



World Investment Forum 2014: Investing in Sustainable Development

IIA Conference - 16 October 2014

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Why do human rights matter to the IIA regime?

The international investment regime comprises rules on Foreign Direct Investment (FDI) and bilateral investment agreements. In contrast with the trade regime, the absence of internationally agreed rules on investment means that the investment regime has a lower level of centralisation and oversight.

In past decades, there has been widespread criticism of, and mobilization against investment treaties due to what is perceived as many governments' focus on advancing commercial interests and providing investor protections (for example through so-called stabilization clauses), without taking into account States' obligations to protect human rights and the environment. Of particular concern is the ad hoc nature with which international investment rules are framed, often without reference to international human rights law, as well as the lack of transparency in the application of these rules and of mechanisms for resolving disputes.

Investment treaties can have a profound impact on all human rights be they social, cultural, economic, political or civil rights. Economic growth through investment can increase resources available for the fulfilment of human rights. At the same time investment agreements have the potential to negatively impact upon rights and can lead to a 'chilling effect' on the ability of the government to regulate different social and economic sectors in the public interest. This is reinforced by the threat of claims by investors, often for significant amounts in compensation. This includes claims even for policy measures in the public interest, where those measures may have the effect of reducing the value of an investment. Investor-state arbitrations have touched upon issues relating to anti-discrimination, the right to water, right to health, rights relating to environmental protections and corruption, among others, putting States in potential breach of their international and national human rights obligations.

Investor agreements are about investor protection, not human rights protection. Yet, when it comes to standard provisions in agreements on expropriation, fair and equitable treatment or full security and protection, there are clear human rights implications which need to be more closely considered. This would include ensuring that the individual whose rights are adversely affected by the investment has access to justice and effective remedies for any damage caused.

The process of negotiating an agreement may also give rise to concern. Low levels of transparency in the conclusion of investment treaties and investment chapters in preferential trade agreements, together with their complexity and density, reduce opportunities for public participation, parliamentary oversight and diminish accountability.

What can a human rights-based approach bring to the IIA regime?

A human rights-based approach to investment entails considering how States' obligations under investment agreements might impact on their ability to meet their human rights obligations; what measures States and other actors should be taking to ensure positive impacts and avoid negative impacts; and consideration of action that is required to mitigate risks and address actual negative impacts that do occur. A human rights-based approach to investment rules is therefore important in terms of creating coherence and balance in international law and policy-making.

In terms of specific recommendations, the following must be considered:

1. Human rights must inform all stages of an IIA, from negotiation to dispute settlement

Human rights norms should provide the parameters for framing the social and ethical dimensions of investment. This includes principles of transparency, participation, accountability and provision of remedies. In terms of reform, investment agreements should be negotiated transparently and with the participation of all potentially affected parties. Dispute settlement procedures should be transparent, participatory and fully compliant with due process principles and the right to remedy of parties adversely affected by investor protection.

2. Responsibilities of business must be underscored with regard to the IIA regime

The UN Guiding Principles on Business and Human Rights stipulate that all business enterprises have a responsibility to respect all internationally recognised human rights. The responsibility to respect also applies in the context of international investment agreements and should be integrated as appropriate in such agreements. The UN Principles for Responsible Contracts provide guidance for negotiators on how to integrate the management of human rights risks into contract negotiations.

3. Balance investor rights with safeguards and/or responsibilities

Any reform of the International Investment Agreements (IIA) regime should include consideration of how to balance investor rights with responsibilities to avoid adverse human rights impacts. International Investment agreements should promote the accountability of investors as well as of States. Safeguards should be in place to ensure that governments maintain adequate policy space to meet their human rights obligations. Of equal importance is ensuring that these concerns are taken into account in any dispute settlement that may arise. UNCTADs "Investment Policy Framework for Sustainable Development" (IPFSD) embodies this broader approach to investment policy that is essential in meeting the sustainable development needs of the future. This broader approach can be bolstered through the respect and protection of human rights.

One way to build an evidence base for integrating human rights in investment policymaking is to encourage the use of human rights impact assessments. The Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, developed by the former Special Rapporteur on the Right to Food in 2011, provide guidance to States on how to ensure that trade and investment agreements are consistent with States' international human rights obligations.