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ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Human rights, trade and investment

Report of the High Commissioner for Human Rights* **

* The report was submitted after the date set by the Assembly in order to allow an appropriate length of time to hold discussions and incorporate comments received.

** The present report exceeds the page limits set by the General Assembly. Therefore, the summary only is being circulated in all the official languages of the United Nations while the annex remains in the language of submission only.

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Summary

The present report is submitted in accordance with the request contained in resolution 2002/11 in which the Sub-Commission on the Promotion and Protection of Human Rights requested the High Commissioner to submit a report on human rights, trade and investment, including specific attention to the human rights implications of privatization, to the Sub-Commission at its fifty-fifth session.

The report is the fourth in a series of reports of the High Commissioner concerning trade and investment liberalization, the others addressing the impact of human rights of the Agreement on Trade-Related Aspects of Intellectual Property Rights (E/CN.4/Sub.2/2001/13); globalization, with an emphasis on agricultural trade (E/CN.4/2002/54); and the liberalization of trade in services (E/CN.4/Sub.2/2002/9). While the previous reports focused on the relationship between human rights and trade, the present report concentrates on investment.

The report begins by noting that the relationship between human rights and investment is difficult to generalize, and depends on a range of factors including the type of investment being discussed, the sector being invested in, the country in question, the motivations of investors and the actions of Governments. Taking these variables into account, the report indicates that well-managed investment has the potential to promote and protect human rights and today, most developing countries seek investment as a means of promoting development.

In order to encourage higher levels of investment, many States have undertaken investment liberalization unilaterally, through World Bank/International Monetary Fund structural adjustment programmes, or through the adoption of trade and investment treaties. However, in doing so, States have had to balance various competing objectives. While the objective of ensuring efficient *international* production by lowering barriers to investment might be what drives investors, Governments generally seek higher levels of investment in order to pursue *national* development objectives. Meeting these two goals might sometimes require compromise. From a human rights perspective, it is important to balance these objectives with a view not only to attracting investment and promoting national development, but also to achieving economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realized.

Agreements concerning investment exist at the bilateral, regional and multilateral levels. Over the last decade, the number of investment treaties has grown rapidly; over 2,100 bilateral investment agreements exist today and several regional trade agreements, such as the North American Free Trade Agreement (NAFTA), include investment-liberalizing provisions. Internationally, no comprehensive international investment agreement exists, although several World Trade Organization Agreements, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights, the Agreement on Trade-Related Investment Measures, the General Agreement on Trade in Services and the Agreement on Subsidies and Countervailing Measures, include provisions that affect investment and investors. However, the WTO Working Group on the Relationship between Trade and Investment has a mandate to clarify certain aspects of a possible future international investment agreement. Further, WTO ministers have agreed that negotiations on a multilateral framework for investment will commence at the Fifth WTO Ministerial Conference in Cancún, Mexico, in September 2003 so long as it is on the basis of an explicit consensus decision by WTO members.

The provisions of investment liberalization agreements vary from agreement to agreement. Generally however, investment agreements will have a dual purpose of first protecting investment flows and, second, encouraging economic cooperation and the promotion of higher levels of investment flows. Examples of rights and protections granted to investors include: protection against discrimination, in the form of most-favoured-nation treatment and national treatment; increasing market access for investors and investment; bans on performance requirements and some investment incentives; and protection against the expropriation of investments. Similarly, investment agreements might include exceptions to allow some protection in the public interest, to protect public morals, public order, national security, as well as human, animal and plant life. Investment agreements also include dispute settlement mechanisms - both in the form of a State-to-State mechanism as well as an investor-to-State mechanism.

From a human rights' perspective, States have undertaken to respect, protect and fulfil human rights nationally which apply in all contexts, including the context of investment liberalization. Further, States have committed to international cooperation and assistance to promote human rights and to create a social and international order through which all human rights and fundamental freedoms can be fully realized. Considering investment liberalization from the perspective of the promotion and protection of human rights brings a new dimension to the discussion. While investment liberalization reduces to some extent the field of State action and policy in relation to investors and investment, a human rights approach emphasizes that liberalization should not go so far as to compromise State action and policy to promote and protect human rights. To the extent that investment agreements concern human rights issues, States have a duty to regulate (the duty to fulfil human rights). That duty to regulate concentrates on four particular areas in the context of investment liberalization:

(a) The need to regulate some forms of investment. Investment agreements should retain greater flexibility for States to regulate and control some forms of investment - particularly short-term and volatile investment - that can have negative effects on economic performance and reduce the available resources needed to promote human rights;

(b) The flexibility to use some performance requirements and other measures. Bans on performance requirements and the application of national treatment provisions should not: reduce States' capacity to use local content requirements in the interests of promoting cultural rights, or reduce States' capacity to introduce special measures such as positive action schemes to promote the human rights of particular individuals or groups;

(c) The flexibility to withdraw commitments to liberalize investment in light of experience. Getting the right balance between investors' rights and States' rights that promotes the human rights of all takes time and the right balance may vary over time. Liberalization is not a one-track process. States should maintain the flexibility to withdraw commitments to liberalization where experience demonstrates that liberalization has had a negative effect on the enjoyment of human rights;

(d) The flexibility to introduce new regulations to promote and protect human rights. There is mounting concern that tribunals adjudicating investor-to-State disputes are increasingly interpreting expropriation provisions broadly in ways that could threaten States' ability and

willingness to introduce new regulations to protect the environment and human rights. It will be important to safeguard the ability to introduce new measures to promote and protect human rights within interpretations of expropriation provisions.

Investment liberalization to be effective should also be balanced by complementary measures to promote and protect human rights. Those measures include:

(a) Balancing investors' rights with investors' obligations. Ongoing efforts to promote corporate social responsibility - both on a voluntary basis and through the recognition of investors' direct accountability for their actions with regard to human rights - should be explicitly acknowledged in investment agreements;

(b) Protecting against certain actions of Governments. National, regional and international accountability mechanisms for violations of human rights need strengthening given that the race to attract investment might lead to a "race-to-the-bottom" of environmental and human rights standards. To this end, it is relevant to note the decision of the Commission on Human Rights to consider options for an individual complaints mechanism in relation to violations of economic, social and cultural rights;

(c) Promoting home-country measures. Importantly, investment liberalization should be linked to the urgent and pressing need for wealthy countries to meet their commitment to provide 0.7 per cent of their gross national product (GNP) as official development assistance (ODA), with a particular focus on meeting the investment and development needs of poor countries.

The report then considers some of the human rights implications of privatization as a result of private sector participation in the water and sanitation sector.

Finally, the report offers the following areas for further consideration and action:

(a) *Including the promotion and protection of human rights among the objectives of investment agreements.* Given States' international responsibilities with regard to the promotion and protection of human rights, States should consider including an explicit reference to the promotion and protection of human rights among the objectives of investment liberalization agreements;

(b) *Ensuring States' right and duty to regulate*. Broad interpretations of expropriation provisions could affect States' capacity and willingness to regulate for health, safety or environmental reasons. Therefore interpretations, or even explicit declarations by parties to agreements, that recognize and protect States' responsibility to fulfil human rights are encouraged;

(c) *Promoting investors' obligations alongside investors' rights*. There is a need to balance the strengthening of investors' rights in investment liberalization agreements with the clarification and enforcement of investors' obligations towards individuals and communities;

(d) *Promoting international cooperation as part of investment liberalization*. Wealthy countries should meet their commitment to provide 0.7 per cent of GNP as ODA as a necessary accompaniment to investment liberalization;

(e) *Promoting human rights in the context of privatization*. It is important to highlight the need to promote the rule of law - particularly through popular participation, transparency, legality, equality and accountability - in relation to essential services sectors, including in the process of decision-making concerning privatization as well as the implementation and monitoring of private sector concession agreements;

(f) *Increasing dialogue on human rights and trade*. Greater consultation is needed between delegates to the WTO and delegates representing the same country as members or observers at the Commission on Human Rights on the links between human rights and trade and on particular ways to ensure coherence in policy and lawmaking;

(g) *Future work*. As a possible field of future study, the High Commissioner ad interim suggests that consideration could be given to the development of methodologies for human rights impact assessments of trade and investment rules and policies and the appropriate assistance needed to undertake them.

Annex

REPORT OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS ON HUMAN RIGHTS, TRADE AND INVESTMENT

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Introduction

1. The present report is submitted in response to Sub-Commission resolution 2002/11, "Human rights, trade and investment", which requested the High Commissioner to submit a report on human rights, trade and investment, including specific attention to the human rights implications of privatization, to the Sub-Commission at its fifty-fifth session.

2. This report is the fourth in a series of reports of the High Commissioner concerning human rights and trade. At the fifty-third session of the Sub-Commission, the High Commissioner submitted a report on the human rights implications of the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (E/CN.4/Sub.2/2001/13) and at its fifty-fourth session, the High Commissioner submitted a report that examined the liberalization of trade in services and its impact on the enjoyment of human rights (E/CN.4/Sub.2/2002/9). Further, the High Commissioner submitted a report on the implications of the WTO Agreement on Agriculture for the enjoyment of the right to food and the right to development to the Commission on Human Rights at its fifty-eighth session in 2001 under the title "Globalization and its impact on the full enjoyment of human rights" (E/CN.4/2002/54). While this is the first report of the High Commissioner to consider investment, it is not the first time the Sub-Commission has considered these issues. Significantly, Sub-Commission experts J. Oloka-Onyango and Deepika Udagama considered the question of human rights, trade and investment in 1999 in the context of the Organisation for Economic Cooperation and Development (OECD) Multilateral Agreement on Investment (MAI) in their working paper (E/CN.4/Sub.2/1999/11). The present report builds on these previous reports.

3. There is increasing acknowledgement that a complex web of legal obligations concerning individuals, Governments and investors link human rights, trade and investment. Given the focus on the relationship between human rights and trade in previous reports, the present report will concentrate on the relationship between human rights and investment, considering trade-related concerns only where they are directly related to investment. To do so, the report first considers the relationship between human rights and investment - a relationship that is difficult to generalize, depending significantly on the country and sector in question, the type of investment, and the actions of investors and Governments. The second section examines the liberalization of investment through investment agreements, reviewing some of the principal areas of those agreements relevant to the promotion and protection of human rights. The third section considers some of the issues relevant to promoting and protecting human rights in the context of investment liberalization, particularly the need to allow flexibility so that States are able to respect, protect and fulfil human rights through appropriate regulation. This section also identifies the importance of complementary measures to investment liberalization to ensure the effective respect for human rights by both States and investors. The fourth section examines the specific case of water privatization as a means of clarifying the human rights implications of privatization, as requested by the Sub-Commission in the resolution. Finally, the report sets out conclusions and recommendations for further work.

