

## CONCEPT NOTE FOR PARALLEL SESSION AT UN FORUM ON BUSINESS & HUMAN RIGHTS – 16 NOVEMBER 2015

### UNPACKING THE UNGPS IN INVESTMENT DISPUTES: IS THERE A PLACE FOR HUMAN RIGHTS IN INVESTMENT TREATY ARBITRATION?

#### Session focus:

The UN Guiding Principles on Business and Human Rights (UNGP) set the standard for States and companies in order to prevent and address human rights abuses committed in business operations. This session looks at whether international investment agreements (IIAs) are currently compatible with the UNGPs. In particular this session will focus on two issues: (1) do IIAs constrain States from fully implementing the State's duty to protect human rights under the UNGPs, and if so what is the solution?; and (2) is international arbitration, the dispute resolution mechanism commonly found in IIAs, adequate as a forum for the UNGPs on access to remedy?

*(1) Do IIAs constrain States from fully implementing the State's duty to protect human rights under the UNGPs, and if so what is the solution?*

Through IIAs States give certain guarantees to foreign investors. Such guarantees typically include protection against expropriation of an investment by the State without justification and without adequate compensation, a commitment to afford 'fair and equitable treatment' (FET) (i.e. to ensure that the normal lawful conduct of business by a foreign investor in relation to their investment is not hampered by the State without good reason), and to observe any commitments the State may have given to the investor. In the event that any of these guarantees is breached, this could give rise to a claim by the investor under the IIA against the State. This session will discuss what happens in circumstances where the State's actions are taken in order to comply with its duty to protect human rights and whether the State is able to adequately raise a human rights defence under IIAs. Panellists will present their views on whether UNGPs should be better integrated into and protected in future IIAs, such as the Transatlantic Trade and Investment Partnership, and how the rights of a foreign investor can be legitimately balanced with States' human rights obligations.

*(2) Is international arbitration, the dispute resolution mechanism commonly found in IIAs, adequate as a forum for the UNGPs on access to remedy?*

The dispute resolution mechanism often found in IIAs is international arbitration. This is a dispute resolution mechanism that developed for the purposes of private commercial disputes and as investment treaty arbitration disputes increasingly involve human rights issues, it is now being used to determine such issues, which would traditionally be reserved for national courts. Steps have been taken to address the suitability of this mechanism for IIAs, such as the introduction of the transparency guidelines by UNCITRAL, and the initiative of some arbitral tribunals to use a proportionality analysis adapted from European Court of Human Rights jurisprudence but questions remain about whether such steps go far enough to address the legitimacy concerns which have been raised. The session will discuss whether a standing court is a more appropriate forum, especially considering the need to enforce the State's human rights obligations.

#### Key discussion questions

The session will be structured around two broad questions for discussion.

1. Do IIAs prevent States from fully implementing their duty to protect human rights under the UNGPs, and if so what is the solution?

- (a) What limits do guarantees provided by States to investors under IIAs impose on their ability to adequately implement the UNGPs? For example, where investors are operating public services such as energy or water utilities, how can States balance: (i) their obligations to provide protection to human rights under the UNGPs and public international law; and also (ii) comply with the guarantees promised to investors under IIAs?
  - (b) Should human rights protections and/or the UNGPs be expressly incorporated into future IIAs? Or could investors' 'legitimate expectations' be adjusted, for example by requiring investors to conduct human rights due diligence prior to investment?
  - (c) From a foreign investor's perspective, how can the balance be struck between investor rights and human rights, to avoid a State ostensibly relying on its human rights obligations to effectively override investor protection in IIAs?
  - (d) How do human rights arise in investment treaty arbitration both for investors and for host-State citizens (e.g. through protection against expropriation, fair trial considerations, right to water and right of non-contamination and fair trial considerations)?
  - (e) Could international arbitral tribunals follow the example of some tribunals in applying a proportionality/margin of appreciation test approach similar to that taken by the European Court of Human Rights, to achieve a balance between adequate protection to human rights and to investor rights under IIAs?
2. Does international arbitration, the dispute resolution mechanism commonly found in IIAs, provide adequate protection as a forum for the UNGPs on access to remedy?
- (a) Is investment treaty arbitration an appropriate forum to provide access to remedy under the UNGPs, in particular in view of (i) degree of deference awarded to States; (ii) non-participatory nature of arbitration (noting amicus rights under ICSID, UNCITRAL and NAFTA); (iii) limited rights of challenge to awards; (iv) nature of appointment of international arbitration tribunals; and (v) risk of conflicting decisions?
  - (b) Would a standing arbitration court with jurisdiction to determine such issues be more appropriate?
  - (c) What does or could the future hold in terms of alternatives or additional forums?

### **Brief background description**

States increasingly outsource what were once public services, such as energy and water supply, to foreign private investors. Through IIAs, States guarantee certain protections to foreign investors, for example, not to expropriate the investor's investment without adequate compensation, to accord foreign investors FET, generally under protection of international arbitration as a dispute mechanism. Regulatory measures taken by a host-State that directly or indirectly affect the value of a foreign investor's investment may be challenged by the investor in arbitration proceedings. This brings into potential conflict the State's obligations to fulfil its population's human rights (for example through regulatory measures intended to protect public welfare and human rights) as against its obligations under investment treaties.

