



## STUDY

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# ENSURING THE PRIMACY OF HUMAN RIGHTS IN TRADE AND INVESTMENT POLICIES:

Model clauses for a UN Treaty  
on transnational corporations, other  
businesses and human rights



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# CONTENTS

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<b>FOREWORD</b>	<b>4</b>
<b>EXECUTIVE SUMMARY</b>	<b>5</b>
<b>I. INTRODUCTION</b>	<b>7</b>
<b>II. AREAS OF CONFLICT BETWEEN TRADE AND INVESTMENT POLICIES AND HUMAN RIGHTS</b>	<b>9</b>
1. Restrictions of policy space: The impact of trade and investment agreements on human rights obligations	9
a) Actual impact of trade and investment agreements	9
b) The “Chilling effect”	11
c) Structural imbalances and effects of market opening	12
2. Conflicting obligations between human rights and investment and trade agreements	13
a) The lack of a clear hierarchy	13
b) The limits of interpretation	15
c) The lack of exception clauses addressing human rights	15
3. Dispute settlement in trade and investment agreements without a human rights perspective	16
4. The potential impact of trade and investment incentives	18
<b>III. REFORM OPTIONS WITHIN THE TRADE AND INVESTMENT REGIME</b>	<b>20</b>
1. The ineffectiveness of so-called “right to regulate” clauses	20
2. Limitation and clarification of the contents of trade and investment agreements	21
3. Broadening general exception clauses	21
4. Reform of investment dispute settlement	22
5. Limits of reforming investment agreements	22
<b>IV. MODEL CLAUSES ON INVESTMENT AND TRADE POLICIES IN A TREATY ON BUSINESSES AND HUMAN RIGHTS</b>	<b>24</b>
1. Regulating the relationship between human rights and trade and investment agreements	25
a) Supremacy clause	25
b) Ensuring the observance of human rights in trade and investment dispute settlement proceedings	27
c) Incorporation of human rights obligations in future investment and trade agreements	27
2. Human Rights Impact Assessments (HRIA)	28
3. Human rights obligations for export credit and investment guarantee schemes	29
<b>V. CONCLUSION</b>	<b>30</b>

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# FOREWORD

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The international trade and investment regime is under the spotlight. The impacts of several high-profile agreements have been hotly debated in the public realm, in some cases their future even placed into question. And while the number of bilateral investment treaties and free trade agreements has grown over the past decades, their impacts on human rights have not been adequately addressed. The UN Guiding Principles on Business & Human Rights, adopted by the UN Human Rights Council in 2011, deal explicitly with international trade and investment agreements and make clear that States are expected to consistently fulfil their obligation to protect human rights in this context, cautioning States to reserve and maintain adequate policy and regulatory ability to do so.

Further, in 2014 the Human Rights Council adopted resolution 26/9 establishing an open-ended intergovernmental working group with a mandate to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. How this treaty might contribute to addressing potential conflicts between trade and investment policies and human rights and ensure the primacy of the latter, was among the key issues discussed during the first and second sessions of the intergovernmental working group in 2015 and 2016.

This study by Prof. Dr. Markus Krajewski was commissioned by CIDSE in order to deepen the analysis and contribute to this debate. Krajewski first reviews potential areas of conflict between State obligations under current trade and investment agreements on the one hand, and obligations under international human rights law on the other, illustrated by actual examples. The study then looks at the different options under consideration for instruments and mechanisms within the trade and investment regime to avoid limitations of States' regulatory spaces to respect, protect, and fulfil human rights.

Krajewski observes that the non-binding Guiding Principles have so far not moved States to fundamentally change their practices concerning trade and investment agreements, concluding that this approach is not sufficient. He therefore goes on to explore the potential of a future treaty to help overcome the limitations and gaps of reforms within the trade regime and contribute to ensuring the primacy of human rights law over trade and investment law, via provisions addressing three specific areas: first, regulating the relationship between human rights and trade and investment agreements; second, human rights impact assessments; and third, human rights obligations for export credit and investment guarantee schemes.

With this study, CIDSE seeks to present proposals for provisions that the treaty could contain, which can serve as a basis for wider discussion. As the third session of the intergovernmental working group in October 2017 will begin negotiations on the draft text for the treaty, the time is ripe to put forward possible concrete wording for its provisions. For CIDSE and its members, it is essential that the treaty not be developed in isolation, but rather in full context including its relation with trade and investment agreements, so that the protection of human rights is strengthened rather than limited therein.

As Markus Krajewski concludes, the international regime of trade and investment agreements is currently suffering from a significant legitimacy crisis, which should be considered as a window of opportunity for the introduction of new legal approaches to address the relationship between human rights and investment and trade policies.

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# EXECUTIVE SUMMARY

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## Introduction

While it is generally agreed that human rights and obligations of trade and investment agreements do not contradict each other per se, many commentators and political observers agree that trade and investment agreements may lead to policies and governmental measures with a negative impact on the full enjoyment of human rights and the State's ability to respect, protect and fulfil these rights.

The United Nations (UN) Guiding Principles on Business and Human Rights recognise the potential tension between trade and investment policies and human rights obligations. While the Guiding Principles became the main reference for the business and human rights discourse, in 2014 the UN Human Rights Council adopted resolution 26/9 by which it decided "to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises".

While the actual negotiations on the legally binding instrument are to begin in 2017, the Working Group held two informative sessions in 2015 and 2016 on the issues most relevant for the structure and scope of the treaty. During the second session of the Open-ended intergovernmental working group, a number of speakers and discussants raised the question of how a treaty on businesses and human rights might address the potential conflict between trade and investment policies and human rights, and called for treaty elements which would ensure the primacy of human rights.

The present study seeks to contribute to this debate in the context of the treaty process. Part II of this study recalls the main areas of potential conflict between trade and investment policies, in particular trade and investment agreements. Part III explains how some of these conflicts could be addressed in reformed trade and investment agreements. As such reforms would not be sufficient, part IV of the study develops and explains model clauses addressing investment and trade policies which could be included in a treaty on businesses and human rights.

## The value of a treaty

The UN Guiding Principles call upon States to negotiate and conclude trade and investment agreements which do not impose undue restrictions on national policy space needed to respect, protect and fulfil human rights. However, the Guiding Principles are non-binding and so far, States have not fundamentally changed their treaty practices. For example, the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU does not contain any provisions which could be seen as an implementation of the UN Guiding Principles. Instead, most of CETA's trade rules follow the classic model. This seems to suggest that the voluntary approach of the UN Guiding Principles is not sufficient to ensure that States negotiate trade and investment agreements which ensure the primacy of human rights. Consequently, it would be beneficial from a human rights perspective if a treaty on businesses and human rights would establish binding obligations for States when developing new trade and investment agreements, and if it would structure the relationship between human rights and the trade and investment regime to ensure the former's primacy.

## Implications for investment

It is unlikely that rebalancing and restructuring the relationship between investment and trade rules on the one side, and human rights on the other, in a treaty on businesses and human rights will have negative effects on the trade and investment performance of the parties of this treaty. A number of empirical studies could not find a significant impact of investment agreements on foreign direct investment. Hence, agreements with lesser investment protection will not necessarily lead to less foreign direct investment. More importantly, establishing a supremacy of human rights does not indicate an investor-hostile regulatory environment. To the contrary, clarifying the relationship between trade and investment could add to a stable legal environment.

## Model clauses for a treaty

*To ensure the primacy of human rights, the treaty could contain provisions addressing three specific areas.*

- Firstly, treaty provisions could regulate the relationship between trade and investment agreements and human rights through a specific supremacy clause or through requirements ensuring the observance of human rights in trade and investment disputes and through the incorporation of human rights obligations and clauses in future trade and investment agreements.*
- Secondly, the treaty could require the States to conduct human rights impact assessments before, during and at the end of the negotiation of a new trade and investment treaty and periodically review the impact of such a treaty on human rights.*
- Thirdly, the treaty on businesses and human rights could specify obligations of export credit and investment guarantee agencies.*

## Window of opportunity for new legal approaches

The international regime of trade and investment agreements is currently suffering from a significant legitimacy crisis, which should be considered as a window of opportunity for the introduction of new legal approaches to address the relationship between human rights and investment and trade policies. Reforming the investment and trade regime and establishing binding norms in a treaty on businesses and human rights are not mutually exclusive. Despite the current crisis of the trade and investment regime, it is safe to assume that these agreements will continue to exist and to exercise considerable influence on States. The treaty on businesses and human rights could therefore be used as an instrument to establish binding obligations on States to reform trade and investment agreements, to mitigate the potential negative impact of trade and investment agreements on the full enjoyment of human rights and to regulate the relationship between the two regimes in case of a conflict.

I.

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# INTRODUCTION

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The relationship between international trade and investment law on the one side and human rights on the other has been the subject of academic and political interest for several years.<sup>1</sup> While it is generally agreed that human rights and obligations of trade and investment agreements do not contradict each other per se, many commentators and political observers agree that trade and investment agreements may lead to policies and governmental measures with a negative impact on the full enjoyment of human rights and the State's ability to respect, protect and fulfil these rights.<sup>2</sup>

The United Nations (UN) Guiding Principles on Business and Human Rights recognise the potential tension between trade and investment policies and human rights obligations. In particular, Guiding Principle 9 states: "States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts." The respective commentary clarifies that General Principle 9 does not only apply to investment treaties and contracts, but also to free trade agreements. The commentary also explains: "(...) the terms of international investment agreements may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so. Therefore, States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection."<sup>3</sup>

Furthermore, Guiding Principle 4 is also relevant in the context of investment and trade policies as it holds "States should take additional steps to protect against human rights abuses by business enterprises (...) that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence." The commentary to General Principle 4 adds: "Where these agencies do not explicitly consider the actual and potential adverse impacts on human rights of beneficiary enterprises, they put themselves at risk – in reputational, financial, political and potentially legal terms – for supporting any such harm, and they may add to the human rights challenges faced by the recipient State."<sup>4</sup>

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<sup>1</sup> See P.M. Dupuy, F. Francioni, and E.U. Petersmann (eds), *Human rights in international investment law and arbitration*, 2009 and T. Cottier, J. Pauwelyn and E. Bürgi (eds), *Human rights and international trade*, 2005.

