

[Consultation on the U.S. National Action Plan \(NAP\) on Responsible Business Conduct](#)

Thursday, April 16, 2015

Georgetown University Law Center

Break-out session: “Overseas investment”

Framing Remarks – Niko Lusiani, CESR [5-7 mins.]

Thank you for the opportunity to contribute to the National Action Plan for Responsible Business Conduct in the United States.

After many years working with frontline communities challenging human rights abuses involving businesses as far apart as the Ecuadorian Amazon, the Niger delta, the Zambian copperbelt, and the gold pits of northern Nevada, one begins to feel like you are in an endless game of whack-a-mole, in which grave business-community frictions multiply far faster than can be remedied. At CESR, we’ve strived recently to probe into the upstream source of many of these local conflicts, which often lie in complex legal, regulatory and policy regimes in home countries. The NAP is a welcome effort to address these problems originating in the US, with potentially far-reaching ripple effects across those communities facing abuse both at home and abroad.

In this session, I want to focus my brief remarks on **three systemic policy arenas** which set the macro conditions within which governments are able to properly protect human rights vis-à-vis business behavior: **First, investment treaties. Second, financial regulation. And third, tax cooperation.** My remarks draw on a submission by Righting Finance – a coalition of CSOs striving to develop a human rights approach to financial regulation, Global Witness and Friends of the Earth.

First, investment treaties. Indirect expropriation and discrimination provisions in investment agreements negotiated and ratified by the United States have been used by

companies to prevent governments from protecting and fulfilling human rights,¹ denying them adequate policy and regulatory space to accomplish this core government function.

Citing just one example, Philip Morris International filed a lawsuit against Uruguay, charging that new health measures designed to protect people right to health and implement the WHO Framework Convention against Tobacco involving cigarette packaging amount to unfair treatment of the company. If the ICSID finally rules against Uruguay, it could have as much as a \$2-billion impact on the tiny nation's economy, not to mention the effects on human health. [As the UN Special Rapporteur on the Right to Health recently pointed out, "International investment agreements impose obligations on States vis-à-vis investors that may affect States' power to introduce health laws in the public interest."²]

Legal stability is of course essential to a functioning modern economy. But these investment treaties go far beyond that, allowing national governments to be sued for protecting human rights, contrary to UN Charter (Art. 103) which stipulates that Charter provisions (including on HRs) prevail over other int'l agreements when there is conflict.

What can be done as part of the NAP process to bring these investment treaties in line with human rights?

1. ***Assess and address*** - Conduct **baseline and periodic human rights impact assessments of all existing investment treaties**, in line with UN Guiding

¹ Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (August 30, 2000). Available at: <http://italaw.com/sites/default/files/case-documents/ita0510.pdf>; Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award (July 14, 2006). Available at: <http://www.italaw.com/sites/default/files/case-documents/ita0061.pdf>; CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award (May 12, 2005). Available at: <http://italaw.com/sites/default/files/case-documents/ita0184.pdf>; Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, Claimants' Notice of Arbitration, Ad hoc – UNCITRAL Arbitration Rules (2009). Available at: http://italaw.com/sites/default/files/case-documents/ita0155_0.pdf; Eli Lilly and Company v. The Government of Canada, Notice of Arbitration, Ad hoc – UNCITRAL Arbitration Rules (2013). Available at: <http://italaw.com/sites/default/files/case-documents/italaw1582.pdf>

² Report on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/69/299, August 11, 2014.

principles on human rights impact assessments of trade and investment agreements. These should include triggers to renegotiate any of treaty provisions which undermine governments' capacities to realize human rights; and to identify cases where companies used them to limit the ability of other States to comply with their human rights and environmental obligations, with proper compensation in such cases.

2. Include **provisions in future BITs which allow** state parties to take the legislative, regulatory, budgetary and judicial measures necessary for the protection and fulfillment (including financing) of human rights.
3. Make **transparency and CSO participation** as *amici* the norm rather than exception in investment arbitration.
4. Improve the **transparency and effective public participation** in investment treaty negotiations, including the Transatlantic Trade and Investment Partnership and the Trans-Pacific Partnership negotiations. Investment policy is public policy, and thus should be fully subject to public feedback.

