as a benchmark for measuring the performance of companies. The decision to appoint a UN Special Representative has created an opportunity for the Norms to be further developed and refined for the purpose of creating realistic and demonstrable principles, along with an implementation process that can provide effective standards for business behavior with regard to human rights. All of us with an interest in these matters should support the work of the Special Representative to achieve this challenging and vital task. ●

Holding Companies Legally Accountable for their Human Rights Impacts

In recent years, the call for human rights-based reviews of multinational enterprise operations, especially in developing countries, has been gaining momentum. This can be attributed to some sensational cases of apparent neglect, on the part of multinational firms, to observe human rights standards. In response to the neglect, a number of legal initiatives have been taken. Lawyers in the United States and the United Kingdom have filed human rights cases before their respective national courts; the court cases pertain to the overseas activities of multinationals based in the United Kingdom and the United States. At the same time, the United Nations Sub-Commission on Human Rights was engaged in a process of drafting a set of human rights Norms applicable to multinational companies and other business enterprises [see Weissbrodt article]. Although the international standards proposed in the UN Norms are not binding, they could be potentially used in litigation when a human rights-based claim is brought against a corporate defendant, especially in the United Kingdom and United States.

Professor Peter Muchlinski of the London School of Economics argues that the legal community is making advances towards bringing successful human rights cases against companies despite the considerable obstacles.

Why the United Kingdom and the United States? A common feature of both systems is the availability of class action suits. A class action suit is a legal action that can bring together, before a single court, a large number of claimants with similar claims against the defendant company. The bringing of such claims can be linked to the “no-win-no-fee” system of payment for legal services that encourages an entrepreneurial style of legal practice already familiar in the United States, and which is becoming increasingly common in the United Kingdom.

However, both the UK and US legal systems face significant obstacles to the bringing of a successful human rights claim. The first hurdle is proving to the court that it is the proper forum to hear the case. This requires showing that the country in which the harm has been suffered does not offer an appropriate alternative forum for the case to be heard. In cases where the claimants come from a developing country, the legal system may be unlikely to offer legal aid or to entertain class actions, let alone have enough lawyers skilled in the bringing of such claims. Indeed, in the Cape Asbestos litigation brought before the UK courts, even South Africa, a relatively developed country, was found wanting in these respects, allowing the House of Lords (the highest level of appeal) to conclude that England was the proper forum for the hearing of claims made against Cape Asbestos. The claims came from former employees of its South African affiliates and from residents of communities located near the asbestos. They alleged gross negligence in the handling of asbestos-related risks leading to illness and death among the claimants. The cases were settled in 2001.

A second obstacle to multinational litigation concerns the adequacy of substantive legal concepts to permit a successful claim to be made. Claimants need to show a recognized cause of action against the defendant firm. Usually, the harm alleged has occurred at the hands of the overseas affiliate of the UK- or US-based parent company. Both the UK and US systems of law recognize the corporate separation between the parent company and its affiliates. As a result, the parent company

will only be liable for acts occurring at the hands of the affiliate where it can be shown that the parent company was itself actively involved in the wrongdoing—for example, by ordering the affiliate to act in an unlawful manner. In many cases this cannot be easily shown. In addition, responsibility may have to be based on actual ownership or control of the affiliate. Both systems place limits on ownership responsibility in the interest of preserving limited liability between separate companies in a group. Reform of these rules is unlikely in the near future, as demonstrated by the refusal of the recent UK Company Law Review (an overhaul of the law governing UK companies) to discuss group liability issues in any detail.

A further problem in prosecuting multinational companies concerns the availability of a human rights-based claim against a private corporate actor. It should be stressed at the outset that human rights-based claims ought to be regarded as remedies of last resort. They become useful where normal regulation through law has become virtually impossible in the host country because the local government has failed to adopt or maintain proper regulatory standards or where national laws have failed to control corporate excesses due to administrative failures or corruption. That said, there remains the difficult question of whether, as a matter of legal principle, a private entity can be held liable for a violation of human rights standards. Traditionally, such standards have applied only to governments and quasi-governmental entities. In the United Kingdom, the proposition that a company can be held liable for violations of human rights has yet to be tested. Indeed, the UK Human Rights Act is limited to “public authorities”—this may include privately owned entities performing a public function, but does not extend to purely private actions of corporations.

