



*Summary Report of the Virtual Consultation for Africa on
Human Rights-Compatible International Investment
Agreements held on 26 May 2021.*

BACKGROUND

The welcome and background on the report was given by the Vice Chair of the United Nations Working Group on Business and Human Rights.

The UN Working Group on the issue of human rights and transnational corporations and other business enterprises (UN Working Group) will present a report to the UN General Assembly in October 2021 on “Human Rights-compatible International Investment Agreements”. This report will unpack Principle 9 and in turn provide guidance to States in negotiating new IIAs or reforming old IIAs in line with the UNGPs. The report will cover all three pillars of the UNGPs: (i) the duty of States to preserve regulatory space while negotiating IIAs to strike a balance between attracting investment and promoting responsible business conduct; (ii) the responsibility of investors to respect all internationally recognized human rights; and (iii) the role of IIAs in providing access to remedy to individuals and communities affected by investment-related projects. This report will build on work previously undertaken by the UN Working Group as well as other organisations and scholars concerning various dimensions of the interface between IIAs and human rights. It will also make connections with the Working Group’s previous reports addressing issues such as human rights due diligence, policy coherence, gender dimensions, and access to remedy.

It is against the backdrop of this report that the working Group is convening regional virtual consultations to seek input. This regional consultation for Africa was convened by the UN

Working Group and co-organized by the UNDP, the African Coalition for Corporate Accountability (ACCA) and SEATINI.

The virtual consultations, which will inform the content of the UN Working Group's provided an opportunity for stakeholders in Africa to discuss:

- Existing gaps in IIAs that are not compatible with Human Rights.
- Synergies for reshaping/ addressing the existing and future treaties compatible to human rights.
- Lessons/ experiences from current legislative and policy efforts towards incorporating business and human rights regulations into the investment frameworks.
- Elements necessary in IIAs to preserve regulatory space needed by States to respect, protect, and fulfil human rights under international human rights law.
- The most efficient options available to States to reform existing IIAs.
- How IIAs could encourage investors to respect for human rights.
- The potential of IIAs in providing access to remedy to communities for investment-related human rights abuses.
- How IIAs could contribute to achieving inclusive and sustainable development, including the realisation of the Sustainable Development Goals; and
- Good practice examples of IIAs from the region.

Following this background information, the consultation was pursued under four broad topics as represented herein.

POLICY SPACE AND REALIZATION OF HUMAN RIGHTS OBLIGATIONS

The next panelist offered an insightful cogitation on the topic of policy space and realization before the floor was opened up for questions and comments.

Reflections on this topic observed the traditional regime for International Investment Agreements (IIAs) to be constrained and constricted policy space for capital-importing States. It was noted that this situation was worsened by the Covid-19 pandemic which exposed the vulnerability of these states when their regulatory systems were put to test in economic hardship.

It was observed that African countries champion for attraction of Foreign Direct Investment (FDI), yet they lack the control of global supply chains and the arbitration process in case of disputes. There is therefore need for a balance to be struck between FDI and compliance with human rights obligations.

It was noted that on many occasions, Human rights are being thrown out of the window whenever international investments are being discussed. Companies benefit from the tax breaks given to them. There are no fair agreements and the policy space needs to be widened. The Human rights violations in Africa especially within the business sector are on the increase. There is a need to provide due diligence and access to remedy. Information should be provided in the value chains and states should reconcile and align with the IIAs with Human rights.

African States have at times taken shortcuts in attracting investments by, for instance, creating special economic zones and giving tax breaks to investors without considering whether there are any commercial gains made by such investments. Further, environmental rights have been sacrificed in the altar of investment that is not sustainable. This has created adverse effects on local communities that continue to suffer violations without proper redress.

There is therefore a need to champion for responsible business conduct by investors which includes imposing duties on such investors to respect human rights, as well as an increase in policy space, for Host States to enable them to regulate and monitor these investments. Importantly, there is need to preserve the policy and regulatory space. This development has been seen in the Nigeria-Morocco BIT which contains specific obligations to protect human rights and environmental conservation.

Investors must ensure that IIAs protect human rights, for instance in the broad areas of labour, equal pay for women, abolition of child labour etc. This requires participation from people involved in the decision-making process, dissemination of information, provision of legal advice as well as a close working relationship between the investors and the communities to ensure respect for human rights and to provide for adequate redress for any violations.