4. As with the previous reports, the Office of the United Nations High Commissioner for Human Rights (OHCHR) consulted with intergovernmental organizations in the preparation of the report and shared a first draft of the report with WTO, the World Health Organization (WHO), the World Bank and the United Nations Conference on Trade and Development (UNCTAD), as well as relevant experts.

I. HUMAN RIGHTS AND INVESTMENT

5. Investment can be made in a range of sectors, including primary industry, manufacturing and services, and can take many forms, such as capital, bonds, shares and stocks, personal and real property, business concessions, technology and intellectual property rights such as patents, copyright or trademarks. While investors can be both individuals as well as business enterprises, transnational corporations (TNCs) are the principal actors in foreign investment, the majority of which are based in developed countries.[1] Foreign investment can be short term or long term, it might set up new industries and entities, it might be a merger or acquisition with an existing enterprise, or it could simply be a share holding. Investment can introduce tangible assets and technology to set up new factories, production systems or services. This in turn can create employment, transfer technology and know-how, stimulate local research and innovation, and improve opportunities for income distribution while at the same time promote trade and prospects of growth and further global integration.[2] Significantly, the importance of investment internationally is growing. UNCTAD has indicated that the flow of outward foreign direct investment (FDI) alone increased from $1.7 trillion to $6.6 trillion from 1990 to 2001,[3] overtaking trade as the leading integrative force in the world economy.[4] Investment therefore offers significant potential for generating growth, combating poverty and promoting development and as such has the potential to contribute to the promotion and protection of human rights.

6. It is difficult to generalize the effects of investment on the enjoyment of human rights. The fact that investment can promote trade, growth and development suggests at first glance a potential correlation between investment and the enjoyment of human rights, particularly economic, social and cultural rights and the right to development. Perhaps the most direct benefits flow from the effects of investment on employment. UNCTAD has noted that investment has generated significant employment in export-oriented labour-intensive activities, primarily in lower-end manufacturing but also in services,[5] and there is evidence to suggest that increases in investment have had positive effects on the participation of women in paid employment over the past 20 years.[6] Employment can lead to new skills and the training of human resources and there is evidence that this can make income distribution less unequal.[7] This in turn can have positive impacts on the enjoyment of human rights by empowering people and creating more equal societies. For women in particular, access to paid employment - even low-paid employment - could provide a vehicle to increased autonomy both within and outside the family and could lead to increased pressure for greater social recognition of women's equal rights. However, increased employment opportunities for women do not necessarily correlate with equal rights for women and male workers. To some extent, human rights and investment could be self-reinforcing. Importantly, while investment offers the opportunity to improve training and skills, the promotion of the right to education through the national education system remains the primary means of ensuring a skilled workforce and a vital area of host government policy to attract investment.[8] Further, reducing child labour, eliminating discrimination in the workplace and promoting collective bargaining are not only important in their own right, they

motivate the labour force and can help attract investment.[9] Similarly, the promotion and protection of the right to participation and freedom of information can promote more accountable, democratic and transparent societies that are also attractive to investors and investment.

7. However, the effects of investment on the enjoyment of human rights are not uniform and the potential for investment to affect human rights through stimulating growth and development will differ depending on the type of investment, the host country, the sector targeted by investment, the motivations of the investor as well as the policies of both host and home country. Significantly, different investment transactions will affect growth and development and potentially human rights in various ways. For example, foreign direct investment (FDI) setting up new industries or capacities - greenfield investment - can (although not necessarily) effectively lead to the "crowding in" of local enterprises, increasing business opportunities and local linkages and stimulating growth and development of underdeveloped or new industries.[10] On the other hand, mergers and acquisitions - a more common form of foreign investment - is more likely to lead to larger foreign investors with strong competitive advantages increasing market concentration and "crowding out" local investors and entrepreneurs which could potentially have adverse effects on domestic enterprises, initiatives and even local employment. This does not have to be the case and in other situations, mergers and acquisitions might simply be the start of a longer-term and more productive relationship with the local environment, possibly leading to sequential investment.[11]

8. On the other hand, while not necessarily always the case, some forms of portfolio investment, particularly short-term speculative capital flows, are less stable and less productive than FDI, taking advantage of differences in interest rates and currency instability and offering fewer long-term benefits for the progressive realization of human rights. In the 1990s several developing countries experienced surges and reversals of foreign capital flows that destabilized the local economy, particularly where the reversals were sudden and large.[12] Economic instability in turn can have negative effects on the enjoyment of human rights, straining available resources in national budgets needed for the progressive realization of economic, social and cultural rights and the right to development. The independent expert on the right to development noted that this was the general experience of the East Asian financial crisis in the second half of the 1990s, although it should be noted that the volatility of short-term capital flows was only one of many factors that led to the crisis (E/CN.4/2003/WG.18/2, para. 30). Significantly, a United Nations Development Programme (UNDP) report has indicated that the distinction between FDI and more volatile investments is becoming blurred and investors are increasingly able to convert bricks and mortar investments into liquid assets which they can rapidly take out of the country. As such, some forms of FDI might have similar effects to short-term capital flows in times of crisis.[13]

9. Similarly, the potential effects of investment on the progressive realization of human rights differ between countries. In spite of the substantial increases in investment over the last 10 years, the majority of investment occurs between developed countries, with flows to developing countries and countries in transition remaining unevenly distributed. Of the $735 billion of world inflows of investment in 2002, $503 billion went to developed economies, $205 billion to developing economies and the remaining $27 billion to economies in transition. Among developing countries, the five largest recipients attracted 62 per cent of the total inflows.[14] On the other hand, Africa remains a marginal recipient of FDI, although inflows

did rise from $9 billion in 2000 to more than $17 billion in 2001, the majority of this increase being concentrated in large projects in Morocco and South Africa.[15] Similarly, FDI in the 49 least developed countries (LDCs) was small in absolute terms. While levels rose to $3.8 billion over 2002 in spite of an overall economic slowdown, LDCs remain marginal recipients of FDI, accounting for only 2 per cent of all FDI to developing countries or 0.5 per cent of the global total. For LDCs, official development assistance (ODA) rather than FDI has a more significant role to play in promoting human rights. However, while ODA remains the largest component of external financial flows to LDCs, ODA levels have declined in relative and absolute terms since 1990 with LDCs receiving $12.5 billion in net terms in 2000 compared with $16.8 billion in 1990. Such declines are worrying, and UNCTAD has indicated that FDI is not a substitute for ODA.[16]

10. Next, the effects of investment on the enjoyment of human rights can change over time, leading to progressive improvements in times of prosperity but regressions when investment flows decrease, particularly where the State has pursued a policy of investment liberalization without also setting up appropriate social safety nets. In Viet Nam, for example, UNICEF identified positive effects on children's rights, particularly the right to a standard of living adequate for a child's overall development (Convention on the Rights of the Child, art. 27), due to economic reforms encouraging foreign direct investment and trade complemented by ODA.[17] The report notes that savings and investment, rapid expansion of trade and sizeable inflows of FDI and ODA had led to high real rates of growth in gross domestic product (GDP) which in turn resulted in greater choice for people and greater opportunity to participate in development. The report also highlighted the potential of foreign investment to broaden technology and employment opportunities generally, although it also noted children leaving school to enter the workforce early. Significantly, available data indicated that economic reforms had helped reduce poverty from 58 per cent of the population in 1992/93 to 37 per cent in 1997/98. However, the report also noted a drop in FDI flows over 1998, due to the prevailing financial crisis, amounting to $3 billion, which had deteriorated previous gains.[18]

11. Further, the potential for investment to affect human rights can differ from sector to sector. For example, opportunities for women and men can differ between sectors, with opportunities for women appearing to be greater in the manufacturing sector and services sector but less so in the agricultural sector. In particular, investment in export-oriented industries (textiles, apparel, electronics, leather goods and food processing) tend to promote higher levels of women's employment, potentially improving the enjoyment of their human rights.[19] Similarly, investment in specific sectors, such as the health, education, water and sanitation sectors, are likely to have more direct effects on the enjoyment of human rights due to their direct relationship with specific rights, namely the right to health, the right to education and the right to water. In particular, where investment is in previously public-owned utilities, investment could have dramatic effects - both beneficial and less so - on the enjoyment of these rights due to the differences of approach in service provision between public and private service providers and their different responsibilities towards the promotion and protection of human rights. Similarly, investment in manufacturing or services sectors might be more likely to offer potential for employment and development than investment in the mining sector, given that investment in the mining sector often has little interaction with the domestic economy, often creates little employment, and the possibilities of technology adaptation through investment in the mining sector are small.[20]

12. The effect of investment as a positive force to promote the enjoyment of human rights depends significantly on the actions of the Government. Traditionally, host country Governments have taken various active measures to direct investment towards national development needs. Such measures have included protecting infant industries by restricting the entry of foreign investors, protecting the domestic economy against the entry of certain forms of investment, or requiring investors to use certain local materials, to transfer technology and skills, or to undertake joint ventures with local enterprises. Provided they have been part of an overall coherent and comprehensive investment strategy, such measures have, in the past, had beneficial impacts on national development.[21] While such measures might help direct investment towards improved trade, growth and development, additional government action might be needed to ensure that improvements benefit those whose human rights are most vulnerable, such as the poor or people living in outlying regions that might not immediately attract investment. In certain situations, Governments have to introduce or reinforce complementary measures to investment, such as competition policies, environmental protection standards, taxation measures and regulations directed towards the fulfilment of human rights, in order to direct investment and to avoid abuses of market power.

13. Indeed, government action can be an important determinant in the relationship between human rights and investment. In the past, there has been concern that Governments have lowered environmental and human rights standards - including labour standards, freedom of expression and freedom of association - to attract investment. The phenomenon, known as the "race-to-the-bottom", has arisen specifically in the context of Economic Processing Zones (EPZ). While there is little direct evidence to support such "race-to-the-bottom" arguments, the International Labour Organization (ILO) acknowledges that, as a result of investment, downward pressure on labour and environmental standards exists and it is difficult to judge the extent to which foreign investment is inhibiting the socially optimal raising of standards.[22] Interestingly, there is increasing evidence that performing EPZs depend on the existence of complementary policies, notably policies that aim at enhancing human resources and creating infrastructure.[23] ILO has identified "smart" EPZs strategies pursued in some countries that encourage stable labour relations over poor but potentially volatile labour relations and the production of goods for export to countries sensitive to labour production methods.[24]

14. Not only are host country government policies and measures important; home country Governments can also play a role in promoting investment in developing countries and consequently in improving investment's potential to promote human rights. Home country Governments can promote investment to developing countries through providing information and facilitating contacts between potential investors and host countries and providing financial and fiscal incentives to offset investment risks and to promote technology transfer.[25] Governments of wealthy countries also play an important role in supplementing investment by meeting their ODA commitments.

