



Polish Institute  
for Human Rights  
and Business



## Summary of the discussions from the consultation on Human Rights-Compatible International Investment Agreements

### Report from

### for Central and Eastern Europe and the Central Asia region

*held on April 21<sup>st</sup>, 2021*

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## Introduction

1. This is a report from the Regional Virtual Consultation for Central and Eastern Europe and Central Asia on “Human Rights-Compatible International Investment Agreements” (“**Consultation**”), which was held on April 21<sup>st</sup>, 2021, 12.00-15.00 CEST.
2. The Consultation was convened by the UN Working Group on the issue of human rights and transnational corporations and other business enterprises (“**the Working Group**”) and co-organized by the [Polish Institute for Human Rights and Business](#) and [Yaroslav Mudryi National Law University](#). The Consultation was part of a process of regional events convened in 2021 to seek input from a range of stakeholders on how to align IIAs with States’ international human rights obligations. Regional consultations were complemented by a call for written submissions.<sup>1</sup> Concept note is attached in [Annex 1](#).
3. The purpose of the Consultation was to inform the Working Group’s report to the UN General Assembly which is to be presented in October 2021 and is meant to provide practical guidance for States on negotiating human rights-compatible international investment agreements (“**IIAs**”) in line with the UN Guiding Principles on Business and Human Rights (“**UNGPs**”). The goal was also to provide an opportunity for stakeholders to discuss issues at the nexus of IIAs and human rights (“**HR**”). 58 participants from 19 States

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<sup>1</sup> All relevant information, including on consultations held so far as well as an [open call](#) to collect input from States and other stakeholders is available at the dedicated UN Working Group’s website <https://www.ohchr.org/EN/Issues/Business/Pages/IIAs.aspx>

from the Central and Eastern Europe (“CEE”) and Central Asia (“CA”) region registered. 31 participants from 15 States actually took part in the Consultation. The [list of participants](#) is enclosed at the end of this report.

4. The Consultation started with opening remarks by Prof. Surya Deva, Vicechair of the UN Working Group as well as representatives of the organizers: Beata Faracik, President of the Polish Institute for Human Rights and Business and Prof. Olena Uvarova, Head of the International Business & Human Rights Lab at the Yaroslav Mudryi National Law University. They were divided into two parts: (i) Mapping IIAs & HR landscape in **CEE** and **CA** and (ii) identifying solutions. The discussion was moderated by two lawyers with practical experience of advising in international arbitration cases, Stanisław Drozd and Filip Balcerzak, Ph.D., LL.M., Associate Professor at the Adam Mickiewicz University in Poznań, Poland.
5. The first part – Mapping IIAs & HR landscape in CEE and CA – was intended to map the current situation in the region and provide space to share specific examples of how IIAs regimes and investor-State dispute settlement (“ISDS”) decisions had negative impact on human rights and sustainable development. The second part – Identifying solutions – was aimed to provide space to discuss possible substantive and procedural solutions to address IIAs’ negative effects identified in the first part of the meeting.

## **Part I – Mapping IIAs & HR landscape in CEE and CA**

6. The first part, opened with a brief introduction by the moderator, focused on whether governments in the participants’ jurisdictions were able to strike the right balance between protecting the interests of foreign investors and the interests of local communities, and on whether States’ possible liability under IIAs can tilt this balance and lead to “regulatory chill”.
7. Discussion started with a statement that IIAs do not prevent the governments from standing up for their communities, and that those communities do have effective ways to demand government intervention when their interests are threatened by foreign investments. Examples of two investment cases were presented (Cunico Resources v. North Macedonia, ICSID Case No. ARB/17/46 and Artem Skubenko v. North Macedonia, ICSID Case No. ARB/19/9). These cases arose from the government’s interference with foreign investments for the sake of defending the interests of local communities and the protection of the environment. Other examples, of similar cases which have not reached the plane of international law, were also given.
8. It was also suggested that (i) the fact that the State was sued in international arbitration for these interventions may discourage similar government action in the future, (ii) environmental protection, which was the area with which all the discussed cases were concerned, is a special field, in which abuses are more visible and more likely to trigger strong, mass protests, (iii) situation may differ with other abuses, less manifest to the public, where the affected communities/individuals might not have the same leverage.
9. It was suggested that the issue of the potential regulatory chill caused by the IIAs is irrelevant in relation to those governments which are not interested in protecting and promoting human rights in the first place, and which are dependent on the inflow of capital from foreign investors because of the poor state of their own economies. In [authoritarian and some “hybrid” regimes](#) even the most progressive human rights clauses in the IIAs remain on paper, because the host States are not interested in enforcing them.

