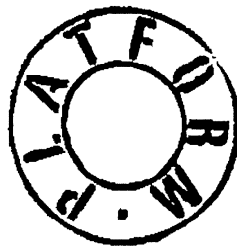


**KURDISH HUMAN RIGHTS PROJECT,
THE CORNER HOUSE, PLATFORM
AND
KURDISTAN REGIONAL
GOVERNMENT
MINISTRY OF TRADE**

**INVESTMENT AGREEMENTS AND
HUMAN RIGHTS:
A TRAINING FOR GOVERNMENT
OFFICIALS**

**16 December 2008
Hawler Plaza Hotel, Erbil**



THE
CORNER
HOUSE

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**Erbil, Iraq
16 December 2008**

09:45-10:00	Registration of Participants
10:00-10:15	Opening speech by Minister of Trade
10:15-10:30	Speech by Head of KRG Board of Investment
10:30-10:45	Introduction to speakers and need for the seminar Kerim Yildiz, Executive Director, KHRP and Rachel Bernu, Deputy Director, KHRP
10:45-11:40	Seminar I : Introduction to the fundamental principles of human rights Kerim Yildiz, Executive Director, KHRP and Rachel Bernu, Deputy Director, KHRP
11:40-12:00	Coffee break

12:00-13:00	Seminar Part II: How investment agreements should respect human rights Nicholas Hildyard, The Corner House and Greg Muttitt, Platform
13:00-13:15	Question and Answer session Nicholas Hildyard, Greg Muttitt, Kerim Yildiz and Rachel Bernu
13:15-14:15	Lunch
14:15-15:20	Workshop Part I: Best practice for ensuring investment agreements protect human rights Nicholas Hildyard, Greg Muttitt, Kerim Yildiz and Rachel Bernu
15:20-15:40	Coffee break
15:40-16:45	Workshop Part II: Identifying violations in investment agreements Nicholas Hildyard, Greg Muttitt and Kerim Yildiz and Rachel Bernu
16:45-17:15	Question and Answer Session Nicholas Hildyard, Greg Muttitt and Kerim Yildiz and Rachel Bernu
17:15-17:30	Closing comments Kerim Yildiz and Rachel Bernu

Organisers

KHRP

Kurdish Human Rights Project (KHRP) is an independent, non-political, non-governmental human rights organisation founded in 1992 and based in London, England. KHRP is a registered charity and is committed to the promotion and protection of the human rights of all persons living within the Kurdish regions, irrespective of race, religion, sex, political persuasion or other belief or opinion. Its supporters include both Kurdish and non-Kurdish people. KHRP achieves its aims through monitoring legislation, conducting investigations and producing reports, using those reports to raise awareness on a national and international level, liaising with other independent human rights organisations, assisting individuals with applications before international human rights mechanisms, providing advice and training on international human rights mechanisms.

PLATFORM

PLATFORM is an interdisciplinary, London-based organisation monitoring the human rights, development and environmental impacts of the oil and gas industry.

THE CORNER HOUSE

The Corner House is UK-based research and advocacy group focusing on human rights, environment and development.

Speakers

Rachel Bernu

Rachel Bernu, KHRP's Deputy Director, is an established human rights advocate, having worked in Senegal, Israel/Palestine, French Guiana, Washington and Paris, while studying International Relations and International Law. Formerly Co-Director of Development at the Washington-based Institute for Policy Studies, her expertise lies in institution building, development, and broad-based human rights campaigns.

Nicholas Hildyard

Nicholas has worked on issues relating to human rights, environment and development for over 30 years, most recently with The Corner House, which he co-founded in 1997. He has written and campaigned extensively on the social and environmental impacts of infrastructure investment, notably in the water and oil sectors, and on socially-responsible investment and the human rights implications of investment agreements.

Greg Muttitt

Greg has worked at PLATFORM for nearly nine years, including as Co-Director from 2006 to 2008. He has been studying Iraqi oil policy since 2003, and has also worked on oil issues in the Caucasus, Russia, Kazakhstan, Nigeria, Thailand and other countries.

Kerim Yildiz

Kerim Yildiz is an expert in international human rights law and the Kurdish regions, and a co-founder of the Kurdish Human Rights Project. Kerim has extensive experience in human rights and actively works to raise awareness on human rights violations worldwide; assisting with many cases to the European Court of Human Rights, conducting legal training seminars in Europe and the Kurdish regions, and regularly contributing to seminars and conferences. Kerim received an award from the Lawyers Committee for Human Rights for his services to protect human rights and promote the rule of law in 1996, and in 2005 also received the Sigrid Rausing Trust's Human Rights award for Leadership in Indigenous and Minority Rights. He has also written extensively on human rights including numerous essays, articles and chapters on freedom of expression, national security, torture and minority rights published in English, Turkish, Finnish and Russian. He is also a Board member of other human rights and environmental organisations, serving as the Board Chair of the Gateway trust, advisor to the Delfina Foundation and a member of Kurdish Pen.

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The need for the training: Having only recently emerged from dictatorship, human rights must be at the centre of the new Iraq. Therefore, as has been recognised by varying groups in and outside of government, in establishing itself as a democratic, federal state, key decisions are being made about the country's laws, institutions and economy, that have a serious bearing on rights. In particular, badly-drafted provisions of investment agreements can undermine human rights for decades into the future – such as the rights to freedom of association, to work, to non-discrimination or to adequate living conditions.