15. The effect of investment on the enjoyment of human rights also depends on how investors manage investment. For example, WHO has identified adverse health effects of investment and trade in relation to tobacco and infant formula. In the context of tobacco control, WHO has indicated that the transnational tobacco industry has taken advantage of foreign direct investment to develop strategic partnerships with local companies which is spreading and reinforcing worldwide the "tobacco epidemic" - one of the most significant causes globally of preventable death, killing an estimated 4 million people a year, the majority of whom live in

developing countries.[26] Similarly, the promotion of infant formula in developing countries can have a negative impact on children's health where infant formula is promoted in areas that lack clean water, where parents have difficulties associated with reading or following the mixing instructions and where there is poor hygiene. WHO has stated, for example, that direct advertising by corporations of infant formula was singularly inappropriate, noting that it competes with healthy breastfeeding and favours uninformed decision-making.[27] Similarly, a report of UNICEF has noted that one of the reasons why only 44 per cent of infants in the developing world are breastfed is due to "unethical" corporate promotion of infant formula.[28] On the other hand, socially responsible investors can help mitigate some of the negative impacts of investment while promoting its benefits. For example, in the largest oil field project in the Western Hemisphere, British Petroleum personnel worked directly with affected communities to diagnose their development needs, prepare plans for some 50 development projects including schools, health clinics, water supply and sanitation projects, and helped local authorities with the submission of the projects, most of which were ultimately successful.[29]

16. Finally, the effect of investment on the enjoyment of human rights depends on how investors and Governments manage investment together. Two cases illustrate some of the worst-case scenarios where the actions of Governments and investors can have negative effects on the enjoyment of human rights. The first concerns a case before the African Commission on Human and Peoples' Rights in relation to a communication brought by representatives of the Ogoni People in Nigeria under the African Charter on Human and Peoples' Rights (communication No. 155/96). The communication claimed violations of rights under the African Charter, including the right to health, the right to a generally satisfactory environment, the right to dispose of wealth and the right to property, as a result of negligent and intentional acts by the previous government administration in Nigeria through the State oil company, the majority shareholder in a consortium with Shell Petroleum. In particular, the Government had failed to regulate and monitor the actions of the oil companies and had undertaken a succession of violent military interventions in support of the companies. The acts and omissions of the Government and oil companies resulted in oil spills and the contamination of the water, soil and air, as well as the destruction of crops and the livelihoods of the Ogoni people. In May 2002, the Commission found in favour of the Ogoni people, making orders for compensation.

17. Another case concerns the liability of a foreign investor for human rights violations in Myanmar. The foreign investor, Unocal, had been involved in a project concerning the extraction and transportation of natural gas from the Myanmar coast through the interior of the country towards Thailand. During the project, the Myanmar military forced villagers to act as porters and to build roads without compensation. The military also confiscated land owned by villages along the pipeline route without compensation and committed acts of murder, rape, assault and torture on forced labourers and their families. The villages and other parties brought proceedings in the United States against the investor for its complicity in the human rights violations under Californian law as well as under the Alien Tort Claims Act [28 U.S.C. § 1350]. After dismissing the claims in the District Court,[30] the Court of Appeals, noting that it was well known that the military provided security and other services to the project and that Unocal was aware of this, recently held that there was evidence to raise the issue of whether the investor was sufficiently aware and involved in the human rights violations to be liable under the Act. The case has been remanded to the District Court for further consideration (*Doe and Others v. Unocal Corporation and Others; Roe III and Others v. Unocal Corporation and Others*).[31]

18. The relationship between human rights and investment is therefore subject to many variables and much depends on the type of investment, the motivations of the investor, the actions of Governments, and the country and sector in question. Nonetheless, the potential of well-managed investment to promote the enjoyment of human rights exists and today most developing countries seek investment as a means of promoting development.[32] In order to encourage higher levels of investment, many States have undertaken investment liberalization, unilaterally, through World Bank/International Monetary Fund (IMF) structural adjustment programmes, or through the adoption of trade and investment treaties. While the liberalization of investment through the removal of obstacles to the entry of investment and investors, strengthening standards of treatment for investors and the establishment of a more stable and transparent investment environment domestically and abroad is only one factor that determines investment flows, UNCTAD has identified investment liberalization as one of the long-term driving forces behind investment behaviour of firms.[33]

19. However, while the objective of ensuring efficient *international* production through lowering barriers to investors might be what drives investors, Governments generally seek higher levels of investment in order to pursue *national* development objectives. Thus, the objectives of investors might focus on freeing up movement of investment and reducing restrictions on how they invest in order to increase economic efficiency and provide an optimum return on investment, while the objectives of Governments might focus on attracting certain forms of investment over others and in directing investment towards specific sectors or activities that promote long-term national development goals. Meeting these two goals might sometimes require compromise. From a human rights perspective, it is important to balance these objectives with a view not only to attracting investment and promoting national development, but also to achieving economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realized, as stated in article 1 of the Declaration on the Right to Development (DRD).

II. RULES AND POLICIES CONCERNING INVESTMENT LIBERALIZATION

A. Bilateral, regional and international agreements concerning investment

20. Agreements concerning investment exist at the bilateral, regional and multilateral levels. Given the unwillingness of Governments to subject their investment policies to international rules at the creation of the General Agreement on Tariffs and Trade (GATT), investment rules, unlike international trade rules, have developed primarily at the bilateral level.[34] States originally adopted bilateral investment agreements (BITs) to protect investment in response to the uncertainty of the cold war and the decolonization period where unilateral government actions such as asset stripping or nationalization of industries exposed foreign investors to risks, often without compensation. Since the cold war, States have increasingly viewed BITs as vehicles for liberalizing investment by reducing constraints on investment opportunities as a means of attracting investment. Indeed, over the last decade, the number of investment treaties has grown rapidly and over 2,100 BITs exist today.[35] At the regional level, among 172 regional

trade agreements, several, such as the North American Free Trade Agreement (NAFTA), include investment rules.[36] Further, Western Hemisphere States are currently negotiating the Free Trade Area of the Americas which includes a mandate to draft a legal framework on investment for the region.

21. Internationally, there is currently no comprehensive international investment agreement, although discussions have been ongoing since the 1990s. For example, the member States of the OECD commenced discussions on a Multilateral Investment Agreement (MAI) during the second half of the 1990s and had prepared a draft agreement by 1998. The process subsequently collapsed, however, in part due to concerted pressure from human rights, environmental and consumer groups. At the time, Sub-Commission experts Mr. Oloko-Onyango and Ms. Udagama criticized the MAI both for the lack of transparency throughout the negotiating process and for its failure to take into account several dimensions of States' affirmative obligations to respect, protect and fulfil human rights within its substance (E/CN.4/Sub.2/1999/11, paras. 38, 47).

22. While no comprehensive international investment agreement currently exists, several WTO agreements deal with aspects of investment. For example, the Agreement on Trade-Related Investment Measures (the TRIMS Agreement) relates to investment in the manufacturing sector, focusing on discriminatory investment measures such as certain performance requirements over imported and exported goods. The General Agreement on Trade in Services (the GATS Agreement) relates, inter alia, to investment in the services sector through the establishment of certain rules governing the entry and treatment of foreign investment. The Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) has an investment dimension - but only indirectly - given that increasing shares of corporate investments are intangible assets such as brands, patents and trademarks, while the Agreement on Subsidies and Countervailing Measures concerns subsidies but not other investment-related measures. Consequently, different rules apply to different sectors. For example, while GATS covers the entry and treatment of investment in the services sector, the TRIMS Agreement covers only performance requirements over investment in goods but not the entry and treatment of foreign investors and investments. Proponents of a multilateral investment agreement have described the current WTO approach as a patchwork of investment rules and as a result promote the development of comprehensive multilateral rules on investment - a generic set of investment disciplines that no longer makes artificial distinctions between goods, services, business people or intellectual property.[37]

23. Consequently, WTO member States are considering how to treat investment more systematically by exploring the possibilities of a multilateral framework agreement on investment. In 1996, the member States of WTO established a working group on the relationship between trade and investment at the First WTO Ministerial Conference in Singapore. As a result of this decision, investment - along with competition policy, trade facilitation and transparency in government procurement - has become known as a Singapore issue. In 2001, WTO member States revised the mandate of the working group at the Fourth WTO Ministerial Conference in Doha. In Doha, ministers mandated the working group to focus on the clarification of: the scope and definition of such an agreement; transparency; non-discrimination; modalities for pre-established commitments based on a GATS-type positive list approach; development provisions; exceptions and balance-of-payments safeguards; consultation and the settlement of disputes between members (Doha Declaration, para, 22). Further, ministers agreed that negotiations on a multilateral framework to secure transparent, stable and predictable conditions

for long-term cross-border investment would take place after the Fifth WTO Ministerial Conference in Cancún, Mexico, in September 2003 on the basis of a decision to be taken by WTO members, by explicit consensus (ibid., para. 20). The working group's mandate as a result of the Doha Declaration therefore is exploratory and does not, as yet, include a mandate to negotiate new rules or commitments.

