



REPORT

**Virtual Consultation
in support of the
UN Working Group's 2021 Report
to the UN General Assembly
on Human Rights-Compatible
International Investment Agreements**



Achieving the Sustainable Development Goals (SDGs), particularly poverty eradication, requires national policies and an international regime that supports and does not undermine development efforts. The South Centre is an intergovernmental policy research think-tank composed of and accountable to developing country Member States. It conducts policy-oriented research on key policy development issues, and supports developing countries to effectively participate in international negotiating processes that are relevant to the achievement of SDGs. The Centre promotes the unity of the South in such processes while recognizing the diversity of national interests and priorities.

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Virtual Consultation in support of the UN Working Group's 2021 Report to the UN General Assembly on Human Rights-Compatible International Investment Agreements

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South Centre

1. Background

Foreign investment should support States' efforts to "bring the SDGs and goals of the Paris Agreement to life for all people, everywhere."¹ However, achievement of these objectives is slowed down in the current situation where investor-State dispute settlement (ISDS) mechanisms included in international investment agreements (IIAs), such as bilateral investment treaties and investment chapters in free trade agreements, are regularly used to challenge sovereign regulatory measures. These mechanisms have increased the exposure of States to claims from foreign investors against regulatory measures taken to protect and guarantee a clean environment, public health, human rights, social inclusion, and poverty reduction.

Similarly, excessive compensation awarded by ISDS tribunals, and costs associated with the State's defense, have impaired public expenditure intended to reduce inequality and promote economic and social justice. Some of these arbitral awards have amounted to almost a third of the official aid for development received by developing States in 2018.² The threat posed by investment-related claims also drives a "regulatory chill" that hampers the ability of States to achieve the Sustainable Development Goals (SDGs) and advance human rights,³ as well as to fulfill climate change commitments.

In the current scenario marked by the impact of the COVID-19 pandemic, foreign direct investment can be a valuable source of financing a better and fairer recovery, including investment needed to achieve the full realization of all human rights. To achieve this potential, there is a need to reshape the international investment regime, including through

¹ United Nations, *United Nations Secretary-General's Roadmap for Financing the 2030 Agenda for Sustainable Development 2019-2021* (July 2019). Available from <https://www.un.org/sustainabledevelopment/wp-content/uploads/2019/07/UN-SG-Roadmap-Financing-the-SDGs-July-2019.pdf>.

² In one of the most well-known ISDS cases, the arbitral tribunal awarded nearly USD 50 billion to the claimant investors, while the Official Development Assistance (ODA) received for 2018 amounted to USD 153 billion. See *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227.

³ See Lorenzo Cotula, "Rethinking investment treaties to advance human rights", Briefing (International Institute for Environment and Development, September 2016). Available from <https://pubs.iied.org/17376IIED/>. See also documents A/CN.9/WG.III/WP.149 and A/CN.9/WG.III/WP.151-153 from the United Nations Commission on International Trade Law (UNCITRAL) website: https://uncitral.un.org/en/working_groups/3/investor-state.



the reform of its substantive rules and standards; as well as of the ISDS mechanisms embedded in existing IIAs. The United Nations Guiding Principles on Business and Human Rights (UNGPs), endorsed by the Human Rights Council in resolution 17/4 of 16 June 2011, recognize that:

States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.⁴

Therefore, there is a need for serious discussions on the objectives and design of investment agreements for enabling and advancing sustainable investments that add value to pro-people and pro-planet developmental processes of host States.

The United Nations Working Group on human rights and transnational corporations and other business enterprises (UNWG) has been conducting virtual consultations with the objective of informing its upcoming report to the Seventy-sixth session of the United Nations (UN) General Assembly. The report will focus on providing practical guidance to States on negotiating human rights-compatible IIAs in line with the UNGPs.⁵

The South Centre has supported developing countries in their efforts to discuss the challenges arising from the global investment regime, the need for its reform, as well as the need to safeguard the right of countries to adopt the necessary measures to articulate and apply policies designed to achieve inclusive, equitable, fair and sustainable development and for the full enjoyment of human rights.

In line with such efforts, the South Centre and the UNWG convened a virtual consultation to identify and assess the different challenges developing countries face while negotiating or reforming IIAs in line with their international human rights obligations.