<sup>2</sup> P.M. Dupuy/J.E. Vinuales, *Human Rights and Investment Disciplines: Integration in Progress*, in: M. Bungenberg et al. (eds), *International Investment Law*, 2015, p. 1751.

<sup>3</sup> OHCHR, *Guiding Principles on Business and Human Rights, Implementing the United Nations "Protect, Respect and Remedy" Framework*, 2011, p. 11.

<sup>4</sup> *Ibid.*, p. 7.

While the Guiding Principles became the main reference for the business and human rights discourse,<sup>5</sup> in 2014 the Human Rights Council adopted resolution 26/9 by which it decided “to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises”.<sup>6</sup> The Human Rights Council established the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights on that basis and entrusted it with the task to pursue the mandate of the resolution. While the actual negotiations on the legally binding instrument (hereafter referred to as the treaty on businesses and human rights) are to begin in 2017, the Working Group held two informative sessions in 2015 and 2016 on the issues most relevant for the structure and scope of the treaty. During the second session of the Open-ended intergovernmental working group, a number of speakers and discussants raised the question of how a treaty on businesses and human rights might address the potential conflict between trade and investment policies and human rights, and called for treaty elements which would ensure the primacy of human rights.<sup>7</sup>

The present study seeks to contribute to this debate in the context of the treaty process. It aims at deepening the analysis and further developing the relevant arguments. Furthermore, the study suggests possible treaty elements which could address the relevant issues. Part II of this study recalls the main areas of potential conflict between trade and investment policies and human rights, in particular trade and investment agreements. Part III explains how some of these conflicts could be addressed in reformed trade and investment agreements. As such reforms would not be sufficient, part IV of the study develops and explains model clauses addressing investment and trade policies which could be included in a treaty on businesses and human rights.

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<sup>5</sup> A. Sanders, *The Impact of the ‘Ruggie Framework’ and the ‘United Nations Guiding Principles on Business and Human Rights’ on Transnational Human Rights Litigation*, in: J. Martin/K. Bravo (eds), *The Business and Human Rights Landscape*, 2015, p. 289. On the relationship between the UN Guiding Principles and the proposal of a binding legal instrument see D. Bilchitz, *The Necessity for a Business and Human Rights Treaty*, 2016, pp. 203-227.

<sup>6</sup> Human Rights Council, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, A/HRC/RES/26/9, 14 July 2014.

<sup>7</sup> Draft report on the second session of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (version of 28 October 2016), pp. 7-10.

## II.

# AREAS OF CONFLICT BETWEEN TRADE AND INVESTMENT POLICIES AND HUMAN RIGHTS

### 1. RESTRICTIONS OF POLICY SPACE: THE IMPACT OF TRADE AND INVESTMENT AGREEMENTS ON HUMAN RIGHTS OBLIGATIONS

#### a. Actual impact of trade and investment agreements

Free trade and investment agreements contain obligations of States concerning trade restrictions and the treatment of foreign investors. Trade agreements prohibit tariffs above an agreed level, quantitative restrictions for goods such as import bans or quotas and discriminations based on the origin of a good or service. They may also oblige countries to open their markets for foreign services and service providers, and to extend and enforce intellectual property rights. Furthermore, most modern trade agreements also contain obligations for government procurement and require the opening of public procurement markets.

Investment agreements or investment chapters in free trade agreements require States to treat investors in a fair and equitable manner and to pay compensation for direct and indirect expropriation. In addition, they prohibit discriminatory measures distinguishing between foreign investors and local business entities. While the scope and exact contents of these provisions may differ, it is safe to claim that trade and investment agreements generally aim at limiting States' measures with negative impacts on commercial activities.

Trade agreements usually reduce tariffs and therefore also lower the potential revenue basis of the importing State, which may have negative effects on the government budget and therefore reduce the State's resources necessary to fulfil its human rights obligations. In addition, the obligations of trade and investment agreements lead to constraints on the regulatory space of the importing State (in the case of trade obligations) or the host State (in the case of investment protection requirements). This regulatory space may, however, be necessary to fulfil human rights obligations of the respective State.

While trade and investment agreements do not prohibit measures and policies aimed at protecting human rights per se, they may limit the options of a State to fulfil its human rights obligations. In the context of the debate on the relationship between trade and investment and human rights the host States' freedom to regulate has become "a proxy for human rights".<sup>8</sup> This has also been recognised by various human rights experts and institutions.<sup>9</sup> Furthermore, if investment tribunals award large sums of compensation to investors, this may constrain public budgets and limit funds available for the fulfilment of human rights

<sup>8</sup> M. Jacob, *Faith Betrayed: International Investment Law and Human Rights*, in: R. Hofmann/C. Tams (eds), *International Investment Law and Its Others*, 2012, p. 39.

<sup>9</sup> See recently Committee on Economic, Social and Cultural Rights, Concluding observations on the sixth periodic report of Canada, E/C.12/CAN/CO/6, 6 March 2016, para. 15-16.

## EFFECTS OF INVESTMENT ARBITRATION AWARDS

### CHEVRON V. ECUADOR

The much-debated and highly controversial *Chevron v. Ecuador* dispute concerns a series of arbitration cases that were filed by Chevron to avoid paying damages awarded by Ecuadorian courts.<sup>10</sup> From 1964 until 1992, Texaco (acquired by Chevron in 2001) and its subsidiary Texaco Petroleum (TexPet) engaged in oil extraction in the Lago Agrio region of the Ecuadorian Amazon. After Texaco withdrew from its extraction activities in the area, a series of class action suits by Ecuadorian individuals was filed before United States (US) courts and Ecuadorian courts. The claimants alleged that Texaco was responsible for severe environmental contamination of the Amazon rain forest and rivers in Ecuador which led to increased rates of cancer as well as other serious health problems of the indigenous people residing in the region. The claimants were finally awarded \$18 billion damages by an Ecuadorian court in 2011. In 2013, Ecuador's Superior Court of Justice upheld the ruling against Chevron, but reduced the damages to \$9.5 billion.

In 2006 and 2009, Chevron commenced proceedings before the Permanent Court of Arbitration (PCA) and claimed that the Ecuadorian Government breached a number of obligations under the Bilateral Investment Treaty (BIT) concluded between the United States and Ecuador. It claimed that Ecuador disregarded agreements entered into by the State and TexPet in 1995 and 1997, which granted full and complete release from any liability to the company, and that Ecuador unduly influenced the trial against Chevron. Therefore, Chevron alleged a violation of the obligation to afford fair and equitable treatment, full protection and security, an effective means of enforcing rights, non-arbitrary treatment, non-discriminatory treatment and national most favorable treatment. It requested an order by the PCA requiring Ecuador to indemnify, protect and defend the company in connection with the Lago Agrio litigation including payment for all damages that may be awarded against Chevron.<sup>11</sup>

In February 2011, the PCA arbitration panel issued interim measures in favour of Chevron and obliged the State to take all measures at its disposal to suspend enforcement of any judgment in the Lago Agrio Case.<sup>12</sup> In August 2011, the company was awarded \$96 million in compensation.<sup>13</sup> Ecuador's attempts to challenge the decision before US courts remained unsuccessful.

In February 2012, the Ecuadorian claimants in the Lago Agrio case filed a petition for precautionary measures with the Inter-American Commission on Human Rights. They stated that the investor-state proceedings were threatening their enjoyment of their rights to life, physical integrity, health, as well as their rights to a fair trial, judicial protection and equal protection under the law. It was brought forward that any delay in the implementation of the judgment of the Ecuadorian courts would be a violation of Ecuador's obligation under the Inter-American Convention on Human Rights and the San Salvador Protocol. The claimants requested the Inter-American Commission to order measures assuring that Ecuador would not interfere with the judgment of the Ecuadorian courts in violation of the claimants' human rights. The petition was withdrawn shortly thereafter as it became apparent that the Ecuadorian courts would not be influenced by the decision in the arbitration proceedings.<sup>14</sup>

This case shows that investment agreements and arbitral awards enforcing these agreements through compensations may challenge State policies to protect human rights. Arguably, the decision of the Ecuadorian courts to award damages against Chevron was based on the duty to protect the human right to life and health. Obviously, the PCA arbitral panel did not accept that human rights should trump over obligations of an investment agreement.

<sup>10</sup> Report of the Special Rapporteur on the rights of indigenous peoples, A/HRC/33/42, 11.08.2016, <https://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador>, 18.02.2014 (23.12.2016).

<sup>11</sup> *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, Claimant's Notice of Arbitration (2009), [http://www.italaw.com/sites/default/files/case-documents/ita0155\\_0.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0155_0.pdf) (23.12.2016).

<sup>12</sup> Permanent Court of Arbitration, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, Order of Interim Measures dated 9 February 2011, <http://www.italaw.com/sites/default/files/case-documents/ita0167.pdf> (23.12.2016).

<sup>13</sup> Texaco/Chevron lawsuits (re Ecuador), <https://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador> (02.02.2017).

<sup>14</sup> Jarrod Hepburn, Ecuadorian plaintiffs withdraw request for protective measures, after sparring with Chevron over need for human rights authorities to intervene, Investment Arbitration Reporter Vol 5 No 5 March 14, 2012.

