



**LAB**  
The Laboratory for  
Advanced Research on  
the Global Economy



## Investment & Human Rights Project

# Implementation of the State Duty to Protect Human Rights in the context of investment policymaking

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Report and recommendations  
Workshop and Dialogue  
10 and 11 November 2015

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### Table of Contents

1. Introduction	1
2. The UN Guiding Principles on Business and Human Rights and NAPs	2
3. Why the investment context is useful for the NAP process in Indonesia	3
4. IHRP work in Indonesia	4
5. Reflections and recommendations from the workshop and dialogue	8

## Introduction

### 1. The Investment & Human Rights Project

The Investment & Human Rights Project (IHRP) is a project of the Laboratory for Advanced Research on the Global Economy in the Centre for the Study of Human Rights at the London School of Economics and Political Science.

The IHR Project seeks to:

- Build awareness about how international investment works and how it relates to both positive and negative impacts on human rights;
- Create constructive spaces for learning, research, discussion and the sharing of practical tools in the area of investment and human rights; and
- Facilitate and carrying out training and capacity building activities for civil society, representatives of governments, practitioners and other relevant groups on the relationship between investment and human rights.

At present, the IHRP is implementing a project to help States, civil society and the private sector to understand in practical terms how States can implement their duty to protect under the UNGPs in the area of investment policy. The practical outcomes of this project are a Guide on the State duty to protect in investment policymaking (published in English, Indonesian and Spanish) and a set of training workshops and multi-stakeholder dialogues in two countries: Colombia and Indonesia, with specific outcomes for each set of trainings and dialogues. In Indonesia, this project will contribute directly to the on-going work of Komnas HAM and civil society to draft a National Action Plan (NAP) on business and human rights.

## **2. The UN Guiding Principles and NAPs**

The UNGPs received unanimous endorsement of the UN Human Rights Council in June 2011. Since then, they have become the authoritative reference point for the respective obligations and responsibilities of States and companies regarding business and human rights. The UNGPs are based on three pillars setting out the differentiated roles of States and companies:

1. The State duty to protect human rights (DtP)
2. The Corporate responsibility to respect human rights (RtR)
3. Access to effective remedy

The UN Working Group (UNWG), tasked with catalysing implementation of the UNGPs, have focused in large part on the State duty to protect over the last two years, encouraging the creation of NAPs and of other steps to implement the UNGPs by States. In December 2014 they published guidance to States on developing NAPs. While that guidance addresses investment, it does not provide States with extensive guidance. As described below, a number of States have already issued their NAPs, and a number of other States will do so over the next year. So far, none of the existing NAPs has an explicit focus on investment, even if some, such as the UK NAP, does address a variety of steps related to investment.

In Indonesia, Komnas HAM, the national human rights institution, along with ELSAM, a non-governmental organisation, is carrying out a series of dialogues to help it draft a National Action Plan. The strategy to ensure a political commitment to implement the plan is still under development. Currently, Komnas HAM and ELSAM are in the initial stages of their consultation and engagement process.

### 3. Why the investment context is useful for the NAP process in Indonesia

There are at least two reasons why looking at foreign direct investment (FDI) specifically is useful as Indonesia implements its DtP and creates its NAP. First, in practical terms, focusing on FDI and the life cycle of inward and outward investment helps to bring a new set of government actors to the table. It also helps identify a number of potential tools to use, as well as opportunities to coordinate efforts among government actors to bring about meaningful change. For example, considering the FDI context brings into focus a range of government roles and agencies that may not yet be in the business and human rights discussion such as investment promotion agencies and investment coordinating bodies. Considering FDI also brings to the fore potential tools such as State-investor contracts and international investment agreements (IIAs). Finally, considering FDI and the life cycle of investment also helps to put a clear focus on the relationship between and among municipal, regional and national authorities that regulate and monitor investment, and allows States to consider whether better coordination among these levels of government might better ensure investors respect for humanrights. So using FDI as one focus for the NAP should assist Indonesia to consider a wider range of actors, tools and opportunities for bringing meaningful change.

