Statement of the Special Representative of the UN Secretary-General on the issue of human rights and transnational corporation and other business enterprises to the Department of Trade and Industry, South Africa

On its review of Bilateral Investment Treaties (a.k.a. Reciprocal Promotion and Protection of Investment Agreements) entered into by the Republic of South Africa since 1994 to date.

September 4, 2009

In 2005, the growing recognition that the activities of companies and the rules governing global business may have significant effects on human rights led the United Nations to request the Secretary-General to appoint a Special Representative for business and human rights – a position in which I have served ever since.

The same types of governance gaps and failures that produced the current economic crisis also constitute the permissive environment for corporate wrongdoing in relation to human rights. What is needed, therefore, are government policies that induce greater corporate responsibility and corporate strategies that reflect the now inescapable fact that their own long-term prospects are tightly coupled with the well-being of society as a whole.

In short, the fact of the worst worldwide economic downturn in a century makes this a more, not less, appropriate time for governments to drive the business and human rights agenda more deeply into policy domains that directly shape business practices. The important review the Department of Trade and Industry is currently undergoing regarding

South Africa's Bilateral Investment Treaties represents an opportunity to do just that. For this reason I submit to you brief comments on the occasion of your Review.

The UN Human Rights Council has welcomed the policy framework for better managing business and human rights challenges I proposed in 2008. The framework is based on three core principles. The first is the state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication. The second principle is the corporate responsibility to respect human rights, meaning, in essence, to not infringe on the rights of others. In addition to compliance with applicable laws, companies are subject to what is sometimes called a social license to operate—or prevailing social expectations, which typically evolve more rapidly than the law. The baseline social expectation for companies is that they respect human rights, as is widely recognized by firms and business groups in their voluntary initiatives. The third principle is the need for more effective access to remedies for victims of human rights abuses involving companies. Even where institutions operate optimally, disputes over adverse human rights impacts of companies are likely to occur, and victims need redress.

The first principle in this framework, the state duty to protect, is particularly relevant to your Review. It is often stressed that governments are the most appropriate entities to make the difficult balancing decisions required to reconcile different societal needs. But in the area of business and human rights, the question is whether governments, on the whole, have got the balance right. Most governments take a relatively narrow approach to managing business and human rights. It is often segregated within its own conceptual, and typically weak, institutional box.

Often human rights concerns are kept apart from, or heavily discounted in, other policy domains that shape business practices, including commercial policy, investment policy, securities regulation, and corporate governance. Inadequate domestic policy coherence is replicated internationally.

Therefore, the human rights policies of states in relation to business need to be pushed beyond their narrow institutional confines, and Governments should consider human rights impacts in a range of broader policy areas, including when they sign trade agreements and investment treaties.

This, of course, relates directly to the subject of your own review. Recent experience suggests that some investment treaty guarantees and contract provisions may unduly constrain the host Government's ability to achieve its legitimate policy objectives, including its international human rights obligations. That is because under threat of taking the host State to binding international arbitration, a foreign investor may be able to insulate its business venture from new laws and regulations, or seek compensation from the Government for the cost of compliance. At the same time, the right to regulate must of course be reconciled with the investors' need for predictability, legal safeguards, and minimum requirements regarding the actions of the State and compensation in the event of expropriation.

In May 2009 I published the final report of a study I undertook jointly with the International Finance Corporation (the private sector lending arm of the World Bank Group), which took an empirical look at some aspects of private investment agreements between investors and host states related to this discussion. While the study confirms the established and widespread use of stabilization clauses as a risk-management device, it

also found that beyond the OCED area the text of stabilization provisions in those agreements may unduly constrain a state's policy space to implement bona fide policies and regulations in the public interest and therefore its ability to fulfil its international human rights legal obligations. I attach that report here, should you find it of interest.

Providing effective investor protection is necessary for maintaining FDI. But imbalances between the scope of markets and business organizations, on the one hand, and the capacity of societies to protect and promote the core values of social community, on the other, can only be corrected by embedding global markets with shared values and institutional practices. Ensuring a balance of interests between investors and receiving States will benefit both.

Additionally, I have expressed concern that when a case is brought under a BIT arbitration procedure the public may know little or nothing about it. This is at variance with precepts of transparency and good governance. While confidential business information must be protected, under some arbitration rules not even the existence of a case against a country is known to its public, let alone its substance. This impedes more responsible contracting by companies and Governments, and contributes to inconsistent rulings by arbitrators, thereby undermining the system's predictability and legitimacy.

I am continuing to explore how better to achieve both investor protection and the preservation of policy space for states to fulfil their international human rights obligations, as well as how to ensure that transparency rules for arbitration procedures are consistent with what have been widely accepted as standards of good governance.

I am therefore greatly interested by your own review of your bilateral investment agreements and I will follow your work with close attention.