

## **Input for Working Group on Business and Human Rights’ report on “Human Rights-compatible International Investment Agreements (IIAs)”**

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We greatly appreciate the opportunity to provide input for the Working Group on Business and Human Rights’ report on “Human Rights-compatible International Investment Agreements (IIAs)”. The focus of this input is on **Question 5** of the Questionnaire:

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.

Based on an analysis of BITs and investment chapters in FTAs concluded in recent years, we submit that States could harness the potential of IIAs to accomplish policy objectives mainly through retaining regulatory ability, including policy objectives in IIAs, introducing environmental and human rights due diligence, and strengthening the relationship between IIAs and national and international law. We identify treaty provisions that could serve as examples and guidance for States in reforming old IIAs to make them compatible with their international human rights obligations. The selected agreements belong to a ‘new generation’ of treaties, which include provisions relating to gender equality, labor rights, environmental protection and sustainable development among other public policy objectives.

### **1) Retaining regulatory ability: the right to regulate**

Retaining adequate domestic policy and regulatory space is of crucial importance for States to meet their human rights obligations without undue constraints. In the following BITs and investment chapters in FTAs, Parties agree to maintain regulatory ability through reaffirming the right of States to regulate. Including such a reaffirmation constitutes a way to harness the potential of IIAs to accomplish public policy objectives.

The Model BIT of the Southern African Development Community (SADC Model BIT, 2012)<sup>1</sup> provides that, in accordance with customary international law and general

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international legal principles, the ‘Host State has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives’<sup>2</sup>. This provision reaffirms the Host State’s right to regulate investments in the public interest to avoid that arbitrators interpret investment treaties as containing purely investor rights.<sup>3</sup> Like the provisions below, it is intended to strike a balance between maintaining the State’s regulatory ability and providing the necessary investor protection.

In the Latin American region, recent Model BITs also reaffirm states’ regulatory power. The Brazilian Model BIT (2015) reassures in its preamble Parties’ regulatory autonomy and policy space.<sup>4</sup> It is more specific than the SADC Model BIT providing examples of public policy objectives. It states: ‘Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure it deems appropriate to ensure that investment activity in its territory is undertaken in a manner according to labor, environmental and health legislations of that Party’.<sup>5</sup> In addition, the Colombian Model BIT (2017)<sup>6</sup> also provides examples of public policy objectives. It reaffirms Parties’ right to regulate ‘in order to achieve legitimate public policy objectives such as those enshrined in their Constitutions or in international agreements that promote and protect human rights, public health, safety and security, natural resources, the environment, sustainable development and other public policy objectives.’<sup>7</sup>

In a similar provision, the Dutch Model BIT (2019)<sup>8</sup> states ‘The provisions of this Agreement shall not affect the right of the Contracting Parties to regulate within their territories necessary to achieve legitimate policy objectives such as the protection of public health, safety, environment, public morals, labor rights, animal welfare, social or consumer protection or for prudential financial reasons.’<sup>9</sup> Compared to the SADC and Colombian Model BITs, the Dutch Model BIT does not use the term ‘reaffirm’ but straightforwardly states the Parties’ right to regulate within their territories. It also provides a broader range

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<sup>1</sup> SADC Model Bilateral Investment Treaty Template with Commentary (2012) available at <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf> last accessed 28 March 2021

<sup>2</sup> Ibid. Art. 20.1.

<sup>3</sup> Ibid. Art. 20, Commentary.

<sup>4</sup> Brasil Model BIT (2015), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/download>, Preamble

<sup>5</sup> Ibid. Art. 16.1.

<sup>6</sup> Colombia Model BIT (2017) available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6082/download>

<sup>7</sup> Ibid., p.10.

<sup>8</sup> Netherlands model Investment Agreement, 22 March 2019, <<https://www.rijksoverheid.nl/ministeries/ministerie-van-buitenlandse-zaken/documenten/publicaties/2019/03/22/nieuwe-modeltekst-investeringsakkoorden>>

<sup>9</sup> Ibid. Art. 2.2.

of examples of policy objectives including specifically public morals, labor rights, animal welfare, consumer protection and financial reason.

Concerning investment chapters in FTAs, the Comprehensive Economic and Trade Agreement (CETA, 2016) between Canada and the European Union provides that ‘parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity’<sup>10</sup>. In addition, the United States–Mexico–Canada Agreement (USMCA, 2018) –also known as ‘New NAFTA’ for replacing the North American Free Trade Agreement– provides ‘Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, safety, or other regulatory objectives.’<sup>11</sup> This is a comparatively weak wording leaving broad room for interpretation of what constitutes ‘a manner sensitive to regulatory objectives’.

