What the UN Guiding Principles on Business and Human Rights mean for investment treaty reform

Andrea Shemberg
Andrea Saldarriaga
1. The LSE Investment & Human Rights Project
Raise awareness

Constructive spaces for learning & dialogue

Capacity building

Learning HUB at
www.lse.ac.uk/InvestmentHumanRights

LET’S CONNECT!
2. The UNGPs and investment policy reform
Implementation of UNGPs

- 10 NAPs (UK, Spain, Colombia)
- 28 NAPs in development (Chile, Malaysia, US)
- Adoption of BHR legislation (MSA, EU transparency directive)

Reform of international investment regime

Common Policy Goals

- Ensure policy coherence
- Maximise positive impacts and minimise negative impacts from FDI

- 115 States: investment policy review
- 60 States: new model IIAs
- 19 IIAs renegotiated or replaced
- Regional level treaty reviews and action plans
- Multilateral reform efforts
The Government will do the following to reinforce its implementation of its commitments under Pillar 1 of the UNGPs ...

[ens]ure that agreements facilitating investment overseas by UK or EU companies incorporate the business responsibility to respect human rights, and do not undermine the host country’s ability to either meet its international human rights obligations or to impose the same environmental and social regulation on foreign investors as it does on domestic firms.

The Working Group will engage in a multi-stakeholder dialogue to address the investment - human rights relation so as to guide the generation of an investment strategy at the national, sectorial and regional levels.
3. Guide to implementing the UNGPs in investment policymaking
Six key issues

Suggested measures for implementation and examples from State practice

States design implementation measures for their specific context

Map of investment policymaking
Mapping investment policymaking

FIVE PHASES OF THE INVESTMENT LIFE CYCLE

PHASE 1: Putting the policy and regulatory framework in place
- Define policies
- Create laws and regulations
- Implement laws and regulations
- Environmental, social, tax, and corporate laws and regulations
- Set international policies
- Negotiate ISAs

PHASE 2: Promoting, facilitating, financing, and insuring investment
- Promote Investment

PHASE 3: Initiating the investment project
- Prepare and carry out the tendering process
- Negotiate State investor contract
- Permits and processes
- Ensure enforcement of investors’ rights and provide access to remedy for adverse human rights impacts

PHASE 4: Implementing the investment project
- Enforce laws and regulations
- Monitor implementation
- Facilitate investment
- Finance and insure investment

PHASE 5: Ending or decommissioning the project
- Expedite cleanup and decommissioning
Six key issues

- Managing human rights risks
- Ensuring access to remedy
- Preserving policy space
- Setting and managing expectations
- Improving transparency
- Managing conflicts and post-conflict contexts
Examples from State practice
4. Six questions for investment policy reform
KEY ISSUE 1: Make the management of human rights risks an integral part of investment policymaking and a key component of investment protection
If the sustainability and stability of investments can be threatened by the adverse HR impacts they may cause, are IIAs an adequate vehicle to keep investments safe?

Are IIAs creating unintended risks for investment?
KEY ISSUE 2: Ensure access to effective remedy for people adversely impacted in the context of FDI projects as an integral part of investment policymaking protection

FDI

Vulnerability of foreign investors

Vulnerability of people adversely affected by FDI activities

Addressed by more than 3,000 IIAs and access to ISDS

Not yet addressed

Animosity

Further risks for investors

LEGITIMACY CRISIS
If we should address access to remedy for adverse human rights impacts in the investment policy reform discussion, what does it mean?

What kind of instruments and reforms we need?
International law requires States to meet their human rights obligations by using their policy space – "a DUTY to regulate"

- **KEY ISSUE 3:** Pursue economic growth and investment goals, while ensuring that the policy and regulatory framework for investment provides the State adequate domestic policy space to meet its human rights obligations

- **UNGP Principle 8**
  - POLICY COHERENCE

- **UNGP Principle 9**
  - MAINTAINING ADEQUATE POLICY SPACE
What does the State “DUTY to regulate” mean for the discussion on the “right to regulate” within investment policymaking?
KEY ISSUE 4: Clearly set out the expectation that outward investors respect human rights; and manage the expectations of investors and of the communities and individuals directly impacted by investment activity

1. Setting out State’s expectations for outward investors
2. Managing expectations of inward investors
3. Managing expectations of communities and individuals potentially impacted by investment activity
How is reform of investment policymaking taking account of these sets of expectations related to investment?
KEY ISSUE 5: Improve transparency across State functions that relate to investment

“[w]here human rights and other public interests are concerned, transparency should be a governing principle, without prejudice to legitimate commercial confidentiality.” (John Ruggie)

- Disclosure of environmental and social impact assessments, management plans and State-investor contracts

- Investment permitting and tendering processes
- Adopting policy and regulatory investment reforms
What does this mean for the process of designing and negotiating IIAs?

What does this mean for determining the rules under which arbitrations are conducted?

What does this mean for the process of creating investment rules and reforming the investment system?
KEY ISSUE 6: Institute special measures for investment in conflict-affected and post-conflict areas

Conflict affected areas

• Context for gross human rights abuses
• Heightened risk for companies to be involved in gross human rights abuses

Post conflict areas

• Period of rapid transformation where States need the full spectrum of their policy space
• FDI might be a key vehicle to consolidate transition to peace

Support investors to ensure adequate management of human rights risks

Particular role of the Home State
What is the role of FDI in conflict and post conflict scenarios?

What challenges do conflict and post conflict scenarios present for protecting investors? For protecting people?

How can investment rules ensure FDI plays a constructive role or at least does not exacerbate conflict?

How can States ensure that investment rules do not constrain the State’s policy space in a time when policy and regulatory changes are most needed?

What does this mean for the way we think that IIAs should be equally applied worldwide and at all times?
THANK YOU

LSE INVESTMENT & HUMAN RIGHTS PROJECT

www.lse.ac.uk/InvestmentHumanRights