QUESTIONS POSED

- (i) In what ways do the substantive and procedural protections enshrined in existing IIAs undermine the state's duty to protect against human rights abuses by third parties? Have changes in recent treaty drafting practice done enough to protect policy space and flexibility?
- (ii) How can future IIAs play a role in strengthening, rather than undermining, the capacity of domestic institutions to realize human rights? What reforms are necessary to achieve this?

STAKEHOLDER CONTRIBUTIONS

A key phenomenon in the limitation of policy space is the existence of stabilization clauses in IIAs which are often one sided and in favour of the investors. These clauses limit fiscal space as well as the ability to regulate. It was therefore suggested that stabilization clauses should be reviewed to reserve the Host State's policy space in order to fulfill human rights obligations and foster development.

Further, it was noted that there exists fragmentation and compartmentalization of state agencies and departments in some African states with zero inter-departmental coordination. This creates an economic regard to FDI without reflecting on the human rights concerns due to lack of multi-disciplinary consultation. These agreements end up having no reference to human rights and they are drafted with a special focus on business protection.

This is partly because the UN agencies have left States without technical support on this topical issues. This disconnect between government departments should be addressed by fostering coordination and a multi-disciplinary view on investments in Africa which not only seeks to protect the investor but also human rights obligations and the local communities.

Therefore, sensitization and training for the various state agencies and negotiators involved in IIAs negotiations with an aim of emphasizing the importance of human rights should be pursued since it is a glaring omission in some states.

Further, it was observed that IIAs are anchored on contractual law which mainly examines monetary gains from such investments without a clear consideration of human rights obligations. This traditional view which focuses on protection of gains to be realized by the investors should be altered in favour of human rights and environmental conservation.

The issue of constraints of weaker states that lack the proper technical know-how in negotiating for the IIAs is a problem area. It was observed that the context of certain African countries leaves them inherently under the control of investors. This includes weak states that have weak legal systems to combat vices by the investors. There is also a general lack of expertise within these weaker states regarding the best way to protect human rights in the IIAs.

States should assess the Home State legislation and whether there are any obligations for investors that exist related to Human Rights and Environmental Rights. Such a clear perspective of the investor obligations from the Home State and the extension of these obligations to the investor in the Host State will allow for a negotiation of IAs best suited to protect the Host State to negotiate Investment Agreements that are best suited to protect the Host State with a clear perspective of the investor obligations from the Home State while extending such obligations to the investor in the Host State.

Moreover, copying of BIT models from capital-exporting countries blindly without considering the circumstances of the African States creates a situation of no input from African states.

It was also noted that the dual role of institutions which seek to regulate as well as promote investments creates a weaker incentive to negotiate for stronger IIA agreements.

Cases of political intimidation to institutions that seek to hold investors liable for human rights violations were cited since investment is politically driven. It was noted that there is a pressing need for information dissemination and a national action plans on business and human rights.

The consultants found that competition for FDI with lack of accountability mechanisms is a strong cause for human right violations which are brought about by the relaxation of these obligations to please investors.

Additionally, the consultants noted that it is high time that investors were tasked with being duty bearers. In order to ensure that such duties are born, resort to Global Governance is a key push to such investors. It was stated that capacity ought to be built by Host States to enforce the terms of the IIAs.

It was noted that there has been a general wind of awareness that seeks to establish the duties of investors in respecting laws and environmental considerations. Nevertheless, there is need to build institutional capacity to monitor and implement human rights against investors.

Transparency and publicity clauses should be incorporated in IIAs for the public to be aware to champion for accountability from the investors and lay a foundation for making claims for access to information.

IIAs AS INSTRUMENTS FOR PROMOTING INVESTOR ACCOUNTABILITY

This portion of the consultation was led by a panelist from the University of Pretoria's Center for Human Rights.

Reflections on this issue highlighted the reality that old generation IIAs were crafted with the aim of promotion and protection of investments. Duty bearing was a reserve of the states. However, there is a recent shift in departing from the traditional approach with a good number of IIAs bearing the phrase 'Human rights. New generation agreements are slowly bringing in duties and obligations for investors. This shift is however seen on soft law and it has created a 'soft-signal' on the shift to human rights compliant IIAs. Unfortunately, most of these agreements cover intra-African investments.

The question of locus standi is a real issue especially with the admission of local communities as proper parties to investment arbitration. The availability of these processes for local communities and the location of the dispute settlements are a challenge to the local people.

