Submission from the South African Human Rights Commission ("the Commission") on the Department of Trade and Industry's draft Bilateral Investment Treaty Policy Framework Review: Government Position Paper, June 2009 ("draft Policy Framework")

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1 Introduction and Mandate

The South African Human Rights Commission (hereinafter "the Commission") is pleased to participate in the process of considering and commenting on the draft *Bilateral Investment Treaty Policy Framework Review: Government Position Paper, June 2009* ("draft Policy Framework") and commends the Department of Trade and Industry on initiating the process of reviewing South Africa's bilateral investment treaty ("BIT") framework and the draft Policy Framework produced thus far.

The draft Policy Framework presents an opportunity to consider the human rights framework within which investment and development is facilitated and regulated, and how this is reflective of a commitment to the protection, promotion and fulfilment of human rights in accordance with the Constitution of the Republic of South Africa Act, 108 of 1996 ("the Constitution") and South Africa's obligations in terms of international human rights law. The submission does therefore not address all aspects of the draft Policy Framework, but instead comments on relevant provisions and raises specific concerns.

In accordance with its' constitutional mandate the Commission is compelled to make this submission and wishes to emphasize specific matters for consideration. In terms of section 184 (1) of the Constitution, the Commission is mandated to:

" (a) promote respect for human rights and a culture of human rights;
(b) promote the protection, development and attainment of human rights; and
(c) monitor and assess the observance of human rights in the Republic."

The Commission has a specific mandate in terms of section 184 (3) of the Constitution to monitor and assess the realisation of economic and social rights. Section 184 (3) provides that each year the Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights of the Constitution concerning housing, health care, food, water, social security, education and the environment.

Furthermore, the Commission recognizes the importance of engaging with the private sector in the context of investment and development as well as the human rights obligations of business. In September 2007 the Commission established a Human Rights and Business Special Programme. The purpose of this position is to streamline, strengthen, co-ordinate and drive the activities of the Commission in relation to human rights and the corporate sector. In accordance with its mandate in terms of section 184 of the Constitution and the Human Rights Commission Act, 54 of 1994, the Commission's responsibilities include monitoring compliance by the corporate sector with its human rights obligations. The Commission seeks further to engage in developing policy options and practical strategies to facilitate such compliance. The Commission has and will continue to undertake research to assess the role of business and the corporate sector in the development and enjoyment of human rights, and continues with its key responsibilities of advocacy and public awareness.

The Commission reiterates that it is necessary to consider the human rights obligations of all actors in our constitutional democracy in the broader sense. In this regard we consider it necessary to emphasise that in terms of the Application Clause (section 8(4)) of the Bill of Rights of the Constitution, juristic persons can be the bearers of rights to the extent that the nature of the right permits. However, they are also the bearers of obligations, and are bound by the provisions of the Bill of Rights "if, and to the extent that, it is applicable, taking into account the nature of any duty imposed by the right" (section 8(1)). The Commission does not consider these obligations necessarily to exist to same extent as the obligations of the state, but the

horizontal operation of the Bill of Rights is clear. It is this nuanced understanding of the Bill of Rights and the rights and obligations of natural and juristic, private as well as state actors, which informs our consideration of the draft Policy Framework.

A holistic approach requires consideration of the draft Policy Framework with due regard to the developmental context and economic and social rights, and the Commission emphasizes the impact of investment on development as well as promoting a rights-based approach to development. Furthermore, any holistic solution involves the engagement of the state concerning the enforcement of the constitutional obligations of private actors. The state has a role to play in a regional and international context as well as human rights obligations in terms of international human rights law.

Internationally, regulatory bodies are taking stock of the status quo and attempting to define their role in regulating and monitoring the human rights impact of corporations, both within their jurisdictions and externally, especially in weak governance and conflict zones.

2 Human Rights Context and Provisions

Paragraph 8.5 of the draft Policy Framework questions the appropriateness of the inclusion of specific human rights provisions in BITs. The Commission emphasizes that the human rights obligations of the state and business are entrenched in the Constitution and binding obligations are placed on the state in terms of international human rights law. In light of this, the Commission proposes that the state remedy the absence of specific human rights provisions in BITs to ensure investor clarity and avoid uncertainty and finally resorting to the interpretation of state and investor obligations by courts or tribunals.