B. Investment rules

24. Investment agreements establish a set of rights and obligations between States in relation to their treatment of investors and investment. It is commonly stated that, in doing so, investment agreements establish a set of investors' rights. However, from a legal perspective, it is important to distinguish those rights from human rights. National, regional and international treaties recognize a range of civil, cultural, economic, political and social rights - known as human rights - that are fundamental to a life of human dignity. Investors' rights, on the other hand, are instrumental rights: rights created and modified by States in order to meet certain economic and developmental objectives. The type of rules and the level of protection to investors guaranteed under investment agreements will thus vary between agreements although many investment agreements have common elements. Typically, investment agreements will have the dual purpose of first protecting investment flows and second encouraging economic cooperation and the promotion of higher levels of investment flows. Importantly, investment agreements will establish which investors and which investments come within their scope and at times will exclude some types of investors - for example partnerships, joint ventures, not-for-profit organizations or State-owned corporations[38] or some types of investments - for example, short-term capital flows or portfolio investment. Examples of rights and protections granted to investors include:

(a) *Protection against discrimination*. The principle of non-discrimination generally takes two forms - most-favoured nation (MFN) treatment and national treatment. MFN treatment concerns discrimination *between* investors and investments from foreign countries. MFN treatment requires each party to a treaty to grant to every other party the most favourable treatment that it grants to any other country with respect to "like" investors or the import and export of "like" investments. On the other hand, national treatment concerns discrimination *against* investors and investments from foreign countries in relation to national investors and investments. National treatment requires each party to a treaty to treat foreign investors and investments no less favourably than "like" domestic investors and investments once they have crossed the border and they are part of domestic commerce;

(b) *Market access*. Investment treaties at times distinguish between treatment of investors and investment at the point of entering the market, and treatment within the host country. Thus, a State party to an investment treaty might retain greater flexibility to set the terms, limitations and conditions for market access which a State must apply without discrimination. For example, a State party to an investment treaty might wish to screen the entry of investment or to place restrictions on entry through, for example, imposing limitations on the extent of foreign ownership of enterprises or by requiring investment to be directed towards joint ventures with local enterprises. However, once investors and investments have entered the domestic market, States would undertake to treat them without discrimination;

(c) *Prohibitions on some State actions*. Investment liberalization agreements will include investors' rights and certain prohibitions on State actions such as bans on performance requirements or bans on investment incentives. Bans on *performance requirements* prevent host countries from imposing requirements on investors that might be directed towards employment generation, the use of local materials, requirements to transfer technology or entry into partnerships, or joint venture with local enterprises. While a State might impose performance requirements in the interests of local development, performance requirements can limit the economic efficiency and profits of an investment. Apart from performance requirements, investment agreements will often impose bans on the use of *investment incentives* such as loans and tax rebates. Investment agreements will also often include other matters such as prohibitions on senior management nationality requirements, rights to transfer profits, revenues and dividends out of the host State and compensation for acts of war or civil strife;

(d) *Protection against expropriation of an investment*. Similarly, investment agreements will protect investors and their investment against *expropriation* unless expropriation is subject to compensation by the host Government for the loss of the investment. In NAFTA, for example, the agreement prohibits parties from directly or indirectly nationalizing or expropriating an investment of an investor of another party or to take a measure tantamount to nationalization or expropriation except for a public purpose, on a non-discriminatory basis, in accordance with due process and with compensation based on the fair market value of the expropriated investment (art. 1110).

25. Taking into account the need to balance States' right to regulate with investors' rights, investment agreements will also establish certain exceptions to their application, giving States some flexibility to protect the public interest and promote development. For example, agreements will often provide for general exceptions in the public interest typically relating to the protection of public morals, public order, national security, as well as human, animal and plant life. Similarly, country-specific exceptions might be available. In GATS, for example, the specific obligations of national treatment and market access apply only to those service sectors identified and scheduled by each WTO member. Thus, a full commitment on "market access" would prohibit a country from limiting access to its servicing markets. However, a country may determine the limitations, conditions and terms of market access - or application of national treatment - that fall short of full access. This gives each country some flexibility to moderate liberalization according to national needs although it is important to underline that this flexibility is subject to the overall objective of each country achieving the progressive liberalization of trade in services over subsequent negotiations in the WTO (art. XIX).

26. Finally, investment agreements will establish the means of resolving disputes. These will often take two forms - a State-to-State mechanism and an investor-to-State mechanism. A State-to-State mechanism allows one party to an investment agreement to bring a complaint against another State party to the agreement before a panel of specially appointed trade experts who interpret the provisions of the treaty and issue a report. The WTO dispute settlement mechanism is perhaps the best known State-to-State mechanism. In the case of the WTO mechanism, the initial panel decision is subject to appeal to the WTO Appellate Body. If the State party to a dispute fails to abide by a decision, the other State party may impose trade sanctions on the State in breach upon authorization of the Dispute Settlement Body. The second form of dispute settlement mechanism is the investor-to-State mechanism which allows investors

to bring a complaint against a State party to an investment treaty. Investors may bring a complaint against a State party through recognized arbitration processes such as the International Centre for the Settlement of Investment Disputes (ICSID) or the United Nations Commission on International Trade Law.

27. The discussions on investment in the WTO Working Group on the Relationship between Trade and Investment have considered many of the issues outlined above. While much of the discussion has focused on the mandate outlined by WTO ministers in the Doha Declaration, there has also been some discussion on broadening the mandate to include other issues including a prohibition on performance requirements. Of particular relevance to the promotion and protection of human rights in the context of investment has been the Working Group's discussion on the development dimension, which the Working Group has considered as an issue that cuts across all the issues within its mandate. However, as yet there does not appear to be agreement on whether the WTO members will negotiate an international investment agreement nor on what such an agreement would contain. In particular, WTO members link discussions on investment liberalization to other aspects of the Doha Declaration agenda including special and differential treatment for developing countries and increasing market access for developing country agricultural products. Agreement in one area is generally subject to agreement on the overall WTO agenda.

III. THE HUMAN RIGHTS IMPLICATIONS OF INVESTMENT LIBERALIZATION

A. Human rights and investment liberalization

28. In liberalizing investment, States have had to deal with the reality that host country objectives in relation to investment might differ from those of investors: while Governments seek to spur national development, investors seek to enhance their own competitiveness and market share in an international context.[39] Much of the debate in the context of investment liberalization has focused on achieving the right balance between States' "right to regulate" and investors' rights. On the one hand, States have promoted investors' rights - rights of entry, rights to use investment without unnecessary restrictions, protection against expropriation and so on - as a means of attracting higher levels of investment. On the other hand, States have exercised their "right to regulate" in order to protect infant industry by restricting entry of foreign investors, protecting foreign exchange and balance of payments by regulating the entry of investment, guiding investment towards longer-term development through the use of performance requirements, local content requirements, transfer of technology clauses or local innovation requirements, and by protecting against market abuses by investors through competition policy, environment regulation and labour standards.

29. The promotion and protection of human rights adds a new dimension to this debate - that of the promotion and protection of the human rights of individuals and groups. The Universal Declaration on Human Rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), amongst other treaties, recognize a series of civil, cultural, economic, political and social human rights carrying corresponding obligations on States - most of which can be affected, one way or another, by investment. Consequently, to the extent that investment affects these rights, the obligations on States in relation to individuals and groups should also be considered within the

context of rights and obligations between States and towards investors. The Committee on Economic, Social and Cultural Rights has adopted a classification of those obligations as the obligations to respect, protect and fulfil human rights (see, e.g., E/C.12/2002/11, paras 21-29):

(a) *The obligation to respect.* The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights;

(b) *The obligation to protect.* The obligation to protect requires States to prevent violations of economic, social and cultural rights by third parties;

(c) *The obligation to fulfil.* The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of economic, social and cultural rights.

30. While national Governments have the primary responsibility to respect, protect and fulfil human rights, the international community's responsibilities towards human rights should also be considered in the context of investment liberalization. To this end, States have committed to international cooperation and assistance to promote human rights (Charter of the United Nations, Arts. 55, 56); ICESCR, arts. 2 (1)) and to create a social and international order through which all human rights and fundamental freedoms can be fully realized (UDHR, art. 28).

B. States' right and duty to regulate

31. Considering investment liberalization from the perspective of the promotion and protection of human rights therefore brings a new dimension to the discussion. In short, as far as investment agreements concern human rights issues, States' right to regulate is in fact a duty to regulate. As noted above, States' responsibilities towards human rights include an obligation to fulfil human rights through appropriate legislative and other measures. Article 2 (3) of the Declaration on the Right to Development establishes that "States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom". In the context of investment liberalization agreements, States' right and duty to regulate raises the following issues:

(a) *The need to regulate some forms of investment.* While in some cases investment offers important opportunities for the progressive realization of human rights, this is not always so and short-term or volatile capital flows and even longer-term investment in some cases might deserve closer regulation by States. There is evidence to suggest that the instability in international lending and speculative capital flows have led to financial crises and consequent social and political problems in the past and that States can avoid and mitigate such effects through the use of capital controls.[40] The liberalization of foreign capital flows through deregulation of the domestic financial sector can, however, restrict traditional instruments of macroeconomic policy that might limit capital mobility such as restrictions on foreign ownership of domestic stocks and bonds, restrictions on overseas borrowing by domestic financial and non-financial institutions, and the imposition of higher tax rates on foreign speculative capital

flows. Thus, in implementing their economic and development policies, countries might wish to accept different rules concerning the treatment of different types of foreign investment.[41] While it is important to note that while introducing barriers to short-term or portfolio investment will also potentially penalize and possibly deter investment that can be productive and long term and therefore desirable, those losses need to be weighed against the consequences of excessive liberalization on the enjoyment of human rights;

(b) *The flexibility to use some performance requirements and other measures.* Maintaining flexibility in the use of certain performance requirements such as employment or local content requirements could be appropriate at times to promote the right to culture of particular cultural or linguistic minorities, or to respect the principle of non-discrimination through the introduction of affirmative action schemes to promote employment opportunities for disadvantaged or under-represented people. Take, for example, the National Water Act of the Republic of South Africa (Act No, 36 of 1998). In the context of post-apartheid South Africa, the Act envisages favourable treatment to racial minorities to redress the results of past racial and gender discrimination in the issuance of water licences. While such a measure could favour certain nationals over foreigners - including foreign investors that might seek access to water as a means of providing water and sanitation services - this might be necessary as a means of dealing with de facto discrimination. However, the normal application of national treatment prohibits measures that give better treatment to a "like" national investor or investment over a foreign investor or investment. Given that a foreign investor in the water and sanitation sector might seek a licence over water as part of its operations, the foreign investor might view such a measure as discriminatory against it, despite the fact that the measure is intended to promote equality and diminish racial discrimination rather than act as a barrier to investment. Much would in fact depend on the interpretation of "like". Similarly, it might be argued that such measures are performance requirements (local content). It will therefore be important to protect the use of such measures in investment agreements.

