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Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Human rights-compatible international investment agreements

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, in accordance with Human Rights Council resolutions 17/4 and 44/15.

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Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises

Summary

In the present report, the Working Group on the issue of human rights and transnational corporations and other business enterprises discusses the implications of principle 9 of the Guiding Principles on Business and Human Rights for States in negotiating new international investment agreements or reforming old agreements. Most existing international investment agreements reflect an imbalance between rights and obligations of investors, which can have the unintended effect of facilitating irresponsible investor conduct or making it challenging for States to regulate such conduct. The Working Group therefore recommends that States ensure that all existing and future investment agreements are compatible with their international human rights obligations. States should also invoke international investment agreements to encourage responsible business conduct on the part of investors and hold them accountable for abusing internationally recognized human rights.

I. Introduction

A. Context

1. In the present report, the Working Group on the issue of human rights and transnational corporations and other business enterprises discusses the implications of principle 9 of the Guiding Principles on Business and Human Rights for States in relation to international investment agreements. According to this principle, 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". In the commentary to principle 9, it is stated that "the terms of international investment agreements may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so".

2. Principle 9 has direct implications for States that wish to negotiate new international investment agreements or reform existing agreements. It also has indirect implications for foreign investors availing themselves of the protection afforded under such agreements, arbitrators who decide investor-State disputes and communities affected by investment-related projects. For this reason, the focus of the report is on all three pillars of the Guiding Principles: the State duty to protect human rights, the corporate responsibility to respect human rights and access to remedy.

3. Investment is often regarded as being necessary for development as well as for realizing human rights. However, attracting investment is not a sufficient condition for inclusive and sustainable development or for realizing human rights and in turn leaving no one behind. A policy framework that not only promotes responsible business conduct but also directs investment promotion efforts towards achieving inclusive and sustainable development is required. States have used international investment agreements as one of the strategies to attract foreign investment, although there is no conclusive evidence about a positive direct correlation between such agreements and the flow of investment.[1] Irrespective of debates about this linkage, international investment agreements – if not designed properly – can significantly limit the ability of States to regulate investors and their investment. They can also exacerbate the existing imbalance between rights and obligations of investors and undermine affected communities' quest to hold investors accountable for human rights abuses and environmental pollution.

4. It also seems that significant foreign investment in different world regions has not really moved the needle in addressing pervasive economic inequality[2] or improving good governance generally.[3] Moreover, the coronavirus disease (COVID-19) pandemic has raised further concerns that health-related or other measures taken by States may fall foul of international investment agreements. There

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[1] Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford, United Kingdom of Great Britain and Northern Ireland, Oxford University Press, 2017), pp. 155–166.

[2] "There is an urgent need for policymakers to recognise that the current model of foreign investment governance has failed time and again to facilitate an equitable sharing of benefits from economic activity within and among societies. The current model focuses solely on maximising corporate profitability at all costs". See Daria Davitti and others, "COVID-19 and the precarity of international investment law", 6 May 2020; available at https://medium.com/iel-collective/covid-19-and-the-precarity-of-international-investment-law-c9fc254b3878.

[3] Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* (Oxford, United Kingdom, Hart Publishing, 2018). Furthermore, during one of the regional consultations, it was observed that, owing to international investment agreements, certain Governments may have fewer incentives to reform national governance institutions.

have also been calls for a moratorium on the investor-State dispute settlement mechanism,[4] amid fear that investors may challenge pandemic-related measures.[5] Even if States are able to defend claims against these measures,[6] the appropriateness of investors raising such claims in itself raises legitimate public policy questions.

5. It is in this context that the Working Group unpacks the implications of principle 9 of the Guiding Principles for States, investors, investment arbitrators and other relevant actors. As the principle is part of the "ensuring policy coherence" section of the first pillar of the Guiding Principles, the present report should be situated in the wider context of policy coherence required at various levels to promote business respect for human rights and corporate accountability (see A/74/198). Moreover, if a foreign investor is a State-owned enterprise (see A/HRC/32/45) or is investing in a conflict-affected area (see A/75/212), it should follow the Working Group's specific guidance on these issues. Furthermore, a gender perspective should be integrated into all investment-related decisions (see A/HRC/41/43).

B. Objectives

6. The Working Group seeks to achieve three objectives with the present report. First, it provides guidance to States on why and how to maintain domestic policy space while negotiating new international investment agreements or reforming existing agreements, in order to meet their human rights obligations under international law or constitutional law. By doing so, States should be able to act in conformity with principle 9 of the Guiding Principles, as the terms of international investment agreements have a bearing on the ability of States to regulate the conduct of foreign investors.