The state's approach to BITs should form part of a cohesive strategy regarding the regulation of private actors in fulfilment of the state's own human rights obligations. For example, much emphasis has been placed of late in the national and international context, on the potential of human rights impact assessments in mitigating the risk of

human rights violations by corporations.[1] Broadly speaking, the requirement that investors conduct human rights impact assessments, much like the requirement to conduct an environmental impact assessment, could be included in domestic legislation and reflected in BITs. This also speaks to the standards for conduct of multinational corporations referred to in paragraph 8.6 of the draft Policy Framework, which is discussed further in paragraph 3 below.

The actions of investors have the potential to impact upon the full ambit of civil and political and economic and social rights entrenched in Chapter 2, the Bill of Rights, of the Constitution. Aside from those issues which have been traditionally raised in submissions, the Commission wishes to further emphasise the right of access to information.

Transparency of dispute settlement raises further human rights concerns. The right of access to information is entrenched in section 32 of the Constitution, and the relevant enabling legislation is the Promotion of Access to Information Act, 2 of 2000 ("PAIA"). PAIA does include grounds for refusal of a request for information, including commercial information of private bodies and of third parties (sections 64 and 68) in specific instances. Refusals must however be interpreted restrictively and assessed on the specific factual grounds of each matter. It should not be assumed that all information relating to investment disputes and the operations of the department automatically merit non disclosure of information. A non restrictive interpretation will permit for the excising of sensitive or protected information and the release of all other information alternatively through the processes to secure consent based release advocated by PAIA. Apart from the objective of increased public participation, the legislation drives the aspirant objectives of transparency and increased accountability. These objectives are the loadstones of sound corporate governance in both the public and private sectors. The matter of public notification and the openness of proceedings is a concern which has been raised by numerous commentators over the years, and remains an issue relevant to the democratic principle of public participation and the balancing of interests in protected information. In view of the primacy of the right to access information and South Africa's own regional commitments to transparency,

[1] This is discussed in paragraph 3 below.

accountability and public participation, every effort should be made to ensure that information sharing is fully integrated in the processes and ethos of the Department.

While emphasis is placed on those treaties which the state has ratified and state compliance with its' obligations and the role of treaty monitoring bodies, the relevance of international human rights law and foreign law in a national context should not be forgotten. Section 39 of the Constitution is emphasised which provides that "[w]hen interpreting the Bill of Rights, a court, tribunal or forum…must consider international law and… may consider foreign law."

3 Human Rights and Business

The Commission refers to its' position regarding the human rights obligations of business as set out in paragraph 1 above. The Commission's perspective on the human rights obligations of business is informed by the principle that "[b]usinesses should not only be responsible in their practices, but responsive to the contextualised challenges which specific communities may face."[2]

The Commission's position is further developed as follows:

> "…within the context of engagement with business, there is a need to move beyond the understanding of CSR as necessarily fulfilling corporations' human rights obligations under the Constitution of the Republic of South Africa Act, No. 108 of 1996 ("the Constitution"). This is not to undermine the value of corporate social responsibility in itself and the enabling environment which CSR creates.
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> It is necessary to consider the human rights obligations of all actors in our Constitutional democracy in the broader sense. In this regard it necessary to emphasise that in terms of the Application Clause (section 8(4)) of the Bill of Rights of the Constitution, juristic persons can be the bearers of rights to the extent that the nature of the right permits. However, they are also the bearers of obligations, and are bound by the provisions of the Bill of Rights "if, and to the extent that, it is applicable, taking into account the nature of any duty imposed by the right" (section 8(1)). In this instance, pharmaceutical companies bear obligations with regard to access to medicines. The [South African Human Rights Commission]… does not consider these obligations to exist to the same extent as the obligations of the state, but the horizontal operation of the Bill of Rights is clear. It is this nuanced understanding of the Bill of Rights and the rights and obligations of natural and juristic, private as

[2] Commission press release, October 2007.

well as state actors, which informs the participation of the Commission in its engagement with business.
The next step is to progress from pure compliance to organisational internalisation, and address the gap between corporate policy and practice."[3]

