



# IISD's response to the questionnaire published by UNWG on Business and Human Rights

## I. STATE DUTY TO PROTECT HUMAN RIGHTS

- 1. Are you aware of any regulatory framework at the national or regional level requiring an integration of human rights provisions in IIAs?*

The [Kenya Investment Policy \(2019\)](#) sets forth a series of investor obligations, including on human rights, which “are intended to create a better balance in investment treaties and guarantees, [and] bolster domestic law.” (Art. 5.3)

At regional level, the [ECOWAS Common Investment Policy](#) requires Member States to comply with UNGP. (Ch.12, Art. 1.A.6) State Parties to the [Revised Investment Agreement for the COMESA Common Investment Area Agreement \(2017\)](#) also committed to require investors and their investments to observe UNGP. (Art. 29)

- 2. What mechanisms or processes should exist at the State level (e.g., inter-ministerial committee, ex ante human rights impact assessment) to assess and ensure that IIAs do not impact negatively the protection of human rights and the environment?*

UNGP.9 requires States to retain policy space to protect human rights when formulating their treaties. In our view, one of the key processes to achieving this is conducting human rights impact assessment before and after the conclusion of a treaty negotiation. Ongoing monitoring and evaluating human rights impact after treaty's conclusion is equally important. Sometimes, this requires parliamentary involvement. For example, section 178 of Thailand's Constitution requires the National Assembly to approve any treaty that has a "wide scale effect" on national economic or social security, hence the suspension of the Thailand-US FTA after the [result of the ex-ante HRIA was published](#).

- 3. Do new generation IIAs adequately preserve domestic regulatory space available to States to meet their international human rights obligations? If not, what further changes in IIAs are desirable?*



Several recent IIAs have included provisions aiming to preserve governments' right to regulate (to protect human rights, for example). However, many are formulated in a way to merely reaffirm States' right to regulate under customary international law and therefore may not prevent a tribunal finding a compensable treaty breach even where a state takes a measure for legitimate public objective.

Further, treaty language tends to leave room for broad interpretation through investor-state arbitral tribunals. Wherever there is room for interpretation and a provision is subject to ISDS, there is a chance that a tribunal will award compensation to an investor challenging legitimate public policy measures. An alternative would therefore be to carve out certain measures or sectors from ISDS altogether or restrict investors' access to it, for example by requiring investors to exhaust domestic remedies. (IISD, 2018c) [UNCTAD's Reform Accelerator](#) also encourages States to include exceptions for domestic regulatory measures in pursuit of circumscribed policy objectives, such as human rights obligations. (p. 26)

*4. How could old IIAs be reformed efficiently to make them compatible with States' international human rights obligations?*

IISD suggests establishing a mechanism where an expert panel can issue binding interpretations on human rights related issues. This could either be a standalone mechanism or be incorporated in the ongoing multilateral processes. This panel could conduct fact-finding missions and provide professional assistance to adjudicators depending on the complexity involved in a dispute.

*5. How can States harness the potential of IIAs to accomplish important policy objectives such as achieving gender equality, protection of human rights and the environment, mitigation of climate change and realising the Sustainable Development Goals? Please provide examples if possible.*

To ensure SDG-compatible investments, IIAs need to be developed on three building blocks - demoting unsustainable investments, promoting sustainable investments, and ensuring a just transition to environmentally, socially, and economically sustainable economies and societies. This is the approach of the IISD-proposed Draft Treaty on Sustainable [Investment for Climate Change Mitigation and Adaptation](#), which offers treaty protection only to carefully defined sustainable investments (Brauch, 2018).

*6. What special mechanisms or processes could be built-in in IIAs to safeguard human rights in cases where investment may take place in special economic zones or in conflict and post-conflict settings?*



No comment.

*7. Is the current Investor-State Dispute Settlement (ISDS) regime “fit for the purpose” to address complaints related to human rights abuses linked to investment projects? If not, what are the alternatives for a legitimate, transparent and effective dispute resolution system to address such complaints?*

Treaty-based ISDS is primarily modelled on commercial arbitration. It is neither designed for interested third parties to participate in the process, nor does it allow victims to bring claims in case of human rights abuses. Due to the requirement of consent in the arbitration model, it is also not clear, what could be the legal basis for meaningful third-party participation.

By contrast, in respect of an international court, consent would not be needed. Alternatively, jurisdiction for human rights or civil tort cases could remain with national courts. In this case, it would be important to ensure that victims can bring a case in the home state jurisdiction.