The question of jurisdiction of the Home State over acts and decisions made in relation to the investment in the Host State poses concerns on the involvement of the home states.

QUESTIONS POSED

- (i) Should IIAs provide legal or other procedural mechanisms to hold investors accountable for violating laws or contributing to human rights abuses? If so, to what extent? Who should be able to initiate claims against investors, and who should make determinations regarding investor misconduct?
- (ii) What signals do IIAs send to investors regarding responsible business conduct and investor accountability? What signals should they send?
- (iii) What are the human rights responsibilities of other users of IIAs, including law firms and third-party funders?

STAKEHOLDER CONTRIBUTIONS

The reliance on external institutions for arbitration which processes are not cost effective is a challenge in access for justice. Power dynamics and unequal bargaining power adds to the conundrum.

Consultants also noted that the shift in new generation BITs has not been embraced in all jurisdictions with some African countries still signing BITs without human rights obligations.

There was equally an urge to embrace alternative dispute resolution mechanism in place of ISDS. Moreover, dispute prevention mechanisms through public participation and transparency in the investment regime and use of local remedies particularly national courts (these can be improved), ombudsman, and operational grievance mechanisms were alternative suggestions from the consultation. Further, the participation of the local communities was advocated for in negotiation of investment agreements as being critical to the negotiation and implementation of IIAs.

There was a proposal on review of investment codes in Africa to include duties for investors to respect, promote and fulfill their human rights obligations.

There was a concern that International dispute resolution mechanisms for Investor-state disputes (ICSID) had failed to provide redress to the local communities and therefore need to develop domestic legal frameworks to provide remedies for these communities. This was as a result of the difficulty experienced by some local communities in obtaining justice domestically. There was a call to promote exhaustion of local remedies. Justiciability of socio-economic rights came up with a general urge to African States to embrace these body of human rights and protect and fulfill them when violations specific to this group of rights arise.

There was a rallying call by the consults for the inclusion of the local communities who are the most affected parties in the investor human rights violations as parties to these investment disputes, as well as an urge for review of existing IIAs to reflect the trend on investor responsibility for violations of human rights obligations. Further it was noted that there needs to be a move towards the promotion of sustainable investment in Africa.

It was mooted that the adoption of a minimum standard of investment for all African countries starting with the regional level through to the continental level would deal with the issue of competition for investment since no country would cheapen their obligations below the threshold to impress investors. Emphasis was placed on the need for local communities should be granted locus standi to present their grievances in their own account with support of civil societies since states do not have the best interest of the communities as most of the states are focused on attracting and retaining investments.

It was noted that although there has been mention of human rights obligations in the new generation agreements, the drafting is vague as it does not detail the specific obligations that arise therefrom. For example, there was a mention of the Morocco—Nigeria BIT and the SADC Model BIT as example of progressive agreements but these too remain vague in terms of the actual human rights obligations they are imposing on investors. For instance, Article 18 (2) of the Morocco-Nigeria BIT provides thus “Investors and investments shall uphold human rights in the host state”. This is clearly vague. This is especially problematic as the exact elements of human rights obligations of private entities are unclear. Flowing from this, it was propounded that a mere reference to the adherence of investors to human rights may not be sufficient. Laws need to be drafted clearly setting out the actual human rights obligations that these investors will have to ensure this balance is upheld. States should incorporate surveillance and assessment mechanisms for IIAs to determine their impact on Human and environmental rights.

IIAs, ISDS AND ACCESS TO JUSTICE FOR RIGHTS-HOLDERS

A panelist from the University of Rwanda and who is President of Initiatives for Peace and Human Rights reflected on this topic and highlighted the fact that state obligations have been predominantly enforced by use of ISDS arbitration. ICSID has in almost 90% of its disputes condemned States to pay damages.

It was realized that most of the cases have changed state provisions and policies. Access to justice has raised little attention because people have no access to effective remedy. The effectiveness of the remedies both in terms of the process and the outcome are a subject of questioning and criticism. There has been the ‘over-protection’ of the investors at the expense of local communities since investors are viewed as ‘saviors’.

Governments don’t provide spaces for citizens to participate in investment negotiations which has made access to justice very difficult. The situation is also facilitated by barriers such as the language in which the treaties are documented, and the proceedings which mainly happen at the international level (foreign countries).. International arbitration is systemically structured to exclude local communities with the dispute resolution mechanisms pitched far from the people.