(c) *The flexibility to withdraw investment liberalization commitments in light of experience.* Investment liberalization from a human rights perspective requires a careful balancing of States' rights and investors' rights with a view to promoting respect for human rights and development. Getting the right balance could take time, and furthermore might change over time. Importantly, States should not enter into commitments in investment agreements that might threaten the enjoyment of human rights. Consequently, it will be important to undertake human rights impact assessments prior to undertaking commitments to liberalization investment. Further, at times, modification of commitments to liberalize investment might be necessary to protect against unforeseen consequences of liberalization which disproportionately affect the poor, disadvantaged or vulnerable. Thus, it will also be important to undertake human rights assessments of the impact of the implementation of commitments after the adoption of investment agreements. To this end, a human rights approach to investment liberalization raises the question of what degree of flexibility is appropriate with respect to withdrawing commitments to investment liberalization where human rights impact assessments indicate that this would be necessary to promote and protect human rights. At times, liberalization agreements allow commitments to be withdrawn. For example, article XXI of GATS allows a country to modify or withdraw a commitment after three years have elapsed from the date the commitment came into force. However, GATS also obliges the country to enter into negotiations for compensation with any country affected by the modification if requested to do so. While compensation might be appropriate in some cases, a human rights

approach would raise the question as to the effect that a requirement to give compensation, or a threat of compensation, might have on the ability or willingness of a State to take the necessary action to promote and protect human rights. Importantly, a human rights approach would seek to avoid the situation where a requirement to pay compensations might discourage States from taking action to protect human rights - such a situation could reinforce the status quo or exacerbate human rights problems. Establishing a direct link between withdrawing commitments and promoting human rights obligations might be an important consideration to bear in mind in allowing flexibility to modify commitments and in determining the appropriateness of compensation case by case;

(d) *The flexibility to introduce new regulations to promote and protect human rights.* Introducing new regulations to promote human rights is an important aspect of States' duty to fulfil human rights. As economic, social and political conditions change, it is appropriate that in response States might introduce appropriate regulations strengthening protection for human rights. However, there is increasing concern about investors' use of "expropriation provisions" to protect investments against new measures to protect the environment and to promote human rights. Expropriation provisions do not prohibit government regulatory action. However, they do require compensation to the investor where the regulation directly or indirectly expropriates an investment or is tantamount to expropriation. Such compensation should be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place. The extent of what constitutes direct expropriation, indirect expropriation or a measure tantamount to expropriation of an investment is unclear. Traditionally, investment treaties introduced expropriation provisions to protect investors against arbitrary nationalization of industries and destruction or deprivation of property. However, cases under the NAFTA investor-to-State dispute mechanism suggest broader interpretations are possible. That being so, it will be important to safeguard measures directed towards improving respect for human rights within such interpretations.

32. The relationship between expropriation provisions and the protection of human rights warrants particular attention as existing cases suggest that investor-to-State tribunals are willing to interpret such provisions broadly, which could affect States' ability to regulate in favour of human rights. For example, in 1997, the Government of Canada had introduced a ban on the import of the additive methylcyclopentadienyl manganese tricarbonyl (MMT). The Government justified the ban primarily on the ground that it had not adequately assessed toxic qualities of MMT. Ethyl Corp., the only manufacturer of the substance in the world, commenced proceedings against the Government of Canada including a claim that the introduction of the ban was an expropriation of its investment or, alternatively, that it was "tantamount" to expropriation of its investment. The parties subsequently settled the proceedings and the Canadian Government withdrew the legislation, paid $13 million for costs and lost profits while the legislation was in place and gave Ethyl Corp. a letter authorizing the use of MMT, stating that there was no scientific evidence of any health risk or any impact on car exhaust systems (*Ethyl Corp v. Canada*).[42]

33. In a subsequent case under NAFTA, a waste management business, Metalclad Corp., brought proceedings against the Government of Mexico, amongst other things claiming expropriation of its investment. In 1993, Metalclad had purchased a local waste management company with a view to building and operating a full hazardous waste landfill facility. The project was subject to the issue of permits from the municipal, State and federal levels of

Government. The municipality had previously denied the permit to the local company, however, Metalclad continued with the purchase after receiving the State and federal permits and upon assurances from the federal Government that the municipal permits were not necessary. Metalclad commenced the project. The municipal authorities, however, never issued the required permits for a number of reasons, including environmental concerns, and the fact that a great number of local inhabitants opposed the granting of the permit. Finally, the State authorities issued an Ecological Decree declaring the area a natural reserve for the preservation of rare cactus, forcing the waste management project finally to close.

34. Metalclad claimed, amongst other things, compensation from the Mexican Government under NAFTA article 1110 due to the expropriation of its investment. The tribunal made a series of findings including that the Mexican Government took a measure tantamount to expropriation by participating or acquiescing in the municipalities' unfair and inequitable treatment in denying Metalclad the right to operate the landfill. Further, the tribunal held that, while not necessary to its findings, the Ecological Decree was a further ground for a finding of expropriation. The tribunal ordered Mexico to pay $16.7 million in compensation. Mexico sought statutory review of the decision and the Government of Canada intervened in the proceedings. A judge of the Supreme Court of British Columbia held that the problems of transparency on behalf of the Mexican authorities were not requirements for compliance with the expropriation provisions and so there was no act of expropriation prior to the Ecological Decree. On the other hand, the judge upheld the tribunal's finding that the Ecological Decree expropriated Metalclad's investment on the basis that the tribunal's conclusion was not patently unreasonable - the requirement to set aside the tribunal's award. In doing so, however, the judge stated that the Tribunal had given:[43]

> "… *an extremely broad definition of expropriation* for the purposes of article 1110. In addition to the more conventional notion of expropriation involving a taking of property, the Tribunal held that expropriation under the NAFTA includes covert or incidental interference with the use of property which has the effect of depriving the owner in whole or in significant part, of the use or reasonably-to-be expected economic benefits of property. This definition is sufficiently broad to include a legitimate zoning of property by a municipality or other zoning authority."

35. Such broad interpretations of expropriation provisions could have direct consequences for regulations intended to promote and protect human rights. While these two cases focused on environmental protection, government action in relation to chemicals and toxic wastes has flow-on effects in relation to the enjoyment of human rights such as the right to health or the right to water. The decisions raise questions about the assumptions of responsibility - moral or legal - for actions that could negatively affect human rights or the environment. One commentator has suggested that broad interpretations of expropriation provisions could reverse the established tenet of environmental policy that the polluters should bear the cost of their pollution rather than be paid not to pollute.[44] To the extent that broad interpretations of expropriation provisions could affect States' willingness or capacity to introduce new measures to promote and protect human rights, then the use and interpretation of expropriation provisions is a cause of concern. Specifically, it will be important to avoid a situation where the threat of litigation on the basis of broadly interpreted expropriation provisions has a "chilling effect" on government regulatory capacity, conditioning State action to promote human rights and a healthy environment by the commercial concerns of foreign investors. While human rights should not provide a shield to protect unwarranted protectionism, administrative failures or unfair treatment,

neither should they be made subject solely to an economic calculus. Consequently, it will be important to ensure that interpretations of these and other provisions in investment agreements place human rights and environmental considerations centrally within their reasoning where relevant.

C. Complementary measures to promote human rights in the context of investment liberalization

36. Apart from maintaining a Government's right and duty to regulate, there are certain complementary issues that would help promote human rights within the context of investment liberalization.

37. Balancing investors' rights with obligations. Investors' rights are instrumental rights. In other words, investors' rights are defined in order to meet some wider goal such as sustainable human development, economic growth, stability, indeed the promotion and protection of human rights. The conditional nature of investors' rights suggests that they should be balanced with corresponding checks, balances and obligations - towards individuals, the State or the environment. While investment liberalization has focused on the definition of investors' rights, balancing those rights with States' "right to regulate", discussions over investment liberalization have paid less attention to parallel discussions in the United Nations, OECD and ILO defining investors' obligations towards individuals.[45] Yet this risks skewing investment liberalization in favour of investors' rights, losing sight of their conditional nature, possibly to the detriment of the rights and interests of other actors.

38. Two approaches to defining investors' obligations are relevant. First, measures to encourage corporate social responsibility on a voluntary basis are taking on increasing importance. The Secretary-General's Global Compact, launched in 1999, provides a platform for encouraging and promoting good corporate practices and learning experiences in the areas of human rights, labour and the environment and the basis for a structured dialogue between the United Nations, business, labour and civil society on improving corporate practices. In relation to human rights, the Global Compact proposes that enterprises develop human rights criteria for market entry, explicit human rights policies to protect workers, undertake human rights impact assessments of their business activities, engage with Governments, labour and civil society on human rights issues, ensure programmes to promote the right to health of employees, and ensure that security arrangements do not contribute to human rights violations. Another voluntary initiative is the OECD Guidelines for Multinational Enterprises. The member States of the OECD adopted the non-binding Guidelines in 1976 as part of the Declaration on International Investment and Multinational Enterprises and have since revised them in 1991 and 2000. Significantly, the 2000 revision included references encouraging multinational enterprises to respect human rights set out in the UDHR. The current Guidelines aim to promote the positive contributions multinationals can make to economic, environmental and social progress in OECD member countries with increasing interest from some developing countries. Further, the OECD Guidelines aim to assist adhering countries in the process of investment liberalization by promoting responsible multinational enterprises.[46]

39. However, while voluntary codes are significant in promoting human rights approaches amongst willing investors, there is also recognition of the need to balance voluntary corporate social responsibility initiatives with the strengthening of investors' accountability for their

actions as they affect individuals and communities. This raises complex questions for human rights law which has traditionally focused on the relationship between the individual and the State. However, as investors become more powerful vis-à-vis States and as more becomes known of how their actions can affect the enjoyment of human rights, attempts to define investors' obligations towards individuals and communities are taking on greater significance. As the High Commissioner recently stated in the context of the recent Group of Eight (G8) meeting: "respect for the Universal Declaration is an imperative for Governments; it should be obligatory for business".

40. The Sub-Commission is considering draft Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights (E/CN.4/Sub.2/2003/12). The draft norms set out particular obligations of investors including the obligation to respect the right to equal opportunity and non-discrimination, the right to security of persons, workers' rights, and national sovereignty, consumer protection and environmental protection. The draft norms include provisions regarding periodic monitoring by the United Nations, periodic evaluation by corporations, as well as reparation, restitution, compensation and rehabilitation for any damage done or property taken as a result of violations of human rights. Other initiatives relevant to defining more direct investors' obligations include the OECD's Convention on Combating Bribery (1997) which outlaws cross-border bribery and other corrupt practices, establishing bribery of a foreign public official as a criminal offence.[47] Importantly, the strengthening of investors' accountability towards individuals and communities might be a means of balancing the strengthened protection of investors' rights through investor-to-State dispute mechanisms with the protection of human rights vis-à-vis investors.

41. Protecting against certain actions by Governments. As noted above, positive impacts of investment on the enjoyment of human rights depend considerably on the actions of Governments. In some cases, Governments have relaxed human rights and environmental standards in a "race-to-the-bottom" to attract investment. To avoid such cases, it will be important to ensure adequate legal protections for individuals and communities affected by such government actions. The provision of effective and comprehensive human rights dispute settlement mechanisms will provide a key element in a strategy to avoid a possible "race-to-the-bottom" in the protection of human rights and environmental standards. While national protection systems differ between countries, international mechanisms to deal with individual complaints of human rights violations are uneven. The Human Rights Committee has the authority to hear individual complaints in relation to civil and political rights while the Committee on the Elimination of Discrimination against Women (CEDAW) has the authority to consider individual complaints of women in relation to discrimination in the exercise of their human rights, including economic, social and cultural rights. The ILO has a series of mechanisms such as the Committee on Freedom of Association and its Fact-Finding and Conciliation Committee to consider complaints in relation to certain labour rights; however, these do not allow individual complaints nor do they address the interdependence of human rights owing to their focusing solely on labour standards. However, there is currently no international mechanism to consider complaints on all aspects of economic, social and cultural rights. On the other hand, under investment agreements, investors have recourse to international redress against States and States have redress against other States. This risks skewing the balance of protection in favour of investors, which in turn could lead to investment decisions favouring the interests of investors over the human rights of individuals and communities who

could remain voiceless in the event of a conflict of interests and rights. To this end, it is relevant to note the recent decision of the Commission on Human Rights to establish a working group to consider options for the elaboration of an individual complaints mechanism under the ICESCR (resolution 2003/18, paras. 12, 13). States could also raise their human rights obligations where relevant in any disputes under investment agreements.