Finally, investment chapters in two Chilean FTAs are worth mentioning. In the Canada–Chile Free Trade Agreement (CCFTA, as amended in 2019), Parties ‘reaffirm the right of each Party to regulate within its territory to achieve legitimate policy objectives, such as the protection of health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.’<sup>12</sup> It adds that ‘the mere fact that a Party takes or fails to take an action, including through a modification to its laws or regulations, in a manner which negatively affects an investment or interferes with an investor’s expectations, including its expectations of profits, even if there is loss or damage to the covered investment as a result, does not amount to a breach of an obligation under this Chapter.’<sup>13</sup> Secondly, the investment chapter of the FTA between Chile and Brazil (2018) contains a more general provision stating that the Parties ‘podrán adoptar, mantener o hacer cumplir cualquier medida que considere apropiada para garantizar que las actividades de inversión en su territorio se efectúen tomando en cuenta la legislación laboral, ambiental o de salud de esa Parte, de manera consistente con lo dispuesto en este Capítulo.’<sup>14</sup>

The above-mentioned provisions in BITs and investment chapters in FTAs could serve as guiding examples for States in reforming old IIAs to make them compatible with their

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<sup>10</sup> [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf) Article 8.9. 1.

<sup>11</sup> <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/14-Investment.pdf>, Art. 14.16

<sup>12</sup> [https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/2017\\_Amend\\_Modif-App1-Chap-G.aspx?lang=eng](https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/2017_Amend_Modif-App1-Chap-G.aspx?lang=eng), Art. G-01.3

<sup>13</sup> Ibid. Art. G-01.4.

<sup>14</sup> [http://www.sice.oas.org/TPD/BRA\\_CHL/BRA\\_CHL\\_e.ASP](http://www.sice.oas.org/TPD/BRA_CHL/BRA_CHL_e.ASP), Art. 8.17.1.

international human rights obligations. An affirmation of State's policy and regulatory space could contribute to promoting a more balanced interpretation of treaty obligations such that both investor protection and policy objectives could be harmonized.

## **2) Including policy objectives in IIAs**

In addition to retaining regulatory ability, States could harness the potential of IIAs to accomplish policy objectives through including such objectives in IIAs. For instance, the SADC Model BIT ensures the right of the host State to pursue development goals,<sup>15</sup> while the Colombian Model BIT provides that the BIT shall not preclude Parties from adopting measures for protecting, inter alia, human rights, the environment and consumer rights.<sup>16</sup>

Concerning sustainable development, the Dutch Model BIT provides that Parties 'encourage high levels of environmental and labor protection and shall strive to continue to improve those laws and policies and their underlying levels of protection';<sup>17</sup> 'emphasize the important contribution by women to economic growth through their participation in economic activity, including in international investment'<sup>18</sup> and 'acknowledge the importance of incorporating a gender perspective into the promotion of inclusive economic growth';<sup>19</sup> 'recognize that it is inappropriate to lower the levels of protection afforded by domestic environmental or labor laws in order to encourage investment'<sup>20</sup> and 'reaffirm their obligations under the multilateral agreements in the field of environmental protection, labor standards and the protection of human rights to which they are party, such as the Paris Agreement, the fundamental ILO Conventions and the Universal Declaration of Human Rights'.<sup>21</sup> In addition, the Brazilian Model BIT recognizes the 'essential role of investment in promoting sustainable development'<sup>22</sup> and provides that 'Investors and their investment shall strive to achieve the highest possible level of contribution to the sustainable development of the Host State and the local community, through the adoption of a high degree of socially responsible practices, based on the voluntary principles and standards set out in this Article.'<sup>23</sup> The 'voluntary principles and standards for a responsible business conduct' investors shall endeavour to comply with include contributing to the economic, social and environmental progress, aiming at achieving sustainable development,<sup>24</sup> and

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<sup>15</sup> Ibid. article 21.

<sup>16</sup> Supra n. 6, p. 11.

<sup>17</sup> Ibid, article 6.2

<sup>18</sup> Ibid, article 6.3

<sup>19</sup> Ibid.

<sup>20</sup> Ibid, article 6.4

<sup>21</sup> Ibid, article 6.6

<sup>22</sup> Supra n. 4 Preamble.

<sup>23</sup> Supra n. 4 Art. 14.1.

<sup>24</sup> Supra n. 4 Art. 14.2.a).

respecting the internationally recognized human rights of those involved in the companies' activities.<sup>25</sup> A more general provision on environmental concerns is found in the CCFTA.<sup>26</sup>

On the subject of corporate responsibility, the Colombian Model BIT provides that Parties shall ensure that investors follow the OECD Guidelines for Multinational Enterprises, on a voluntary basis.<sup>27</sup> In addition, the Dutch Model BIT states that investors shall comply with domestic laws and regulations of the host state, including those on human rights, environmental protection and labor laws'.<sup>28</sup> This is a good example of a provision explicitly stating investors' obligation to comply with domestic laws. The Dutch BIT also recognizes the importance of Parties encouraging investors to comply with internationally recognized standards, guidelines and principles such as the OECD Guidelines for Multinational Enterprises, the United Nations Guiding Principles on Business and Human Rights, and the Recommendation CM/REC(2016) of the Committee of Ministers to Member States on human rights and business.<sup>29</sup> The Indian Model BIT also provides that investors and their enterprises incorporate internationally recognized standards of corporate social responsibility.<sup>30</sup> The USMCA, the CCFTA and the FTA Chile – Brazil contain a similar provision expressly mentioning compliance with the OECD Guidelines for Multinational Enterprises.<sup>31</sup> Clauses like these contribute to ensuring that foreign investors comply with recognized international standards.