For example, a State may privatise its water services by entering into a concession agreement with a foreign investor-owned water company. In light of rising water prices, water shortages or public health concerns, the State may wish to change or terminate the concession agreement, to ensure that the human right to water of its citizens is adequately protected. But any such changes would likely affect the value of the foreign water company's investment and the investor would be within its rights to bring an international arbitration claim that the State has breached the expropriation, FET or umbrella protections under the applicable IIA. When

looking to regulate to protect human rights in this way, States must therefore consider not only their human rights obligations under the UNGPs and public international law, but also their responsibilities under international investment treaties towards foreign investors. The tension between these two sets of obligations is difficult to reconcile and concerns have been raised that current IIAs unduly restrain a State's public policy making and that investor rights and human rights could be better reconciled in future IIAs.

Especially in the context of the water and energy sectors, as investors turn to international arbitration to seek to protect the rights afforded to them under IIAs, international investment tribunals are increasingly ruling on disputes which touch on human rights issues.

Some tribunals have been flexible and looked to a proportionality analysis from European Court of Human Right jurisprudence to determine whether a State's regulatory measures intended to strengthen domestic (including human rights standards) are within the State's margin of appreciation. However, the legitimacy of determining human rights issues (traditionally reserved for domestic courts) by way of investment treaty arbitration is questionable, given the nature of the selection of arbitrators, limited rights of intervention of third parties and limited means of challenging an award once issued. To ensure accountability and to 'legitimise' investment treaty arbitration in a broader sense (e.g. reducing risk of inconsistent decisions and providing accountability for exercise of public powers) alternatives are being suggested, including a permanent arbitral body. Some suggest that such a body would provide better access to remedy and transparency (e.g. by permitting amicus interventions by civil society on a wider basis than investment treaty arbitration currently allows); however, such a body could also mean additional delay, cost and unwanted publicity for parties.

### **Names of speakers and moderator**

Moderator: Angeline Welsh (Allen & Overy LLP)

Speakers:

1. Professor Zachary Douglas QC (Matrix Chambers)
2. Ariel Meyerstein (United States Council for International Business)
3. Tara Van Ho (Essex Business and Human Rights Project)

### **Session format**

The session is for 1 ½ hours and will start with a brief introduction from the moderator. The session will be split into two; in the first half the first question will be posed to each of the speakers in turn who will be asked to deliver a 6-8 minute overview of their opinion. The panel will then be open to questions from the floor. The same format will be adopted in the second half, this time in relation to the second question.

### **Information about the organisers:**

#### ***Allen & Overy LLP's Human Rights Working Group / Arbitration team:***

A&O's Human Rights Working Group brings together lawyers from around the world who are passionate about using their expertise on human rights work. We provide pro bono support to human rights charities and international non-governmental organisations, such as Liberty, Fair Trials International and Amicus, in the delivery of their work. This might be by representing marginalised communities in court, submitting interventions and amicus curiae briefs and undertaking international comparative research projects to inform policy work.

A&O's Human Rights Working Group also delivers training for (and with) Allen & Overy's clients on human rights compliance. We advise commercial clients on their human rights policies, particularly in the light of the adoption by the UN Human Rights Council of the Guiding Principles on Business and Human Rights (known as the 'Ruggie Principles'), and the applicability to their business of instruments such as the European Convention on Human Rights and the Charter of Fundamental Rights.

A&O's Arbitration Group is one of the world's leading International Arbitration and Public International Law practices. With specialist practitioners across the world, we have an excellent track record of achieving successful outcomes in commercial arbitrations and investment treaty disputes across a number of sectors, including energy and natural resources, banking and finance, telecommunications, media and technology, and intellectual property.

***Essex Business and Human Rights Project, in collaboration with Al-Haq***

Based at the world-renowned University of Essex's Human Rights Centre, EBHR uses academic knowledge to inform and guide practical considerations in the areas of business and human rights, and investment, trade and human rights. With a multi-disciplinary team available for research, training, and consultancy, EBHR has worked with governments, NGOs and IGOs in evaluating the human rights impacts of proposed laws, new investments, and business activities in a wide range of states.

Amongst other projects, EBHR has worked on corporate criminal responsibility in Brazil, mining laws in Afghanistan and Liberia, oil and petroleum legislation in Uganda, and issues surrounding construction in Kosovo. EBHR's members also regularly write both academic and non-academic pieces on issues relevant to the field of business and human rights.

Al-Haq is an independent Palestinian non-governmental human rights organisation based in Ramallah, West Bank. Established in 1979 to protect and promote human rights and the rule of law in the Occupied Palestinian Territory, the organisation has special consultative status with the United Nations Economic and Social Council. Al-Haq is the West Bank affiliate of the International Commission of Jurists - Geneva, and is a member of the Euro-Mediterranean Human Rights Network, the World Organisation Against Torture, the International Federation for Human Rights, Habitat International Coalition, and the Palestinian NGO Network.