## b. The “Chilling effect”

Trade and investment agreements may even have an impact on human rights induced policies if it is unclear whether a government measure or policy actually violates a trade or investment agreement. It seems sometimes sufficient for a foreign investor to simply claim that such a measure might be a violation for governments to withdraw or reconsider the respective measure. This is often termed as the “chilling effect” of trade and investment agreements.<sup>15</sup> This effect is especially powerful, because many investment agreements do not contain specific obligations, but rather broad and unclear principles (e. g. “fair and equitable treatment” or “measure tantamount to an expropriation”) which need to be interpreted by the respective dispute settlement tribunals. An illustration of this effect are the rules on plain packaging for tobacco products. New Zealand had planned to implement strict plain packaging rules for health reasons, but was reluctant to do so after Philip Morris attacked similar rules in Australia on the basis of an investment protection agreement and waited for the outcome of this claim.<sup>16</sup>

In this context, it is important to note that the “chilling effect” exists regardless of whether States win Investor-State Dispute

Settlement (ISDS) cases or not. Even if a State wins a case at the end or has good chances of winning, the mere fact that their measures can be challenged may have a limiting effect on their regulatory freedom. The “chilling effect” is not mitigated by the fact that States do not lose in the majority of ISDS cases.

It should be noted that from a human rights perspective, the regulatory space of a State is necessary to meet its obligations to respect, protect and fulfil human rights. It is generally understood that a State’s human rights obligation require the State not only to refrain from certain actions (obligation to respect), but to protect individuals from activities of others, including business entities, which might have a negative impact on the full enjoyment of human rights.<sup>17</sup> This includes *inter alia* regulating the provision of public services including water and sanitation services if the sectors have been privatized<sup>18</sup> or the protection of the rights of indigenous communities vis-à-vis extractive industries. It should be stressed that human rights law requires States to adopt the respective regulatory measures. It is hence more appropriate to speak about a human rights obligation or “duty to regulate” instead of referring to a “right to regulate”, a term which can be found in many trade and investment agreements.<sup>19</sup>

<sup>15</sup> C. Côté, A chilling effect? The impact of international investment agreements on national regulatory autonomy in the areas of health, safety and the environment. PhD thesis, The London School of Economics and Political Science (LSE). 2014; J G. Brown, International Investment Agreements: Regulatory Chill in the Face of Litigious Heat?, (2013) *Western Journal of Legal Studies* 3. See also UNGA, Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples on the impact of international investment and free trade on the human rights of indigenous peoples, A/70/301, 7 August 2015, para 46. For example, in Guatemala internal government documents obtained through the country’s Freedom of Information Act show how the risk of one of these cases weighed heavily on one State’s decision not to challenge a controversial gold mine, despite protests from its citizens and a recommendation from the Inter-American Commission on Human Rights that it be closed down, see Lorna Gold a. o., The impact on and opportunities in relation to The Transatlantic, Trade and Investment Partnership (TTIP) - Presentation to the Joint Committee on Jobs, Enterprise and Innovation, 26th January, 2016, p. 5, available at <https://www.trocaire.org/sites/trocaire/files/resources/policy/trocaire-attach-submission-to-jobs-committee-jan-2016.pdf>.

<sup>16</sup> McHaffie, New Zealand to implement plain packaging for tobacco. 2016, <http://www.ajpark.com/ip-central/news-articles/2016/02/new-zealand-to-implement-plain-packaging-for-tobacco/>.

<sup>17</sup> See F. Mégret, Nature of Obligations, in: Moeckli/Shah/Sivakumar (eds), *International Human Rights Law*, 2<sup>nd</sup> ed, 2014, p. 96 at 102-103.

<sup>18</sup> M. Krajewski, Privatisierung und Regulierung der Wasserversorgung als Gegenstand des Investitionsschutzrechts, in: D. Ehlers/H.-M. Wolfgang/J. Schröder (eds), *Rechtsfragen des internationalen Investitionsschutzes*, 2009, pp. 103-126.

<sup>19</sup> See GATS Preamble and Article 8.9 CETA. On the inadequacy of such a clause see below III.1.

### c. Structural imbalances and effects of market opening

The limiting effect of investment agreements on regulatory autonomy is reinforced through the structural imbalance created by these agreements. They generally only confer rights on foreign investors, but do not establish binding obligations on them concerning human rights, social and labour standards or environmental protection. As a consequence, governmental measures pursuing public policies are typically perceived as encroachments on subjective commercial rights and as such need to be justified. In this setting, the government is “defending” a public good, while the investor is claiming a “right”. From a human rights perspective, the government would be protecting a human right and the investor would need to claim a limitation of this right.

In addition to directly limiting the regulatory space of governments, trade agreements often have economic and social effects which may restrict the enjoyment of human rights. For example, opening markets for foreign foodstuffs may have negative impacts on local agricultural production and the livelihood of local small-scale farmers or small scale retailers.<sup>20</sup> In such a case, human rights law requires a State to protect poor and vulnerable groups. However, trade agreements prohibit the use of trade barriers such as tariffs or import restrictions or production subsidies to protect the poor against negative effects on the enjoyment of human rights. A well-documented example of these effects of trade agreements concerns

European Union (EU) exports of dairy products such as milk powder or poultry in Sub-Saharan Africa which have devastating effects on the livelihoods of local producers and on their right to food. Rising tariffs or implementing measures to protect local production which could serve as remedies are often prohibited by relevant trade rules.<sup>21</sup>

Finally, most modern trade agreements also contain obligations concerning the protection of intellectual property rights. These obligations often go beyond standards agreed in other international treaties and require States to extend the protection of intellectual property rights to activities which have hitherto not been protected. This may have negative impacts on the access to basic drugs and medicines, which in turn could amount to a violation of the human right to health.<sup>22</sup> For example, the EU’s insistence on test data exclusivity being protected as an intellectual property right in the EU-India Free Trade Agreement would have had a negative impact on the production of generics in India.<sup>23</sup> Chapters on the protection of intellectual property rights in trade agreements may also oblige countries to ratify and implement far-reaching agreements on intellectual property rights such as the International Convention for the protection of new varieties of plants of the International Union for the Protection of New Varieties of Plants (UPOV) which they may have abstained from in the past. This may have detrimental effects on the access of farmers to affordable seeds and therefore impede the enjoyment of their right to an adequate standard of living, including the right to food.<sup>24</sup>

<sup>20</sup> Misereor et al., Right to Food Impact Assessment of the EU-India Trade Agreement, 2011, p. 29, available at [http://www.ecofair-trade.org/sites/ecofair-trade.org/files/downloads/12/02/right\\_to\\_food\\_-\\_impact\\_assessment\\_of\\_the\\_eu-india\\_trade\\_agreement\\_web.pdf](http://www.ecofair-trade.org/sites/ecofair-trade.org/files/downloads/12/02/right_to_food_-_impact_assessment_of_the_eu-india_trade_agreement_web.pdf).

<sup>21</sup> See A. Paasch, Devastating Floods – Man Made, 2008, <http://www.fian.org/fileadmin/media/publications/Ghana-Devastating-Floods-Man-Made-2008.pdf> and Tobias Reichert & Johannes Leimbach, Billiges Milchpulver für die Welt - Das Auslaufen der EU-Milchquote und die Milcherzeugung und -exporte in Deutschland und der EU, 2014, <https://germanwatch.org/de/download/13255.pdf>.

<sup>22</sup> See H. Hestermeyer, Human Rights and the WTO: The Case of Patents and Access to Medicines, 2007.

<sup>23</sup> J. Delgado Rivera, EU-India FTA - the data exclusivity dilemma, Public Service Europe, 14 July 2011, available at [http://www.bilaterals.org/spip.php?page=print&tid\\_article=19895&lang=en](http://www.bilaterals.org/spip.php?page=print&tid_article=19895&lang=en). See also S. Modwel/S. Singh, The EU-India FTA Negotiations: Leading to an Agreement or Disagreement? ORF Occasional Paper 32, February 2012.

<sup>24</sup> See Declaration of Berne, Owning Seeds, Accessing Food – A Human Rights Impact Assessment of UPOV 1991, 2014 available at [https://www.publiceye.ch/fileadmin/files/documents/Saatgut/2014\\_07\\_10\\_Owning\\_Seed\\_-\\_Accessing\\_Food\\_report\\_def.pdf](https://www.publiceye.ch/fileadmin/files/documents/Saatgut/2014_07_10_Owning_Seed_-_Accessing_Food_report_def.pdf).

## 2. CONFLICTING OBLIGATIONS BETWEEN HUMAN RIGHTS AND INVESTMENT AND TRADE AGREEMENTS

### a. The lack of a clear hierarchy

Potential conflicts between trade and investment policies and human rights obligations as discussed above could be avoided or solved if human rights would always have a higher rank than trade and investment rules. However, it is unclear and a much-debated question if and to which extent human rights could claim hierarchy over trade and investment agreements.

Formally, all sources of public international law have the same rank. Unlike domestic legal systems which are based on a clear hierarchy of constitutional norms over ordinary legislation and acts of legislation over administrative rules, public international law does not contain such clear and formal rules of hierarchy. There are only two generally accepted deviations from the formal equality of norms in public international law. The first concerns peremptory norms of public international law (*ius cogens*)<sup>25</sup> and the second is the Charter of the United Nations, which claims supremacy over other international agreements as per Article 103 of the UN Charter.<sup>26</sup> In addition, some commentators have argued that norms which display fundamental global values and principles should be given a higher rank than norms which are based on bilateral exchange relations only.

It is an open question if it can be argued based on current international law doctrine that human rights always have a higher rank than international trade and investment agreements. While a few core human rights such as the prohibition of torture and the prohibition of slavery are norms of *ius cogens* and therefore take precedent over trade and investment agreements, it is unclear if and

to which extent other human rights could be seen as *ius cogens*.