2. Objectives of the Virtual Consultation

The virtual consultation aimed at highlighting and discussing some of the most common concerns and challenges those developing countries face in the promotion of responsible investment practices, including an exploratory discussion about balancing the rights and obligations of investors in IIAs and safeguarding the sovereign right of States to regulate in the public interest for building back better and fairer in face of the COVID-19 pandemic. It also discussed possible reforms of the ISDS mechanism.

3. Presentation of the UNWG 2021 General Assembly Report

The UNWG's 2021 report to the UN General Assembly will focus on providing practical guidance to States on negotiating human rights-compatible IIAs in line with the UNGPs. The

⁴ United Nations Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (New York and Geneva, 2011), Principle 9.

⁵ United Nations Human Rights Office of the High Commissioner, "International Investment Agreements and Human Rights". Available from <https://www.ohchr.org/EN/Issues/Business/Pages/IIAs.aspx>.



report will cover all three pillars of the UNGPs: (i) 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; (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.

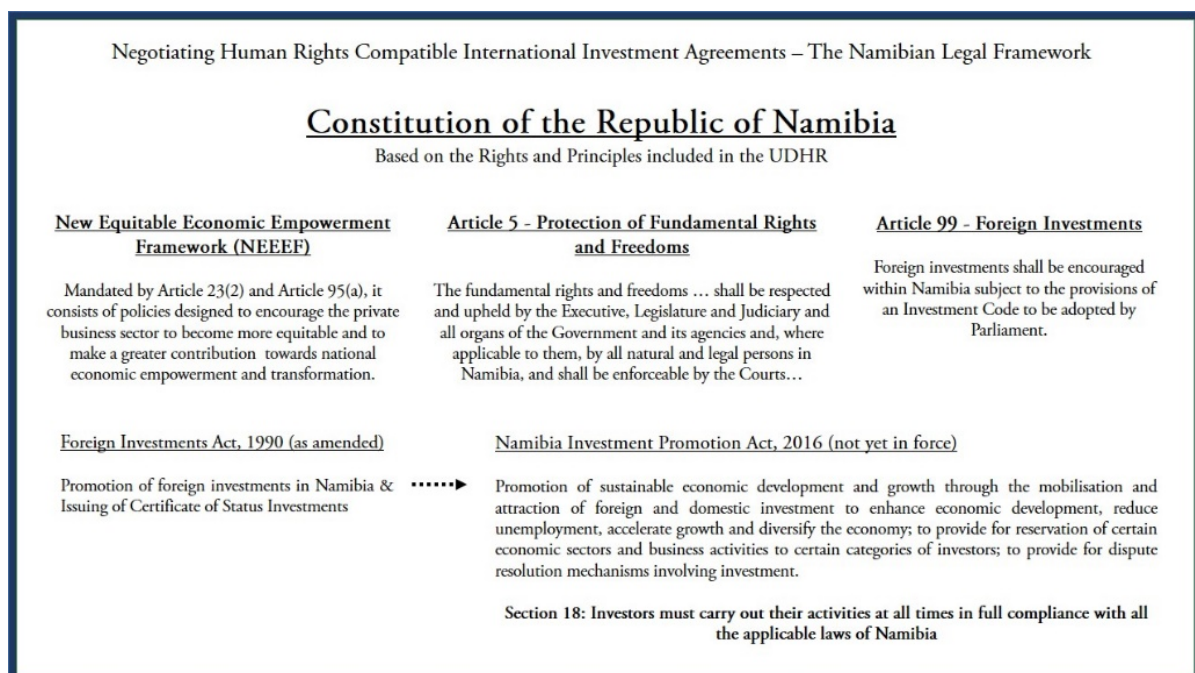
4. Issues addressed at the consultation

4.1. Experiences and challenges on the negotiation of IIAs and their compatibility with international human rights law and the SDGs

Developing countries have faced several challenges in the negotiation of IIAs and in ensuring their compatibility with international human rights law and the SDGs. During the consultation, participants discussed and reviewed the current state of play of existing IIAs and how ‘new generation’ IIAs could help achieve a better balance between promotion and protection of foreign investment, upholding human rights, achieving sustainable development, and supporting developing States’ COVID-19 responses.

Panellists highlighted that most of the old generation IIAs were signed within the last 30 years. Many of them were the outcomes of circumstances that have changed significantly since their adoption. The current COVID-19 pandemic has seen a considerable rise of tension between the measures that governments take for the protection of public health and reviving the economy with the provisions contained in bilateral investment treaties concluded decades ago. This background has made evident the need to mainstream human rights in all recovery efforts, including in the reform of past, and negotiation of new investment agreements. States must ensure that their IIAs allow them to make full use of their regulatory and policy space to protect and promote human rights, safeguarding the necessary fiscal space towards building back better. A strong domestic legal framework for regulating foreign investment and upholding human rights can play a key role in this regard (see Figure 1).