With the recent exponential rise in the use of investment agreements, this topic is increasingly being addressed at an international level. For example, the United Nations Special Representative to the Secretary General for Business and Human Rights, John Ruggie, has recently published a report, commissioned by the International Finance Corporation (part of the World Bank Group), on the implications of investment agreements for human rights. As an emerging area of best practice, it is important that Iraqi institutions, and the Kurdistan Regional Government in particular, incorporate the highest international standards in their decision-making.

This training aims to give participants an understanding of the principles of human rights and of Iraq's international obligations, in relation to investment agreements. Participants will examine agreements used in other countries, and discuss both damaging provisions that should be avoided, and best practice elements that should be incorporated. This will enable officials of the Kurdistan Regional Government and also members of civil society not only to meet their

international obligations and to protect citizens' rights, but also to enhance the benefits of investment agreements to the state and the region.

KHRP's Qualifications: KHRP's expertise lies in the practical application of international law in the day to day life of ordinary people. Over the last 15 years, it has worked in Turkey to train human rights advocates and to create materials designed to explain in plain language the rights to which everyone is entitled. Its staff and Legal Team concern themselves with how to make concepts practicable and eschew theoretical debate about ideals or political persuasion. This is evidenced by the testimony of many of KHRP's beneficiaries, our casework at the European Court of Human Rights and before the United Nations, and our publications, such as the manual 'Taking Human Rights Complaints to UN Mechanisms'. KHRP trainers are the personification of this expertise, bringing a wealth of practical and academic experience and knowledge to human rights defenders and advocates in Turkey, in order to transfer skills and build capacity on the ground.

The Corner House qualifications: Since its inception, The Corner House has followed closely the evolution of international rules and practices governing investment. Together with Kurdish Human Rights Project (KHRP) and Platform, The Corner House was one of the first civil society groups to raise concerns over the human rights implications of investor-state contracts, publishing a joint critique of the Host Government Agreements underpinning BP's Baku-Tbilisi-Ceyhan oil pipeline in 2003. Subsequently, the issue was taken up by the UN's Secretary-General's Special Representative on Business and Human Rights which recently published a major report on human rights and foreign direct investment. The Corner House works closely with parliamentarians and civil society organisations globally on investment-related issues.

PLATFORM qualifications: PLATFORM specialises in the social and environmental impacts of the oil industry. It has examined the economics, law and politics of oil investment contracts in a number of countries, including Azerbaijan, Kazakhstan and Russia, as well as Iraq. PLATFORM's work has been published in academic journals, policy papers, reports and books; PLATFORM has carried out workshops and presentations for parliamentarians, company representatives and civil society, in Iraq, the UK, the USA and Europe.

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**I : INTRODUCTION TO THE
FUNDAMENTAL PRINCIPLES OF HUMAN RIGHTS**

What are human rights?

- Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status.
- Universal human rights are usually expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law.
- International human rights law sets out obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.
- Human rights are universal and inalienable. This is the cornerstone of international human rights law. As a result, states must promote and protect all human rights and fundamental freedoms, regardless of their political, economic and cultural systems.

- Human rights entail both rights and obligations. States assume obligations and duties under international law to respect, to protect and to fulfil human rights.
- The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights.
- The obligation to protect requires States to protect individuals and groups against human rights abuses.
- The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights. At the individual level, while we are entitled our human rights, we should also respect the human rights of others. These concepts will be explained in more detail later in the seminar.

The fundamental principles of human rights

- The progression of international human rights law developed with the founding of the UN in 1945.
- UN Charter of 1945 contains a number of references to human rights, including a proclamation that one of the purposes of the UN is the promotion and encouragement of respect for human rights and fundamental freedoms for all 'without distinction as to race, sex, language or religion'.
- This led to the development of the Universal Declaration of Human Rights (UDHR) in 1948, which contains a vast range of rights. The Declaration is 60 years old this year.
- The UDHR is a 'common standard of achievement for all peoples and all nations' and sets out a wide span of rights covering all aspects of life
- Article 1 describes the idea of fundamental human rights "All human beings are born free and equal in dignity and rights"

- UDHR includes civil and political rights (the right to equality, to life, to an effective remedy by national tribunals, to fair trial, to freedom of assembly, opinion and expression, and thought conscience and religion; it also condemns torture and slavery, prohibits arbitrary interference with privacy, family, home and correspondence and protects the right to property
- UDHR also provides for social, economic and cultural rights, including the right to social security, to work, to rest and to education
- Although not legally binding, the importance of the UDHR should not be underestimated. It is of high moral force, representing the first internationally agreed definition of rights of all people.
- Many of the most fundamental principles of the UDHR have taken the status of binding obligations, and are also enshrined in international law by being protected in international treaties.
- The most important of these rights in relation to investment agreements are the right to life, liberty and security of person; the right to recognition as person before the law, the right to an effective remedy, the right to property and the right to freedom of opinion and expression. These are set out below:

Article 3: Everyone has the right to life, liberty and security of person.

Article 6: Everyone has the right to recognition everywhere as a person before the law.

Article 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 17: (1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property.