Regarding Article 103 of the UN Charter, it should be recalled that even though the UN Charter contains reference to human rights, it does not contain a full human rights catalogue or binding obligations concerning specific rights as spelled out in the relevant human rights treaties. From a legal policy perspective, there are a number of convincing arguments why human rights should take precedent over trade and investment agreements. Yet, it cannot be said that there is a clear and coherent practice in international law establishing a hierarchy between human rights and trade and investment agreements in international law as it stands today (*de lege lata*).<sup>27</sup> The Inter-American Court for Human Rights (IACHR) has held that the obligations under a bilateral investment treaty cannot justify the violation of human rights.<sup>28</sup> This reflects a general international law principle which requires States to fulfil all treaty obligations without giving priority to specific obligations. Hence, the Court's judgement can be interpreted that investment law does not trump human rights law, but it does not establish a hierarchy of human rights over investment treaties. Investment tribunals have argued in a similar way that a violation of a provision of an investment agreement cannot be justified through reliance on human rights.<sup>29</sup>

The above arguments do not mean that such a hierarchy could not be established *de lege ferenda* in international agreements such as a treaty on businesses and human Rights. In fact, the lack of clear hierarchy rules is an important argument to include such rules in such a treaty to ensure the primacy of human rights.<sup>30</sup>

<sup>25</sup> R. Howse and M. Mutua. Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization, Human Rights in Development Yearbook 1999/2000, pp. 51-58.

<sup>26</sup> See K. D. Beiter, Establishing Conformity Between TRIPS and Human Rights: Hierarchy in International Law, Human Rights, Obligations of the WTO and Extraterritorial State Obligations Under the International Covenant on Economic, Social and Cultural Rights, in: H. Ullrich et al. (eds.), TRIPS plus 20, 2016, p. 445, at 470 et seq.

<sup>27</sup> Note that the Commentary to Principle 17 of the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights refers to the "primacy of human rights" only when citing two documents of the UN Sub-Commission on Human Rights. Yet, the Commentary does not provide a formal argument to support the case that human rights always claim primacy over other international norms *de lege lata*, see O. De Schutter et al. Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, Human Rights Quarterly Vol. 34, No. 4 (Nov. 2012), pp. 1084 at 1122.

<sup>28</sup> Inter-American Court of Human Rights, Case of the Sawhoyamaya Indigenous Community v. Paraguay, Judgment of March 29, 2006, para 140.

<sup>29</sup> SAURI v. Argentina, ICSID case N° ARB/04/4, para. 331. See also B. Farrugia, The human right to water: defences to investment treaty violations, Arbitr Int (2015) 31 (2): 261 at 265 et seq.

<sup>30</sup> See below section IV.1.a).

## CONFLICTING HUMAN RIGHTS AND INVESTMENT OBLIGATIONS

### BURLINGTON RESOURCES V. ECUADOR (2010)

In *Burlington Resources v. Ecuador (2010)*<sup>31</sup> the oil and gas company Burlington Resources filed a claim against Ecuador before the International Centre for Settlement of Investment Disputes (ICSID). It alleged *inter alia* that the State had failed to meet its obligation under the US-Ecuador Bilateral Investment Treaty to provide the company's investment with full protection and security. Burlington's exploration and exploitation activities were facing opposition involving violent attacks by the indigenous community residing in the exploitation area. After negotiations between the company and the indigenous community had failed, Burlington requested the State's assistance.

In the case before a tribunal of the International Centre for Settlement of Investment Disputes, the investor sought damages for the State's failure to provide such assistance. Ecuador, however, claimed that the behaviour of the respective individuals must be considered as *force majeure* and that the events were therefore beyond the control of the State. Yet, Ecuador did not raise the issue of indigenous peoples' rights in its defense. Neither did the Tribunal assess indigenous rights in its decision, since the claim was rejected due to a procedural question and not decided on its merits.<sup>32</sup> This is different in the pending case *South American Silver Mining v. Bolivia* in which Bolivia explicitly referred to this right.<sup>33</sup>

The situation in question in *Burlington Resources v. Ecuador* was also subject to parallel proceedings before the Inter-American Court of Human Rights in the case *Kichwa Indigenous People of Sarayaku v. Ecuador (2012)*.<sup>34</sup> The Inter-American Court found that Ecuador violated the human rights of the affected Sarayaku People. The State's failure to consult with the Sarayaku People prior to granting the company permission for exploration and exploitation amounted to a violation of the right to property and to cultural identity under Article 21 of the Inter-American Convention on Human Rights. The Sarayaku were therefore awarded \$1.4 million in compensation, furthermore Ecuador was obliged to adopt legislative or other measures to give full effect to the right to prior consultation of indigenous peoples and had to make a public acknowledgement of its international responsibility.

This case study illustrates that without clear rules on hierarchy or references to human rights in investment and trade agreements, investment tribunals will be reluctant to consider the human rights implications of the respective economic activity.

<sup>31</sup> International Centre for Settlement of Investment Disputes, *Burlington Resources Inc. v. Republic of Ecuador (2010)*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, <http://www.italaw.com/sites/default/files/case-documents/ita0106.pdf> (23.12.2016).

<sup>32</sup> Committee on the Implementation of the Rights of Indigenous Peoples of the International Law Association (ILA), Case Study: *Burlington Resources Inc. v. Ecuador/Kichwa Indigenous People of Sarayaku v. Ecuador*.

<sup>33</sup> Permanent Court of Arbitration, Respondent Counter-Memorial, paras. 217 and 219, PCA Case No. 2013-15.

<sup>34</sup> Inter-American Court of Human Rights, *Kichwa Indigenous People of Sarayaku v. Ecuador (2012)*, [http://corteidh.or.cr/docs/casos/articulos/seriec\\_245\\_ing.pdf](http://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf) (23.12.2016).

## b. The limits of interpretation

Conflicts between human rights and the trade and investment regime currently need to be solved through interpreting the respective rules. In particular, human rights treaties could be seen as the wider context of trade and investment treaties based on Article 31 para 2 lit. c) of the Vienna Convention on the Law of Treaties.<sup>35</sup> However, this option faces limits in practice. First, the respective rules of trade and investment treaties need to be interpretable. For example, the standard of fair and equitable treatment in an investment agreement contains broad language which is open for interpretation, and can therefore be interpreted in a manner amenable to the State's duty to protect human rights. Contrary to this, a clear prohibition of tariffs above the bound level in a trade agreement could not be interpreted in such a way that the tariff could be raised to fulfil the duty to protect, because the wording of the tariff prohibition may not be open to interpretation. Second, even if trade and investment agreements contain terms which are open to an interpretation from a human rights perspective, solving conflicts through interpretation rests on the competence of the respective dispute settlement organs to interpret both regimes of international law, which is usually not the case for an international investment tribunal.<sup>36</sup>

If investment agreements are interpreted without taking human rights into account, States may be confronted with conflicting international obligations, which often leads them to follow the rules of the trade and investment regimes, because these are usually equipped with effective dispute settlement mechanisms which may impose sanctions or render enforceable awards. The enforcement of decisions of human rights committees and courts is – on the other hand – relatively weak. A rare exception are

the regional human rights courts such as the European Court on Human Rights or the Inter-American Court on Human Rights, which have the power to render binding judgements.

## c. The lack of exception clauses addressing human rights

Trade agreements usually contain general exception clauses which allow deviations from the obligations of the agreement, if a State party pursues other legitimate public policy objectives and the respective measure is not more trade-restrictive than necessary. In World Trade Organisation (WTO) law, Art. XX of the General Agreement on Tariffs and Trade (GATT) contains such an exception clause. This provision has been the cornerstone of attempts to balance trade obligations and environmental or health policies.<sup>37</sup> Exception clauses can therefore mitigate conflicts between trade and investment obligations on the one side, and other policy objectives on the other side.

However, it should be noted that exception clauses are based on closed lists of acceptable public policies. Human rights are not among them. In practice, a State can therefore justify the deviation from an obligation in a trade agreement because the measure is necessary to protect human, animal or plant life or health (Article XX b) GATT) or related to the conservation of exhaustible natural resources (Article XX g) GATT). However, a State could not justify such a deviation because it is necessary to protect human rights, unless this deviation could also be justified on the basis of Article XX GATT or similar clauses.<sup>38</sup> In this context, it is also worth mentioning that exception clauses often only apply to trade rules and not to investment agreements or investment protection chapters in free trade agreements.

<sup>35</sup> On this option see B. Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, ICLQ vol 60, July 2011, pp. 573 at 584. The relevant provision reads: "There shall be taken into account, together with the context: (c) Any relevant rules of international law applicable in the relations between the parties".

<sup>36</sup> See below Section 3.

<sup>37</sup> See *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, para 125 et seq.; *European Communities — Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R, paras 155 et seq.

<sup>38</sup> R. Harris / G. Moon, *GATT Article XX and Human Rights: What Do We Know from the First 20 Years?* (2015) 16(2) *Melbourne Journal of International Law* pp. 1-52; L. Bartels, *Article XX of GATT and the Problem of Extraterritorial Jurisdiction - The Case of Trade Measures for the Protection of Human Rights* (2002) 36 *Journal of World Trade*, Issue 2, pp. 353-403.

3.

### DISPUTE SETTLEMENT IN TRADE AND INVESTMENT AGREEMENTS WITHOUT A HUMAN RIGHTS PERSPECTIVE

The dispute settlement organs of the trade and investment regimes, such as the WTO panels and Appellate Body or arbitral tribunals established based on an investment treaty usually have difficulties in incorporating public concerns. As long as the interpretation is left to dispute settlement institutions of each regime, there will be little engagement of the trade and investment system with human rights issues. However, even if human rights issues are raised before an investment arbitration tribunal or a Panel or the Appellate Body (AB) of the WTO, it is questionable if the members of these institutions have sufficient knowledge and expertise to adequately address human rights questions. Even though parties to an investment dispute could also choose human rights experts as arbitrators and therefore ensure that some expertise is available to the panel, this hardly ever happens.

