

Inputs - Special Rapporteur on the Right to Development

"Role of businesses in realising the right to development"

South Centre

June 2023

Background:

The Human Rights Council, in its resolution 33/14 of 29 September 2016, established the mandate of the United Nations Special Rapporteur on the right to development. In 2023, the Special Rapporteur will present a report on "the role of business in realising the right to development in the context of the 2030 Agenda for Sustainable Development and other relevant international human rights instruments" to the United Nations General Assembly in October 2023.

With the objective of collecting information regarding the role of businesses in realising the right to development, Prof Surya Deva, Special Rapporteur on the Right to Development, made an open call for inputs from various stakeholders such as States, international organisations, national human rights institutions, civil society organisations, and others.

In line with its programme of work, the South Centre is keen to submit the following information to the Special Rapporteur on the Right to Development considering the need to achieve progress on the fulfilment of social rights, in particular the Right to Development (RtD) and its interface with issues such as climate change, corporate responsibility, food security and small farmers' livelihood.

As the world is currently facing multiple crises that affect all facets of multilateralism, impacting the achievement of the 2030 Agenda for Sustainable Development and the full enjoyment of human rights, there is an urgent need to strengthen the duty to cooperate for the promotion, and observance of all human rights and fundamental freedoms, incorporated in Article 6 of the Declaration on the Right to Development, including by business enterprises.

Moreover, the comprehensive, crosscutting, and multidisciplinary nature of the Right to Development makes it an essential pillar for supporting good and informed decision-making for promoting sustainable development and articulate actions at the international, regional, and domestic levels for promoting responsible investment, good corporate governance, and ethical business conduct.

1. Business enterprises, foreign direct investment and the right to development

The 2030 Agenda recognised the role of private businesses as significant drivers of productivity, inclusive economic growth, and job creation¹. Corporate responsibility has become a critical component of good corporate governance and ethical business conduct in recent years, particularly regarding respecting human rights and protecting the environment.² Nevertheless, there is a need to develop tools and mechanisms for promoting the implementation of international standards related to good corporate conduct³ and a 'business case' for firms and investors to benefit from the opportunities and incentives they stand to gain as model corporate actors.⁴

At the international level, the United Nations Guiding Principles on Business and Human Rights (UNGPs),⁵ together with the International Labour Organization (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and the OECD Guidelines for Multinational Enterprises,⁶ have served as tools for guiding responsible business conduct and States' efforts towards establishing an international framework on business and human rights.

While the UNGPs recognise the duty of States to protect human rights through maintaining "adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives,"⁷ the Declaration on the Right to Development identifies the duties of all individuals towards promoting and protecting an "appropriate political, social and economic order for development."

Developing countries have continuously undertaken efforts to promote human rights,⁸ ensuring that protecting human dignity is the ultimate objective of State conduct.⁹ Experiences from several States show a particular interest in developing IIAs, including provisions on corporate social responsibility and investor obligations.

¹ UN, Transforming our World: The 2030 Agenda for Sustainable Development, A/RES/70/1, para. 67. Available from

<https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf>

² International Corporate Governance Network, "Human rights through a corporate governance lens", April 2015. Available from <https://www.icgn.org/policy/viewpoints/human-rights>

³ <https://www.ohchr.org/en/issues/business/pages/internationalstandards.aspx>

⁴ Dr. Başak Bağlayan, Ingrid Landau, Marisa McVey and Kebene Wodajo, "Good Business: The Economic Case for Protecting Human Rights", (BHR Young Researcher Summits, Frank Bold and International Corporate Accountability Roundtable, December 2018). Available from https://corporatejustice.org/2018_good-business-report.pdf

⁵ United Nations Human Rights Council, United Nations Guiding Principles on Business and Human Rights, Resolution 17/4 (2011)

⁶ Organization for Economic Co-operation and Development, Guidelines for multinational enterprises (2015) in <https://www.oecd.org/corporate/mne/>

⁷ United Nations Human Rights Council, UNGPs 9.