Article 19: Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

International Covenant on Economic, Social and Cultural Rights

- The International Covenant on Economic, Social and Cultural Rights (ICESCR) is a United Nations based treaty that binds the nations signed to it.
- Economic, social and cultural rights are designed to ensure the protection of people as full persons, based on a perspective in which people can enjoy rights, freedoms and social justice simultaneously.
- ICSECR mirrors the corresponding rights in the UDHR. It contains some of the most significant international legal provisions establishing economic, social and cultural rights, including rights relating to work in just and favourable conditions, to social protection, to an adequate standard of living, to the highest attainable standards of physical and mental health, to education and to enjoyment of the benefits of cultural freedom and scientific progress.
- Iraq ratified ICESCR on 25 January 1971
- ICESCR is monitored by the Committee on Economic, Social and Cultural Rights.
- Under Article 2, states must pass laws to give effect to these rights. They are permitted to limit the rights, but only for the purpose of promoting the general welfare in a democratic society (Article 4)
- The two most important rights in relation to investment agreements are the rights to an adequate standard of living, and mental and physical health. These are set out below:

Article 11:

1. *The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.*

2. *The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:*

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Article 12:

1. *The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*

2. *The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:*

- (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;*
 - (b) The improvement of all aspects of environmental and industrial hygiene;*
 - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;*
 - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.*
- Other relevant rights include the right to work (Article 6), the right to just and favourable conditions of work, including non-discrimination (Article 7), the right to form trades unions (Article 8), the right to social security (Article 9), and the right to family life, in particular in relation to maternity rights in employment (Article 10)

The International Covenant on Civil and Political Rights

- Like the ICESCR, the International Covenant on Civil and Political rights (ICCPR) is a United Nations based treaty that binds the nations signed to it.
- The ICCPR protects the individual's physical integrity against execution, torture and arbitrary arrest, procedural fairness in law, protection based on gender, race and other forms of discrimination, international freedom of belief, speech association and the right to hold assembly, and the right to political participation.
- Iraq ratified ICCPR on 25 January 1971
- The ICCPR is monitored by the Human Rights Committee, the members of which are elected by Member States, although not to represent the Member State

- The Covenant contains two Optional Protocols. The First Optional Protocol creates an individual complaints mechanism whereby individuals in member states can submit complaints to be reviewed by the Human Rights Committee. The Second Optional Protocol promotes abolition of the death penalty. However, Iraq has not signed either of these protocols.
- Relevant rights in relation to investment agreements are the right to self-determination, right of peaceful assembly, freedom of association and equality and non-discrimination under the law.

Article 1:

1. *All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*
2. *All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.*
3. *The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.*

Article 21:

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national

security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22 :

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 26:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

International Conventions relating to Women and Children

The UN Convention on the Rights of the Child (CRC) and the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) specifically reference human rights obligations related to the right to enjoyment of the highest attainable standard of health,

including the provision of clean drinking-water (Article 14.2 of CEDAW and Article 24.2 of CRC).

II: HOW INVESTMENT AGREEMENTS SHOULD RESPECT HUMAN RIGHTS

The Importance of International investment

- Investment is generally viewed as critical for economic development.
- Investment from abroad can bring the benefits of technology transfer, new know-how, improvements to the quality of products and services and new export opportunities.
- Yet foreign investment also has the potential to damage national economies, jeopardising growth and resulting in net outflows of capital for development. Whether or not investment benefits national economies therefore depends critically on the terms under which it takes place.
- In many instances, particularly in negotiations with States that are politically fragile or economically weak, investors have often obtained terms that can seriously undermine the State's ability to fulfil its duties under international human rights law to implement and promote the social and economic rights of its citizens.¹ Investors have been able to exploit a lack of knowledge of human rights law or other institutional weaknesses. In many cases, the terms obtained would not be permitted in developed countries.
- The long-term damage to national economies can be considerable. For example, many former Soviet republics entered into long-term investment agreements with international companies to develop their oil and gas resources at rock-bottom prices. Signed during the mid-1990s at a time when the states were new, weak and divided, the agreements strongly favoured the investors but lasted for decades – preventing the countries

¹. The rights in instruments such as The International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Iraq is a party, are legally binding. Such rights include rights to water, to education and to health. States that are party to the ICESCR are under an obligation to take positive action to “the maximum of [their] available resources” with a view “to achieving progressively the full realization of the rights recognized in the covenant” (Article 2). See: http://www.unhchr.ch/html/menu3/b/a_ceschr.htm.

from developing their economies or enforcing their laws, even as the institutions matured.

Major Types of Investment Agreements

Investors can be both individuals as well as business enterprises. Whereas investors as individuals have intrinsic human rights, business enterprises do not. Unlike human rights, which are universal and inalienable, the rights enjoyed by businesses are contingent and negotiable. Such rights only arise from investment agreements between and amongst states or between states and individual enterprises (or consortia thereof).²

There are two broad types of investment agreement: *international agreements* (investment treaties) and *investor-state contracts*:

A. **International treaties**

- Investment Treaties are agreements between states which lay down provisions for protecting investments made in signatory countries by investors incorporated in other signatory states.
- They have a higher status than domestic law and govern the terms of all investments of a particular class, often very wide-ranging.
- They take three main forms:
 - **Multilateral Agreements**

² For a discussion of the differences between human rights and investor rights, see: UN Economic and Social Council, "Human Rights, Trade and Investment – Report of the High Commissioner for Human Rights, 2003, [http://www.unhcr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/9b2b4fed82c88ee2c1256d7b002e47da/\\$FILE/G0314847.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/9b2b4fed82c88ee2c1256d7b002e47da/$FILE/G0314847.pdf). Paragraph 24 states: "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."