In fact, the rules of the selection of panel members or arbitrators in trade and investment agreements favour trade and

investment law experts. For example, Article 17:3 of the WTO's Dispute Settlement Understanding states that Members of the Appellate Body should be "persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally." It is clear therefore, that AB members would be experts in international trade law, but not necessarily in human rights law. Similarly, the members of the Investment Court System established under the recently concluded Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU shall have "demonstrated expertise in public international law" as per Article 8.24.4 CETA. This provision also holds that "[i]t is desirable that they have expertise in particular, in international investment law, in international trade law and the resolution of disputes arising under international investment or international trade agreements." Again, the competence shall be in the fields of trade and investment law.

## THE UNWILLINGNESS OF INVESTMENT TRIBUNALS TO TAKE HUMAN RIGHTS INTO CONSIDERATION

### VON PEZOLD AND OTHERS V. REPUBLIC OF ZIMBABWE (2015) AND BORDER TIMBERS AND OTHERS V. ZIMBABWE

The cases *Von Pezold and Others v. Republic of Zimbabwe* (2015) and *Border Timbers and Others v. Zimbabwe* concern land disputes arising under the Bilateral Investment Treaties that Zimbabwe entered into with Germany and Switzerland.<sup>39</sup>

Following Zimbabwe's independence and the election of Robert Mugabe as President in 1980, the State introduced land reform to enhance the indigenous population's access to land and to rectify colonial injustice. As the initial "willing buyer – willing seller" approach proved ineffective, the Government took measures to accelerate the process by allowing the compulsory acquisition of agricultural land while compensating the owners. In 2005, a Constitutional Amendment entered into force that allowed expropriation without compensation. The seizure of land predominantly owned by the white minority population involved also the claimants' land titles. The claimants consequently filed claims with the International Centre for Settlement of Investment Disputes stating that the Government's actions amounted to unlawful expropriation, a violation of the obligation to fair and equitable treatment as well as full protection and security and several other provisions of the BITs.

In May 2012, the European Centre for Constitutional and Human Rights (ECCHR) and four indigenous communities of Zimbabwe submitted a petition to participate in the arbitral proceedings as *amicus curiae*.<sup>40</sup> In their petition, they pointed out that the situation involved duties of the State as well as of the investor under international human rights law towards the affected indigenous peoples. Since international human rights law applies to the arbitral proceedings, the Tribunal should take the indigenous peoples' right to self-determination including their traditional land rights into account.<sup>41</sup> The *amicus curiae* request was denied by the Tribunal in its entirety. Although the Tribunal was aware of the impacts that the decision of the dispute would have on the interests of the indigenous communities, it stated that international human rights law was outside of the scope of the dispute. The tribunal held that an argument based on indigenous peoples' rights would force it to decide whether the concerned communities can be considered "indigenous peoples", which would be clearly outside the scope of the dispute.

In July 2015, the Tribunal reached the decision that the seizure of the land without any compensation amounted to expropriation and violated the fair and equitable treatment and several other provisions of the BITs. It ordered the State to return the seized land to the farmers and to pay \$65 million in compensation to account for the lost value.

This case study shows that even if human rights are raised in investment proceedings or brought to the attention of the tribunals, there is a clear reluctance to engage with these arguments due to an unwillingness or inability to assess human rights arguments by the respective tribunal.

<sup>39</sup> International Centre for Settlement of Investment Disputes, *Von Pezold and Others v. Republic of Zimbabwe*, ICSID CASE NO. ARB/10/15, Award (2015), [http://www.italaw.com/sites/default/files/case-documents/italaw7095\\_0.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw7095_0.pdf) (23.12.2016).

<sup>40</sup> International Centre for Settlement of Investment Disputes, *Von Pezold v. Republic of Zimbabwe* (ICSID CASE NO. ARB/10/15) and *Border Timbers v. Zimbabwe* (ICSID CASE NO. ARB/10/25), Procedural Order No. 2 (2012), <http://www.italaw.com/sites/default/files/case-documents/ita1044.pdf> (23.12.2016).

<sup>41</sup> C. Schliemann, Requirements for *Amicus Curiae* Participation in International Investment Arbitration. A Deconstruction of the Procedural Wall Erected in Joint ICSID Cases ARB/10/25 and ARB/10/15, *The Law and Practice of International Courts and Tribunals* 12 (2013) 365–390.

4.

## THE POTENTIAL IMPACT OF TRADE AND INVESTMENT INCENTIVES

As mentioned in Guiding Principle 4, export credit and investment insurances or guarantees play a significant role in the context of business and human rights. Many governments offer economic incentives for exporters and investors based in their jurisdiction, through guarantees and insurances for non-commercial risks which may occur to exporters or investors in other countries.<sup>42</sup> These credit guarantees and investment insurances are an important source of finance for the exporter.

However, export credit guarantees may also financially support economic activities associated with significant human rights violations.<sup>43</sup> A well-known case is the support of the German export credit agency for the building of a dam for a hydroelectric power plant in Ilisu, Turkey, a project which involved large-scale evictions of local residents from the villages with only limited compensation.<sup>44</sup> In 2008 the German, Austrian and Swiss governments terminated their financial support of the Ilisu Dam project due to social, cultural and environmental risks the project posed.<sup>45</sup> Cephas Lumina, then UN Independent Expert on the effects of foreign debt on the full enjoyment of all human rights, confirmed in 2011 that “a significant number of the projects supported by export credit agencies, particularly large dams, oil pipelines, greenhouse gas-emitting coal and nuclear power plants, chemical facilities, mining projects and forestry and plantation schemes, have severe environmental, social and human rights impacts.”<sup>46</sup>

Similar to export credit guarantees, investment guarantee schemes are also

government-backed financial support measures covering so-called “political risks” including expropriation or measures with similar effects, currency inconvertibility as well as damages resulting from war and civil disturbances. Usually, the economic and financial viability of the project is an important factor for eligibility. Other factors may include the impact of the investment on the domestic economy (such as domestic employment) or on the economy of the host country. Increasingly, the environmental impact of the projects supported by these schemes is also assessed. However, as already stated by the UN Special Representative on the issue of human rights and transnational corporations John Ruggie in 2007, even though some States may refer to human rights and sustainable development in their policies to support foreign direct investment in other countries, “[f]ew States have specific and formal outgoing investment programmes, projects, measures or policies that are specifically devoted to human rights.”<sup>47</sup> In addition, there is a considerable lack of public participation and transparency in many national investment guarantee schemes, which makes it difficult to assess the impact of these schemes on human rights.<sup>48</sup>

It has long been recognised that granting export credit guarantees and investment guarantees (or political risk insurances) not based on human rights performance of the respective investment or trade project may exacerbate the negative human rights impact of these activities.<sup>49</sup> The relevant export credit agencies (ECAs) are governmental institutions and bear therefore a special responsibility with regards to human rights

<sup>42</sup> K. Gordon, *Investment Guarantees and Political Risk Insurance: Institutions, Incentives and Development*, in: *OECD Investment Policy Perspectives 2008*, p. 92.

<sup>43</sup> K. Keenan, *Export Credit Agencies and the International Law of Human Rights*, Halifax Initiative Coalition January, 2008, available at [http://www.halifaxinitiative.org/updir/ECAs\\_and\\_HR\\_law.pdf](http://www.halifaxinitiative.org/updir/ECAs_and_HR_law.pdf).

<sup>44</sup> Further examples can be found in K. Keenan, *Export Credit Agencies and Human Rights. Failure to Protect*, 2011, available at [http://www.eca-watch.org/sites/eca-watch.org/files/Failure%20to%20Protect\\_0.pdf](http://www.eca-watch.org/sites/eca-watch.org/files/Failure%20to%20Protect_0.pdf).

<sup>45</sup> ECA Watch, *Ilisu Dam*, <http://www.eca-watch.org/dodgy-deals/ilisu-dam>.

<sup>46</sup> UNGA, *Report of the independent expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights*, 5 November 2011, A/66/271, para 3.

<sup>47</sup> Report of the Special Representative on the issue of human rights and transnational corporations and other business enterprises (2007) A/HRC/4/35/Add.3, para 17.

<sup>48</sup> M. Krajewski, *Investment Guarantees and International Obligations to Reduce Poverty: A Human Rights Perspective*, in K. Nadakavukaren Scheder (ed), *Poverty and the International Economic Legal System Duties to the World's Poor*, 2013, pp. 189 et seq.

<sup>49</sup> M. Krajewski, *Investment guarantees and international obligations to reduce poverty – A human rights perspective*, in: K. Nadakavukaren Schefer (ed), *Poverty and the International Economic Legal System: Duties to the World's Poor*, 2013, pp. 174- 195.

obligations. The Guiding Principles consider the human rights implications of ECAs hence as part of Pillar 1 (“The State duty to respect”). Numerous reform proposals have been put forward by civil society, political actors and academic scholars. The need to reform has also been recognised in the commentaries to the UN Guiding Principles.<sup>50</sup> In general, the relevant proposals include the requirement that ECAs should undertake human rights impact assessments of the projects financed by them and to oblige investors and exporters to undertake human rights due diligence. Furthermore, it has also been argued that the decision-making processes of ECAs should be transparent and based on clear legal conditions. In addition, some have also called for an exclusion of supporting projects

in sectors with a high risk of human rights abuses.<sup>51</sup> Finally, there have been proposals to exclude companies without proper human rights due diligence procedures from the support offered by ECAs.

It should be noted that most national export credit and investment guarantee schemes are based on domestic laws and policies. While many governments aim to follow the voluntary Common Approaches of the Organisation for Economic Co-operation and Development (OECD),<sup>52</sup> there are no internationally binding rules on export or investment guarantee agencies. Except for the Multilateral Investment Guarantee Agency (MIGA), international treaties do not regulate the activities of ECAs.

<sup>50</sup> See above note 4.

