

## INTEGRATING HUMAN RIGHTS IN IIAs: IISD's Submission to the Crowd-drafting Session of the 2018 UN Forum on Business and Human Rights

5 November 2018

### 1. Background

Investment treaties or chapters in free trade agreements include a number of investment protection provisions that can restrict states' right to regulate, including to uphold and implement human rights obligations. The most effective way to avoid such consequences is to avoid investor–state dispute settlement (ISDS) or restrict investors' access to it, by limiting its scope and requiring investors to exhaust domestic remedies. State–state dispute settlement could also improve states' ability to protect human rights but to a much lesser degree. Another option to limit negative consequences on a state's ability to regulate to protect human rights is to limit the substantive investment protection provisions, particularly broad standards such as fair and equitable treatment. These issues are extremely important but will not be covered in this submission for the sake of brevity.

### 2. Limiting the scope of dispute settlement to investments that comply with domestic law, human rights obligations and standards of responsible business conduct

In recent years, some treaties have denied investors access to ISDS where their investments were made through fraud, corruption, or other unlawful means. Other treaties have limited the definition of investment under the treaty to investments made “in accordance with the laws and regulations”, thereby limiting their scope of application. Both approaches focus on the investment's establishment phase: if the investment was not made in accordance with the applicable law of the host state, or if there was corruption involved in the making of an investment, a tribunal would have to deny its jurisdiction. Even where not referring explicitly to human rights, the national law would cover many human rights issues. For example, if domestic law provides that the establishment of an investment requires proper consultation with local communities, the investor's non-compliance with this requirement means tribunal would have to find the investor or its investment to be outside the scope of the treaty. The problem with this approach is that (i) it is not a given that all human rights standards have been integrated into national law and (ii) it does not take into account the investor or investment's behaviour *during the operation* of the investment. It raises the question of whether an investor or investment that is violating labour laws or not abiding by basic standards of responsible business conduct should have access to the extraordinary right to initiate international arbitration under a treaty. In our view, access to ISDS should be limited to investments that comply with national law, human rights–related due diligence obligations, and widely accepted standards of responsible business conduct.

#### PROPOSED DRAFT TEXTS

##### **Article XXXX: Scope of investor–state dispute settlement**

*[For greater certainty], an Investor may not submit a claim under this agreement if the Investment has been made, acquired or operated in violation of the domestic law of the Host*

#### WINNIPEG

111 Lombard Avenue, Suite 325  
Winnipeg, Manitoba  
Canada R3B 0T4

TEL: +1 204 958 7700  
FAX: +1 204 958 7710

#### GENEVA

International Environment House 2  
9 chemin de Balexert, 1219 Châtelaine  
Geneva, Switzerland

TEL: +41 22 917 8683  
FAX: +41 22 917 8054

#### OTTAWA

220 Laurier Avenue West, Suite 1400  
Ottawa, Ontario  
Canada K1P 5Z9

TEL: +1 613 238 2296  
FAX: +1 613 238 8515

#### NEW YORK

300 East 56th Street #11D  
New York, NY  
USA 10022

TEL: +1 646 536 7556  
FAX: +1 646 219 0955

*State or Home State provided the breach is materially relevant to the issues before it, or in violation of other obligations under this agreement.*

**Article XXXX: Investor obligations and responsible business conduct**

*Investments and Investors shall operate their Investments responsibly, in line with, in particular, the UN Guiding Principles on Business and Human Rights, the OECD<sup>1</sup> Guidelines on Multinational Enterprises and the ILO Tripartite Declaration concerning Multinational Enterprises and Social Policy, as well as any applicable sector-specific corporate social responsibility norms.*

**Article XXXX: Impact assessments**

*As a part of the broader due diligence process, the Investor shall conduct an environmental and social impact assessment, including considerations on human rights and climate change, of proposed investments prior to their establishment, as required by the laws of the Host State for such an Investment and in accordance with the minimum requirements set out in Annex XXX.*

**3. Providing for tort and civil liability**

Many developing country host states face significant challenges in seeking to regulate the activities of foreign investors. As a result, in many cases, communities and individuals adversely affected by a foreign investment find it difficult if not impossible to achieve justice through domestic legal processes. For example, the local investment vehicle may be insolvent, or otherwise judgment-proof in the host state. One approach to overcome this situation is to allow affected communities and individuals to bring tort or civil liability claims in the courts of the investor's home state. Complementary provisions should be developed to enhance access to justice by lowering the standard of proof, easing access to information and reducing the costs of legal representation. In this regard, we think Article 8 of the Zero Draft of the *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises* would serve as good starting point.

**PROPOSED DRAFT TEXTS**

1. *Investors and their Investments shall be subject to civil liabilities for the acts, decisions or omissions made in relation to the investment in the territory of the Host State where such acts, decisions or omissions led to damage, personal injuries or loss of life.*
2. *Parties shall ensure that their legal systems and rules allow for, or do not prevent or unduly restrict, the bringing of court actions on their merits before domestic courts relating to the civil liability of investors for damages resulting from alleged acts, decisions or omissions of Investors and/or their Investment in the territory of other Parties.*
3. *In particular,*
  - i. *each Party shall guarantee the right of allegedly injured parties, individually or as a group, to present claims to its courts, and shall provide its domestic judicial and*

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<sup>1</sup> In case a country wanted to avoid referring to the OECD, an annex could be added with the language included in part 1 of the OECD Guidelines on Multinational Enterprises instead.

- other competent authorities with the necessary jurisdiction in order to allow for the injured party's access to adequate, timely and effective remedies;*
- ii. *each Party shall allow its courts to look at the structure of the Investor and its Investments to impose liability on the parent corporation and/or a sister subsidiary if the acts, decisions or omissions of the Investor or its Investment led to damage, personal injuries or loss of life in the Host State;*
  - iii. *each Party, acknowledging that it is for the Investor to prove that it has taken reasonable steps to comply with its duty of due diligence with respect to human rights, shall allow its courts asserting jurisdiction on relevant claims to require, where needed, reversal of the burden of proof for the purpose of fulfilling the alleged injured party's access to justice; and*
  - iv. *each Party shall establish mechanisms to ensure that allegedly injured parties have access to relevant information and evidence to initiate such actions, and to reduce the costs of legal representation.*

#### **4. Establishing an accountability mechanism**

Building on the experience of existing international accountability mechanisms, a new type of accountability mechanism with mediation, fact-finding and compliance functions could be integrated into investment treaties to ensure responsible business conduct and prevent human rights violations. A provision (not included here) could set up a roster of professional mediators and panellists to investigate complaints by affected individuals or groups.

#### **PROPOSED DRAFT TEXTS**

##### **Article XXXX: Mediation and Compliance**

1. *The Parties shall establish an accountability mechanism with two complementary functions: (a) multistakeholder mediation and (b) compliance.*
2. *The multistakeholder mediation function shall:*
  - (a) *strive to resolve and respond to the issues and concerns raised in complaints brought by individuals or communities affected or potentially affected by an investment or brought by civil society organizations;*
  - (b) *adopt a flexible, collaborative and problem-solving approach; and*
  - (c) *identify and engage all stakeholders, including complainants, investors, investments and State Parties.*
3. *The compliance function shall:*
  - (a) *strive to ensure compliance of Investors and their Investments with obligations under this Treaty in response to complaints brought by individuals or communities affected or potentially affected by an Investment or brought by civil society organizations;*
  - (b) *include fact-finding through an impartial and careful investigation when there is factual disagreement between the stakeholders, as well as a final report; and*
  - (c) *identify and engage all stakeholders, including complainants, Investors, Investments and State Parties.*

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