⁸ See: South Centre Report on Human Rights-Compatible International Investment Agreements, August 2021. Available from <https://www.southcentre.int/south-centre-report-august-2021/#more-16869>

⁹ Barnali Choudhury, Carving Out a Role for Human Rights in International Investment Law, SouthViews No. 228, 15 October 2021. Available from <https://www.southcentre.int/southviews-no-228-15-october-2021/#more-17419>

For example, Brazil has developed their 'Cooperation and Facilitation Investment Agreements (CFIAs)' that require investors to make the best efforts to adopt a high degree of socially responsible practices and voluntary standards, including the need to "achieve the highest possible level of contribution to the sustainable development of the Host State and the local community, through the adoption of a high degree of socially responsible practices". The State parties to the Caribbean Forum signed an economic partnership agreement with the United Kingdom which recognises the need to respect human rights, democratic principles, and the rule of law through strengthening cooperation towards cooperation for promoting corporate social responsibility through public information and reporting. Colombia has also included provisions promoting investors' voluntary commitment to include international corporate social responsibility standards. In the case of the EU comprehensive trade agreement with Colombia, Peru and Ecuador, Title IX references to trade and sustainable development, including specific provisions on guaranteeing the right to regulate of the States (Art. 268) and supporting climate change action (Art. 275), among others.

Angola has recently signed a sustainable facilitation agreement with the European Union. Chapter V includes provisions related to investment and sustainable development; it reaffirms the commitment of the parties to promote investment which is conducive to decent work in line with the Standards of the International Labour Organisation and environmental governance and climate change, in particular the United Nations Framework Convention on Climate Change.¹⁰ It includes in Article 34 the need to promote the "uptake by enterprises and investors of corporate social responsibility or responsible business practices with a view to contributing to sustainable development and responsible investment."

The African Continent has set a gold standard by introducing investor obligations in the Protocol on Investment to the African Continental Free Trade Agreement¹¹ , recognising the obligations of investors to comply with high standards of business ethics, investment-related human rights and labour standards. It also extends such conduct towards environmental protection, indigenous peoples and local communities. The Protocol also requests State Parties to promote the inclusion of guidelines and principles of corporate social responsibility in business conduct and meet internationally accepted standards of corporate governance.

Although these efforts are a step forward in promoting human rights and sustainable development, many States continue to face difficulties in ensuring that such investment is sustainable and in line with the needs and priorities of their national development plans and the respect for human rights. In addition, the international investment regime has come under intense scrutiny and criticism in recent years

¹⁰ See: Sustainable Investment Facilitation Agreement between the European Union and the Republic of Angola in <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/a17ccfe1-ce36-428f-bc7f-76bcb902c36a/details?download=true>

¹¹ See: Danish, Hamed El-Kady, Makane Moise Mbengue, Suzy H. Nikiema and Daniel Uribe, "The Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area: What's in it and what's next for the Continent?" in <https://www.iisd.org/itn/en/2023/05/31/the-protocol-on-investment-to-the-agreement-establishing-the-african-continental-free-trade-area-whats-in-it-and-whats-next-for-the-continent/>

because many countries, particularly in the Global South, have been exposed to abusive claims under the investor-state dispute settlement (ISDS) mechanisms that have become a typical feature in international investment agreements (IIAs).

The (mis)use of ISDS by foreign investors has resulted in disproportionate and exorbitant compensations being awarded by several ISDS arbitral tribunals against States. It also increases the risk of 'regulatory chill', which hampers the ability of States to design and adopt policies for promoting public interests, achieving the Sustainable Development Goals (SDGs), meeting their climate commitments or ensuring the protection of human rights.¹²

2. Business enterprises and the digital divide

Accelerating the transition to digital governance will also require additional efforts. While the use of digital technologies for working and learning during the COVID-19-related lockdowns has shown an increase in innovation and empowerment of certain sections of society, it has also showcased how almost half of the world population lacks access to such digital technologies and the Internet. Achieving digital transformation in the current world scenario will require identifying innovative solutions for tackling the unique challenges faced by developing and least-developed countries on the path to digital transformation, including by seeking the best means for the improvement of human conditions that allow a broader understanding of development for the promotion, protection, and fulfilment of all human rights.

The lack of adequate access to the Internet raises the risk of increased poverty and social exclusion at the expense of the right to development. Likewise, transitioning to affordable, reliable, sustainable, and modern energy for all is imperative to achieve sustainable development¹³, to address environmental degradation and poverty.¹⁴ In line with this reality, human rights should be at the core of the digital transformation, which not only implies expanding the interpretation of existing human rights to the digital transformation but identifying the gaps in human rights law that need to be addressed to guarantee that the digital transformation benefits all, without discrimination based on income, gender, race and ethnicity, disability, access to education or age.