However, in the United States, lawyers have sought to establish such liability for corporate defendants through the bringing of test cases under the Alien Tort Claims Act (ATCA) [see Box: Legal accountability for companies in US courts]. The ATCA case of *Doe v Unocal* set a precedent whereby it is necessary to show that the corporate defendant directly violated fundamental human rights or aided and abetted the host state in such a violation, including “turning a blind eye” to state violations from which the corporation profited.

Notwithstanding these developments, the prospects for human rights-based approaches to corporate liability remain restricted. International business will not readily accept an analogy between private corporations and the state in terms of human rights responsibilities. The legal issues raised by such claims still need to be properly developed, and it is not clear that using human rights arguments is necessarily better than focusing on regulation and liability under established heads of law. Equally important, while there is a strong basis in moral and legal thought to make private actors accountable for violations of human rights, corporations should not become scapegoats for failures of governance on the part of host country governments. As stressed in the opening paragraph of the UN Human Rights Norms for Business, it is governments that retain the ultimate responsibility for human rights. ●

CHALLENGES TO COMPANIES IN US COURTS

In the United States, civil cases accusing companies of involvement in human rights abuses have been brought under the Alien Tort Claims Act (ATCA), as well as other statutory and common law provisions.

In *Doe v Unocal*, settled in December 2004, plaintiffs alleged that Unocal was aware of and supported slave labor, murder, rape and forced relocation of villagers by the Burmese military, in connection with Unocal's pipeline project in the region. In addition to the ATCA, these claims were brought under the Torture Victims Protection Act, the Racketeer Influenced and Corrupt Organizations Act (RICO), the California [State] Business Codes and California state tort law. After years of setbacks in the California courts, Unocal agreed to compensate the plaintiffs and provide funds to improve living conditions, health care and education in the pipeline region.

Other prominent ATCA cases are still pending in US district courts. *Presbyterian Church of Sudan v Talisman Energy Inc.* sits before a New York judge, after Talisman's two motions to dismiss the case were denied. Talisman is alleged to have been complicit in the Sudanese military's genocidal assault, forced displacement and enslavement of non-Muslim African Sudanese from 1997 to 2003.

Oil companies ExxonMobil, Chevron and Occidental Petroleum have all been the subjects of ongoing ATCA suits. Eleven Indonesian citizens brought suit in June 2001 alleging ExxonMobil hired the Indonesian national military, who regularly committed murder, rape and torture, to provide security for ExxonMobil's gas project in Aceh. In *Bowoto v Chevron Texaco*, Nigerian citizens sued the oil company, under the ATCA, for its alleged commission of human rights abuses in Nigeria. Chevron's motion for judgment in its favor was denied by the court in March 2004. Colombian citizens sued Occidental Petroleum for the company's alleged involvement with the Colombian military's raiding and bombing of their town, killing family members. In June 2005, the court in *Mujica v Occidental Petroleum* denied the company's motion to dismiss the case.

Aside from ATCA, plaintiffs alleging human rights violations are using other US laws to bring corporate defendants to court. In a 2005 suit filed against retail giant Wal-Mart, plaintiffs from six countries brought breach of contract claims based on Wal-Mart's internal code of conduct, which provided for fair labor practices by suppliers. In three other cases filed against factory owners in Saipan and US retailers, NGOs and garment workers alleged misleading advertising, by labeling goods "sweatshop free", as well as violations of ATCA, RICO and the Fair Labor Standards Act. The defendants settled for \$20 million and agreements to monitor conditions and implement and enforce a code of conduct on suppliers.

As of this writing, members of the US business community are actively lobbying the US Congress to pass new legislation reforming the ATCA, seeking to limit the scope of human rights cases against companies.