10. In this context, it was suggested that an action from the side of international partners (especially European ones, given the proportion of the EU-related trade in the overall trade of the countries in the region) can have an impact, in particular through political instruments. When people under authoritarian governments talk to foreign business actors, they hear a reply: “if there will be sanctions, then we will take action.”
11. It was commented that the “environment” in which businesses operate, corporate culture and infrastructure (in broad sense) of such business operating play an important role. Therefore, it is especially important to develop human rights due diligence mechanisms (“**HRDD**”) beyond the authoritarian States. It would have an impact on companies that operate in authoritarian and “hybrid” regimes States and have partners which apply HRDD. This could be more effective than political instruments mentioned in the paragraph above. Such political instruments, especially sanctions, tend to prohibit companies from working with (or in) specific countries, including investing there. Therefore, the HRDD and increasing corporate culture to respect human rights in general could be more effective.
12. Several speakers pointed that from the perspective of a citizen of a given State, the issue of how to know the terms of the IIAs remains topical. In many States, civil society does not have access to information and therefore does not have the tools to enable meaningful participation in negotiating the IIAs. The issue of the Civil Society Organizations’ (“**CSOs**”) role in the assessment of the possible impact on human rights by IIAs was also raised. The public and the CSOs do not have access to the information about the IIAs, which the State is going to sign, and about how such IIAs could impact the day-to-day lives of ordinary people. In some States, there is no access to the drafts of IIAs and the citizens receive information only after the IIAs are already signed. The governments do not conduct any public consultations on IIAs and there is no assessment of their human rights impact. In majority of cases, the domestic laws formally protect both, investors’ rights and interests as well as human rights. But in practice the investors’ interests have priority and there is no effective mechanism to protect human rights. It was noted that there are very few examples where non-state actors implement initiatives to provide transparency of investments’ projects (one of such examples is Soros’s Foundation’ implementation of the project related to the mining industries).
13. Many examples of lack of transparency were shared. Terms of investment contracts between investors and States are often confidential and sometimes they are even classified as State secrets.
14. An interesting example was discussed with respect to Uzbekistan. It concerned efforts of a foreign investor from the tobacco industry to block public health reforms in that State, which aimed to ban tobacco advertising and public smoking, and to mandate health warnings on tobacco products. The reforms were reportedly significantly scaled back due to the pressure from the investor, which, however, was unknown to the public. Even when the public finally learned about this, there was no proper debate, due to limitations to the freedom of speech and independence of the media in the concerned State.
15. It was suggested that without transparency, free speech and independent media, societies can live unaware of the extent to which their governments are pressured by foreign investors not to pursue human rights reforms which could interfere with the investors’ economic interests.
16. It was also observed that some governments are completely open about their disregard for human rights protection (e.g. in the area of labour law and health and safety standards) and present this to foreign investors as an advantage. As a result, (i) citizens of those States suffer direct consequences of such governments’ conduct, (ii) other, socially responsible investors are discouraged from investing in those States and are placed in

disadvantaged position compared to other investors that do not apply the same standards of conduct in relation to respect of human rights, and therefore benefit from the host governments' deficiencies.

17. It was also stressed that investors often ignore accusations that there were human rights abuses in relation with their investments. Human rights due diligence and disclosing obligations are necessary to tackle this in developing States.
18. Finally, the important role of the States in not only requiring, but also assisting with the conduct of consultations with local communities was discussed. It was underlined that local governments should be involved in such consultations. An example of a fracking project in Ukraine was given, in which consultations were conducted but were not run properly and did not adequately inform the public of the investment's possible implications and impacts on human rights.