The path towards digital transformation will impact the labour market and should promote and guarantee decent work in developed and developing countries. Similarly, the energy transition required to achieve the objectives set out by the climate agenda in the context of digital transformation should minimise the challenges that workers might face while maximising its benefits towards achieving a just transition that guarantees the creation of decent work and quality jobs in accordance with the

¹² See Lorenzo Cotula, "Rethinking investment treaties to advance human rights", International Institute for Environment and Development Briefing, September 2016. Available from <https://pubs.iied.org/17376IIED/>

¹³ United Nations General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, UN Doc. A/RES/70/1 (21 October 2020), Goal 7.

¹⁴ Adrian J. Bradbrook and Judith G. Gardam, Human Rights Quarterly, Vol. 28, No. 2 (May, 2006), pp. 389-415

principle of common but differentiated responsibilities and respective capabilities included in the Climate Change discussion.

The discussion on the Global Digital Compact should strengthen multilateralism through an intergovernmental process that protects the voices of developing and least-developed countries while enhancing the opportunity to participate in civil society and communities facing digital transformation challenges. The process should guarantee a State-led open discussion while identifying any conflict of interest that could undermine the development of an outcome guided by the global public interest.

Given that the existing digital divide has deeper roots in the realisation of human rights, such as the right to education and culture, and the right to enjoy scientific progress, there is a need for strengthening international cooperation, including by increasing digital literacy to guarantee the full implementation and protection of human rights by States and other stakeholders, including the private sector.

3. Way forward

The effective recognition of the right to development (RtD) could provide an essential basis for the development of public policies and international cooperation towards facing the multifaceted challenges the world is currently facing. The Right to Development as a human right by itself, and as a means for the full enjoyment of all other freedoms, could provide an immense opportunity for innovation and the promotion of greater international solidarity and cooperation towards redoubling the "efforts to eradicate poverty and inequality, deal with the impacts and threat of climate change and work towards achieving the seventeen interconnected and indivisible Sustainable Development Goals."¹⁵

Notably, achieving these objectives will require adopting responsible investment standards, which include balancing the rights and obligations of foreign investors and respecting the right of States to regulate in their public interest. Developing countries have pioneered the revision and modernisation of IIAs, prompting a wave of reforms in many IIAs¹⁶ and contributing to a more equitable international investment framework. Still, much remains to be done to deepen and expand the adoption of those reforms.

There is a need to increase the interlinkages between IIAs reform and the right to development. For example, UNCTAD continues to take stock of its policy tools for improving investment policy coherence and synergies through its 'IIA Reform Accelerator'.¹⁷ Likewise, increasing the consistency, coherence, predictability and correctness of arbitral decisions by ISDS has been at the foresight of UNCITRAL

¹⁵ Statement by H.E. Mr. Hugh Hilton Todd, Minister for Foreign Affairs and International Cooperation of the Co-operative Republic of Guyana, at the Forty-fourth Annual Meeting of Ministers for Foreign Affairs of the Group of 77 and China, "Global response to the covid-19 pandemic and the obstacles it poses to the implementation of the 2030 Agenda and Achievement of the SDGs" (New York, 12 November 2020).

¹⁶ See for example: South Africa, India, Indonesia, EU Member States and others.

¹⁷ See: UNCTAD, International Investment Agreements Reform Accelerator, UN Doc. UNCTAD/DIAE/PCB/INF/2020/8 in https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf

Working Group III¹⁸. Discussions in WG III would require more efforts towards building momentum for effectively leading to responsible investment and how the foreign investment policies can integrate, among other things, human rights and environmental standards throughout such processes.

Likewise, creating international conditions to fulfil the right to development requires articulated actions, including international assistance, access to technologies and economic and technical cooperation. Given the significant role of the private sector in the world economy, such conditions would also require strengthening the domestic legal framework towards promoting good corporate governance and responsible investment. Adopting a legally binding instrument on business and human rights can be essential for achieving this objective.

Finally, enhancing international cooperation towards the achievement of the Right to Development could consider the engagement of the right to development, but States should abide by the principles of transparency and inclusiveness, engage in collaboration at all levels of public decision-making, and pay particular attention to the participation of grassroots and vulnerable groups. South-South cooperation among developing countries can play a crucial role in this regard through the exchange of relevant experiences, good practices and the provision of innovative solutions for tackling the unique challenges faced by developing and least-developed countries.

¹⁸ See documents A/CN.9/WG.III/WP.149 and A/CN.9/WG.III/WP.151-153, available on the UNCITRAL website https://uncitral.un.org/en/working_groups/3/investor-state.