Second, financial regulation. We believe financial companies—both listed and non-listed (private equity, hedge funds and venture funds)—pose particular human rights risks because of: a) the systemic repercussions of their activity, especially since the 2008 financial crisis, b) the superior leverage they have upon the behavior of other economic actors and c) the relative distance and opacity such companies enjoy, removed as they generally are from the abuses themselves. These factors compound the normal financial and reputational risks. So, the US NAP should:

1. **Commit the SEC to expand its corporate disclosure requirements for listed and non-listed financial companies** on human rights and environmental issues, including: due diligence measures companies have in place to prevent such risks; mechanisms for identifying and consulting with potentially affected communities

before financing projects and outcomes; available remedies in compliance with pillar 3 of the Guiding Principles on Business and Human Rights.

2. Introduce **human rights and environmental disclosure requirements for index funds**, which pose particular challenges to monitoring the human rights performance of constituent companies. Processes should be in place to expediently remove companies in these indices which exhibit lack of compliance.
3. So-called vulture funds (which buy distressed sovereign debt on the cheap and, when conditions for the debtor improve, sue for the full amount) pose particular threats to countries' ability to fulfill their human rights obligations in times of financial crisis. The US NAP should consider supporting the process to pass **regulation to prevent financial firms that buy distressed sovereign debt in the secondary market from extracting gains superior to those a majority of creditors have agreed** in a debt restructuring with the debtor country.

Thirdly, tax cooperation. Businesses decisions to invest overseas depend in no small part on the tax regime present in host countries. A large industry of tax lawyers, accountants and auditing firms has emerged over the past decades which enable MNCs to shield themselves from their national tax liabilities and thus invest in places there might not otherwise be a feasible business model. Corporate tax fraud, evasion and aggressive avoidance tactics has a tremendous material cost on all governments in terms of lost revenue, but especially in poorer countries who receive more CIT as a proportion of their tax take. As a result, the realization of human rights of all types—[from education to access to justice, health to freedom of expression, occupational safety to social protection]—remain underfunded mandates.

But this loss of precious financing is not just a threat to the government's starving revenue base, but also undercuts its redistributive capacities to reverse growing economic

and gender inequalities. These tax abuses also deepen mistrust in how fiscal policy is governed and thus how effective it can be, especially for the most disadvantaged.

Corporate tax practices, in other words, are fundamental to the business and human rights debate, and so they should be brought in line with the GPs, OECD Guidelines and relevant international human rights law. What can the USG do as part of its NAP process?

1. Include **due diligence requirements on the human rights risks of companies' tax and financial arrangements as part of any reporting guidelines** for large US companies.
2. These due diligence requirements should **include the users, but also the market makers and suppliers of tax abuse schemes** (tax lawyers, accountants, financial intermediaries). This will simultaneously provide greater transparency and access to information for tax authorities to better do their jobs.
3. The NAP should also set out **criteria under which companies should refrain from negotiating special tax holidays, incentives and rates** that will prevent governments from fulfilling their human rights obligations.
4. Finally, the US government should—as the Netherlands and Ireland have already done—to commit to **conduct impact assessments to monitor the spillover effects of its tax policies and agreements on the achievement of human rights in other countries**. These should be periodic and independently-verified, with public participation in defining the risks and potential extraterritorial impacts. These impact assessments should analyze not only the revenue implications, but also the distributive and governance spillover effects of a country's tax regime abroad. If and when the main problems are identified, these impact assessments should trigger policy action by including explicit recommendations and clear deadlines for remedies and redress of any negative impacts discovered. These

types of impact assessments are essential tools to ensure policy coherence and evidence-based policy making in the 21st century.

In the end, US businesses should compete in the global economy on the merit of their innovation and product quality, rather than on the cleverness of their tax attorneys, opacity of their financial intermediaries, or shrewdness of their investment arbitration units.

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