42. Promoting home-country measures. While liberalization might attract investment for some countries, the figures demonstrate that this is not always the case and LDCs and many African countries still attract only low levels of investment. This is because liberalization is only one factor that influences investment decisions - other determinants of investment include size of markets, infrastructure, political and economic stability, labour productivity, the quality of health and education and the quality of institutions, including their transparency.[48] Countries trying to attract finance for development that do not have these prerequisites will not necessarily benefit from investment liberalization on its own. Instead, home countries to investment, particularly industrialized countries, have a responsibility to promote development-friendly investment to these countries, promote public-private partnerships to encourage investments towards poorer countries, support the capacity of poorer countries to participate in international forums and support capacity-building through technical assistance so that poorer countries have the means of developing investment policies that attract the right investments.[49]

43. More importantly, home countries should complement investment through the provision of ODA. This requires not only maintaining ODA levels but increasing them significantly to meet the target, affirmed in the Millennium Declaration Goals, of 0.7 per cent of GNP. Indeed, if each member country of the Development Assistance Committee contributed 0.7 per cent of its GNP as ODA, nearly US$ 160 billion would be released.[50] However, few countries have met this target and “there are serious questions about the directions in which ODA flows” with little actually reaching the poorest countries.[51] This provides little comfort for poor countries currently engaged in discussions over whether to negotiate an international investment agreement that are in need of finance for development and that attract low levels of investment. While the overriding focus of ODA should be on development and poverty alleviation, it is also relevant to note that ODA and investment can be complementary where ODA focuses on creating infrastructure and promoting good governance provides a means of attracting private investment. Significantly, poorer countries also need to have the capacity to absorb investment if investment is to work towards the promotion and protection of human rights and ODA directed towards improving infrastructure is relevant in this regard. Increasing ODA for these countries - for development, poverty alleviation and technical assistance - is therefore an urgent and pressing need. States could consider including among home-country obligations in investment agreements the inclusion of the ODA target of 0.7 per cent of GNP as a necessary complement to investment liberalization.

IV. THE HUMAN RIGHTS IMPLICATIONS OF PRIVATIZATION

44. The privatization of previously public owned utilities has motivated increases in foreign direct investments in many regions in recent years.[52] On the one hand, privatization can promote investment into failing essential services in need of new technology, infrastructure and management and can play an important role in modernizing sectors such as telecommunications.[53] On the other hand, privatization can lead to market concentration amongst large corporations and the crowding out of smaller firms.[54] As already noted in

previous reports of the High Commissioner, privatization can, in some cases, lead to: the establishment of a two-tiered service supply with a corporate segment focusing on the healthy and wealthy and an underfinanced public sector focusing on the poor and sick; brain drain from the public to higher paying private sector; an overemphasis on commercial objectives at the expense of social objectives; and an increasingly large and powerful private sector that can threaten the role of the Government as primary duty bearer of human rights by subverting regulatory systems through political pressure (E/CN.4/Sub.2/2002/9). Given the need to attract investment into all sectors, including essential services related to the enjoyment of human rights, the question from a human rights perspective is how to optimize the benefits of investment while minimizing the challenges of privatization to individuals and communities, particularly those who are poor, disadvantaged or vulnerable.

45. The privatization of the water and sanitation sector has provoked significant discussion in the context of the right to water. Increasing investment in the water and sanitation sector is possibly the most pressing issue facing the realization of the right to water today. Investment in water comes primarily from a mixture of sources including water users (households, farmers, businesses), Governments (through tax earnings), aid donors and the private sector (both national and international), with the overwhelming bulk of investment coming from domestic public sources.[55] While figures are difficult to estimate, one analysis suggests that public funding of the water sector has remained static since the mid-1990s, with ODA falling from $3.5 billion a year in 1996-1998 to $3.1 billion a year in 1999-2001 and international private investment and commercial bank lending in water and sewerage projects fluctuating widely from $2 billion in 1998 to $7 billion in 1999 and to $4.5 billion in 2000 - although overall, private sector investment appears to be increasing.[56] If the international community is to meet the Millennium Declaration commitments to reduce by half the proportion of people without sustainable access to safe drinking water and access to basic sanitation by 2015, it will have to increase investment in the water and sanitation sector considerably. One estimate suggests that meeting the commitment on safe drinking water alone will require an extra annual investment of at least $10 billion.[57] Another estimate suggests the need for additional annual investment of $8 billion for water supply and $17 billion for sanitation in order to meet the target of universal coverage.[58] In recognition of the need to improve the situation, Ministers of States, in the context of the recent Third World Water Forum, agreed in their Declaration to "redouble … collective efforts to mobilize financial and technical resources, both public and private" to achieve the Millennium Declaration Goals (para. 16).

46. As part of this effort, many actors are increasingly considering private sector participation as a source of investment in the water and sanitation sector.[59] Private sector participation in the water and sanitation sector involves several actors and can take many forms. For example, private sector participation might involve the full transfer of ownership of public assets to the private sector, or it might be partial, referring to the delegation of certain activities and services to the private sector with the public sector maintaining varying levels of control and ownership over assets. While the terms privatization and private sector participation often evoke foreign investment through multinational corporations, domestic corporations and the informal private sector such as small-scale providers, entrepreneurs and water vendors also participate in the provision of water and sanitation in many countries. Indeed, international private sector participation is relatively low while domestic private sector participation is significant in many countries. Estimates suggest that the international private sector reached only 5 per cent of the global population in 2001 although this figure could increase to 35 per cent by 2015.[60] On the

other hand, in developing countries, the informal private sector services more than 50 per cent of users.[61] In terms of investment (as opposed to private sector participation), international private sector investment in the water and sanitation sector has lagged behind other international private sector investments in sectors such as telecommunications, power, gas and hydro, particularly due to the low potential for returns and the high capital intensity which delays return on investments.[62] International private sector investment makes up some 10-15 per cent of investment in the sector while domestic private sector investment is even lower, representing only 5 per cent of investment in the water and sanitation sector.[63]

47. While promoting investment through private sector participation in the water and sanitation sector might be a possible strategy to upgrade the sector, there is concern that private sector participation might threaten the goal of basic service provision for all, particularly the poor, and transform water from being an essential life source to primarily an economic good. The Committee on Economic, Social and Cultural Rights has recently recognized that the human right to water "entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use" (E/C.12/2000/11, para. 2), setting out the following elements that indicate whether water is adequate for human dignity (E/C.12/2000/11: para. 12):

(a) *Availability* - the water supply for each person must be sufficient and continuous for personal and domestic uses, such as drinking, sanitation, washing clothes, and food preparation in accordance with relevant WHO guidelines;

(b) *Quality* - water required for personal and domestic use must be free from micro-organisms, chemical substances and radiological hazards and of an acceptable colour, odour and taste for personal and domestic use;

(c) *Accessibility* - water should be physically acceptable, economically accessible in that it is affordable for all and accessible without discrimination. Further, information on water must be accessible and everyone has the right to seek, receive and impart information concerning water issues.

48. Some of the concerns in relation to private sector participation on the enjoyment of the right to water stem from a perceived overemphasis by the private sector on economic imperatives such as profitability to the detriment of social and cultural objectives. In particular, there are concerns that private sector participation will improve services for those who can afford them and neglect those who cannot such as the poor or people living in outlying regions.[64] Similarly, there are concerns that economic efficiency could lead to increases in water tariffs which could have a disproportionate effect on poor people.[65] Another issue of concern is that the private sector over-emphasizes short-term profit to the detriment of longer-term sustainability of water and sanitation projects.[66] However, experience can differ between countries and generalized conclusions on the effects of private sector participation on the right to water are difficult to draw. In some cases, private sector provision has reduced water rates.[67] Similarly, while high tariffs can obstruct poor people from accessing or improving access to water and sanitation, low or no tariffs are not always appropriate either, leading to higher levels of debt and

low levels of resources to invest in infrastructure.[68] Further, not only the private sector but also the public sector has neglected poor communities. In some cases, public sector authorities have also been prone to evaluate problems in the water and sanitation sector in economic and financial terms, with social considerations being introduced only after concerted public pressure.[69]

49. In light of the urgent need to attract investment to the water and sanitation sector, the key question from a human rights perspective therefore is: How can States ensure available and accessible water of quality in light of the imperative of increasing investment - public or private - in the sector? Where the State decides to engage the private sector, the Committee on Economic, Social and Cultural Rights has underlined that States have responsibilities to ensure that "water should be treated as a social and cultural good and not primarily as an economic good" (E/C.12/2002/11, para. 11). More specifically, the State must:

(a) Prevent the private sector from interfering with the enjoyment of the right to water (E/C.12/2002/11, para. 23) or from compromising equal, affordable, and physical access to sufficient, safe and acceptable water (E/C.12/2002/11, para. 24);

(b) Prevent companies based in their territory from violating the right to water in other countries (host countries to investment) (E/C.12/2002/11, para. 33);

(c) Regulate the private sector to prevent infringements of the right to water including through laws; to prevent contamination and inequitable extraction of water; to regulate and control water service providers; and to protect water distribution systems (E/C.12/2002/11, para. 44 (b)). Similarly, States must regulate to ensure that the private sector is fully aware of and considers the importance of the right to water in the fulfilment of its duties (E/C.12/2002/11, para. 49) and to adopt legislation setting out intended collaboration with the private sector (E/C.12/2002/11, para. 50);

(d) Ensure adequate accountability measures in relation to the private sector such as the imposition of penalties for non-compliance (E/C.12/2002/11, para. 24).

