

Towards a Repository of Policy Options for IIA Reform

Meeting

Making the Right Impact? –Expert Workshop on Evaluating Human Rights Impact Assessments (HRIAs) in Trade and Investment Regimes¹

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Office of the High Commissioner for Human Rights and
Friedrich Ebert Stiftung, Geneva Office

Key messages of findings regarding IIA or ISDS reform:

- While investment brings with it the potential for leading to better sustainable development outcomes, it also brings with it the negative potential to create **adverse human rights impacts** on the grounds and unfavourable human rights outcomes.
- To address the negative impacts of investment upon human rights, and to ensure investment advances sustainable development, there is arguably **a need for a transformation of investment regimes**. Among other measures, the **integration of human rights protections and mechanisms for accountability** should be involved throughout reform of the international investment agreement regime.
- **Human Rights Impact Assessment (HRIA) is a pioneering tool** in bringing a human rights perspective into the policy development stage and unveiling human rights issues to policy makers and business who may not have considered them. HRIAs can be of utility in the context of negotiating and implementing investment agreements.
- HRIA can be defined as "an instrument for examining policies, legislation, programs and projects and measuring their impact on human rights." The purposes for conducting HRIAs include **prioritising human rights in policy-making, strengthening accountability, and empowering rights holders**.
- Unlike other forms of impact assessment, HRIAs engage the international human rights framework. The organising principle of HRIAs is the human rights themselves. With time and resources, an **ex-ante assessment brings significant value** and has the potential to change a project or agreement and mitigate adverse impacts.
- HRIAs can be an effective tool for identifying, quantifying and assessing the ways trade and investment agreements impact upon the full spectrum of human rights, providing an **evidence base for IIA or ISDS reform and to guide policy-makers** in making the right impact on the ground.

¹ The opinions expressed in this paper are those of the author and do not necessarily reflect the views of the UNCTAD Secretariat or its Member States.

- The term investment incorporates domestic policies and regulation on investment, investment projects, investment contracts and complex investment treaties. HRIAs have been applied in the area of investment projects but there has been no specific **HRIA of an investment treaty**.
- Establishing the human rights impacts of investment agreements is no doubt **challenging for a number of reasons**. It is difficult to determine with precision the sectors and geographical areas that will be affected by the agreement. This is in part because the scope of provisions of an investment agreement may be subject to interpretation by arbitration tribunals and applied on a case-by-case basis. Comparing baseline conditions and conditions post-assessment could only make tenuous attributions to the investment agreement.
- To overcome these challenges, more effort should be placed on **examining investor-state dispute settlement and the impact these cases may have on human rights**. By analysing arbitral awards through a human rights lens, it provides data on how human rights are implicated in these cases and how this links with larger issues of regulating in the public interest and evaluating the impacts of investment on people on the ground. By working through this type of analysis, recommendations can be made on the sectors for example such as extractive industries or privatization of public services that may pose some of the greater risks to human rights protection.
- This analysis, then coupled with more HRIA practice would provide policy makers with the necessary **tools to make more informed choices in negotiation and implementation of treaties**. If HRIAs are to be effective in addressing the human rights impacts of trade and investment agreements, further guidance, capacity building and support for their practice is essential. Through developing the practice of HRIAs, respective roles will be balanced creating a **more democratic and transparent process for the design, negotiation and implementation of investment agreements**.