Second, right now is the right time for States to consider how to integrate DtP into investment policy because of a strong shift globally regarding international investment policy, where there is newfound support for the idea that an enabling environment for investment can also (a) actively regulate environmental and social impacts of investment; and (b) place a responsibility on investors to manage risks to people and the planet in their business activities. The key policy documents of global and international institutions on investment policy reflect this trend. The 2015 OECD Policy Framework for Investment and the 2015 UNCTAD Investment Policy Framework for Sustainable Development both address the benefits of more active management of social and environmental issues and for the need for companies to act responsibly, including with respect to human rights.<sup>1</sup>

The 2015 UNCTAD World Investment Report (WIR) identified an important trend – namely that States are increasingly playing a stronger role in sustainability issues. This trend is marked by States creating stronger social and environmental rules, more actively promoting sustainable development and placing more emphasis on the role of company responsibility for impacts on people and the planet. The WIR indicates that this trend signals “a renewed realism [among States] about the economic and social costs of unregulated market forces”.<sup>2</sup> Playing a more active role in regulating the economy does not mean discouraging investment according to UNCTAD or the OECD. Indeed, the 2015 OECD Policy Framework for Investment indicates that, on the contrary, this active role is precisely how a State can ensure investment drives broader value creation and sustainable development:

While it is the role of businesses to act responsibly, governments have a duty to protect the public interest and a role in providing an enabling framework for responsible

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<sup>1</sup> 2015 Policy Framework for Investment, OECD, available at <http://www.oecd.org/daf/inv/investment-policy/PFI-pocket-edition.pdf>.

<sup>2</sup> UNCTAD, World Investment Report 2015, United Nations Publication (2015), at p. 128.

business conduct...This point goes to the heart of the Policy Framework for Investment: to the extent that governments provide an enabling environment for businesses to act responsibly and meet their duty to protect the public interest from potential negative impacts of business activities, they are more likely to keep and attract high quality and responsible investors, minimise the risks of potential adverse impacts of investments, and ensure broader value creation and sustainable development.<sup>3</sup>

This context is particularly important for Indonesia as it recently took on a review of its IIAs. The review included – among other issues – the question of whether the State had adequately preserved its policy space to regulate in the public interest. This review by BKPM – the investment coordinating agency – might offer a very good starting place for discussion about how future IIAs should be shaped, whether the State is appropriately active in regulating social and environmental issues and whether its expectation of investors to respect human rights can be better integrated into investment policy.

In sum, there are good practical and policy reasons for Indonesia to consider FDI as it moves forward to shape its NAP.

#### **4. The IHRP in Indonesia**

Given the initial stages of the NAPs process in Indonesia, and the high level of expertise and experience of the NGO sector there, the IHRP wanted to focus on building capacity around investment while tapping the experience of civil society to apply the learning in context. The IHRP designed a technical workshop for civil society members, academics and national human rights institutions from the region. The workshop focused on growing understanding around investment as an important context in which to implement the DtP. The workshop was also designed to hear the participants experience and apply the learning to the Indonesian context by discussing and agreeing on priority human rights and investment topics. The topics chosen in the workshop then served as the focal point for a multi-stakeholder dialogue the following day. The multi-stakeholder dialogue was designed to try to build some common ground around a few concrete steps that might be useful for the NAP regarding the priority issues determined by civil society.

#### **10 November 2015 technical workshop**

The IHRP, in partnership with Human Rights Resource Centre (HRRC), Komnas HAM and ELSAM, carried out a technical workshop on 10 November 2015 to introduce the UNGPs and how they apply in the investment context. The workshop gathered 35 participants from civil society organisations, national human rights institutions and academia that work on human rights in the context of investment projects (agriculture and mining for example) and other business and human rights related topics. The workshop covered the UNGPs, focusing on DtP and The Principles for Responsible Contracts as well as a general introduction to investment policy and the key UNGPs issues that apply to investment.