Examples include the 1991 Energy Charter, which protects foreign investors against non-commercial risks such as discriminatory treatment, direct or indirect expropriation, or the breach of individual investment contracts.³

- **Regional Investment Agreements**

Typically, regional investment agreements cover the standards of treatment that an investor is entitled to expect, performance standards, guarantees against expropriation and dispute procedures.

Within the Middle and Near East (MENA) area, a number of countries are signatories to regional investment agreements, including the Unified Agreement for the Investment of Arab Capital in the Arab States, to which Iraq is a party. Further agreements are expected to emerge from the US-backed initiative to encourage a Middle East Free Trade Area (MEFTA) by 2013.⁴

A number of new features have become increasingly common in recently-negotiated regional investment agreements. In particular, there has been a stretching of the notion of expropriation. The North American Free Trade Agreement (NAFTA), for example, includes a clause that prevents signatories from taking measures that are “ tantamount to nationalization or expropriation”. Rulings by investment arbitration tribunals have interpreted such measures to include new environmental or social laws where these reduce the value of an investor’s asset. US investors have

³ . Energy Charter, “Part III: Investment Promotion and Protection”, http://www.encharter.org/fileadmin/user_upload/document/EN.pdf#page=55.

⁴ . MENA-OECD Investment Programme, “International Investment Agreements Concluded by MENA countries”, Policy Brief, Issue 3, 2006, <http://www.oecd.org/dataoecd/23/24/39992736.pdf>.

also used clauses in NAFTA to overturn Canadian legislation that excluded foreign companies from investing in the energy sector.

- **Bilateral Investment Treaties (BITs)**

Originating in the 1950s, BITs are now the major international instrument for regulating investment. As of mid-2008, more than 2,600 BITs had been signed worldwide. Within the MENA region, the number of BITs has increased considerably in the last decade, not only between OECD and MENA countries but also amongst MENA countries.

The contents of individual BITs varies considerably but, typically, they confer rights on investors to “fair and equitable treatment”, “full protection and security”, “national treatment” or “most favoured nation treatment”. Many recent BITs, particularly those negotiated by the USA, lay considerable emphasis on protecting investors against direct or indirect expropriation, by obligating states to pay full compensation for any investment that is expropriated. In its free trade agreements and BITs, the United States also insists on establishing the right of an investor to submit an investment dispute with the host government to international arbitration.⁵

B. Investor-state agreements

- Investor-state agreements are contracts between a host state and one or more companies planning to invest in its territory, relating to that single investment. These include concession contracts, production sharing contracts and build-operate-transfer contracts.

⁵ . US Department of Commerce, “Legal Guide to Investing in Iraq”, <http://www.trade.gov/iraq/LegalGuide2008.asp>.

- Typically the agreement determines important issues like the sharing of economic benefits and costs, and the relative decision-making power of the parties.
- Investors may seek to give investor-state contracts the status of international law through so-called “*umbrella clauses*”, which nestle the contract within an international agreement to which both the host government of the investor and the state in which the investment takes place are signatories.

Iraq’s Investment Environment

- Iraq is party to a number of regional investment agreements, including the Unified Agreement for the Investment of Arab Capital in the Arab States. Iraq’s 2005 application to join the World Trade Organisation also provides an extensive list of BITs signed by Iraq since the 1920s.⁶ As yet, it has no BITs with OECD countries,⁷ but in November 2006, Iraq began trade negotiations with the European Union, which are expected to arrive at an investment treaty, and agreements with other nations will almost certainly follow.
- In 2006, Iraq passed a national Investment Law. The Kurdistan Regional Government has also passed an investment law. Both laws provide for national treatment of investors outside of the oil sector, which is not covered by the national law.
- Whilst the national law forbids expropriation except pursuant to a final judicial judgment, the KRG law contains no provisions on expropriation.⁸ Both laws allow for disputes to be settled by arbitration rather than

⁶ . MENA-OECD Investment Programme, “Strategy for BITs Negotiations: Elements to Consider”, <http://www.oecd.org/dataoecd/21/43/39990061.pdf>.

⁷ . MENA-OECD Investment Programme, “International Investment Agreements in the MENA region”, <http://www.oecd.org/dataoecd/21/42/39990094.pdf>.

⁸ . US Department of Commerce, “Legal Guide to Investing in Iraq”, <http://www.trade.gov/iraq/LegalGuide2008.asp>.

through the national courts, although the national law requires that this be stipulated by contract. Significantly, and in contrast to many national investment laws, the Iraq national Investment law requires investors also to meet specified obligations.

- The US Department of Commerce has identified a number of areas in these laws where the provisions “do not yet strictly adhere” to “high standards” of protection that the US would expect for US investors in Iraq. Significantly, it suggests that bilateral agreements and regional agreements may offer a route for establishing more investor-friendly provisions.⁹

Investment Agreements and Human Rights – Recent Disputes

International investment agreements rarely make explicit reference to human rights obligations. Therefore, states may undermine their ability to respect, protect and fulfil human rights nationally.

EXAMPLE: *Suez et al v Argentina*.