The Commission engages throughout the "human rights value chain" in five primary spheres, namely:

"The internal operations ie. human rights in the workplace;
The external environment ie. the supply chain and relationships and interactions with customers and the public;
Actions in the communities within which they operate. This includes the environmental impact of operations and facilitation of fulfillment, or refraining from interference with existing access to socio-economic rights;
Relationships between business and the state; and
The conduct of South African multinationals outside the borders of South Africa."[4]

Paragraph 8.6 of the draft Policy Framework refers to a number of Codes and voluntary initiatives to which corporations may subscribe to or be members of. Nationally and internationally, the human rights and business debate is focused on using human rights law both to inform and influence corporate behaviour. The Business Leaders Initiative on Human Rights ("BLIHR"), with members such as The Coca-Cola Company, Barclays PLC and Newmont Mining Company, indicated in its fourth and final report upon closure of the project in March 2009, that "short-termism" was one of the reasons for the recent failure of financial systems.[5] BLIHR made the further link between this and the need for social sustainability marked by the universal entrenchment of human rights values, which would indicate that "'human rights in business' has come of age".[6]

The human rights and business framework has developed over a number of decades, beginning with the 1976 Organization for Economic Development and Cooperation ("OECD") Guidelines for Multinational Enterprises;[7] the 1977 International Labour Organization ("ILO") Tripartite Declaration of Principles Concerning Multinational

[3] Commission submission to National Human Rights Institutions' International Coordinating Committee, *South African Human Rights Commission: Human Rights and Business Overview*, 4 June 2009, pp. 1-2.
[4] Id. p. 3.
[5] *Policy Report 4*, <http://www.blihr.org>, p. 1.
[6] Id.
[7] Part of the OECD Declaration and Decisions on International Investment and Multinational Enterprises, updated June 2000.

Enterprises and Social Policy;[8] the United Nations Commission on Transnational Corporations' code of conduct initiated in the 1970s and abandoned in 1994; and the contentious United Nations "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights",[9] which was abandoned in 2004.[10] In fact, in 1977 a Code of Conduct for Companies Operating in South Africa during apartheid was adopted by foreign ministers of the European Economic Communities.[11] A recent voluntary initiative is the United Nations Global Compact, which arose from the call by United Nations Secretary General Kofi Annan in 1999 at the World Economic Forum. Member corporations and organisations can sign up to the Global Compact and report on their compliance with the ten principles relating to labour, human rights, anti-corruption and the environment.[12]

Taking the agenda forward internationally, the United Nations appointed John Ruggie as the Special Representative to the Secretary General on human rights and transnational corporations and other business enterprises, in 2005.[13] Ruggie's 2008 report identified the three pillars of the conceptual framework for human rights and business as "respect, protect and remedy".[14] This comprises the "State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies."[15]

In accordance with Ruggie's international framework, the duty of corporations is, at a minimum, to respect human rights as part of their social licence to operate and to

[8] Adopted November 1977, 204th Session, amended November 2000, 279th Session (2001), <http://www.ilo.org/public/english/employment/multi/download/english.pdf>.
[9] See U.N. Econ. & Soc. Council (ECOSOC), Sub-Comm. On Promotion and Protection of Human Rights, *The United Nations Norms on the Responsibilities of Transnational Corporations and Other business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003).
[10] *Responsibilities of Transnational Corporations and Other business Enterprises with Regard to Human Rights*, C.H.R. Res. 2004/116, U.N. ESCOR, Commission on Human Rights, 60th Session, U.N. Doc. E/CN.2/2004/L.73/Rev.1 (2004).
[11] U.N. Doc. A/32/267.
[12] <http://www.unglobalcompact.org>.
[13] Human Rights Resolution 2005/69, <http://www.business-humanrights.org>.
[14] *Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General, John Ruggie*, U.N. GAOR, Human Rights Council, 8th Session, Agenda Item 3, U.N. Doc. A/HRC/8/5 (2008).
[15] Id. para 9.

carry this responsibility out with due diligence.[16] This duty to respect entails the following:

> "57. If companies are to carry out due diligence, what is its scope? The process inevitably will be inductive and fact-based, but the principles guiding it can be stated succinctly. Companies should consider three sets of factors. The first is the country contexts in which their business activities take place, to highlight any specific human rights challenges they may pose. The second is what human rights impacts their own activities may have within that context - for example, in their capacity as producers, service providers, employers, and neighbours. The third is whether they might contribute to abuse through the relationships connected to their activities, such as with business partners, suppliers, State agencies, and other non-State actors. How far or how deep this process must go will depend on circumstances.
> 58. For the substantive content of the due diligence process, companies should look, at a minimum, to the international bill of human rights and the core conventions of the ILO, because the principles they embody comprise the benchmarks against which other social actors judge the human rights impacts of companies."[17]

Companies need to undertake the following four steps:

> Adopt a human rights policy;[18]
>
> Consider the human rights implications of activities through conducting impact assessments;[19]
>
> Integrate the human rights policy into the company's activities, and throughout the company;[20]
>
> Audit performance against policies and assessments on an ongoing basis and report on this performance.[21]

The United Kingdom has acted on this framework, and is considering its' role in establishing the appropriate regulatory framework and monitoring the activities of business.[22] To this end, the Joint Committee on Human Rights called for public submissions in 2009 and the process is currently ongoing. This government action speaks to the apparent "considerable legal and policy incoherence" regarding human rights and business to which Ruggie refers,[23] and the UK's attempt at clarification.

[16] Id. paras 54-56.
[17] Id. paras 57-58.
[18] Id. para 60.
[19] Id. para 61.
[20] Id. para 62.
[21] Id. para 63.
[22] See the submissions at <http://www.business-humanrights.org>.
[23] Prepared remarks by John Ruggie, *Public Hearings on Business and Human Rights*, Sub-Committee on Human Rights, European Parliament.

A critical aspect of Ruggie's pillar of the corporate obligation to "respect" human rights is the human rights impact assessment ("HRIA") which bears similarities to the environmental impact assessment.[24] Ruggie developed a report on HRIAs concerning methodological questions and making reference to various current initiatives. The International Finance Corporation ("IFC") has developed *Guide to Human Rights Impact Assessment* in collaboration with the Global Compact and the International Business Leaders Forum.[25] The IFC intends testing the draft HRIA in September 2009.

Ruggie has also paid specific attention to trade and investment agreements, commenting that "some treaty guarantees and contract provisions may unduly constrain the host Government's ability to achieve its legitimate policy objectives, including its international human rights obligations."[26] This may be undertaken for various reasons, but specifically assists the business to insulate itself from the risk of the impact of legislative amendments or new legislation and regulation, or provide a safety net through compensation.[27] Ruggie refers to a Norwegian commentary and model agreement which observes that

"these treaties pose potential risks to Norway's own highly developed system of regulations and protection, including environmental and social policies. It also stresses the vulnerability of developing countries to agreements 'that tie up political freedom of action and the exercise of authority ...' The draft model agreement strives to 'ensure that the State's right to make legitimate regulations of the actions of investors is not restricted by an investment agreement. However, the right to regulate must be balanced against the investors' wish for predictability, legal safeguards, minimum requirements regarding the actions of the State and compensation in the event of expropriation'."[28]

This state response to the risk to compliance with its' own human rights obligations is noteworthy and provides an opportunity for comparative learning.

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[24] *Human Rights Impact Assessments – Resolving Key Methodological Questions, Report of the Special Representative of the Secretary-General, John Ruggie*, U.N. GAOR, Human Rights Council, 4th Session, Agenda Item 2, U.N. Doc. A/HRC/4/74 (2007).
[25] Road-Testing Draft, June 2007, requested from desiree.abrahams@iblf.org.
[26] *Business and human rights: Towards operationalizing the "protect, respect and remedy" framework, Report of the Special Representative of the Secretary-General, John Ruggie*, U.N. GAOR, Human Rights Council, 11th Session, Agenda Item 3, U.N. Doc. A/HRC/11/13 (2009), at para 30.
[27] Id.
[28] Id at para 31.

4 Conclusion

The Commission thanks the Department of Trade and Industry for the opportunity to make a submission on the draft Policy Framework and looks forward to the continuing process of engagement.