FINAL WORD: A ROLE FOR ACTIVISTS



Foreign Investment and the Human Rights Link

For the last ten years, human rights activists have had to adjust to a fundamental change in the way the world does business. A new system of economic regulation has emerged to regulate the dramatic increase in the international flow of goods, services and capital. Particularly controversial was the creation, in 1995, of the World Trade Organization (WTO). Activists have charged the institution with everything from facilitating worker exploitation to turtle killing, often calling for its dissolution or for inclusion of labor and environmental standards.¹ Despite the best efforts of activists, the WTO and its new rule-bound regulatory system did not collapse, and attempts to include basic workers' rights and environmental protections in the WTO regulatory framework failed.

But the WTO and its discontents have, perhaps, overshadowed another hugely powerful economic phenomenon: increased flows of foreign investment into developing countries.² From a human rights perspective, the effects on human rights from foreign investment are viewed, to use a boxing analogy, from two corners of the ring. In one corner stand those who believe that investment by multinationals in host countries leads to a decrease in human and labor rights protections. This is because, so the reasoning goes, multinationals are attracted to low-wage labor and stable political environments. In order to ensure stability and low wages, a deal is struck with elites in the host country to keep down any resulting political unrest and instability through state repression.

In the other corner stand those who believe the opposite: foreign investment is associated with higher levels of respect for human and labor rights. Proponents of this view argue that foreign investors seek out host countries that respect human rights, and that foreign investment is likely to create an upward pressure on human rights when it is located there.

This latter view was put forward in 1999 by Deborah Spar, a Harvard Business School professor, who, in an influential article, hypothesized that foreign investment could be a significant agent for improving respect for human rights, particularly in high-profile consumer product firms.³ In the wake of Spar's article, a number of scholars have attempted empirically to test the correlation between human rights and foreign investment. The results have often suggested a positive correlation between foreign investment and human rights, although some academics suggest a more ambiguous relationship.⁴

So, given that there is evidence suggesting that foreign investment quite possibly results in stronger human rights enforcement, should human rights activists simply call it a day and hit the beach? Of course not. Spar acknowledges in her article that activism plays a role in spurring along the foreign investment/human rights link by exposing the human rights abuses of individual businesses. But more needs to be done by activists to ensure that this link is a real one: there should be a focus on three levels of advocacy to ensure that foreign investment indeed leads to improved respect for human rights.

Professor Kevin Kolben of Rutgers University Business School calls on activists to play a key role in ensuring that foreign investment leads to improved respect for human rights.

First, human rights activists may aid the foreign investment/human rights connection by shining what Spar terms the “spotlight” on individual companies. This is the traditional human rights methodology of “naming and shaming” and, particularly in the labor rights context, generating information about factory conditions and corporate practices for the consumer market on labor standards. Foreign investors are not any more likely to commit these abuses than domestic companies, and are probably less likely to do so. However, they are more likely to be vulnerable to a range of activist campaign strategies because their higher-profile brand names make them more susceptible to bad publicity. Targeting well-known foreign companies might also create “spillover” effects where respect for human rights would serve as examples domestically to other companies, encouraging their respect of human rights.

Second, campaigners should focus on domestic legislation regulating the barriers to foreign investment. Foreign investment remains highly restricted in a number of countries, but the barriers are rapidly falling. In a highly contested political context, campaigners might have leverage to place conditions on the liberalization of foreign investment. Some campaigners in India, for example, have considered campaigning for the government to restrict the entry of Wal-Mart unless it agrees to certain collective bargaining and freedom of association rights.

Third, human rights activists should focus on the international arena. While the first attempts to create a Multilateral Agreement on Investment under the auspices of the Organization for Economic Cooperation and Development failed, it is possible that another attempt to negotiate rules on investment might take place in the WTO. A core issue is the requirement, negotiated in NAFTA and in a number of stabilization agreements, that provides for compensation in case of a governmental decision that affects the ability of a company to profit from its investment in the manner originally intended. These provisions severely tie the hands of human rights and environmental campaigners to put pressure on governments to protect both indigenous lands and the environment. Campaigners must also focus on the bilateral and sectoral agreements that will be and have been negotiated, advocating for, at the very least, an exceptions clause that allows governments to take regulatory and legislative actions that it genuinely deems are in the interests of its citizens without having to pay large penalties to affected foreign investors.