<sup>51</sup> M. Müller / A. Paasch, When only the coal counts – German co-responsibility for human rights in the South African coal sector, ActionAid/MISEREOR/MACUA, 2017, para 13, [http://www.actionaid.org/sites/files/actionaid/study\\_when-only-the-coal-counts\\_online.pdf](http://www.actionaid.org/sites/files/actionaid/study_when-only-the-coal-counts_online.pdf). - <https://www.misereor.de/fileadmin/publikationen/studie-wenn-nur-die-kohle-zaehlt.pdf>, p. 12.

<sup>52</sup> OECD, Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (the “Common Approaches”), TAD/ECG(2012)5, 6 April 2016.

## CASE

### THE IMPACT OF ECONOMIC INCENTIVES

#### GERMAN EXPORT CREDIT GUARANTEES FOR COAL-FIRED PLANTS IN KUSILE AND MEDUPI, SOUTH AFRICA

Coal mining and coal-fired power plants in South Africa have negative effects on environment-related human rights to water, food and health to local communities. A study commissioned by MISEREOR and others found that 19 German companies have been or are involved in the construction and operation of the Kusile and/or Medupi power plants.<sup>53</sup> The involvement of these companies was partially financed and supported by the German state-owned KfW IPEX Bank and Germany’s export credit agency. The study concludes that the German government and the KfW IPEX Bank failed to properly identify the environmental and human rights risks of the construction of the coal-fired power plants and the associated operations before becoming involved in the projects.

<sup>53</sup> Müller / Paasch, above note 51.

### III.

## REFORM OPTIONS WITHIN THE TRADE AND INVESTMENT REGIME

The potential conflicts mentioned above are not new. They have also been acknowledged in the ongoing reform debates concerning investment agreements and have generated reform proposals for these agreements.

#### 1. THE INEFFECTIVENESS OF SO-CALLED “RIGHT TO REGULATE” CLAUSES

A first option which has increasingly gained prominence is the inclusion of a general “right to regulate” clause. For example, according to Art. 8.9.1 CETA, the parties “reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity”. “Right to regulate” clauses are based on the above-mentioned assumption that trade and investment agreements may limit the regulatory and legislative policy space for States to fulfil their human rights obligations.

However, “right to regulate” clauses are largely ineffective. First, it should be noted that the clauses usually do not add any legal obligations or rights and are merely an interpretative tool. In other words, the clauses do not change the substantive rules of a trade and investment agreement. The value of these clauses is therefore limited, as they maintain fundamental problems of the agreements discussed above.<sup>54</sup> Second, the formulation of such clauses is often vague and ambiguous, leaving much room for debate and little clarity. For example, some “right to regulate” clauses state that the agreement “shall not affect the right of the Parties to regulate”. This wording corresponds neither to the standard formulations in general justification clauses such as Article XX GATT or Article XIV of the General Agreement on Trade in Services (GATS) (“nothing in this agreement shall be construed”) nor to the formulations used for sectoral exceptions.

While “shall not affect” signifies a binding obligation, it doesn’t have clear legal content and remains a mere observation. Moreover, the formulations often contain a so-called necessity test and protect only “legitimate” State objectives. Third, most existing “right to regulate” clauses do not include human rights obligations nor the implementation of the UN Guiding Principles on Business and Human Rights as part of the “right to regulate” which – as mentioned above – should not in any way be read as an “obligation to regulate” from a human rights perspective.

On a more fundamental level, “right to regulate” clauses are based on a flawed perception of the problem created by trade and investment agreements. These agreements cannot and do not question or limit the “right” of States to regulate, which is an essential feature of the sovereignty of States. Instead, trade and investment agreements limit the policy options and choices of States how to exercise the right to regulate, by excluding certain regulatory measures or putting them under pressure by requiring the State to pay compensation. It is hence not surprising that trade and investment dispute settlement organs have repeatedly held that trade and investment agreements do not limit the right to regulate, but that States must exercise this right without violating the respective treaties.<sup>55</sup> This shows that any reference to a right to regulate will be ineffective if the respective rules and obligations of investment and trade agreements are not changed.

<sup>54</sup> See above Section III.1.

<sup>55</sup> Generally C. Titi, *The Right to Regulate in International Investment Law*, 2014.

2.

## LIMITATION AND CLARIFICATION OF THE CONTENTS OF TRADE AND INVESTMENT AGREEMENTS

The negative impact of trade and investment agreements on regulatory space could be mitigated by limiting the scope of investment protection, or by reducing and clarifying the standards of protection. For example, some recent investment agreements clarify that general and non-discriminatory regulations usually do not amount to indirect expropriations or a violation of the fair and equitable treatment standard.<sup>56</sup> However, even if the standards of investment protection are more clearly defined, they still operate with open terms such as “arbitrariness” which may be interpreted in a manner limiting the regulatory space of the host State.<sup>57</sup>

In addition, countries may limit their market access commitments in trade agreements (tariff concessions, market access in services or procurement) to ensure greater flexibility regarding regulatory space and the (re-) introduction of specific regulatory measures which might otherwise conflict with the commitments of the trade agreement. However, the limitations of these market

access commitments could run counter to the countries’ WTO commitments (so-called WTO-minus commitments).

While reformulating and limiting standards of bilateral investment agreements or investment chapters in trade agreements pose no problem from the perspective of multilateral rules, it should be noted that free trade agreements with so-called WTO-minus commitments could be seen as incompatible with the respective norms on regional integration systems (i.e. Art. XXIV:4-8 GATT and Art. V GATS) which contain the conditions a free trade agreement must meet in order to be in conformity with WTO rules. It is beyond the scope of this study to analyse the conditions of these provisions in detail, but it is safe to argue that minor deviations from GATT and GATS commitments would not render the entire free trade agreement incompatible with WTO rules. However, major limitations of tariff concessions or market access commitments could be problematic.

3.

## BROADENING GENERAL EXCEPTION CLAUSES

Another option which has often been suggested concerns the broadening of general exception clauses to include other policy goals which might be invoked when justifying a deviation from the agreement. As mentioned above, human rights are normally not directly covered by the standard general exception clause based on the model of Article XX GATT or Art. XIV GATS. Hence, a reformed trade and investment treaty could include an exception clause which specifically refers to the fulfilment of human rights obligations and therefore creates a

possibility to justify measures which would otherwise violate the agreement if the measures are related to human rights. A human rights exception clause could also explicitly state that this includes respecting, protecting and fulfilling human rights in internal and international policies. This would clarify that the exemption clause is not limited to domestic policies, but has an external dimension as well.<sup>58</sup> Finally, a human rights exception clause should not only cover the trade part of the agreement but also the investment protection chapter.

<sup>56</sup> See e. g. Article 8.10.2 CETA.

<sup>57</sup> G. Van Harten, Comments on the European Commission’s Approach to Investor-State Arbitration in TTIP and CETA (July 3, 2014). Osgoode Legal Studies Research Paper No. 59/2014, p. 12.

<sup>58</sup> See L. Bartels, A Model Human Rights Clause for the EU’s International Trade Agreements, German Institute for Human Rights / MISEREOR, 2014, [http://www.institut-fuer-menschenrechte.de/uploads/tx\\_commerce/Studie\\_A\\_Model\\_Human\\_Rights\\_Clause.pdf](http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Studie_A_Model_Human_Rights_Clause.pdf), p. 37.

4.

## REFORM OF INVESTMENT DISPUTE SETTLEMENT

Among the many proposals regarding dispute settlement mechanisms such as the establishment of a permanent international investment court system, suggestions concerning the incorporation of investor obligations in investment agreements are of particular interest in the present context.<sup>59</sup> The most far-reaching option would be to establish directly binding obligations for investors. For example, an investment treaty could require foreign investors to undertake human rights due diligence as envisaged in the Guiding Principles. Furthermore, an investment treaty could also require foreign investors to respect fundamental labour rights or specific environmental norms.

A less far-reaching proposal concerns the denial of access to the dispute settlement mechanism for investors which have been engaged in or are connected with human rights violations (so-called “clean hands” doctrine<sup>60</sup>). This approach could be incorporated on the basis of a so-called

“denial of benefits” clause, i.e. a clause which allows one party to deny the benefits of an investment treaty to investors which do not meet certain standards. Alternatively, the “clean hands” of the investor could be a precondition for an investment tribunal’s or court’s jurisdiction. Unlike direct investor obligations, such clauses would not oblige all investors to adhere to these standards, but would create an incentive to do so in order to benefit from the dispute settlement mechanism.

Other relevant proposals include the granting of participatory rights to victims of human rights violations or interest groups representing these victims. The most far-reaching idea concerns direct rights to file claims against investors. Other options include extended participatory rights as third-party intervenors for civil society groups or victims’ associations in investment dispute settlement proceedings.

5.

## LIMITS OF REFORMING INVESTMENT AGREEMENTS

While the proposals to reform trade and investment agreements discussed above may serve as useful options within the trade and investment regimes, they are subject to a number of significant shortcomings.

First, as most investment agreements and many trade agreements are of a bilateral nature, their norms only apply to the two parties of such an agreement. This limits

their scope and impact significantly. More specifically, such investment agreements would only apply to investors of either of the two parties. Human rights abuses of corporations which are not “investors” of a party to the treaty are not covered. This contains the danger of a company restructuring to avoid the binding obligations of such a treaty. This could lead to “reverse forum shopping”<sup>61</sup>

<sup>59</sup> See also the proposals in UNCTAD’s Investment Policy Framework for Sustainable Development, available at <http://investmentpolicyhub.unctad.org/ipfsd/policy-options-ia>.

<sup>60</sup> In international investment law, the “clean hands” doctrine usually refers to violation of the law of the host State by the investor, see *Hesham T.M. Al Warraq v. Republic of Indonesia (UNCITRAL)*, Final Award, 15 December 2014, paras. 645-647. However, the doctrine could also be extended to human rights abuses. See P. Dumberry / G. Dumas-Aubin, *How to Impose Human Rights Obligations on Corporations Under Investment Treaties?* 4 Yearbook on International Investment Law and Policy, 2011-2012, pp. 569 at 589.