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<sup>3</sup> 2015 Policy Framework for Investment, OECD, at p. 36

The second half of the workshop then focused on tapping the expertise of the participants to reflect upon how they could think about investment in the NAP, starting with identifying priority human rights issues that emerge in the context of investment.

The participants agreed that the following three issues should be the focus of the multi-stakeholder discussion because of the widespread nature of these human rights challenges:

- i. **Land disputes** – the improper taking of lands from indigenous people or other land users or owners to implement investment projects (plantations and mining were mentioned most) without appropriate procedures or remedy
- ii. **Environmental destruction** – some of the key environmental issues mentioned were the destruction of forests, forest fires, air and water pollution, and loss of biodiversity
- iii. **Labour rights violations** – freedom of association, inappropriate wage levels and precarious work were mentioned

The participants also identified that violence against human rights defenders and lack of effective access to remedy were key issues, but the group agreed to focus on the top 3 issues listed above as they were thought to be core issues to be resolved. The IHRP then facilitated a discussion of the perceived causes of these three human rights issues.

**The perceived causes for each of the three human rights issues that were aired during the workshop are listed below:**

**i. Land disputes**

- Unclear status of land ownership and rights of usage
- Lack of integrated land map for land use
- Unclear rules including for investors regarding land use and ownership
- Parallel legal systems (Sharia, tribal rules and Indonesian law) that conflict in terms of land ownership and usage rights
- Lack of participation of communities in consultations before investments take place
- Rules on participation in consultations are not clear and confusing
- Lack of clarity on who qualifies as “indigenous persons”
- Complicated procedures and land policy
- Decentralisation has confused processes and created overlapping competences

**ii. Environmental destruction**

- Lack of involvement of the ministry of environment in land issues
- Lack of strategic environmental assessment at the regional and national level
- Lack of knowledge of judges and prosecutor on environmental issues
- Lack of monitoring of the Environmental Impact Assessments of investors and left to voluntary compliance

**iii. Labour rights violations**

- A perception that the government has a pro-investment policy designed on cheap and precarious labour, outsourcing, lack of social protections and no union protections; while offering high protections to investors
- Suppression of association rights

- Lack of implementation of the labour supervisory body
- Lack of regulation and deficiencies in monitoring

The IHRP then facilitated the workshop participants to work in groups to consider what might be some positive steps towards confronting the causes of the human rights challenges.

The workshop participants suggested the following ideas in brainstorm fashion:

**i. Ideas to confront land disputes related to investment**

- Carry out a review of all competencies and laws related to land with an eye towards harmonising and synchronising the rules on land use
- Create rules on placement of police and military and rules on engagement, respecting human rights and international policing standards
- Create an integrated land use map with the national land agency, including local authorities. A Presidential decree could give competence to the National Land Agency for this project
- Create a one-stop shop for investment coordination and anti-corruption that would also coordinate land use by investors based on the integrated map
- Integrate a law on land usage for investors, which current law on investment does not include

**ii. Ideas to confront environmental destruction from investment**

- The Ministry of forestry and environment could create government regulation on the Strategic Environmental Assessment
- Strengthen the role of the forestry and environmental ministry to carry out monitoring
- Empower civil society to investigate environmental destruction by investors
- Government should require Free Prior Informed Consent (FPIC) and Komnas HAM could have some monitoring competency
- The agencies that have control over investment sectors (mining, agriculture, etc...) could create a harmonised rule on FPIC

**iii. Ideas to confront labour rights violations**

- Include in investment law labour protections that apply across the board throughout the country
- Create and implement sanctions for companies for workplace discrimination
- Revitalise the idea of the independent supervisory body on labour issues. It was reported that the last law on a supervisory body is from 1951. This Body would work with companies to increase the protection of labour rights.
- Reform 3 sets of regulations:
  - 2003 Labour law 31 on labour unions to include the principle of non-discrimination
  - 2004 Industrial relations law to include the principle of non-discrimination and freedom of association
  - Regulation on wages to include a mechanism for companies, the government and the union to negotiate
- Create a special desk on labour crime to look at issues like freedom of association and labour wages

**11 November 2015 multi-stakeholder workshop**

Building on the technical workshop, the IHRP, with Komnas HAM and ELSAM, then hosted a multistakeholder dialogue on 11 November 2015 with 35 participants from companies, civil society, Komnas HAM and

government agency representatives. The multi-stakeholder dialogue was designed to bring together a small group of stakeholders from the private sector, government ministries, civil society, academics and Komnas HAM to discuss the key points and issues brought out of the discussion on November 10 to share views and deepen the discussion on how to overcome the challenges identified.