A consortium of foreign investors, including multinational companies Suez, Vivendi and Anglian Water, was awarded a concession by the Government of Argentina to supply water to the municipality of Buenos Aires. In response to an economic crisis, the Government of Argentina froze the water price that the companies were able to charge consumers. The investors took Argentina to international arbitration, arguing that Argentina’s actions violated the “fair and equitable treatment” protections contained in BITs signed by Argentina with the investors’ home countries. Argentina has countered that its actions stemmed from its overriding obligation, under international human rights law, to protect its citizens’ right to water. A ruling is expected in early 2009. In particular, Argentina

⁹. US Department of Commerce, “Legal Guide to Investing in Iraq”, <http://www.trade.gov/iraq/LegalGuide2008.asp>

has cited General Comment No 15 of the UN Committee on Economic, Social and Cultural Rights which states: “Where water services (such as piped water networks, water tankers, access to rivers and wells) are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water.”¹⁰

EXAMPLE: Investors try to stop South Africa reversing the deprivation of black communities under apartheid.

In an example that will especially resonate among Kurds in Iraq, South Africa passed a Black Economic Empowerment Act in 2003, to try to right some of the historic injustices of the apartheid era. Although black citizens had gained equal constitutional rights following the end of apartheid in 1994, the vast majority of the economy remains in white ownership. The Act set progressive targets for increasing the number of black managers and the black share of ownership of companies, by focussing economic growth on companies meeting those targets – including in its criteria for awarding licenses to develop natural resources. However, two Italian mining companies have launched a challenge against the law, under the ICSID arbitration rules. The case is pending.

Red Flags – Clauses that Compromise Human Rights

Over the years, investors have successfully negotiated for the inclusion of a range of different clauses in investment agreements that protect investor rights at the potential expenses of human rights. Examples include:

A. Stabilisation clauses

¹⁰ . United Nations, Committee on Economic, Social and Cultural Rights, General Comment No 15, [http://www.unhcr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94/\\$FILE/G0340229.pdf](http://www.unhcr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94/$FILE/G0340229.pdf).

A number of international human rights instruments impose a duty on states to enhance their human rights frameworks over time, in order to move towards the full protection and fulfilment of human rights.¹¹

But many investor-state agreements (contracts) contain “stabilisation clauses”, which aim to protect the investor’s profits from future changes in law or economic framework.

Such clauses come in three main forms, as identified in a study for the World Bank’s International Finance Corporation and the United Nations Special Representative to the Secretary General on Business and Human Rights:

- **“Freezing clauses** “freeze” the law of the host state with respect to the investment project over the life of the project.
- **Economic equilibrium clauses** require that the investor comply with new laws but also require that the investor be compensated for the cost of complying with them (compensation taking such forms as adjusted tariffs, extension of the concession, tax reductions, monetary compensation, or other), but exemptions are not specifically mentioned in the contract.
- **Hybrid clauses** (so named because they share some aspects of both of the other categories) require the state to restore the investor to the same position it had prior to changes in law, including, as stated in the contract, by exemptions from new laws.”¹²

11 . For example, International Covenant on Economic, Social and Cultural Rights, Article 2.1.

12 . International Finance Corporation and the United Nations Special Representative to the Secretary General on Business and Human Rights, “Stabilization Clauses and Human Rights”, March 2008, [http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/\\$FILE/Stabilization+Paper.pdf](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/$FILE/Stabilization+Paper.pdf).

Such clauses not only compromise the sovereignty of the state – they are also likely to have what the UN High Commissioner on Human Rights has called a “chilling effect”,¹³ discouraging future governments from passing new legislation, for which they would have to pay in lost revenues. Stabilisation provisions can thus conflict with the state’s obligation to progressively realise human rights.

This could prevent future governments from passing:

- Labour laws – which are necessary to *protect* the rights of workers;
- Environment laws – necessary to *protect* local people’s rights to health, property, livelihood (eg by regulating pollution of agricultural land by industrial development);
- Anti-discrimination laws – at the heart of human rights is that all people have equal access to rights;
- Economic policies – necessary to *fulfil* the rights of all citizens (to education, social security, health etc).

EXAMPLE: Article 36 of 2003 International Project Agreement (IPA) between Benin, Ghana, Nigeria and Togo and the West African Gas Pipeline Company: Under this clause, if regulatory change (including legislation, court decisions and ratification of international treaties) “causes the benefits derived by the Company from the Project [...] or the value of the Company to the shareholders to materially decrease”; then the state must “restore” the Company and/or the Shareholders to the same or an economically equivalent position it was or they were in prior to such change. In default, it must pay “prompt, adequate and effective compensation”.

B. Clauses that lower standards of rights protection

Often investor-state agreements specify the standards of operation for the investment project. In many cases, the specified standards – which may include

¹³ UN Economic and Social Council, “Human Rights, Trade and Investment – Report of the High Commissioner for Human Rights, 2003, <http://www.unhchr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/9b2b4fed82c88ee2c1256d7b002e47da/SFILE/G0314847.pdf>.

environmental, safety or land compensation standards – may be lower than those provided for under national legislation, or they may be “frozen” so that stricter standards do not apply. These standards have a direct bearing on human rights – including the rights to health, to property, to an adequate standard of living – and on the state’s duty to *protect* those rights.