50. Private sector participation in the water and sanitation sector - as with public sector provision - has produced successes and failures. In Uganda, successes in private sector participation have resulted in the implementation of village-level water supply projects by private contractors on a massive scale across the country and the connection of about 1 million people to wells between 1998 and 2001.[70] In contrast, the provision of services free of charge by the public sector in the United Republic of Tanzania not only crippled the water system, it has pushed the country deeper into debt, leaving at least 120,000 households in one of the poorest areas of the capital completely unconnected.[71]

51. However, in some cases, private sector participation has led to real problems from a human rights perspective. In Cochabamba, Bolivia, the water and sanitation sector had suffered in public hands. While international aid had assisted some communities to dig wells and establish water cooperatives, water purity was often poor, there was chronic water shortage and the poorest neighbourhoods were not connected to the water mains. In 1999, the Bolivian Government conducted an auction of the Cochabamba water system which drew only one bidder - a consortium called Aguas del Tunari, the controlling partner of which was wholly owned by a foreign investor, Bechtel Corporation. The concession agreement gave the

corporation exclusive rights to the water, a guarantee of a minimum 15 per cent return on its investment, and allowed the corporation to install water meters and charge for water. Shortly afterwards, water tariffs increased with a view to expanding and upgrading the water network. However, the company shortly introduced increases of up to 35 per cent and cut people off from water connections if they did not pay their bills. This in turn led to violent demonstrations and, ultimately, the departure of the water company and a reversal of the Government's decision to liberalize the water supply. The Government assumed responsibility for the provision of water services, but services still require enhancement.[72] The foreign investor since commenced proceedings against the Bolivian Government before the International Centre for the Settlement of Investment Disputes under the bilateral investment agreement between the Netherlands and Bolivia. The arbitration is ongoing.[73]

52. This case, while not necessarily the rule, does raise serious questions for the enjoyment of the right to water. According to the Committee on Economic, Social and Cultural Rights, the obligation to respect the right to water includes refraining from arbitrary or unjustified disconnection or exclusion from water services and from increasing the price in water to the extent that it is unaffordable (E/C.12/2002/11, para. 44). Similarly, the obligation to protect the right to water requires States to take necessary measures within their jurisdiction to prevent infringements of the right to water by third parties and to regulate effectively and control water service providers (E/C.12/2002/11, para. 44). The actions of the investor also raise questions of corporate social responsibility in the context of providing water services. Further, the process of awarding the initial concession agreement between the Government and the private service supplier raise fundamental questions of the rule of law. Participation, transparency and accountability are some of the principal components of the rule of law, yet in the Cochabamba case, the parties negotiated the concession agreement without adequate public consultation. For example, effective participation in public affairs is not only an essential governance issue, it is a human right (ICCPR, art. 25). This requires not only periodic and genuine elections but also institutions and mechanisms that are close to the people themselves so that people are empowered to change their own lives, improve their own communities, influence their destinies and hold accountable the decision makers and actors whose actions affect their rights. Participation in public affairs in turn requires transparency. Transparency is essential for the realization of human rights as it promotes access to information concerning the allocation of resources in the context of progressively realizing economic, social and cultural rights, including the right to water. Such information is essential for effective public action and monitoring of both the public and private sector. In undertaking privatization, while Governments have the primary responsibility to ensure that the process respects the rule of law, other actors, including intergovernmental organizations and international financial institutions, also have a role to play, particularly in poor countries which require assistance in promoting transparent and participatory mechanisms. As noted by the Committee on Economic, Social and Cultural Rights, "the international financial institutions, notably the International Monetary Fund (IMF) and the World Bank, should take into account the right to water in their lending policies, credit agreements, structural adjustment programmes and other development projects so that the enjoyment of the right to water is promoted" (E/C.12/2002/11, para. 60).

53. How then does the case relate to investment liberalization? On the one hand, a decision of the Bolivian Government in consultation with international financial institutions drove the privatization of water services in Cochabamba, not necessarily the opening of markets to foreign investment through a bilateral investment treaty (BIT). Similarly, the sorts of problems which

arose in the case study could feasibly happen with the engagement of the domestic private sector - the challenges of privatization are not restricted to foreign investors only. The liberalization dimension relates to the fact that the foreign investor was able to have recourse to international dispute settlement through the investor-to-State dispute settlement provisions of the Bolivian-Netherlands BIT. This raises two issues from a human rights perspective.

54. The first relates to accountability and the rule of law. A system of government established under the rule of law ensures the availability of mechanisms for conflict resolution, whether judicial or non-judicial, and adequate remedies to address possible violations and transgressions. However, in the Cochabamba case, while the investor had recourse to international dispute settlement as a result of events connected with the privatization process, the mechanisms for individuals and communities to hold the State and the investor accountable were poorly defined or non-existent. While the Inter-American system includes a mechanism for individual complaints concerning economic, social and cultural rights, the tribunal has jurisdiction to hear complaints only in relation to workers' human rights and the right to education (the San Salvador Protocol). Internationally, there is still no comprehensive individual complaint mechanism for violations of economic, social and cultural rights. Similarly, the definition of investors' responsibility towards the individuals and communities affected by privatization and the existence of appropriate accountability mechanisms are lacking. The question arises whether the existence of effective and comprehensive human rights dispute settlement mechanisms between individuals and States and better defined responsibilities and accountability of investors towards individuals and communities might have played an important preventive role.

55. The second issue follows from the first, namely: What could be the effects of allowing recourse to strong dispute settlement provisions under investment agreements in the absence of similarly strong accountability mechanisms for human rights issues arising in the context of investment? The move from public service provision to private service participation in essential services brings with it the uncertainties typical of any reform process. Private sector participation in essential services concerns not only commercial considerations relating to financing projects but a range of other social, political, cultural and environmental concerns. While an investor-to-State dispute settlement mechanism might resolve subsequent problems of a commercial nature, the lack of mechanisms to resolve other issues risks weighing the balance in favour of resolving problems according to the terms of investment agreements which might not necessarily take into account the many other non-commercial dimensions of the issue at hand. To the extent that this prioritizes commercial considerations over other issues, it raises concerns for the promotion and protection of human rights which considers development not only in commercial terms but as "economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realized" (Declaration on the Right to Development, art. 1). In this context, it is relevant to note that this dispute is only one of three disputes between investors and States concerning investment in the water sector, another one of which is ongoing.[74] To this end, States are encouraged to raise their human rights obligations before tribunals in an attempt to secure interpretations of investment agreements and tribunal decisions that take into account the wider legal and social context.

V. CONCLUSIONS AND RECOMMENDATIONS

56. **The relationship between human rights and investment depends on a range of variables - the country and sector in question, the type of investment, the motivations of the investors and the responsibility of the Government. Investment liberalization can modify the balance among those variables by strengthening investors' rights and affecting to an extent the policy choices that Governments have to direct investment. On the one hand, this potentially increases the available resources needed to promote and protect human rights. On the other hand, strengthening investors' rights alone could skew the balance of rights and obligations in favour of investors' interests over those of States, individuals and communities. A human rights approach to investment liberalization therefore examines what complementary measures are needed to ensure an appropriate balance of rights and obligations between States and towards investors, bearing in mind States' responsibilities under human rights law. As States continue discussions in the WTO, regionally and bilaterally, to achieve progressively higher levels of investment liberalization through the negotiation and implementation of investment agreements, it is important to remember that States also have concurrent responsibilities under international law to promote and protect human rights and, to this end, the following areas of action for further consideration are offered.**

57. ***Including the promotion and protection of human rights among the objectives of investment agreements.*** **The Committee on Economic, Social and Cultural Rights has stated that, in compliance with their responsibilities to cooperate internationally to achieve the progressive realization of economic, social and cultural rights, States should ensure that they give due attention to those rights in international agreements, including trade agreements (E/C.12/2002/11, para. 35). To this end, States could consider including an explicit reference to the promotion and protection of human rights among the objectives of investment liberalization agreements, either in the preamble or in the body of the agreement. While not creating new obligations for the parties to an agreement, a reference would recognize the potential for investment to affect the enjoyment of human rights. Recognizing this link could be an important step in avoiding downward pressure on human rights protection in the process of investment liberalization. Further, a reference to the promotion and protection of human rights would encourage interpretations of provisions of investment agreements that take into account States obligations under human rights law. Finally, States are encouraged to raise their human rights obligations in dispute settlements where a decision of a tribunal might affect the enjoyment of human rights nationally or where the interpretation of a provision in an investment agreement might have a human rights dimension.**

58. **Ensuring States' right and duty to regulate. States should ensure that in investment agreements they maintain the flexibility to use certain policy options to promote and protect human rights. Similarly, States should maintain the flexibility to promote cultural diversity and to implement special measures to protect vulnerable, marginalized, disadvantaged or poor people. Moreover, it is important to highlight the need for States to introduce new regulations to promote and protect human rights in response to changing conditions and knowledge of health, water, education, environmental and other issues that affect the enjoyment of human rights. In this context, broad interpretations of some provisions of investment agreements such as "expropriation provisions" could affect**

States' capacity or willingness to regulate for health, safety or environmental reasons; to this end, interpretations, or even explicit declarations, by parties to agreements, that protect State action to fulfil human rights are encouraged. In the context of discussions in the WTO Working Group on the Relationship between Trade and Investment, the emphasis placed on the development dimension should be encouraged further and in this respect it is relevant to note that the Declaration on the Right to Development emphasizes that States have the "right and duty to formulate appropriate development policies that aim at the constant improvement of the well-being of the entire population and of all individuals".

59. ***Promoting investors' obligations alongside investors' rights*. Voluntary codes of conduct promoting corporate social responsibility are important; yet, as investors' rights are strengthened through investment agreements, so too should their obligations, including towards individuals and communities. To this end, initiatives to clarify and specify the legal responsibility of actors towards individuals and groups in the context of investment are important. Further, States could consider the issue of legal responsibility of investors within discussions concerning continuing investment liberalization and consider acknowledging these responsibilities in investment agreements.**

60. ***Promoting international cooperation as part of investment liberalization*. International cooperation and assistance is a fundamental aspect of international human rights obligations and a necessary measure to secure a just and equitable international and social order. In this regard, wealthy countries should meet their commitment to provide 0.7 per cent of GNP as official development assistance and to ensure that such assistance is directed towards development and poverty alleviation in poor countries. In the context of negotiations over new investment agreements, it is strongly encouraged that such targets be included among the obligations in investment agreements. To do so will take into account the fact that while investment liberalization can lead to higher levels of investment for countries having the requisite market size and infrastructure, investment liberalization alone will not attract the necessary finances needed to promote the right to development in poorer countries.**

61. ***Promoting human rights in the context of privatization*. The effective provision of essential services in the health, education, water, sanitation, energy, transport and communications sectors has a significant role in promoting and protecting human rights. The promotion of the rule of law - popular participation, transparency, legality, equality and accountability - is a significant aspect of ensuring access to essential services for all. When the Government seeks private sector investment in these sectors then all relevant actors - not only Government and the private sector but also intergovernmental organizations and international financial institutions - have responsibilities: to promote public participation in decisions concerning private sector participation; to ensure transparency in decision-making and in information concerning privatization; and to build and maintain accountability mechanisms to protect the rights of individuals and groups in relation to the acts of States and investors. The clarification of the responsibilities of the private sector towards individuals and groups should also consider investors' obligations in the context of privatization.**