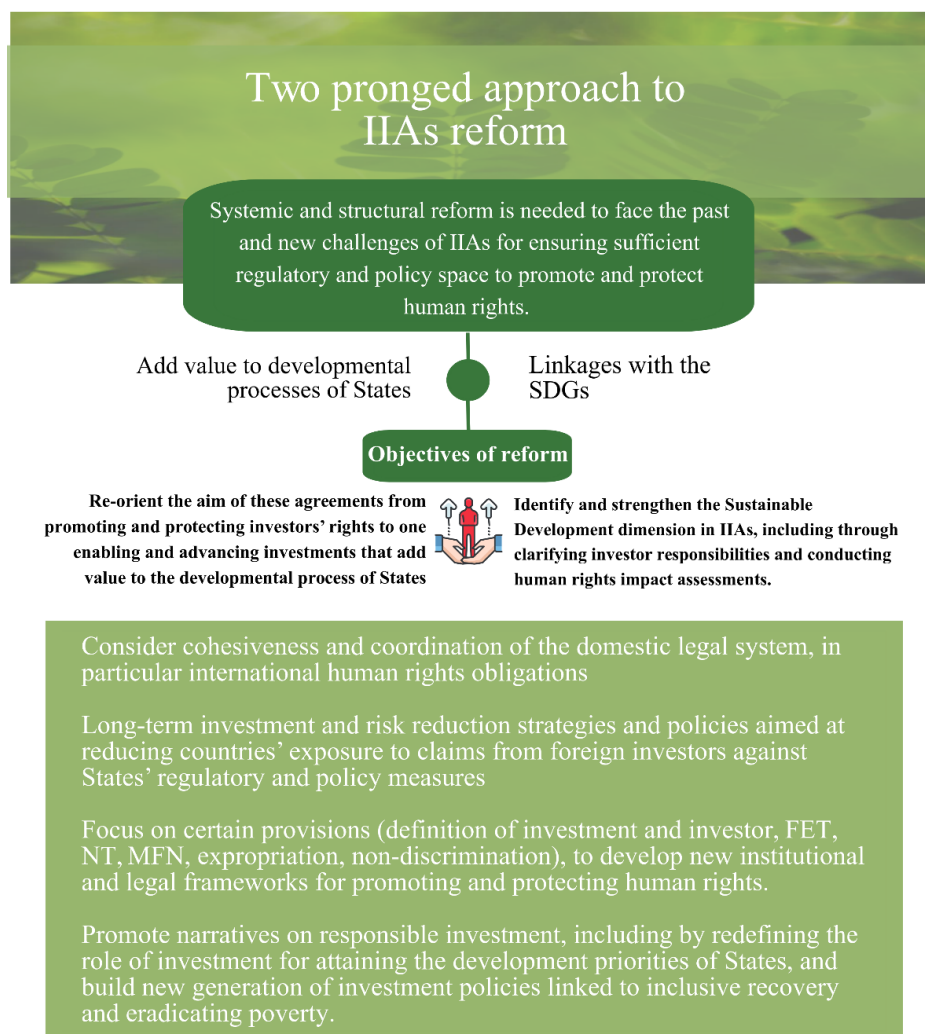
Figure 1- Example from Namibia



The COVID-19 pandemic has also showcased new barriers posed by IIAs in the face of a health crisis, for example, in access to vaccines and medicines, as well as transfer and adaptation of technology and intellectual property rights (IPRs) waivers. Participants addressed the role that the State and the public sector should have in the face of crises, and the recovery process, and what kind of alliances the public sector should build with the private sector, particularly paying more attention to the promotion and protection of all human rights.

For the panel, the need for systemic and structural reform of IIAs is evident, and countries should consider re-orienting the aim of these agreements from only promoting investment to one enabling and advancing investments that add value to the developmental process of States and the achievement of the 2030 Agenda for Sustainable Development (see Figure 2). Therefore, building a new generation of IIAs should address several shortcomings of old generation IIAs. Discussants considered that IIAs must not only ensure that countries maintain their right to regulate but should also reiterate the States' duty to regulate in the benefit of common welfare.

