



# IOE Position Paper

## International Investment Agreements and Human Rights

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# INTERNATIONAL INVESTMENT AGREEMENTS AND HUMAN RIGHTS

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### Introduction

The International Organisation of Employers (IOE) welcomes the focus in the 2021 report of the UN Working Group on Business and Human Rights to the UN General Assembly on providing “practical guidance to States on negotiating human rights-compatible International Investment Agreements (IIAs)”.

*“Investment is central to growth and sustainable development. It expands the economy’s productive capacity and drives job creation and income growth”* to quote from the OECD Policy Framework for Investment. This fundamental fact cannot be forgotten when considering what any guidance to States could look like.

It is, however, not the intention of this paper to restate the truths around the positive force investment plays in economies and societies. Such information abounds. The focus here should be on how to improve IIAs, not to undermine or restrict investment itself.

Social and economic progress globally has always relied on investment and will continue to do so going forward. At the same time, it is important today to ensure that those investment agreements are grounded in human rights and aligned with the internationally recognized human rights. This will help ensure that the benefits of these investments to all parties continue to occur, while at the same time providing a means to address human rights and environmental harm.

This requires a careful balancing of interests by States as they approach new ways to address the content and impacts of IIAs. This need is even greater in the current circumstances of the huge impact of COVID-19 on economies and societies and the signs of an uneven recovery, where investment has a key role to play.

However, given the sharp decline in the use of IIAs, it is important to also address issues within existing agreements to update them to align with the current trade and market needs and any new approach going forward.

IOE welcomes policy alignment of IIAs to the international recognized human rights. The State duty to protect human rights is the overarching and cornerstone responsibility for the realization of human rights and is fundamental to ensuring business and other actors in society can respect them. National Action Plans are necessary tools to implement such a protection and should not be neglected.

Linked to this is the need for governments to undertake the implementation of their own international commitments and laws. Good governance, the rule of law, freedom from corruption, the role of national courts which are depoliticized, effective and neutral, and effective enforcement policies are keys to the proper implementation of any investment activity and provide the element of consistency

needed between international investment between States, direct government investment with business and the needs of the wider national economy. Nothing in such investment agreements should weaken or otherwise undermine States' international obligations.

Moving forward, we do need to create an IIAs approach that gives clarity, certainty and consistency to the international investment regime. Uncertainty is the last thing anyone wants. Investment cannot be at the cost of human rights, labour rights and environmental protection, nor can those rights be diluted or suspended by IIAs. Similarly, in these negotiations between States, no one party should seek to gain an investment advantage by requiring human, labour and environmental rights to be restricted or excluded in the host country. The fundamental duty on both States that are party to an IIA is to protect human rights.

As John Ruggie stated in his report to the UN back in 2009:

*“Recent experience suggests that some [investment] treaty guarantees, and contract provisions may unduly constrain the host Government’s ability to achieve its legitimate policy objectives including its international human rights obligations. That is because under threat of binding international arbitration, a foreign investor may be able to insulate its business venture from new laws and regulators or seek compensation from the Government for the cost of compliance.”*

It is also worth recalling that in the 2030 Agenda that underpins the Sustainable Development Goals (SDGs) adopted by the UN, countries committed to achieving sustainable development in its three dimensions – economic, social and environmental. Any approach to improve outcomes from IIAs needs to do so in ways that are consistent with the achievement of those commitments and the SDGs themselves.

The following responds to the request that contributors focus on practical guidance to States. Below are steps we believe can help governments negotiate the interests involved. Not all these suggestions will fit into every national scenario, but we also do believe that international alignment around how to proceed is important to help countries make progress.

### Practical Guidance to States

- ATTRACT INVESTMENTS AND STRIKING A BALANCE: guidance should help governments in striking the balance, which only they have the legitimacy to make, between promoting and protecting foreign investment on the one hand and the protection of their society, human rights and environment on the other. No investment agreement should restrict a State's ability to regulate in the interests of their own societies.

At the same time, there is a need to continue efforts to help negotiating States maintain a balance between the right of States to regulate and the right of investors to be protected. However, this requires the negotiating countries to ensure they retain sufficient policy space and do not unnecessarily constrain that by the terms of an IIA. This would also be helped by the too often repeated call for greater policy coherence at national level. Negotiating an investment agreement requires the parties to bring in all relevant government departments.