Researchers will continue to argue over the foreign investment/human rights connection. But in the meantime, activists should leverage the inevitable increase in foreign investment flows to make improved respect for human rights a concrete reality. To do this, they must shine the spotlight on individual corporate action, advocate for proper domestic regulation of foreign investment, and ensure that international agreements and institutions properly give governments the freedom to protect their citizens’ human rights and natural resources. ●

Endnotes

“This is the President of the World Bank calling . . .”

- ¹ Demetri Sevastopulo, “World Bank Arm [IFC] may add Human Rights to its Criteria”, *Financial Times*, November 3, 2003.
- ² [Editor’s note] At the time of publication, the government of Chad announced that it was amending the Revenue Management Law, and the oil consortium had already begun making payments to the government into a bank account free of revenue and transparency controls. Both civil society groups and the World Bank are expressing alarm at this development. It is unclear what the World Bank will do in light of this possibility. It has threatened to withdraw from the project completely and, on the other hand has sought to remedy the situation through cooperation with the government of Chad. The failure or success of this project will certainly be determined at least in part by Chad’s actions to reject the revenue management plan set up through the World Bank, and how the Bank reacts to such a move.
- ³ [Editor’s note] On September 7, 2005 Amnesty International published a report entitled *Contracting out of Human Rights: the Chad-Cameroon Pipeline Project*, in which it calls attention to the risks to human rights posed by the agreements that the oil consortium signed with the governments of Chad and Cameroon. Among other things, the report describes how these agreements may make it very difficult for the governments to regulate the behavior of the companies for the lifetime of the project, which could be up to 70 years. The report can be found at: www.amnesty.org (AI Index POL 34/12/2005).

Addressing Human Rights Risks: Too Risky for the World Bank

- ¹ IFC Annual Report, 2004. <http://www1.ifc.org/ar2004/aboutBfacts.cfm>.
- ² The proposed policies do recognize core labor standards and reference the ILO.
- ³ See F&C Asset Management and KPMG Report, “Banking on Human Rights”, September 2004.
- ⁴ *Extracting Sustainable Advantage? A Review of how Sustainability Issues have been Dealt with in Recent IFC & MIGA Extractive Industries Projects. Final Report*, Compliance Advisor Ombudsman, World Bank: Washington DC, April 2003, at p 36.

Export Credit Agencies: Not-so-Innocent Bystanders in Environmental and Human Rights Abuse

- ¹ For more information on Sakhalin II: <http://www.sakhalin.environment.ru/en/> and <http://www.pacificenvironment.org/russia/sakhalin.htm>.
- ² For more information, a case study prepared by the Brazilian NGO network FASE and the Finnish NGO Campaign to Reform the Export Credit Agencies can be found at <http://www.vientiluotto.net>.
- ³ Transparency International, “OECD Agrees to Clamp Down on Bribery in Export Credit Transactions”, Berlin, December 6, 2000.
- ⁴ See, for example, the 2000 Jakarta Declaration and other useful information at <http://www.eca-watch.org>.
- ⁵ World Bank, “Global Development Finance, Harnessing Cyclical Gains for Development”, Washington DC, 2004, p.133.

Investment Protection Treaties and Human Rights

- ¹ The phrase comes from a tribunal’s ruling in *Azurix v Argentine Republic*, Decision on Jurisdiction, ICSID Case No. 01/12, December 8, 2003, at para 56. Note that some treaties restrict claims to alleged violations of the treaty rights, while others encompass any investment dispute, which has given rise to a debate as to whether this also gives investors an international dispute channel for alleged breach of other contracts or undertakings (apart from the investment treaty) with the host government.