The dialogue created an opportunity for participants to work together to develop a draft of some key policy recommendations and/or ideas for practical initiatives to manage some of the human rights challenges in the area of investment in Indonesia discussed on November 10. These recommendations should be helpful for spurring further discussion around the Indonesian NAP.

The dialogue began with an introduction to the UNGPs with a focus on the DtP. The IHRP then introduced the results from the dialogue presenting the three priority human rights issues that relate to investment in Indonesia and their perceived causes.

The first assignment to the group then was to identify what, if any, negative implications the human rights issues presented might have also for the Indonesian government and investors alike. After lively discussion the participants identified a long list of negative implications for the State and for investors stemming from land disputes, environmental destruction and labour rights violations. The IHRP then challenged participants to discuss what might be some useful steps forward for the Indonesian government in the NAP to help confront the priority human rights issues identified in the context of investment. Participants were tasked with identifying which agency or authority would be responsible for each step. Some confusion emerged as to the relevant competencies for the steps, but the suggestions mentioned are laid out below.

The ideas for useful steps to help confront the priority human rights issues identified in the context of investment are listed below:

#### **i. Ideas to confront land disputes related to investment**

- Carry out a review of all competencies and laws related to land with an eye towards harmonising and synchronising the rules on land use, including key concepts such as Indigenous Persons. A number of ministries were mentioned as being the appropriate authority to harmonise rules. Some of those mentioned include: the Ministry of Foreign Affairs and the Law and Human Rights Ministry as well as the Land Ministry. It is unclear from the dialogue which entity could carry out the harmonisation and definition of key concepts
- Improve transparency and stakeholder participation including among the private sector in passing laws on land use. It was suggested in the dialogue that the law on unfair competition is a good practice example for open and participatory processes for creating new law
- Create an integrated land use map. The participants talked about needing presidential authority for such a project
- Strengthen requirements on Environmental and social impact assessments and incentives build in from the financial sector
- Push a legislative procedure on indigenous people's rights and FPIC

#### **ii. Ideas to confront environmental destruction from investment**

- Harmonise the rules on environmental protection and improve implementation of existing laws

- Give the BKPM (Investment Coordinating Board) increased mandate and capacity to monitor environmental performance of investors
- Make environmental assessments public or require public reports on environmental assessments and management plans from investors. At present the BKPM does not even have authority to receive environmental assessments from the regional governments
- Create a Strategic Environmental Assessment of Indonesia to create a management and land use plan on a regional and national basis
- Push parliament to respect constitutional court decision on land use and the environment

**iii. Ideas to confront labour rights violations**

- Harmonise labour rules

**5. Reflections and recommendations from the workshop and dialogue**

The two days of discussions in the workshop and dialogue were extremely rich. In addition to the concrete ideas presented above about issues and steps that could be included in the NAP, a number of key issues emerged for the NAP process itself. As the NAP consultations are still in the early stages, our recommendations are geared towards the NAP process in Indonesia as opposed to concrete ideas that might be included in the eventual Plan.