- **GOOD GOVERNANCE AND THE RULE OF LAW:** the OECD Policy Framework for Investment stresses the need for governments to establish and enforce an adequate legal and regulatory framework that protects the public interest and underpins responsible business conduct. There is nothing that can replace good governance at national level when it comes to promoting and protecting human rights. Efforts must continue to help States improve their governance, transparency and fight against corruption.
- **EXISTING SUCCESSFUL EXAMPLES:** States should be helped to learn from more recent bilateral and free trade agreements such as CETA, CPTPP and the USMCA as well as those coming from the EU which have also addressed ways to include national actors in agreement design and enforcement. If we can learn to avoid trying to recreate what already successfully exists, it can help ensure that these agreements start to converge around the promotion of a common system which includes the protection and advancement of human rights and the remedy of harm. Enquiries may also give good examples of how such agreements can be used to incentivize all parties to protect, promote and respect human rights.
- **INTERNATIONAL ORGANISATION INFORMATIVE SUPPORT:** Similarly, the work on investment guidance within OECD and UNCTAD, among others, should similarly be used to inform this debate as it moves forward. This work needs more robust data and information gathering and sharing about IIAs, their content and impacts, both good and bad. Regular public reporting on IIAs implementation would help in contributing to better decision making over time. Such transparency would help to identify where any concrete challenges are and how they can be overcome. Gathering fact-based data on what the exact impact of investment treaties is can also help build social support for such agreements.
- **COVERAGE AND SCOPE OF IIAs NEEDS UPDATING:** We need to accept that many IIAs approach and content reflect a thinking of the past where many saw the protection of property rights and any other political risks as the only focus of such agreements. The current social expectations around human rights and environmental protection were not part of the thinking then, and certainly not in the minds of societies as they are now. This requires a wider lens to be given to the management and, wherever possible, the elimination of risks. Political risks remain important, but they are not the only ones.
- **IIAs ELABORATION THROUGH WIDER CONSULTATION:** Governments need to take a more inclusive approach with their own societies in the planning and crafting of IIAs, including enforcement provisions. Too often, the views of the society are not sought at the outset; potential impacts not explored before they happen (when they could possibly be removed as a threat without negative impacts). Also too often, consensus is not created around the type of investment that should occur, and how, to the mutual benefit of the society and thereby contribute to meeting the aims of the SDGs.
- **ACCESS TO REMEDY AND ARBITRATION PROCEDURE:** Remedy considerations need to be part of the initial thinking and construct of IIAs, as concrete steps that prevent harm occurring are better than drawn out remedy processes after harm has occurred. This is another strong reason for government to involve its civil society in the design of the IIAs. Particular attention

needs to be given to accommodating the needs and rights of vulnerable groups and indigenous populations.

While some countries are looking to either amend or limit aspects of IIAs or, in some cases, withdrawing from the Convention on the Settlement of Investment Disputes between States and other States (ICSID), others still work within the historical mindset referred to above. This is particularly so with regard to the “traditional” arbitration approaches that many see as looking at investment and trade as the only concern and neglect human rights. In any case it is also clear that the Convention itself needs updating to align with human rights, labour rights and environmental protections. The aim should be to make the Convention meet the needs of our societies today.

That updating needs to be done quickly. As more States look to make individual changes to IIAs across a range of issues, this can create the unintended consequences we referred to at the beginning of this short paper i.e. becoming too uncertain, too complicated, too inconsistent and thereby dissuading investors from investing. A revision process of the Convention could help States move their own thinking towards a “common” approach.

In many instances many social actors see the harm they experience as being a greater evil than the benefits investment bring. This crisis of confidence is what governments and indeed the UN need to address. Failure to do so threatens the realization of the SDGs as well as hampering the inflow of investments which provide the fuel for economic development. If that loss of social confidence were to continue, there is a clear risk that it could quickly translate into a backlash against international investment. Such a lose-lose outcome benefits no-one. This may require a rethink about how remedy is provided in this new environment, be it through legal disputes, arbitration, or alternative dispute resolution (ADR) mechanisms. Tinkering with the existing approaches can lead to unintended consequences but consideration needs to be given as to how rights holders who are negatively impacted, or even third parties, can be a part of any process that should be providing them relief.

- **ALIGNMENT OF FOREIGN AND DOMESTIC BUSINESS:** Equal treatment of foreign and domestic business needs to be a common expectation of IIAs. This debate goes back to the previous, quite common, use by some States of special economic zones where businesses could operate in a bubble outside of many domestic laws, especially those relating to labour rights and other laws applying to business. Treating people differently in an economy simply because of who they work for or where that work is, cuts across the SDG commitments of equality of treatment and opportunity. It also creates an unlevel playing field for local businesses and compromises the concept of fair competition. That is also exacerbated by IIAs provisions that allow for foreign investors to be compensated for the cost of any legislative changes, something local business cannot avail itself of.
- **AVOID LANGUAGE-RELATED UNCERTAINTY:** Governments need to avoid conflict of laws arising from the use of language in IIAs. They need to ensure that the Governments’ pursuit of complementary policies that may be needed to ensure and promote the implementation and enforcement of human and labour rights cannot be frustrated by IIAs terms. Business and

communities do not need any more confusion or uncertainty. Clear drafting of IIAs in the first place, that gives stakeholders a stake in that drafting, clarifies the rights and responsibilities of all parties to it and would go a long way to ensuring the legal clarity everyone seeks.

- **INTERNATIONAL TOOLS:** There needs to be better use made of existing tools and instruments, such as the OECD MNE guidelines. More countries should consider adhering to the OECD Declaration on International Investment, of which the MNE Guidelines are one part, to achieve bigger impact on the ground. Countries that have already adhered to them must also ensure that they have properly working and resourced National Contact Points to address compliance issues raised under the Guidelines.
- **TECHNICAL COOPERATION:** Technical cooperation remains a key necessity to ensure that host countries can negotiate and implement investment treaties in the best interest of their societies and economies. Governments need access to information and data to help in the decision-making processes.

## Conclusion

IOE reiterates its support for this process and urges governments to embrace the guidance. It also calls on governments to engage with their representative business organizations in their national discussions on this and any other social, economic or environmental policy debates. IOE, for its part, stands ready to continue to contribute to a robust and constructive dialogue on necessary measures to improve the content and impact of IIAs.

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