62. ***Increasing dialogue on human rights and trade*. There is a need not only to bring a human rights perspective to investment, but also to ensure that human rights experts and mechanisms understand sufficiently the linkages between investment and the enjoyment of human rights and that they take investment issues adequately into account. In particular, there is a need to improve dialogue between human rights, trade, finance and environmental practitioners and, specifically, social sector and trade/finance ministries at the national level. At the international level, greater dialogue between delegates at the WTO and delegates representing the same country in the Commission on Human Rights could be an important step. Within civil society groups, greater dialogue between trade and human rights organizations at the national, regional and international levels is encouraged. Increasing dialogue between investment, trade, human rights and environmental practitioners could be a significant step in ensuring greater consistency and coherence in the formulation, implementation and monitoring of international treaties and in achieving globalization that promotes the enjoyment of human rights for all.**

63. ***Undertaking human rights assessments of investment liberalization*. Undertaking human rights assessments of trade and investment rules and policies will be an important measure to gauge the extent to which trade liberalization can promote and protect human rights. In particular, discussion in the context of the WTO Working Group on Trade and Investment and the ongoing negotiations in the GATS Council should be informed, inter alia, by sound empirical evidence drawn from public, independent and transparent human rights assessments based on information gathered through a participatory and consultative process with concerned individuals and groups. In particular, such assessments should have a gender perspective and consider the real and potential effects of investment liberalization on disadvantaged and vulnerable groups. Given that discussions on investment are ongoing, human rights assessments could be used to secure informed decisions on investment liberalization in the future. As a possible field of further study, the Office of the High Commissioner therefore suggests that consideration be given to the development of methodologies for such assessments and the appropriate assistance needed to undertake them.**

Notes

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[3] UNCTAD, *World Investment Report 2002: Transnational Corporations and Export Competitiveness*, United Nations, New York and Geneva, 2002, p. 1.

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[5] UNCTAD, *Foreign Direct Investment and Development*, UNCTAD Series on issues in international investment agreements, United Nations, New York and Geneva, 1999, p. 41.

[6] N. Cagatay, "Trade, Gender and Poverty", United Nations Development Programme, New York, October 2001, pp. 20-21.

[7] UNCTAD, supra at note 5, p. 43.

[8] Ibid., p. 42.

[9] OECD, *Good Governance and Best Practices for Investment Policy and Promotion* by Mehmet Ogutcu, paper prepared for the UNCTAD workshop on Efficient and Transparent Investment Promotion Practices: The Case of LDCs, Geneva, June 2002, p. 7.

[10] UNCTAD, supra at note 1, p. 38.

[11] UNCTAD, supra at note 5, pp. 32, 43.

[12] Ibid., p. 32.

[13] UNDP, *Making Global Trade Work for the Poor*, United Nations, New York, 2002.

[14] Ibid., p. 5.

[15] Ibid., p. 7.

[16] Ibid., p. 8.

[17] UNICEF, *Viet Nam: Children and Women: A Situation Analysis 1999*, United Nations Children's Fund, New York, 1999, p. 14.

[18] Ibid., p. 16.

[19] Cagatay, supra at note 6, pp. 20-21.

[20] UNCTAD, supra at note 5.

[21] UNCTAD, supra at note 1, p. 43.

[22] ILO, *Investment in the global economy and decent work* (GB.285/WP/SDG/2), Working Party on the Social Dimension of Globalization, Geneva, November 2002, para. 12.

[23] UNCTAD, supra at note 3, p. 20.

[24] ILO, *Organization, bargaining and dialogue for development in a globalizing world* (GB.279/WP/SDG/2), Working Party on the Social Dimensions of Globalization, Government Body, 279th Session, Geneva, November 2000, para. 53.

[25] UNCTAD, *Home Country Measures*, UNCTAD Series on issues in international investment agreements, United Nations, New York and Geneva, 2001, p. 2.

[26] A. Taylor and D. W. Bettcher, "WHO Framework Convention on Tobacco Control: a global 'good for public health'", *Bulletin of the World Health Organization*, vol. 78, No. 7, 2000, pp. 920-929.

[27] WHO, *Infant Formula and Related Trade Issues in the Context of the International Code of Marketing of Breast-Milk Substitutes*, "Nutrition for Health and Development", Geneva, Switzerland, June 2001, paras. 133-139.

[28] The Right Reverend Simon Barrington-Ward, "Putting Babies Before Business", in *The Progress of Nations 1997*, United Nations Children's Fund, New York, 1997.

[29] IMF, "How Oil, Gas and Mining Projects Can Contribute to Development", *Finance and Development*, December 2000, vol. 37, No. 4, at http://www.imf.org (accessed 2 June 2003).

[30] *National Coalition Government of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 334 (C.D. Cal. 1997) and *Doe I. v. Unocol Corp.*, 963 F. Supp. 880, 883 (C.D. Cal. 1997).

[31] No. 00-56603, F.3d, 2002 WL 31063976 (9th Cir 2002).

[32] UNCTAD, *International Investment Agreements: Flexibility for Development*, UNCTAD Series on issues in international investment agreements, United Nations, New York and Geneva, 2000, p. 11.

[33] UNCTAD, supra at note 3, p. 4.

[34] UNDP, supra at note 13, p. 237.

[35] UNCTAD, supra at note 3, p. 4.

[36] OECD, supra at note 4, p. 11.

[37] P. Sauvé and C. Wilkie, "Exploring Approaches to Investment Liberalization in the GATS", paper prepared for Services 2000 - New Directions in Services Trade Liberalization, a conference co-sponsored by the American Enterprise Institute, the Brookings Institution, the Center for Business and Government at Harvard University and the Coalition of Service Industries Education and Research Foundation, Washington D.C., June 1999, p. 2.

[38] WTO, Report of the Working Group on the Relationship between Trade and Investment to the General Council (WT/WGTI/6), 9 December 2002, para. 31.

[39] UNCTAD, supra at note 1, p. 26.

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[43] *The United Mexican States v. Metalclad Corporation*, Tysoe J., Supreme Court of British Columbia, judgement, 22 May 2001, in particular para. 99.

[44] *Private Rights, Public Problems: A Guide to NAFTA's controversial chapter on investor rights*, International Institute for Sustainable Development, Canada, 2001, p. 33.

[45] WTO, *Investors' and Home Governments' Obligations* (WT/WGTI/W/152), Working Group on the Relationship between Trade and Investment, Communication from China, Cuba, India, Kenya, Pakistan and Zimbabwe, November 2002.

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[49] OECD, supra at note 9, p. 7.

[50] OECD, Official Development Assistance and Foreign Direct Investment: Improving the Synergies, Background paper by V. Vitalis, prepared for the OECD Round Table on Sustainable Development, OECD, Paris, March 2001, pp. 2-3.

[51] Ibid., p. 3.

[52] UNCTAD, supra at note 1, pp. 22-25.

[53] Ibid., p. 40.

[54] UNCTAD, supra at note 5, p. 33.

[55] World Water Council, Third World Water Forum and Global Water Partnership, *Financing Water for All*, Report of the World Panel on Financing Water Infrastructure chaired by Michel Camdessus, by James Winpenny, March 2003, p. 6.

[56] Ibid., p. 7.

[57] Ibid., p 3.

[58] S. Annamraju, B. Calaguas and E.Gutierrez, *Financing water and sanitation: key issues in increasing resources to the sector*, A Wateraid briefing paper, November 2001, p. 14.

[59] World Water Council, supra at note 55, p. 1.

[60] Ibid., p. 17.

[61] Ibid., p. 12.

[62] Ibid., p. 17.

[63] World Water Council, supra at note 55, p. 6.

[64] A. Barungi et al, *Uganda case study*, Wateraid and Tearfund, United Kingdom, 2003. In Uganda, private sector participation in the water and sanitation sector in rural areas has resulted in significant improvements in access to safe water supply and services; however, evidence suggests that the poorest communities are being left out of connection schemes, with private enterprises favouring the connection to wealthier communities which can mobilize contributions to construction costs more effectively.

[65] J. Green, *The England and Wales Water Industry Privatisation: A desk study*, Wateraid and Tearfund, 2003, p.15. For example, in the United Kingdom, privatization of water services led to water tariff increases of 95 per cent from 1989/90 to 1997/98, while in Cochabamba, Bolivia, water tariffs rose by up to 35 per cent in the first year of privatization (E/CN.4/Sub.2/2002/9, para. 49).

[66] L. Breslin and J. Antanasio David, *Small scale private sector participation in Niassa province, Mozambique: A case study*, Wateraid and Tearfund, United Kingdom, 2003, p. 5. In rural Mozambique, the workmanship of small-scale private entrepreneurs was often of poor quality, focusing on making profits rather than delivering effective water supply and quality services. The result has been the breakdown of new water projects with communities returning to the unsafe water sources they had used in the past.

[67] J. Esguerra, *The Corporate Muddle of Manila's Water Concessions: How the world's biggest and most successful privatizations turned into a failure*, Wateraid and Tearfund, United Kingdom, 2003, p. 1. In Manila, in spite of the many problems that have arisen in the context of private sector water provision, the award of the private sector concessions to two foreign corporations did manage initially to bring down water tariffs by 50 per cent and 75 per cent in the two zones in which they were operating.

[68] M. Mbanga et al., *Private sector participation in Dar es Salaam*, Wateraid and Tearfund, United Kingdom, 2003, pp. 1, 11, 27. The preservation for many years of free water introduced by the socialist government in Tanzania crippled the water system, froze investment in water infrastructure and sanitation for 30 years and drove the country further into debt with hundreds and thousands of people in Dar es Salaam still completely unconnected to the water system. Indeed, some poor people have stated their willingness to pay or pay more for water services where they are guaranteed of a connection or there is the prospect of improved services.

[69] F. Almansi et al., *Everyday Water Struggles in Buenos Aires: The Problem of Land Tenure in the Expansion of Potable Water and Sanitation Service to Informal Settlements*, Wateraid and Tearfund, United Kingdom, 2003, pp. 2-3. In Buenos Aires, both the public and private sector failed to provide water and sanitation services to the poor, particularly those living in informal settlements. Both public administrative processes and the private sector relied on the lack of land tenure to justify decisions not to connect informal settlements as the lack of land tenure led to billing problems and buildings were unregistered - in spite of legal guarantees to universal access to infrastructure services.

[70] Barungi, supra at note 64, p. 1.

[71] Mbanga, supra at note 68, pp. 102, 12.

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