- ² Luke Eric Peterson, “Research Note: Emerging Bilateral Investment Treaty Arbitration and Sustainable Development”, August 2003, available online at: http://www.iisd.org/pdf/2003/trade_bits_disputes.pdf.
- ³ Howard Mann, *Private Rights, Public Problem: A Guide to NAFTA's Controversial Chapter on Investor Rights*, IISD, 2001, available at: http://www.iisd.org/pdf/trade_citizensguide.pdf.
- ⁴ See Luke Eric Peterson and Kevin R. Gray, “International Human Rights in Bilateral Investment Treaties and Investment Treaty Arbitration”, a research paper prepared by the International Institute for Sustainable Development (IISD) for the Swiss Department of Foreign Affairs, April 2003, available at: http://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf.
- ⁵ See a listing of these cases at: <http://www.worldbank.org/icsid/cases/pending.htm>.
- ⁶ *Compania de Aguas Del Aconquija, S.A. & Compagnie General des Eaux v Argentine Republic*, ICSID ARB/97/3, Final Award, at para 32. See also *Azurix v Argentine Republic* and *Aguas Del Tunari v Bolivia*, both of which have been described in Luke Eric Peterson, “Research Note: Emerging Bilateral Investment Treaty Arbitration and Sustainable Development”, August 2003, available online at: http://www.iisd.org/pdf/2003/trade_bits_disputes.pdf.
- ⁷ See Committee on Economic, Social and Cultural Rights, the Right to Water (arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), General Comment No. 15 (2002), January 20, 2003; This General Comment determined that a right to water is implicit in articles 11 and 12 of the International Covenant on Economic Social and Cultural Rights and explicit in article 14(2) of the Convention on the Elimination of Discrimination Against Women and article 24(2) of the Convention on the Rights of the Child.
- ⁸ *Técnicas Medioambientales Tecmed, S.A. v United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award of May 29, 2003, at para. 175.
- ⁹ *Ibid.*, at para. 177.
- ¹⁰ Peterson and Gray, “International Human Rights in Bilateral Investment Treaties and Investment Treaty Arbitration”, pp 10-11.
- ¹¹ A notable example of a human rights jurist who also practices as an investment treaty arbitrator is Judge Thomas Burgenthal, a former President of the Inter-American Court of Human Rights, and a current member of the International Court of Justice.
- ¹² See, for example, the IISD’s electronic news service on foreign investment law: www.iisd.org/investment/invest-sd.
- ¹³ See, for example, a bid to intervene by several non-governmental organizations in an ongoing arbitration between Argentina and a foreign water company. See “ICSID Tribunal OKs Amicus Intervention in Water Case, but Hearings to Remain Closed”, *INVEST-SD: Investment Law and Policy News Bulletin*, May 27, 2005, at: http://www.iisd.org/pdf/2005/investment_investsd_may27_2005.pdf.

International Trade and Foreign Direct Investment — Two Sides of the Same Coin?

- ¹ The IMF and the World Bank define “foreign direct investment” as “the ownership by a foreign individual or entity of ten percent or more of the equity of an incorporated entity or a right to ten percent or more of the profits of an unincorporated entity”. Investment resulting in less than 10% is generally referred to as “portfolio investment”.
- ² www.worldbank.org/icsid/treaties/main.htm.
- ³ www.jordanecb.org/pdf/BIT_Factsheet.pdf.

[A Conversation on a Model Investment Agreement with Howard Mann](#)

- ¹ http://www.iisd.org/investment/model_agreement.asp.
- ² See, for example, http://ciel.org/Tae/ICSID_AmicusCuriae_1Jun05.html and <http://www.iisd.org/publications/pub.aspx?id=608>.

[Box 2: A UN Perspective on Human Rights, Trade and Investment](#)

- ¹ [http://www.unhcr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.9.En?Opendocument](http://www.unhcr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.9.En?Opendocument).

[The Cambodian Trade Agreement: A Human Rights Race to the Top?](#)