With regards to maintaining the standards of protection, the Brazilian Model BIT recognizes that it is 'inappropriate to encourage investment by lowering the standards of [Parties'] labor and environmental legislation or measures of health. Therefore, each Party guarantees it shall not amend or repeal, nor offer the amendment or repeal of such legislation to encourage the establishment, maintenance or expansion of an investment in its territory, to the extent that such amendment or repeal involves decreasing their labor, environmental or health standards.'<sup>32</sup> The CCFTA and the FTA Chile – Brazil contain a similar provision.<sup>33</sup>

Some of the selected treaties also contain provisions concerning gender equality,<sup>34</sup> access to effective remedies<sup>35</sup> and environmental protection.<sup>36</sup>

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<sup>25</sup> Supra n. 4 Art. 14.2.b)

<sup>26</sup> Supra n. 12, Art. G-14.1

<sup>27</sup> Ibid.

<sup>28</sup> Ibid, article 7.1

<sup>29</sup> Ibid, article 7.2

<sup>30</sup> Indian Model BIT, article 12 available at [https://dea.gov.in/sites/default/files/ModelBIT\\_Annex\\_0.pdf](https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf)

<sup>31</sup> USMCA supra n. 11, Art. 14.17; CCFTA, supra n. 12, Art. G-14bis; FTA Chile – Brazil, supra n. 14, Art. 8.15.2.

<sup>32</sup> Supra n. 4 Art. 16.2.

<sup>33</sup> Supra n. 12, Art. G-14.2; FTA Chile – Brazil, supra n. 14, Art. 8.17.2.

<sup>34</sup> CETA, Art. 8.10.2.d.

<sup>35</sup> Dutch BIT, Art. 5.3.

### **3) Introducing environmental and social due diligence**

An emerging trend in IIAs is the inclusion of provisions requiring environmental and social due diligence. For example, the Morocco-Nigeria BIT (2016) states that ‘Investors or the investment shall comply with environmental assessment screening and assessment processes applicable to their proposed investments prior to their establishment, as required by the laws of the host state for such an investment or the laws of the home state for such an investment, whichever is more rigorous in relation to the investment in question’<sup>37</sup>, adding that ‘Investors or the investment shall conduct a social impact assessment of the potential investment (...)’.<sup>38</sup> Moreover, ‘Investors, their investment and host state authorities shall apply the precautionary principle to their environmental impact assessment and to decisions taken in relation to a proposed investment, including any necessary mitigation or alternative approaches of the precautionary principle by investors and investments shall be described in the environmental impact assessment they undertake’.<sup>39</sup>

In the same line, the Dutch Model BIT states ‘the importance of investors conducting a due diligence process to identify, prevent, mitigate and account for the environmental and social risks and impacts of its investment’.<sup>40</sup>

### **4) Strengthening the relationship between IIAs and national and international law**

The Colombian Model BIT provides an example of a provision requiring that investments are carried-on in accordance with the law of the Host state.<sup>41</sup> This Model BIT also requires respect for ‘the prohibitions established in international instruments, to which any Contracting Party is or becomes a party’.<sup>42</sup> The latter should include instruments in the areas of human rights, gender equality, environmental protection and sustainability. Including such provisions could contribute to promoting the achievement of States’ policy objectives.

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<sup>36</sup> CETA, Art. 8.4.2.d; CCFTA supra n. 12, Art. G-14.1

<sup>37</sup> Morocco-Nigeria BIT (2016), article 14.1

<sup>38</sup> Ibid, article 14.2

<sup>39</sup> Ibid, article 14.3

<sup>40</sup> Ibid, article 7.3

<sup>41</sup> Colombian Model BIT (2017), supra n 6, p.2

<sup>42</sup> Ibid, p.11

## **Conclusion**

States have the inherent power to decide their policy objectives. However, in the era of globalization many of these objectives are shared goals between States. IIAs have as principal aim to protect foreign investments, but they cannot operate in isolation from States parties' public policies. IIAs must establish the framework in which foreign investments are to be developed, including national and international legislation. Important policy objectives such as the protection of human rights and the environment, gender equality, climate change mitigation and realising the Sustainable Development Goals cannot remain abstract commitments in the context of foreign investment. On the contrary, IIAs could be used to strengthen international and national commitment to policy objectives and their implementation through the inclusion of provisions such as those described above.

Most certainly, real State political will is of crucial importance to effectively include such policy objectives in IIAs. It is also important that States include domestic and international enforcement mechanisms. These should include effective access to remedy for potential victims under the home state jurisdiction, explicitly limiting the possibility of home State domestic Courts to declare themselves *forum non conveniens*.