- In some cases, “soft” industry guidelines are allowed to replace “hard” law, at the expense of human rights, particularly rights to redress.
- Agreements also determine how the standards are to be monitored, regulated and enforced. For example, some agreements may require preparation of an environmental impact assessment or of a workforce safety plan, but create no opportunity for government regulators to approve or disapprove of them, nor to request improvements. The result is that environmental and safety planning can become entirely a matter for the investor, with no reference to any external standard or check and balance. Again, this may impact on rights to health, to property and to an adequate standard of living
- Some agreements explicitly rule out the use of punitive damages. These are a vital tool for many regulators: even if only used in the most extreme cases, they create an incentive for the investor to cooperate in achieving acceptable practice. As a result, they may compromise the State’s ability to fulfil its duty to promote economic and social rights.
- Some agreements place a duty on the state to provide permits and approvals, when requested by the investor. With the threat of having to pay compensation in case of delay, this legal duty could effectively force

government to approve applications for works regardless of their consequences for its citizens' rights.

EXAMPLE: The Baku-Tbilisi-Ceyhan (BTC) pipeline over-rides environmental law in Georgia.

In 2002, a group of oil companies wanted to build the pipeline through the 'support zone' of an ecologically and economically important national park (it is source of the mineral water which is Georgia's largest export). The Minister of the Environment objected that the project would violate Georgian law; however that law was made irrelevant by the pipeline agreements – and she was forced to sign her approval of the construction permit regardless of her concerns.

C. Preferential access to water and electricity

- Public services and utilities play a key role in the achievement of the rights to health and to an adequate standard of living. The state has a legal duty to fulfil those rights.
- However, some investor-state agreements state that an investor may freely use water, electricity and other natural resources, without restriction according to local people's needs or government regulation. The result is often that large quantities are taken from the system, putting a strain on capacity, and reducing the amount available for people. Some agreements also give investors a right to construct earthworks that will affect both the water table and access to other resources, including dams, canals and reservoirs.
- This can also lead to investors' demand for water or electricity being prioritised over the needs and rights of people – as the legal provision in the agreement may exceed any provisions extended to citizens.

EXAMPLE: BTC pipeline gets preferential access to water over local people.

The host government agreement for the Turkey section of the Baku-Tbilisi-Ceyhan pipeline grants the investors free access to whatever quantity of water they require for their operations (Article 4); there are no restrictions to this. The result is that local populations will be able to demand access to water of sufficient quality and quantity only to the extent that their demands do not conflict with demands of the project as stated by the consortium

D. Placing Investments beyond legal challenge

Clauses may be included that ring-fence investors and their investment from court judgments.

EXAMPLE: Macal River Hydro Development Bill, Belize.

The bill which authorizes the Chalillo dam places the development and operation of the project beyond any court or tribunal: “For the avoidance of doubt and for greater certainty, BECOL shall proceed with the design, financing, construction and operation for the Chalillo Project in accordance with paragraphs (a), (b) and (c) of this section notwithstanding any judgment, order or declaration of any court or tribunal, whether heretofore or hereafter granted, issued or made.”

E. International Arbitration

Article 27 of Iraq’s national Investment Law specifically makes investment disputes subject to the jurisdiction of Iraqi courts. Commercial disputes, however, may be submitted to arbitration provided that arbitration is stipulated in the contract between the parties to the dispute.

In sharp contrast, many investment agreements specify that disputes between investor and state are resolved not in the courts of the country, but in international investment tribunals, such as the London Centre for International Arbitration, the Stockholm Chamber of Commerce and the International Centre for Settlement of Investment Disputes (ICSID). Where a foreign investor was protected by such an investment agreement, its international arbitration clauses could be invoked, regardless of whether arbitration was specified in the contract between the parties to the dispute.

International arbitration can severely impact on the state's ability to fulfil its human rights obligations:

- Whereas domestic courts might consider the public interest (for example, they might seek to balance an investor's right to stable terms of its investment contracts with its workers' rights to a safe workplace), these tribunals consider only the purely commercial terms of the contract, extracting and isolating it from the body of domestic law and of international human rights law. The state becomes simply a partner in a commercial arrangement.
- Rulings by international arbitration tribunals are generally binding, and give no right of appeal, except in relation to procedural or administrative issues. Compensation award rulings can mostly be enforced through the "New York Convention", allowing the winning party to seize assets of the losing party in any of the more than 140 countries that are parties to the Convention. Under the rules of many tribunals, no information is provided on cases, before, during or after the hearing. Thus, although the case may have a major bearing on wide areas of public law, citizens would not even have the right to know that an arbitration is taking place, nor its outcome.
- By considering disputes outside the country, people can be deprived of their right to an effective remedy if their other rights are compromised. It may also violate their right to equal treatment under the law, by giving investors more powerful recourse than citizens.

WORKSHOP I: **BEST PRACTICE FOR ENSURING INVESTMENT** **AGREEMENTS PROTECT HUMAN RIGHTS**

Existing Agreements

Where investor-state contracts containing stabilisation clauses have already been agreed - and renegotiation is not deemed possible - contracting companies should be encouraged to promulgate a legally-binding undertaking not to invoke such clauses in the event of new laws being introduced for human rights or environmental reasons. The investors in the Baku-Tbilisi-Ceyhan (BTC) pipeline responded to concerns within the legal community, the World Bank, other public funders and civil society groups about its legal agreements, by publishing such a “Human Rights Undertaking” (although the extent of the Undertaking was diminished by the investors retaining the right to invoke the stabilisation provisions in the event of “rent-seeking” behaviour by Turkey, Azerbaijan or Georgia).