<sup>61</sup> “Forum shopping” refers to activities of transnational companies to relocate their business seats or assets to come under the protection of a bilateral investment agreement. Should such agreements contain binding obligations, companies may try to avoid being covered by these obligations through restructuring which allows them to ensure that they are no longer covered by the agreement. This could be called “reverse forum shopping” as investors try to escape from the scope of the agreement.

Furthermore, investment agreements would not clarify the content of human rights obligations of investors vis-à-vis human rights, because investment agreements usually do not contain human rights obligations to start with. Even those agreements which contain weak references do not establish binding obligations on investors. It has also been noted that States seem relatively reluctant to establish counter-claims on the basis of human rights violations or to defend policies on the basis

of human rights in Investor-State dispute settlement proceedings. Finally, investors who do not need to rely on investment protection could also avoid obligations by simply not relying on the treaty.

In sum, it can be concluded that many of the potential conflicts mentioned above cannot be adequately addressed through a reform of the existing trade and investment regime alone.

## CASE

### NO CLAIMS AGAINST INVESTOR FOR HUMAN RIGHTS VIOLATIONS BASED ON INVESTMENT TREATY

#### URBASER V. ARGENTINA

In the investment dispute between Urbaser SA and Argentina before a tribunal at the International Centre for Settlement of Investment Disputes, Argentina filed a counterclaim in the case, alleging that the investors had violated their obligations in relation to the human right to water, and claiming compensation of US\$191 million.<sup>62</sup> While the tribunal accepted jurisdiction over the counterclaim, it dismissed the counterclaim on its merits. The tribunal even accepted that individuals and corporations could potentially assume obligations under international law. However, the tribunal found that the potential obligation of the investor was not the same as States' positive obligations to fulfil human rights, including the right to water. Thus, while the claimants' obligations under the concession contract may have had the effect of fulfilling Argentina's own human rights obligations, this did not transfer obligations to the investor.<sup>63</sup>

<sup>62</sup> Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26.

<sup>63</sup> J. Hepburn, In a first, BIT tribunal finds that it has jurisdiction to hear a host State's counterclaim related to investor's alleged violation of international human rights obligations, IAREporter, 12 January 2017, <http://tinyurl.com/gvub4vc>.

## IV.

# MODEL CLAUSES ON INVESTMENT AND TRADE POLICIES IN A TREATY ON BUSINESSES AND HUMAN RIGHTS

As mentioned at the outset, the UN Guiding Principles call upon States to negotiate and conclude trade and investment agreements which do not impose undue restrictions on national policy space needed to respect, protect and fulfil human rights. However, the Guiding Principles are non-binding and so far, States have not fundamentally changed their treaty practices. For example, the CETA does not contain any provisions which could be seen as an implementation of the UN Guiding Principles. Instead, most of CETA's trade rules follow the classic model. This seems to suggest that the voluntary approach of the UN Guiding Principles is not sufficient to ensure that States negotiate trade and investment agreements which ensure the primacy of human rights. Consequently, it would be beneficial from a human rights perspective if a treaty on businesses and human rights would establish binding obligations for States when developing new trade and investment agreements, and if it would structure the relationship between human rights and the trade and investment regime to ensure the former's primacy.

It is unlikely that rebalancing and restructuring the relationship between investment and trade rules on the one side, and human rights on the other, in a treaty on businesses and human rights will have negative effects on the trade and investment performance of the parties of this treaty. First, it is empirically unclear to which extent investment agreements actually increase foreign direct investment. A number of empirical studies could not find a significant impact of investment agreements on foreign direct investment.<sup>64</sup> Hence, agreements with lesser investment protection will not necessarily lead to less foreign direct investment. Second and more importantly, establishing a supremacy of human rights does not indicate an investor-hostile regulatory environment. To the contrary, clarifying the relationship between trade and investment could add to a stable legal environment.

<sup>64</sup> See M. Hallward-Driemeier, Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit And They Could Bite, World Bank Policy Research Working Paper No. 3121, 2003; S. Rose-Ackerman / J. Tobin, Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties, Yale Law & Economics Research Paper No. 293, 2005.

## 1. REGULATING THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND TRADE AND INVESTMENT AGREEMENTS

### a. Supremacy clause

As pointed out above, a key challenge concerns the relationship between human rights treaties on the one side, and trade and investment agreements on the other. In light of the formal equality of all international treaties, a treaty on businesses and human rights could establish a formal supremacy of human rights obligations over trade and investment agreements through a supremacy clause.

To achieve this, such a clause would need to establish the supremacy of human rights explicitly. It is necessary to avoid hortatory language as in the case of Art. 20 para 2 of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005.<sup>65</sup> This provision was originally intended to establish a hierarchy of the Cultural Diversity Convention over trade agreements, in particular GATS.<sup>66</sup> However, in its final version, the provision only establishes that the GATS provisions shall not be affected by the Cultural Diversity Convention and vice versa. Hence, a supremacy clause would need to contain clear language which explicitly establishes a hierarchy.

An important aspect would be if the clause would (only) establish the supremacy of the businesses and human rights treaty over trade and investment agreements, or whether it could also establish the supremacy of other human rights treaties, especially the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and specific conventions such as the Convention on the Rights of the Child. While establishing a supremacy clause which only covers the businesses and human rights treaty seems technically possible, a general supremacy clause could be more difficult, because the relationship between two treaties would be addressed in a third treaty which is not connected to the former two treaties. The supremacy clause in the businesses and

human rights treaty would therefore have to specifically list to which human rights treaties it applies. Furthermore, the clause would need to clarify that it only applies if the parties of the businesses and human rights treaty are also parties to the relevant other human rights treaties.

In general, it should be noted that a supremacy clause can only apply vis-à-vis trade and investment agreements concluded between two or more parties of the treaty on businesses and human rights. If, for example, countries A and B are parties to such a treaty, but not country C, a supremacy clause would have an effect on agreements between countries A and B, but not on agreements between A and C or B and C or between A, B and C. This is due to the relative nature of treaty obligations in international law and the so-called *pacta tertiis* rule, which means that treaties between two parties cannot have effects on third parties.

A more complicated and highly technical question concerns if and to which extent a supremacy clause could also extend to the bilateral relationship between two parties which are both parties of the treaty on businesses and human rights and a multilateral trade and investment treaty such as the WTO agreement. This would be the case if countries A, B, C, D and E are parties to the businesses and human rights treaty while countries A, B, C, F and G are parties to a trade and investment treaty. In this case, the supremacy clause could not establish supremacy over the entire trade and investment treaty, but vis-à-vis the relationships of countries A, B and C within the context of a treaty. It might be argued that this relative supremacy could constitute an *inter-se* agreement which might be prohibited by the trade and investment agreement. However, since the supremacy clause would not formally change the obligations of the countries under the trade and investment agreement, it could be argued that it is not an *inter-se* deviation from that agreement.

<sup>65</sup> “Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.”

<sup>66</sup> M. Hahn, A, Clash of Cultures? The UNESCO Diversity Convention and International Trade Law, JIEL 2006, pp. 515 at 542 et seq. and C.-B. Graber, The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO? JIEL 2006, pp. 553 at 566 et seq.

Based on these considerations, a supremacy clause could read as follows:

*In case of conflict between this treaty and another treaty concluded by at least two of the Parties, the former shall prevail over the latter.*

*If not all parties of the other treaty are also Parties of this treaty, this treaty shall only prevail in the relationships between the Parties of the other treaty which are also Parties of this treaty.*

A supremacy clause addressing all human rights treaties could be formulated as follows:

*In case of conflict between a human rights treaty concluded by at least two or more Parties and another treaty concluded by the same Parties, the former shall prevail over the latter. For the sake of clarity, human rights treaties include [... names of human rights conventions to be covered.]*

It should be noted that a supremacy clause would only legally be effective in case of a conflict, because otherwise the two sets of obligations could be applied jointly. Since the notion of a conflict is heavily discussed in international law and practice,<sup>67</sup> it might be useful to also define the concept of a conflict. A narrow concept restricts the notion of a legal conflict to a situation in which one rule prohibits a certain behaviour, while another rule requires this behaviour. Conflicts like these are rare in international law and arguably they do not exist in the relationship between trade and investment agreements on the one side, and human rights obligations on the other.<sup>68</sup> A broader concept of a conflict relates to a situation in which one treaty prohibits a certain activity while the other encourages a treaty party to pursue this goal through the activity prohibited by the former treaty. In this case, there is no formal conflict between two opposing norms, but a conflict could arise due to different goals and objectives.

For example, Article 2 para 2 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) enables State parties to “take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.” This may include positive actions which favour domestic or previously discriminated groups, such as the measures of South Africa’s Black Economic Empowerment Programme which favoured businesses owned and operated by members of the black community in South Africa. However, the application of this programme was challenged by several European investors in South Africa as an infringement on investors’ rights.<sup>69</sup> Formally, South Africa was not required to take those measures under CERD, so there was no conflict in the narrow sense. However, it could be argued that there was a broader conflict between CERD and the investment treaty regime.<sup>70</sup>

Hence, the definition of conflict for the purposes of a supremacy clause should encompass the broad notion of the conflict:

*For the purposes of this article, a conflict constitutes a situation in which a provision of one treaty poses an obstacle to the implementation of another treaty. This includes, but is not limited to a situation in which:*

- a) a provision of one treaty cannot be fulfilled without violating another treaty or*
- b) a provision of one treaty enables or encourages a Party to an activity or measure which is prohibited by the other treaty.*

<sup>67</sup> Generally E. Vranes, The Definition of ‘Norm Conflict’ in International Law and Legal Theory, EJIL 2006, 395-416.