Some of the difficulties faced by local communities are:

- The corruption of judicial systems in Africa
- Language barrier since most are not well versed with the language of the courts.
- Unfamiliar proceedings to local communities due to lack of awareness.
- The limited and neutral nature of admission as amicus curiae with such status having to be decided by the panel.

QUESTIONS POSED

- (i) In what ways do IIAs and ISDS undermine meaningful access to justice for rights-holders affected by investor-state claims and the investments underlying those claims?
- (ii) How could IIAs constrain investors' ability to abuse IIAs by bringing unreasonable (but permissible under the IIA) claims? How can it be done and which kind of limits can be put around the claims investors can bring under the IIAs? What would be the political benefits of these limits including in terms of reassuring investors?
- (iii) What other reform solutions could address the impact of investments on HR and the environment?

STAKEHOLDER CONTRIBUTIONS

Reform ought to be undertaken by abolishing the ICSID system and strengthening regional level dispute settlement schemes and state dispute resolution mechanisms. Further, exhaustion of local remedies should be made compulsory.

Other commentators sought to maintain the existence of the ISDS with reforms to ensure that it acts to protect human rights and access to justice for the local communities. States should review their internal procedure on dispute resolution by adopting negotiations with investors at an internal level before escalating the disputes to an International level. A consultative center on investment in Africa should be established to advise states and create technical capacity, training, and awareness in the subject area. Credibility and confidence ought to be built and fostered in the regional and national legal systems, with rights holders being central to dispute resolution. A proposal was made to empower commercial courts and even create national investment courts to change the landscape of dispute resolution touching on investments. Other suggestions included:

- A supremacy clause should be introduced detailing that human rights obligations triumph investment protection.

- AU should take up the initiative of creating political goodwill from African States in uniting for sustainable investment. In response to whether ICSID should be abolished, it was noted that there are systemic and normative issues within the investment regime with regards to dispute resolution mechanisms, which has primarily been ISDS. A multilateral investment court without a substantive change in the systemic issues in the regime will simply exacerbate the ISDS deficiencies at a multilateral level. From an African perspective, a section of commentators observed that the ISDS should be done away with in its entirety.

Ways in which ISDS has undermined access to justice

- Investors have direct access with states condemned to be respondents on most occasions.
- Lack of direct access by local communities
- Pro-investor arbitration
- Hefty awards that have an effect of affecting national policy on fiscal planning.

The following were proposed to be done in order improve access to justice

- Increase the obligations and transparency within the Judicial systems
- Countries should closely monitor human rights and also, if need be, countries can consider to opt out from IIAs that are against human rights and also renegotiate treaties
- Rights holders should be considered as central beneficiaries in access to remedy
- Process of remedy should also be strong enough to consider the outcomes of remedy

CONTRIBUTION FROM THE WORKING GROUP'S 2021 REPORT

QUESTIONS POSED

- (i) What do you consider to be priority issue areas for alignment of IIAs with IHRL to be achieved?
- (ii) In what ways could the UN Working Group's report best support your work?

STAKEHOLDER CONTRIBUTIONS

- UN needs to prioritize protection of human rights in business ventures.
- A judicial institution of the UN should be set up to specifically look at the human rights violations from investors.
- Citizen participation in the IIA negotiations should be fostered.
- The UN should build technical expertise for African countries.
- The Treaty negotiations should be heightened, and African States should be encouraged to participate actively.
- BITs should be reformed to include the human rights provisions and improve the technical capacity of state and community. Additionally, there was a suggestion to modernize and review the IIAs to incorporate human rights provisions with positive changes in the substantial law; IIAs.
- Ensuring that affected communities have access to an effective remedy is very critical.
- Dispute resolution mechanisms should ensure that not only states and investors have access to resolution mechanisms but also communities.
- Public participation and transparency in negotiation of investment agreements is also an integral part in negotiation and eventually implementation of IIAs.
- States should take caution not to uphold the rights of investors at the expense of rights of the local communities.
- Laws need to be drafted clearly setting out the actual human rights obligations that investors are to uphold.
- Progress reporting and publication of indicators to monitor progress has been made in incorporation of human rights obligations and the actual implementation of these provisions in IIAs.
- There needs to be a substantive reform of IIAs to cure the existing asymmetry between the rights of investors and the rights of citizens of host states. While investors are interested in profits, developing countries are interested in sustainable development and this needs to be balanced. Also, human rights protection of the consumers of investment ought to be prioritized.