Future Agreements

A. Including human rights clauses

One of the most effective ways to address the problems discussed above would be for investment agreements to specifically state that if anything in the agreements conflicts with the state’s duties under international human rights agreements, then it is the human rights agreements that should take precedence.

The July 2003 report by the UN Commission on Human Rights on *Human Rights, Trade and Investment* recommends that investment agreements should include among their objectives “the promotion and protection of human rights”.

B. Transparency

An important part of the realisation of human rights is for people to know and understand what their rights are, and how to defend them. Indeed, the right of access to information is enshrined in Article 19 of the International Covenant on Civil and Political Rights (ICCPR).¹⁴ Given the wide-ranging implications of investment agreements for human rights, publishing the agreements is one of the most important measures that can be taken.

- Emerging international best practice is for such agreements to be published, in spite of resistance by some investors and some governments. For example, oil investment agreements are publicly available in Azerbaijan, Timor Leste and Ghana.
- The International Monetary Fund recommends full publication of contracts as best practice on transparency, and dismisses the confidentiality arguments by noting that since in practice contract terms tend to be widely known within the industry soon after signing, there is no commercial advantage lost by publication of contracts.¹⁵
- For example, oil agreements are published in 'Basic Laws and Concession Contracts', an annual directory that can be purchased for \$67,000 per year from Barrows, a company which specialises in providing legal and contract information to the oil industry. It is held in the legal libraries of all oil companies, but is well beyond the reach of civil society groups.

¹⁴ Article 19.2 provides "Everyone shall have the right to freedom of expression; this right shall include freedom to *seek, receive and impart* information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice" (italics added).

¹⁵ . Guide to Resource Revenue Transparency, 2007, p.14.

- The US Treasury Department calls for “ex ante presumption of disclosure of such documents as Host Government Agreements, Concession Agreements, and bidding documents”.¹⁶
- It is now widely accepted internationally that companies should ‘publish what they pay’ and governments should publish what they receive. Publication of contracts allows citizens to check that there is no corruption, and that public funds are being used well. Many will suspect that if dealings are secretive, there is something the government does not want people to know.
- Unless there is some impropriety involved, it is generally also in a government’s interest to be transparent. In negotiating with an investor, the government will generally strengthen its bargaining power by opening the terms to public discussion, and reflecting the interests of the people in the terms.

C Parliamentary scrutiny

In many countries, parliamentary approval is also required for major, important contracts, as an extra check on whether the terms are in the public interest – rather than just leaving it to the executive branch of government. For example, Azerbaijan, Syria, Egypt and Yemen all require parliamentary approval of oil and gas contracts.

Russia, following the three disastrous production sharing contracts signed in 1994 and 1995, passed a PSA law in December 1995 that included a requirement

¹⁶ . Statement Concerning the Extractive Industries Review, JS-1841, August 2, 2004.

for parliamentary approval of 'strategic' contracts. In Venezuela, the 2002 Organic Law of Hydrocarbons provided that the principal manner in which foreign companies can invest in oil development is a form of joint venture, known as a 'mixed company': the formation of such companies requires parliamentary approval (Article 33).

D. Stabilisation Clauses

Many of the stabilisation provisions of investor agreements with developing countries would simply not be accepted in developed countries, as they would be seen as an encroachment on the sovereignty of the state. For example, the OECD recommends that stabilisation clauses should not grant blanket exemptions or rights to compensation, but should be restricted to clearly specified legislation, with clearly specified compensation terms.¹⁷ Indeed, a recent study undertaken for the World Bank's International Finance Corporation and the United Nations Special Representative to the Secretary General on Business and Human Rights found that:

- "No contracts from the OECD countries contain full or limited freezing clauses or hybrid clauses.
- Full economic equilibrium clauses are prevalent in the contracts used in all non-OECD countries. Only two contracts, both from one OECD country, contain such clauses.
- Stabilization clauses in the OECD contracts and models are, with two exceptions, limited economic equilibrium clauses (the most narrow form of stabilization clauses in the study). In contrast, such clauses are

¹⁷ . Multilateral Centre for Private Sector Development, 2002, *Basic Elements of a Law on Concession Agreements*.

relatively rare in the contracts from Sub-Saharan Africa, the Middle East and North Africa, and Eastern, Southern Europe and Central Asia regions.”¹⁸

Investors often insist on certain elements of investment agreements, often claiming that they are normal practice. However, even in developing countries, there is significant variation: nothing is “standard”, and nothing is “fixed”.

Some investment agreements exclude certain laws from stabilisation provisions (for example, in Kazakhstan’s North Caspian (Kashagan) production sharing agreement the stabilisation clause does not apply to environmental, health and safety laws) – recognising the duty of the state to regulate on these vital issues. Others only rule out new laws which are discriminatory to a particular investor, or those designed to increase government revenues rather than genuinely regulate.

The UN Commission on International Trade Law (UNCITRAL) points out that “All business organizations, in the private and public sectors alike, are subject to changes in law and generally have to deal with the consequences that such changes may have for business . . . General changes in law may be regarded as an ordinary business risk”, and recommends that compensation should only be paid where changes in legislation “are of such a nature that the concessionaire could not reasonably be expected to have taken them into account at the time the concession contract was negotiated or to have avoided or overcome their consequences.”¹⁹

¹⁸ . International Finance Corporation and the United Nations Special Representative to the Secretary General on Business and Human Rights, “Stabilization Clauses and Human Rights”, March 2008, [http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/\\$FILE/Stabilization+Paper.pdf](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/$FILE/Stabilization+Paper.pdf).