- ¹ US-Cambodia Bilateral Textile Agreement, January 20, 1999.
- ² Ibid.
- ³ Regina Abrami, “Worker Rights and Global Trade: The US-Cambodia Bilateral Trade Agreement”, Harvard Business School Case Study, August 2003.
- ⁴ Kevin Kolben, “Trade, Monitoring, and the ILO: Working to Improve Conditions in Cambodia’s Garment Factories”, *Yale Human Rights and Development Law Journal*, vol 7, 2004.
- ⁵ “International Labour Organization Better Factories Cambodia Eleventh Synthesis Report on the Working Conditions in Cambodia’s Garment Sector”, June 2005.
- ⁶ For example, Elizabeth Becker, “Low Cost and Sweatshop-Free: Cambodia’s Garment Makers Hold Off a Vast Chinese Challenge”, *New York Times*, May 12, 2005. See also “Gap Inc. Social Responsibility Report” 2003.
- ⁷ ILO, “The End of Quotas: Impact on Cambodia’s Export Garment Industry”, July 2005.
- ⁸ Report of the Office of the High Commissioner for Human Rights, “Human Rights and Trade”, 5th WTO Ministerial Conference, Cancun, Mexico, September 10-14, 2003.

[Foreign Investment and the Human Rights Link](#)

- ¹ This refers to the controversial decision, commonly known as the “Shrimp/Turtle Case”, by the WTO’s Dispute Settlement Body in which it held that a US law banning the importation of certain shrimp made without the use of turtle-excluder devices violated WTO rules.
- ² The term “foreign investment” is used to describe both foreign direct investment, which the IMF considers to be 10% or more of an ownership stake, as well as “portfolio investment” of less than 10%. The primary concern is to discern whether or not the investment is meant to be a lasting interest.
- ³ Deborah Spar, “Foreign Investment and Human Rights”, *Challenge*, vol. 42, no. 1, January–February 1999, pp 55–80.
- ⁴ For support of the foreign investment/human rights link, see, for example, David L. Richards et al., “Money with a Mean Streak? Foreign Economic Penetration and Government Respect for Human Rights in Developing Countries”, *International Studies Quarterly* vol. 45, 2001, pp 219–239; Mathias Busse, “Foreign Direct Investment and Fundamental Workers’ Rights”, *Journal of International Relations and Development*, vol. 5 no. 2, pp 143–155. For an argument calling into question the link, see Bjorn Letnes, “Foreign Direct Investment and Human Rights: An Ambiguous Relationship”, *Forum for Development Studies*, no. 1, 2002. Letnes argues there is little empirical support for Spar’s analysis that there is a consistent relationship between FDI and increased respect of political and civil rights, and that other variables must also be considered.

Glossary

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|--------|--|
| ATCA | Alien Tort Claims Act |
| BITs | Bilateral Investment Treaties |
| BLIHR | Business Leaders Initiative on Human Rights |
| BTC | Baku-Tbilisi-Ceyhan (pipeline project) |
| ECA | Export Credit Agency |
| EMP | Environmental Management Plan |
| ESIA | Environmental and Social Impact Assessment |
| FDI | Foreign Direct Investment |
| FTA | Free Trade Agreement |
| GATS | General Agreement on Trade in Services |
| GATT | General Agreement on Tariffs and Trade |
| GSP | Generalized System of Preferences |
| HGAs | Host Government Agreements |
| ICSID | International Centre for Settlement of Investment Disputes |
| IFC | International Finance Corporation |
| IAs | International Investment Agreements |
| ILO | International Labor Organization |
| LNG | Liquid Natural Gas |
| MAI | Multilateral Agreement on Investment |
| NAFTA | North American Free Trade Agreement |
| NGO | Non-Governmental Organization |
| OECD | Organization for Economic Cooperation and Development |
| RICO | Racketeer Influenced and Corrupt Organizations Act |
| TRIMs | Trade-Related Investment Measures |
| UDHR | Universal Declaration of Human Rights |
| UNCTAD | United Nations Commission on Trade and Development |
| WTO | World Trade Organization |

Amnesty International's evolving interest in the field of trade, investment and human rights reflects a wider critical focus on the human rights implications of international trade and investment agreements. A broad spectrum of bodies ranging from the UN High Commissioner on Human Rights to research institutes, think tanks and pressure groups have questioned how international trade and investment rules are framed. Of particular concern is the lack of reference to international human rights law, as well as the lack of transparency of application of these rules and of mechanisms for resolving disputes.

This collection of articles explores some of the connections between trade, investment and human rights, examines the role of financial institutions in shaping standards, considers the potential for integrating human rights into trade and investment agreements, and reflects on the opportunity to advance the process of developing universally recognized standards for business.

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