In addition to formal dispute settlement and building on existing accountability mechanisms such as the IFC Compliance Advisor Ombudsman and OECD national contact points, a new type of mechanism with mediation, fact-finding, and compliance functions could be integrated into IIAs to ensure responsible business conduct and prevent human rights violations. The treaties should also set up a roster of professionals to investigate complaints by affected individuals or groups. (IISD, 2015; IISD, 2016)

*8. Does the COVID-19 pandemic offer any lessons for reform of IIAs and/or ISDS? Please provide examples.*

The COVID-19 pandemic is creating an unprecedented risk of ISDS claims. In response to IISD's call for action (Bernasconi et al., 2020), in November 2020, ministers from AU Member States adopted a Declaration on the Risk of Investor–State Dispute Settlement with respect to COVID-19 Related Measures (IISD, 2020a). The Declaration encouraged AU Member States to consider several IIA reform options in light of the current crisis, including suspension of ISDS and renegotiation of the old treaty stock.

In addition, at IISD's 13<sup>th</sup> Forum of Developing Country Investment Negotiators, treaty negotiators highlighted the need for transforming the current international investment governance framework in light of the pandemic. A new framework should ensure developing countries retain their policy space, build solidarity in negotiations, and offer support in renegotiations. (See list of options proposed by the negotiators, IISD, 2020b).



## II. INVESTORS' RESPONSIBILITY TO RESPECT HUMAN RIGHTS

*9. Are human rights provisions in existing IIAs effective in encouraging investors to respect all internationally recognised human rights? If not, what should be done to strengthen their efficacy?*

According to the UNCTAD IIA Database, less than 5% of existing IIAs made reference to human rights. Of these 5%, many only referred to human rights in preambles and do not impose any obligations on investors. Most of the language used is aspirational and ineffective in encouraging investors to respect human rights, as the existing regime does not provide any opportunities for individuals or affected communities to have their voices heard.

If human rights provisions are to be effective, they need to be combined with a compliance mechanism as described above under question 7. (See also IISD, 2018b)

*10. Should IIAs include legally binding human rights responsibilities of investors to prevent and mitigate potential negative impacts of their investment on individuals or communities? What measures and/or mechanisms could ensure that these provisions are complied with by investors in practice?*

Some IIAs or IIA templates (SADC, PAIC, COMESA) include binding investor obligations. A violation of these obligations by investors can have an impact on jurisdiction, on the merits, or on the amount of damages in an ISDS case. Moreover, a violation can be the basis for a counterclaim by the state.

This is insufficient. To ensure compliance with the provisions, IISD is of the view that there is a need for an accountability and mediation mechanism as described earlier, where complaints can be made in case of alleged non-compliance by investors with human rights norms and other obligations under the treaty. (IISD, 2018a; IISD, 2018b)

*11. Should IIAs require investors to conduct a gender-responsive human rights due diligence (HRDD) or environmental and human rights impact assessment prior to, as well as during, their investment? If so, how could such processes ensure meaningful participation of impacted communities, particularly marginalized groups and individuals?*



As a critical part of the broader due diligence process, impact assessment lies at the center of States' and investors' duty to protect those affected by an investment. Independence and inclusiveness of the entity carrying out the impact assessment, clear content of, and benchmark for, impact assessment, and a high level of community engagement will be crucial. (IISD, 2018b)

*12. How could IIAs encourage cohesive and human rights-compatible business practices (e.g., investors not lobbying States to lower human rights standards)?*

IIAs could include an obligation to disclose project-related information. Affected communities should have the right to request relevant information and investors should be under an obligation to disclose such requested information. IIAs could also include provisions denying the protection to investors involved in human rights abuses. (IISD, 2018b)

### III. ACCESS TO REMEDY

*13. How do IIAs undermine the ability of States and/or affected communities to hold investors accountable for human rights abuses linked to investment-related projects?*

Measures taken by governments to protect human rights and hold foreign investors accountable may be challenged by investors in ISDS and result in excessive awarding of damages. A mere threat of a claim could have a chilling effect and deter a government from taking action. Examples include cases involving measures addressing environmental pollution endangering the life and health of communities or measures involving the consultation of local communities.