## **Part II – Identifying solutions**

19. The second part of the Consultation focused on discussing which IIAs provisions potentially create the problem of regulatory chill, if any, and on identifying possible reforms of international investment law, if such were needed.
20. It was commented that the discussed problems are primarily not legal, but political in nature. Some States may have most progressive human rights and corporate social responsibility clauses in their IIAs, but be completely uninterested in enforcing them. Responsible investors and their home States can make a positive change by pressuring host States' governments to observe human rights and democracy standards. Specific obligations and standards would have to be set in IIAs to achieve this purpose. A general reference to human rights would be insufficient.
21. It was noted that the discussion about the conflict between investors' rights and the States' right to regulate is a classic problem of international economic law. The issue is that international lawyers tend to focus on their areas of practice and fail to see international law as a system. Hence, it was noted that the solution to the issue also lies in raising awareness that investment law decisions and awards must take into account the entirety of public international law, which includes human rights law as an applicable and relevant body of law.
22. It was noted that the real problem with ensuring investment compatible with human rights is the lack of rule of law and democracy in some host States. As far as international investment law is concerned, the problem can be addressed by further developing legal concepts that already exist in the case law of arbitral tribunals in treaty-based disputes, such as notions of abuse of law and abuse of process. These concepts allow the tribunals to deny IIA protection to investments made illegally, including investments made in violation of human rights.
23. The majority of the IIAs do not include human rights clauses (save for only a few exceptions), whereas such clauses could help with the achievement of the Sustainable Development Goals (SDGs), especially in light of the increasing importance and influence of transnational corporations. Human rights language in IIAs could help in raising awareness, training of lawyers and inception of much needed solutions and standards into national law. In particular, in the field of natural resources, IIAs could require public consultations prior to granting any concession rights to investors.

24. It was also suggested that each treaty is concluded in a specific time and specific factual context. IIAs could contain provisions requiring the contracting States to periodically review the IIAs impact on human rights, environmental issues etc. IIAs do have a role to play at the initial stage of development of capital importing States, but may cease to have positive effect with time. Therefore, revision clauses could be included in IIAs to make sure that their impact on the host States remains positive and that they are adjusted accordingly, if needed.
25. It was also highlighted that in conflict-affected regions, IIAs can serve as a tool for the protection of some human rights more effectively than classic human rights instruments. This can be relevant for both, State-to-State and investor-State cases and refers in particular to the right to peaceful enjoyment of possessions.
26. Several participants shared the view that IIAs can generally have a positive effect on the host States. For instance, an example was given of how the notion of legitimate expectations, enshrined in the fair and equitable treatment standard present in many IIAs, had an indirect, positive impact on development of national laws in the home State.
27. It was noted that there may be conflicts between IIAs on one side, and human rights and regulatory space on the other side. The proposed solution was to “absorb” the IIAs standards and case law of treaty based arbitral tribunals into States’ domestic laws, paying due attention to each State’s individual social condition.
28. Lack of human rights assessment of the IIAs was also discussed. Views were shared that the discussion should not be about how to balance investors’ interests with human rights, because human rights should be a priority and it is the governments’ obligation to address risks to human rights. A call was made for an international standard and procedure on human rights assessment of the IIAs, which would encompass a wide range of human rights considerations, including environmental issues, property rights, labour rights, housing, etc. This cannot be left to be regulated at the domestic level, as governments could use the populist approach, trying to manipulate the public opinion with promises that investment will lead to positive results.
29. It was also suggested that international financial institutions, such as the World Bank, the International Monetary Fund or the European Bank for Reconstruction and Development, play a significant role in developing the culture to respect human rights and on the formation of the relevant legal framework for business. The offices of such institutions constantly work in specific countries and have the possibility of long-term systemic influence. Similarly, individual investors and their home States can make a significant contribution to the development of the host States’ attitude towards human rights. Thus, they should be encouraged to incentivize efforts to develop a culture that respects human rights. This could relate to strengthening the role of CSOs.
30. Finally, it was discussed that third-party funding (i.e. possibility of financing legal costs of treaty-based arbitration by third parties) can increase the financial leverage which investors can exert on host States parties to the IIAs.

## Conclusions

31. The following key points were identified by participants in the consultation:
  - (i) lack of transparency is the prevailing problem in any discussions concerning human rights and IIAs in the CEE and CA,

- (ii) in many States in the CEE and CA region, problems with transparency, freedom of expression and independent media result in societies being unaware of possible situations in which their governments are pressured by foreign investors not to pursue human rights reforms (“regulatory chill”),
- (iii) [authoritarian and “hybrid” regimes](#) are not interested in protecting the interests of local communities or give priorities to other interests (attraction of investments that often are used for political purpose as well – if the government wants to show its success) and they use any available legal tool to maintain the *status quo*, including by concluding confidential investor-State contracts and by non-enforcing obligations on investors (regardless of their source, whether derived from IIAs or from local law/contracts),
- (iv) IIAs do not create “regulatory chill” in authoritarian regimes and/or States where the governments do not respect human rights,
- (v) in authoritarian regimes and/or States where the governments do not respect human rights, IIAs can actually play a role of increasing the level of protection of human rights standards, by elevating the discussion from the level of domestic law (where no effective human rights regulations and/or enforcement mechanisms exist) to the international level (where IIAs can become relevant).