Figure 2 - Approaches to reform



The reform process should also focus on certain IIA provisions, in particular the definition of investor and investment, as well as national treatment, fair and equitable treatment, and most favored nation provisions. For achieving this objective, countries should consider the scope of investments and investors protected under their IIAs, and how they should fit into their specific national development strategies. For promoting a better alignment of IIAs with the promotion and protection of human rights, States will also be required to reshape their institutional and legal domestic frameworks to achieve coordination and coherence between both regimes. States should also consider how investment promotion strategies should be directed and channelled to encourage specific types of investments that are in line with the country's national development objectives. These investment facilitation policies should support inclusive recovery and contribute to poverty eradication in host States.

The implementation of the right to development, including an inclusive, free, active, and meaningful participation of potentially affected communities, was also emphasized as an imperative and overarching objective for the reform and negotiation of IIAs. The panel considered the need to have a systemic and structural reform of these agreements, in order to reorient the international investment regime towards ensuring that its contribution materializes in benefits for all society and covers the needs and priorities of peoples around the world. Therefore, merely aesthetical reform should be avoided and provisions covering the protection of the environment and human rights should be included.

The panel also recognized that reform is not easy. Several challenges were identified by the discussants, in particular external factors that might limit States' reform efforts. For example, the protection period of investments under IIAs is of 10 or 15 years, and that these might be automatically renewed in case of silence from the contracting States. Similarly, some treaties include a 'survival clause' extending the protection of investments for a period even after States have denounced the IIA. In addition, States must face the 'perception' that international investors might have concerning IIA reform, and the limitation of legal and human capacity to engage in negotiations with more resourceful partners.

4.2. Multilateral and regional efforts towards aligning IIAs with standards arising from international human rights law

The second panel considered the different efforts that multilateral and regional organizations have undertaken for the reform of existing IIAs, including for ensuring their compatibility with international human rights obligations. Discussants identified future steps which could support States' efforts to make their IIAs compatible with international human rights standards, and assist developing countries in achieving a better and fairer recovery from the COVID-19 pandemic.

Human rights-compatible treaty provisions have been incorporated into the treaties of countries in different regions and were reflective of their recent treaty practices. Reflecting on experiences from the Caribbean region, panellists said that CARICOM (Caribbean Community) countries have negotiated and concluded several international investment related agreements with human rights related provisions. Specifically, reference was made to Brazil's Cooperation and Facilitation Investment Agreements with Guyana and Suriname, and trade agreements that CARICOM has negotiated with its external trade partners. Further, the model treaty text that has been developed at the level of the Caribbean Community in the



form of the community's draft template for investment chapters and external trade agreements also features some of these human rights compatible provisions. These also relate to the three pillars of the UN Guiding Principles on business and human rights.

Giving specific examples, it was mentioned that these agreements have provisions that concern the adoption or maintenance of standards concerning labor, environment, and health. The agreements prohibit the encouragement of foreign direct investment by essentially lowering domestic environment, labor, or occupational health and safety legislation and standards, or by relaxing core labor standards or laws that are aimed at protecting and promoting cultural diversity. Other provisions are included that directly concern the behavior of investors or provisions that concern responsible business conduct. Even though these obligations are placed on States, they nonetheless concern the behavior of investors or encourage responsible business conduct.

In the African context, the new generation of national investment rules, regional and continental investment instruments show a focus on sustainable development objectives and needs. A panellist highlighted four main trends that can be clearly observed: One, focus on sustainable development; two, inclusion of investor obligations in investment treaties; three, preserving the right to regulate; and four, more emphasis on investment application.

In addition, the best practice in reforming investment treaties has been seen in the continent with respect to refining the objectives, rationalizing investment standards, redesigning investor-State dispute settlement and balancing the rights and obligations of investors. At the regional level, this evolution started with the Common Market for Eastern and Southern Africa (COMESA) Investment Area in 2007, followed by the Economic Community of West African States (ECOWAS) Supplementary Act, Southern African Development Community (SADC) model bilateral investment model template of 2012, the Pan African Investment Code (PAIC) of 2016, etc. The PAIC particularly has been used as a reference point because it has the objective of sustainable development right at the center of the code.