<sup>68</sup> See the remarks of the tribunal in SAURI v. Argentina, above note 29.

<sup>69</sup> Piero Foresti, Laura de Carli & Others v. The Republic of South Africa, ICSID Case No. ARB(AF)/07/01.

<sup>70</sup> On the relationship between CERD and the BITs see also Simma, above note 35, pp. 585-586.

## **b. Ensuring the observance of human rights in trade and investment dispute settlement proceedings**

The supremacy clause suggested in the previous section would be the strongest protection of human rights vis-à-vis conflicting norms of a trade and investment agreements. In addition to such a clause, the parties of a businesses and human rights treaty could aim to ensure that an investment tribunal or a WTO panel pays due respect for human rights when deciding a case under a trade or investment agreement. This seems necessary, because the traditional WTO and Free Trade Agreement dispute settlement mechanisms as well as classic Investor-State dispute settlement proceedings will continue even after the conclusion of a treaty on businesses and human rights.

A treaty on businesses and human rights cannot directly alter existing trade and investment dispute settlement systems. This could only be done through changes in the relevant WTO or investment agreements. However, the parties to a treaty on businesses and human rights can establish obligations concerning their activities and behaviour in a particular dispute settlement proceeding. For example, they could agree to ensure that human rights are recognised in a trade or investment dispute by agreeing to include references to human rights in their briefs and legal arguments before dispute settlement institutions. As mentioned above, States have been reluctant to do so in the past. A clause ensuring that human rights are recognised in trade and investment dispute settlements might create an incentive to do this more often.

A treaty provision aiming at the recognition of treaty obligations in investment and trade dispute settlement could be formulated in this manner:

*The Parties ensure (or: Each Party endeavours to ensure) the respect of the obligations of this treaty by any dispute settlement mechanism established in another treaty concluded by at least two of the Parties.*

*The Parties fulfil their obligation under this Article inter alia by specifically claiming and relying on human rights obligations in dispute settlement proceedings involving another treaty whenever possible and appropriate or by specifying in trade and investment agreements that members of a dispute settlement panel or tribunal shall have expertise in human rights law in addition to other qualifications.*

## **c. Incorporation of human rights obligations in future investment and trade agreements**

As pointed out above, conflicts between investment and human rights could be mitigated if countries which aim at the conclusion of a new trade and investment agreement recognise and explicitly integrate human rights requirements in such new agreements and aim to ensure the primacy of human rights through the options discussed above in sections III.2 to III.4. While this would not address current problems of the law as it is applied, it might avoid them in the future. In order to clarify which options a State could use to fulfil this obligation, an illustrative list could be included in such a treaty clause.

Such a clause could have the following contents:

*The Parties will include (or: Each Party endeavours to include) clauses ensuring the protection of human rights (human rights clauses) in trade and investment agreements concluded amongst them (or: concluded by that Party).*

The parties could specify this obligation by referring to the inclusion of an exception clause covering human rights, as mentioned above in section III.3:

*A Party may fulfil the obligations of this Article by incorporating an exception clause for human rights in its trade and investment agreements. Such a clause should refer to the obligations to respect, protect and fulfil human rights, cover internal and international policies to ensure the extra-territorial application of human rights and be based on all international human rights instruments applicable to that Party.*

## 2.

## HUMAN RIGHTS IMPACT ASSESSMENTS

In order to assess whether and to which extent trade and investment agreements might have a negative impact on the enjoyment of human rights, States should use human rights impact assessments (HRIA) of existing and new agreements.<sup>71</sup>

The EU may even be under a legal obligation to assess the impact of its trade agreements on the human rights of individuals who are potentially affected by the agreement. In December 2015, the EU's General Court held that the Council of the European Union (EU Council) was required to examine "carefully and impartially, all the relevant facts in order to ensure that the production of goods for export is not conducted to the detriment of the population of the territory concerned, or entails infringements of fundamental rights"<sup>72</sup> before concluding an additional protocol in the context of the EU-Morocco Free Trade Agreement on liberalisation of certain agricultural and fisheries products which also extended to Western Sahara. Even though the Court's ruling which annulled the respective EU Council decision was based on the EU Charter of Fundamental Rights, it can be argued that similar considerations would also apply when taking international human rights into account.

The parties to a treaty on businesses and human rights could include a provision which would require them to conduct a human rights impact assessment of new trade and investment agreements. Unlike the primacy clause, the obligation to conduct HRIsAs can be fulfilled by each party of a treaty on businesses and human rights, independently of the legal obligations of other parties.

Ideally, human rights impact assessments would be conducted before, during and at the end of the negotiations of a trade or investment agreement. A HRIA before the commencement of negotiations is necessary to ensure that the results of the HRIA would inform the decision whether to negotiate at all and would influence negotiating

goals. HRIA during the negotiations are important to shape the process and to still allow alterations of the negotiating goals. Finally, a HRIA at the end would be able to assess the entire agreement and contribute to the decision about the conclusion of the agreement:

*Each Party shall assess the impact of new trade and investment agreements on the respect for, protection and fulfilment of internationally recognised human rights before and during the negotiations of such an agreement and before its conclusion.*

Furthermore, the treaty could also specify the terms and conditions of the HRIA to avoid that the assessment itself remains meaningless:

*Such assessment shall be based on applicable human rights as well as objective and transparent criteria, incorporate the views of potential victims of human rights violations and be carried out by an independent institution. Taking the findings of the assessment into account, the Party shall take any measures necessary to observe its human rights obligations in accordance with international law.*

In addition, States could also agree on an obligation to periodically conduct human rights impact assessment of existing trade and investment agreements. Conducting human rights impact assessments of such agreements is seen as a key instrument to ensure that trade and investment agreements do not have negative effects on human rights.<sup>73</sup> The obligation to conduct such impact assessments of existing treaties could be achieved through the following clause<sup>74</sup>:

*Each Party shall periodically assess the impact of every trade and investment agreement ratified by the Party on the respect, protection and fulfilment of internationally recognised human rights / the international human rights obligations of the Party / fundamental human rights.*

<sup>71</sup> O. de Schutter, Guiding principles on human rights impact assessments of trade and investment agreements, Human Rights Council 2011, A/HRC/19/59/Add.5. [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-59-Add5\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-59-Add5_en.pdf).

<sup>72</sup> General Court, Case T-512/12, Front Polisario v. Council, Judgement of 10 December 2015, para 228. The decision was overturned by the Court of Justice on 21 December 2016 on procedural grounds without addressing the substantive human rights issues relied upon by the General Court, see ECJ, Case C-104/16 P Council / Front Polisario.

### 3. HUMAN RIGHTS OBLIGATIONS FOR EXPORT CREDIT AND INVESTMENT GUARANTEE SCHEMES

As mentioned above, economic incentives for foreign investors or exporters are usually not addressed in trade and investment agreements. However, they may have a considerable impact on the human rights situation in the importing or host country. In light of the divergent approaches to the human rights implications of export credit guarantees and investment guarantees in domestic legal systems, it might be beneficial to establish a general rule or principle in this regard also in the treaty on businesses and human rights, especially since the relevance of these instruments has been recognised in the UN Guiding Principles.

A clause addressing export credits and investment guarantees could be formulated as follows:

*Each Party ensures that enterprises which receive financial and other support from that Party, or any of its agencies or entities, including but not limited to export credit and investment guarantee schemes, do not cause or contribute to human rights violations or support corporate abuses of human rights and to carry out human rights due diligence with respect to its activities and general and with respect to the specific project supported by the Party. Furthermore, each Party ensures that its financial support does not give an incentive to cause or contribute to*

*human rights violations. Each Party also ensures that it does not become complicit in or benefit from the human rights violations.*

The treaty could also require the parties to take concrete steps. A non-exhaustive list could include the following requirements:

*A Party may fulfil its obligations under this article by adopting, among others, the following measures:*

- a) requiring its export credit and investment guarantee agencies to conduct a human rights impact assessment of the respective commercial activity before the economic incentive is promised or fulfilled;*
- b) requiring every beneficiary of an economic incentive to carry out effective human rights due diligence with respect to the project submitted for support specifically and for its activities and business relationships in general;*
- c) requiring that economic incentives may be withheld or withdrawn if their recipients abuse human rights;*
- d) requiring that the decision to grant an economic incentive should be based on clear and transparent criteria established by law.*

<sup>73</sup> UN Human Rights Committee, Report of the Special Rapporteur on the Right to Food, Olivier de Schutter, Addendum – Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, UN Doc A/HRC/19/59/Add.5, 19 December 2011, para 3.3.

<sup>74</sup> See also Bartels, above note 60.

# V.

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## CONCLUSION

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The international regime of trade and investment agreements is currently suffering from a significant legitimacy crisis, which should be considered as a window of opportunity for the introduction of new legal approaches to address the relationship between human rights and investment and trade policies. Reforming the investment and trade regime and establishing binding norms in a treaty on businesses and human rights are not mutually exclusive. Despite the current crisis of the trade and investment regime, it is safe to assume that these agreements will continue to exist and to exercise considerable influence on States. The treaty on businesses and human rights could therefore be used as an instrument to establish binding obligations on States to reform trade and investment agreements, to mitigate the potential negative impact of trade and investment agreements on the full enjoyment of human rights and to regulate the relationship between the two regimes in case of a conflict.

To ensure the primacy of human rights, the treaty could contain provisions addressing three specific areas. Firstly, treaty provisions could regulate the relationship between trade and investment agreements and human rights through a specific supremacy clause or through requirements ensuring the observance of human rights in trade and investment disputes and through the incorporation of human rights obligations and clauses in future trade and investment agreements. Secondly, the treaty could require the States to conduct human rights impact assessments before, during and at the end of the negotiation of a new trade and investment treaty and periodically review the impact of such a treaty on human rights. Thirdly, the treaty on businesses and human rights could specify obligations of export credit and investment guarantee agencies.



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