*14. Should IIAs provide mechanisms to allow individuals or communities affected by investment-related projects to seek effective remedy against investors? If so, what should the nature of such mechanisms and where should they be located (e.g., in host or home countries)?*

IIAs should ensure victims' access to justice in the courts of host *and* home States. IISD also supports the creation of a multilateral mechanism allowing victims to file for damages in certain circumstances. Moreover, IISD supports the development of a compliance and accountability mechanism. These functions could be combined in a comprehensive international mechanism. (See also response to Q7 ; IISD, 2015; IISD, 2016)

*15. Have counter-claims brought by States against investors been effective in addressing human rights abuses linked to their investment? If yes, please provide details.*



No. Investor-State arbitral tribunals rarely examine human rights-based arguments raised against investors. Some of the jurisdictional challenges for States to bring counterclaims include obtaining the investor's consent and demonstrating the subject-matter nexus between the counterclaim and the underlying claim. Further, counterclaims can only be initiated by Respondent States, but interests of victims might diverge from that of the State. The tribunal in *Urbaser v Argentina* was the first to discuss a State's human rights counterclaim in depth. Eventhough the tribunal in this case affirmed its jurisdiction over the counterclaim and concluded that individuals and other private parties must refrain from violating human rights, it still failed to find any positive human rights obligations that can be imposed on investors under international law.

*16. What is your experience, if any, with filing amicus briefs before ISDS or dispute settlement processes? Does this process provide an effective opportunity for affected individuals and communities to seek remedy?*

IISD has filed amicus briefs in multiple proceedings including *Methanex v. U.S.* (the first amicus filed and accepted in ISDS) and *Biwater v. Tanzania* (the first amicus filed under the revised ICSID rules that allowed for amicus submissions). The obstacles for filing amicus briefs are significant. Submissions are only admitted under very strict conditions and admission largely depends on tribunals' discretion. Even if admitted, tribunals are not required to respond or discuss the arguments presented. (See [Canada-Peru BIT Art. 39.7](#)) Furthermore, it is very difficult to present effective arguments relating to social rights. (Somda, 2019) Amici's limited access to case documents also significantly impairs their ability to prepare impactful and relevant briefs.

*17. Are you aware of operational-level grievance mechanisms established by investors to address human rights concerns related to their investment? If so, are these mechanisms effective in terms of both process and remedial outcomes? What role could IIAs play in strengthening such mechanisms?*

No comment.

## IV. GOOD PRACTICES AND OTHER COMMENTS

*18. Are there any good practices regarding the integration of human rights issues in IIAs that you would like to share with the Working Group? Any other comments or suggestions about the forthcoming report are also welcome.*



We have seen increased mentioning of CSR in IIAs accompanied by specific reference to global voluntary standards. Some treaties (COMESA, CCA, SADC) made specific reference to human rights in texts. New sets of international instruments, such as the Legally Binding Instrument on Business and Human Rights are being developed. These examples all remain untested.

But over the years, we have also seen arbitral tribunals expand the scope of application of IIAs and interpret States' obligations broadly. In large part they have done this in isolation from other international law. For example, several tribunals have refused to consider human rights-related arguments under IIAs. (See e.g., *Borders Timbers and Others v. Republic of Zimbabwe*). This has contributed to an increased fragmentation of the international legal framework governing transnational investment activities.

Therefore, if States wish to conclude IIAs, integrating Human Rights will require a fundamentally new approach. To develop human rights-compatible treaties, one cannot simply add human rights provisions or chapters to the texts of traditional investment protection agreements. Instead, States should take a systemic reform approach. Treaties need to be entirely re-oriented towards responsible and sustainable investment, starting from scope, definition, and types of rules incorporated.

## REFERENCES:

Bernasconi, N., Brewin, S., Maina, N. (2020), [Protecting Against Investor–State Claims Amidst COVID-19: A call to action for governments](#)

Brauch, M. (2018), [Tackling Climate Change Through Sustainable Investment: All in a Treaty?](#)

IISD (2015), [Investment-Related Dispute Settlement: Reflections on a new beginning](#)

IISD (2016), [Investment-Related Dispute Settlement: Towards an inclusive multilateral approach](#)

IISD (2017), [IGF GUIDANCE FOR GOVERNMENTS: Managing artisanal and small-scale mining](#)

IISD (2018a), [Harnessing Investment for Sustainable Development: Inclusion of investor obligations and corporate accountability provisions in trade and investment agreements](#)

IISD (2018b), [Integrating Investor Obligations and Corporate Accountability Provisions in Trade and Investment Agreements](#)

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



IISD (2020a), [IISD Welcomes AU Ministerial Declaration on the Risks of Investor–State Arbitration for COVID-19 Measures](#)

IISD (2020b), [Meeting Report: Investment Policy-Making During COVID-19 and Beyond](#)

Mirza, H., Speller W., Dixie, G., Goodman, Z. (2014), [The practice of responsible investment principles in larger-scale agricultural investments: Implications for corporate performance and impact on local communities](#)

Smaller, C. (2014), [The IISD Guide to Negotiating Investment Contracts for Farmland and Water](#)

Somda, S. (2019), [Protecting Social Rights Using the Amicus Curiae Procedure in Investment Arbitration: A smokescreen against third parties?](#)