32. The following reflections were made during the second part of the Consultation:

- (i) systemic integration in treaty interpretation allows to take human rights into consideration when interpreting existing IIAs (even those with no reference to human rights in their provisions), and for example to deny protection provided for in the IIAs to investments made in violation of human rights,
- (ii) even in their current shape, IIAs can play a role in protecting human rights in conflict-affected settings, providing for dispute resolution mechanisms which may be more effective than those present in human rights treaties.

33. The following recommendations and solutions were proposed during the second part of the Consultation:

- (i) IIAs should provide for greater public participation – referring not only to participation in disputes settlements, but from the early stage of agreements’ negotiation and implementation of investors’ projects, for example when concessions are granted to investors,
- (ii) rules and standards of the human rights impact assessment of IIAs should be developed and conducted in line with international standards, and periodic reviews could be foreseen in IIAs to monitor their impact on human rights and other public interest issues,
- (iii) inclusion of general references to human rights in IIAs could raise awareness, but specific human rights obligations binding on investors would need to be introduced in IIAs to make any legally relevant change.

## Annex 1 Concept Note



Polish Institute  
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### Human Rights-Compatible International Investment Agreements

*Virtual Consultation for Central and Eastern Europe and the Central Asia region*

21 April 2021, 12 noon – 3 pm CET (online - Zoom)

#### Background

The United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises (“the Working Group”) will present a report to the UN General Assembly in October 2021 to provide practical guidance for States on negotiating human rights-compatible international investment agreements (IIAs) in line with the UN Guiding Principles on Business and Human Rights (UNGPs). The report will cover all three pillars of the UNGPs: the duty of States to preserve regulatory space while negotiating IIAs so as to strike a balance between attracting investment and promoting responsible business conduct; the responsibility of investors to respect all internationally recognized human rights; and the role of IIAs in providing access to remedy to individuals and communities affected by investment-related projects.

In order to inform the drafting of the report, the Working Group is convening several virtual consultations to seek input from a range of stakeholders on how to align IIAs with States’ international human rights obligations. To complement these regional consultations, the UN Working Group has also issued an [open call](#) to collect input from States and other stakeholders. All relevant information, including on consultations held so far as well as the call for written input is available at the dedicated UN Working Group’s website <https://www.ohchr.org/EN/Issues/Business/Pages/IIAs.aspx>

This regional consultation – focused on Central and Eastern Europe and Central Asia (CEE and CA) region - is convened by the UN Working Group and co-organized by the [Polish Institute for Human Rights and Business](#) and [Yaroslav Mudryi National Law University](#). It will be held virtually under the Chatham House Rule.

#### The Subject and Purpose

International Investment Agreements (IIAs)<sup>2</sup> are deployed by States as one of the tools to create an investment-friendly environment. To protect the legitimate interests of investors, they impose conditions and standards on a host State’s ability to regulate.

At the same time, IIAs should not prevent host States from protecting and promoting human rights within their territories. Principle 9 of the UN Guiding Principles on Business and Human Rights (UNGPs) reminds States to “maintain adequate domestic policy space to meet their

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<sup>2</sup> IIAs here refer to bilateral investment treaties as well as investment chapters in trade agreements negotiated at a bilateral or regional level.

human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.”

However, IIAs can have a chilling effect on States’ ability to effectively regulate the conduct of investors and ensure that they respect human rights, as well as on States’ ability to hold companies accountable for human rights abuses. This effect is especially seen when local authorities in host States do not have the proper measures, processes and resources in place to ensure that human rights policies and reforms can be pursued in accordance with the principles of good governance, transparency, meaningful participation of all stakeholders and legitimacy stemming from stakeholders’ engagement and support.

As a result, host States may achieve higher development level thanks to – *inter alia* – the investment treaties that attract business investment. However, IIAs may also not only fail to promote further sustainable development, but even contribute to reinforce various development deficiencies and injustices in that host State.