Challenge	Recommendation
<p><b>Obtaining political support and buy-in from stakeholders</b></p> <p>One of the challenges of building a NAP is ensuring that the authorities that must take concrete steps to implement the NAP are willing and able to do so. Those who are running the NAP process and drafting the NAP in Indonesia will therefore need cooperation and resources from a range of government agencies in Indonesia. Komnas HAM and ELSAM are currently creating a strategy for how to build momentum and political buy-in for the NAP as the consultations and research continues.</p>	<p><b>Build collaborative partnerships with the private sector and government agencies to create momentum for the NAP</b></p> <p>If the concrete steps introduced in the NAP can also carry benefits for the State itself and for responsible investors from the private sector there may be some useful collaborations that Komnas HAM and ELSAM can formulate to gain momentum behind at least some of the steps in the NAP. From our very limited experience, there seemed to be a high level of consensus among stakeholders about some steps the government could take to protect human rights in the context of investment. In fact, the multi-stakeholder dialogue discussion came up with some very similar ideas to resolve the human rights challenges as the participants in the civil society workshop on the previous day. While there were overlaps in participation, the addition of the government and company participants did not seem to alter the suggestions materially. This indicates that there may be an opportunity to find support from within the private sector and in governmental agencies to build momentum</p>

	<p>behind certain suggestions for the NAP. Might there be ways the private sector can be involved in presenting the NAP to government agencies? Would there be useful partners in government to engage? What steps need to be taken to guarantee such political commitment to the NAP?</p>
<p><b>Confusion on the current status of government competencies and initiatives</b></p> <p>The two days of work helped to develop some very interesting initial ideas of what might be included in the NAP, not only regarding the investment context, but also relating to more generalised business and human rights challenges. However, there appears to be some confusion around the current status of government competencies and even of government work to address some of the challenges raised. For example, one of the most discussed ideas over the two days was the idea of the “Integrated Map” of Indonesia. After the dialogue our research revealed that the former President had engaged in a One Map process: <a href="http://ggim.un.org/knowledgebase/Attachment279.aspx">http://ggim.un.org/knowledgebase/Attachment279.aspx</a>. Clarity is needed on this process. Similarly, the discussion brought to light that there is little knowledge generally about the remit and scope of power that the BKPM has to monitor environmental and social impact assessments and management plans. Finally, the discussion led to a number of questions about what competencies different agencies have regarding harmonising laws.</p>	<p><b>Identify the current status of work and competencies of investment-related government agencies</b></p> <p>It may be useful during the NAP process to clarify the mandate and capacity of several government agencies, including the BKPM, the investment coordinating board. This “mapping” exercise is fundamental to ensure policy coherence in integrating human rights across investment policy making.</p> <p>Additionally, as harmonising standards and laws was a prevalent theme over the two days, it may be useful to know which agencies would be the appropriate bodies to carry out such actions so that engagement can begin regarding these ideas.</p>
<p><b>Lack of technical knowledge on investment</b></p> <p>During the workshop and dialogues, we identified an appetite among participants to pursue a discussion of more technical issues on investment such as State-investor contracts and IIAs and their relation to human rights. This discussion can be useful for both the NAP process and also to improve advocacy more generally.</p>	<p><b>Inquire as to interest for further training or work on State-investor contracts and IIAs</b></p> <p>If such interest exists, the IHRP would be available to explore with the HRRC, Komnas HAM, ELSAM or others how further workshops or discussions on State-investor contracts and/or IIAs can be useful in the Indonesian context.</p>
<p><b>Absence of framework for addressing the relevance of investment and human rights in the context of the NAP</b></p> <p>The IHRP events were the first discussions on the Indonesian NAP context to address investment. Going forward it may be helpful to have a structured way to</p>	<p><b>Consider some key issues regarding investment for the NAP and other advocacy on DtP and investment policy</b></p> <p>Komnas HAM, ELSAM and others might find the list of key issues for DtP and investment</p>

discuss investment to identify concrete steps for the NAP. Furthermore, as civil society and others think about investment policy reforms, it can be helpful to have a set of key issues that are derived from the UNGPs but applied directly to the investment context.

policy created by the IHRP useful in structuring dialogues for the NAP or for considering advocacy on DtP and investment. The key issues can be found in the *Guide to Implementing the UNGPs in Investment Policymaking*. Available in Bahasa Indonesia and in English at: <http://blogs.lse.ac.uk/investment-and-human-rights/2016/02/29/7197/>.