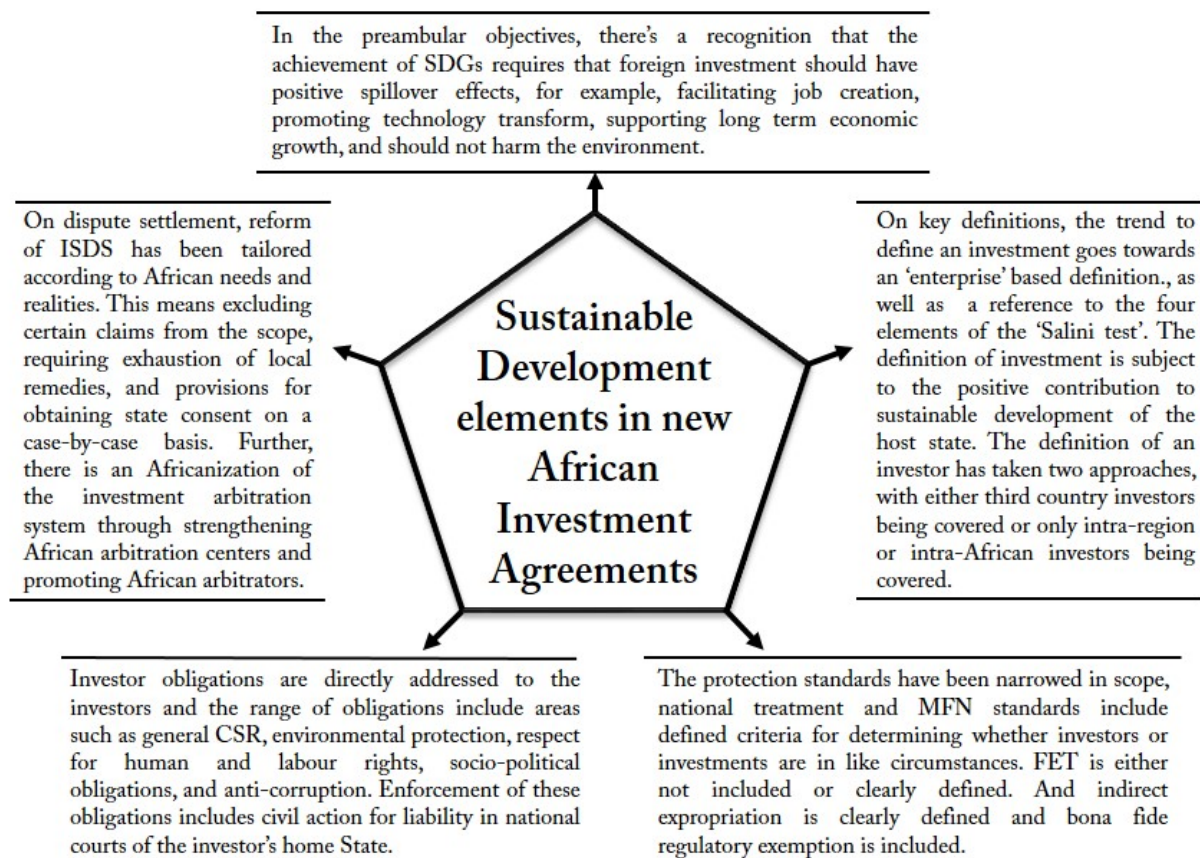
The specific changes that reflect sustainable development in these instruments can be seen in five areas: the objectives of the instruments, the key definitions, protection standards, investor obligations, and resolution of dispute provisions (see Figure 3).

There are also many examples of the practice of individual African countries, such as the Egyptian investment law of 2017, the Côte d'Ivoire Investment Code of 2018, the Protection of Investment Act of South Africa 2015, among others. These are very sustainable development focused, require foreign investment to contribute to the comprehensive and sustainable development of the State, and empower the government to take measures that may include redressing historical socio-economic inequalities and injustices and upholding the rights guaranteed in the Constitution, promoting and preserving cultural heritage and practices, indigenous knowledge and biological resources or national heritage and fostering economic development.

These laws are also expected to feed into ongoing negotiations on the investment protocol to the African Continental Free Trade Area (AfCFTA). One of the specific objectives of the

protocol is to promote social and economic transformation for inclusive growth and sustainable development in line with African Union's Agenda 2063.

Figure 3 – Sustainable Development elements in new African Investment Agreements



4.3. Conclusion

Participants considered that investment agreements can and should be used to channel investments that promote rather than undermine sustainable development. They should foster, rather than constrain the SDGs, and promote international cooperation to overcome collective action and challenges related to governance of international investments.



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