The purpose of the consultation is to identify areas in which these negative effects can be identified and to discuss possible solutions – both substantive (e.g. possible revisions of IIAs or their abandonment in favour of a whole new regime) and procedural (e.g. possible revisions of the ISDS mechanisms).

### **The format and objectives of the consultation**

The consultation will provide an opportunity for stakeholders to discuss issues at the nexus of IIAs and HR. It will be divided into two parts:

#### **I. Mapping IIAs & HR landscape in CEE and CA**

The first part of the meeting will map the current situation in the region and will provide space to share concrete examples of how IIAs regimes and ISDS decisions had negative impact on human rights and sustainable developments. This will include examples of how potential liability under IIAs have prevented or hampered business and human rights policies and reforms in the region and cases where individuals and communities affected by investment-related human rights abuses were not provided access to remedy.

#### **II. Identifying solutions:**

The second part will provide space to discuss possible substantive and procedural solutions to mitigate IIAs’ negative effects identified in the first part of the meeting. This will include options to reform existing IIAs, as well as elements necessary in IIAs to preserve regulatory space of States to meet their obligations under international human rights law.

Each of the two segments will consist of a moderated discussion between the experts from various countries, law and policy makers (from governments, civil society organizations and other non-governmental organizations from the region) with experience in addressing the limitations stemming from IIAs, as well scholars and practitioners conducting investor-State disputes on behalf of host States from the region.

The summary report of the discussions with conclusions and recommendations will be provided to the Working Group and will be posted on the Working Group’s website in due course.

### **Practical information**

The consultation will take place virtually on Zoom. A Zoom link will be sent to the registered participants in due course.



Simultaneous translation English – Russian will be provided upon demand thanks to support provided by the Wardyński & Partners law firm.

For any further information about the Working Group’s project on human rights-compatible IIAs or should you wish to join the project’s Google group, please contact the Secretariat of the Working Group at [wg-business@ohchr.org](mailto:wg-business@ohchr.org) (indicating “IIAs and HRs” in the email subject).

## **Registration**

To register your interest in participating in the consultations please fill in the registration form in English or Russian by April 12th. Link: <https://forms.gle/yzAZ8uumxucGp7UU7>

Organizers will endeavour to enable participation by all interested stakeholders. However, given the platform limitations, organizers reserve the right to admit only selected participants based on criteria to ensure geographic, gender and stakeholders representation. All who registered their interest will receive information by email. Admitted participants will receive a confirmation email by April 14<sup>th</sup>.

Inquiries specific to the CEE & CA consultation should be directed to:

- Stanisław Drozd - [stanislaw.drozd@pihrb.org](mailto:stanislaw.drozd@pihrb.org) (English, Polish)
- Prof. Olena Uvarova - [o.o.uvarova@nlu.edu.ua](mailto:o.o.uvarova@nlu.edu.ua) (Ukrainian, Russian, English)
- Beata Faracik - [beata.faracik@pihrb.org](mailto:beata.faracik@pihrb.org) (English, Polish).

## **Annex 2 List of participants of the Consultation (alphabetically)**

1. Nodira Abdulloeva, Tajikistan
2. Postica Alexandru, Moldova
3. Borys Babin, Ukraine
4. Filip Balcerzak, Poland (moderator)
5. Anna Bilanova, Czech Republic
6. Lana Chkhartishvili, Georgia
7. Ana Dangova Hug, North Macedonia
8. Ekaterina Deikalo, Belarus
9. Surya Deva, Hong Kong, China
10. Daniel Dozsa, Hungary
11. Stanislaw Drozd, Poland (moderator)
12. Beata Faracik, Poland (co-organizer)
13. Aleh Hulak, Belarus
14. Jacqueline Kacprzak, Poland
15. Marcin Kałduński, Poland
16. Muatar Khaydarova, Tajikistan
17. Maryna Kupchuk, Ukraine
18. Olga Maria Kyritsi, Greece
19. Vsevolod Martseniuk, Ukraine
20. Federica Morvay, Switzerland
21. Wojciech Sadowski, Poland
22. Artur Sakunts, Armenia
23. Robert Sroka, Poland
24. Anastasiia Tokunova, Ukraine
25. Maria Garcia Torrente, Switzerland
26. Alisher Umirdinov, Japan
27. Olena Uvarova, Ukraine (co-organizer)
28. Lana Willebrand, Sweden
29. Karolina Woszek, Poland
30. Тахмина Жураева, Tajikistan
31. Salome Zurabishvili, Georgia