¹⁹ . *Legislative Guide on Privately Financed Infrastructure Projects*, 2001, paragraphs 123, 125

The UN Conference on Trade and Development adds that a balance should be struck “between the legitimate commercial expectations of the investor party and the right of the host country party to oversee the evolution of the resulting relationship in a manner that is consistent with national development priorities”.²⁰

Canada’s model investment treaty contains an explicit clause limiting the interpretation of “indirect expropriation”: “Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.”²¹

E. Arbitration

International arbitration is often described by investors as an essential provision of investment agreements, and indeed is used in the majority of cases.

However, again there are exceptions – including Iraq’s model contract of 1995, which specified Iraq as the ‘country place of arbitration’. China’s 1982 (revised in 2001) offshore oil regulations (Article 24) specify that in case of disputes, ‘mediation and arbitration may be conducted by an arbitration body of the People’s Republic of China’. Venezuela’s Organic Law of Hydrocarbons (Article 34) states that ‘All disputes shall be decided by the competent courts of the Republic, and no foreign claims shall arise for any reason’.

²⁰ . UN Conference on Trade and Development , *State Contracts*, 2004, p.45

²¹ . Draft Treaty, available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/what_fipa.aspx?lang=en#structure.

For arbitration to take place in-country would help to increase consideration of the public interest – and of citizens' rights – in any dispute, and would increase the access of affected persons to any proceedings.

WORKSHOP II: IDENTIFYING VIOLATIONS

IN INVESTMENT AGREEMENTS

Scenario 1 – Stabilisation clause

Below is a clause from a production sharing contract, signed in Azerbaijan in 1994.

Azeri-Chirag-Guneshli fields PSA, Article XXIII, clause 23.2: “In the event that the Government or other Azerbaijan authority invokes any present or future law, treaty, intergovernmental agreement, decree or administrative order which contravenes the provisions of this Contract or adversely or positively affects the rights or interests of Contractor hereunder, including, but not limited to, any changes in tax legislation, regulations, administrative practice, or jurisdictional changes pertaining to the Contract Area the terms of this Contract shall be adjusted to re-establish the economic equilibrium of the Parties, and if the rights or interests of Contractor have been adversely affected, then SOCAR shall indemnify the Contractor (and its assignees) for any disbenefit, deterioration in economic circumstances, loss or damages that ensue therefrom.”

Imagine the development of Iraq and the Kurdistan Region over the next 25 years – their economies, their political systems, their legal systems.

If the Iraqi government or the KRG signed a contract containing a clause like the above, how would that affect development, in relation to human rights? Which human rights would be affected?

Scenario 2 – Protecting Rights to Water

Discuss the current regulations protecting water supplies in Kurdistan.

Now look at the clauses below, taken from a Production Sharing Agreement between Belize and US Capital Energy Partners:

- *“Whereas the Government and the Contractor agree that this Agreement is bound by all Belize statutes, regulations and laws which govern or regulate the exploration, development and production of petroleum in Belize which are in effect at the time this Agreement was signed, and not by those statutes, regulations and laws adopted after this agreement was signed”*
- *“The contractor shall be responsible for conducting all petroleum operations within the contract area diligently, expeditiously and efficiently in accordance with generally accepted practice in the international petroleum industry . . .”*
- *“Upon relinquishment of any area, the Contractor shall perform all necessary clean-up activities in accordance with generally accepted practices in the international petroleum industry, and shall take all other action necessary to prevent hazards to human life or third party property”*
- *“If the Government reasonably determines that any works or installations erected by the contractor or any operations conducted by the contractor endanger or may endanger persons or third party property or cause pollution or harm wildlife or the environment to a degree that is unacceptable according to international petroleum standards, the Government may require the contractor to take remedial*

measures within a reasonable period established by the Government and to repair any damage to the environment that may be necessary in accordance with international petroleum standards."

How might such clauses affect the quality of water? How will this conflict with the needs of citizens? How does it relate to international human rights norms?

Scenario 3 – Environmental and safety regulations

Some investors uphold high standards of environmental responsibility and worker safety, but others do not. Think of ways in which some companies are irresponsible (it may or may not be a concrete example – in Kurdistan, elsewhere in Iraq, or in another country), and the consequences. How does that relate to human rights?

What are the mechanisms by which governments can ensure high standards in all operations? How are dangerous or polluting operations improved? What tools does the government use now in Kurdistan? How could they be improved in the future?

Now think about what we have discussed about some provisions of investment agreements. What could be the consequences in the example you discussed, if the wrong provisions are included in investment agreements?

Scenario 4 – Transparency

What kind of expertise exists in Kurdistan, that might be relevant to investment agreements? Who can make a useful contribution to discussions about how to obtain positive outcomes from investment?

Do the people and civil society of Kurdistan support the KRG more or support foreign investors more?

In a negotiation for an investment agreement, both sides are trying to get a good deal through bargaining. Will it help the KRG or the investor if the people of Kurdistan have a say?

What are the advantages of investment agreements being transparent, and being discussed in the open?

What are the advantages of them being confidential?