7. Second, the Working Group unpacks the implications of States' duty, flowing from both principle 9 of the Guiding Principles and international human rights law, for foreign investors. Although the responsibility of business enterprises to respect human rights under the second pillar of the Guiding Principles is not legally binding, it may acquire a binding character by virtue of international investment agreements or other regulatory developments unfolding at the national, regional and international levels.

8. Third, the Working Group outlines the "enabling" potential of international investment agreements in providing access to remedy for individuals and communities affected by investment-related projects. It will also highlight that agreements, at a minimum, should not have any "disabling" potential for access to remedy for the affected rights holders.

C. Methodology

9. The report is a culmination of a project on international investment agreements and human rights that the Working Group launched in 2016.[7] In addition to reviewing

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[4] Columbia Center on Sustainable Investment, "Call for ISDS moratorium during COVID-19 crisis and response", 6 May 2020; available at https://medium.com/iel-collective/covid-19-and-the-precarity-of-international-investment-law-c9fc254b3878. See also International Institute for Sustainable Development, "Agreement for the coordinated suspension of investor-State dispute settlement with respect to COVID-19-related measures and disputes", 18 June 2020; available at www.iisd.org/system/files/2021-02/suspension-isds-covid-19-en.pdf.

[5] Daniel Uribe and Danish, "Investment policy options for facing COVID-19 related ISDS claims", South Centre Investment Policy Brief No. 22 (June 2021).

[6] Prabhash Ranjan and Pushkar Anand, "Covid-19, India, and investor-State dispute settlement (ISDS): will India be able to defend its public health measures?", *Asia Pacific Law Review*, vol. 28, No. 1 (2020), p. 225.

[7] See www.ohchr.org/EN/Issues/Business/Pages/IIAs.aspx.

the relevant literature, the report draws on input received from various stakeholders in response to an open call for submissions as well as various sessions organized at the Forum on Business and Human Rights held annually in Geneva. Owing to the COVID-19 pandemic, the Working Group, in collaboration with partner institutions, organized several virtual consultations with various stakeholders. In addition to regional consultations for Africa, the Americas, Asia and the Pacific, Western Europe, and Eastern Europe and Central Asia, two consultations were organized exclusively for States and the private sector.[8] Rich insights gained from these consultations have informed the present report.

10. Moreover, the report builds on the work done in this area by the United Nations Conference on Trade and Development (UNCTAD), the United Nations Commission on International Trade Law (UNCITRAL), the Organisation for Economic Co-operation and Development (OECD), the South Centre and other research centres and civil society organizations. The recommendations made in the report are also informed by model bilateral investment treaties and selected progressive international investment agreements that incorporate human rights provisions in some form.

D. Scope and limitations

11. The report is focused on international investment agreements, which ought to be compatible with States' duty to respect, protect and fulfil human rights under international law. The term "international investment agreements" in the present report includes these agreements as well as other treaties with investment provisions negotiated in a bilateral, regional or international setting. The term "human rights" is interpreted in accordance with principle 12 of the Guiding Principles: all "internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work". Crucially, businesses often need to consider "additional standards", as noted in the commentary to this principle.[9]

12. Principle 9 also covers trade agreements and investment contracts. However, the present report is not focused on preserving policy space in those contexts. Although the report has no direct focus on trade agreements, States may still draw inspiration from it in negotiating human rights-compatible trade agreements. On the other hand, the "principles for responsible contracts" already provide specific guidance to negotiators of investment contracts (see A/HRC/17/31/Add.3), as these contracts are closely related to claims under international investment agreements.

13. As international investment agreements are only one part of wider investment policy frameworks,[10] the report should be seen in the context of the need for wider and fundamental reforms of such frameworks. In addition to negotiating new human rights-compatible agreements and reforming old agreements, States should develop investment policy frameworks that pay greater attention to "for what" and "for whom" aspects of foreign investment.[11] They should also seek to reform other initiatives that have a bearing on their policy frameworks. For example, the World Bank ease of doing

[8] Ibid.

[9] The Working Group, for instance, stressed that adopting "a gender perspective is always appropriate for all States and businesses in all situations" (see A/HRC/41/43, para. 31).

[10] London School of Economics and Political Science, Centre for the Study of Human Rights, "Guide to implementing the UN Guiding Principles on Business and Human Rights in investment policymaking" (London, 2016).

[11] Surya Deva, "Managing States' 'fatal attraction' to international investment agreements", 13 August 2018; available at https://investmentpolicy.unctad.org/blogs/75/managing-states-fatal-attraction-to-international-investment-agreements.

business index, which ranks States on the basis of the extent to which "the regulatory environment is more conducive to the starting and operation of a local firm",[12] does not consider operating conditions conducive for businesses to respect human rights relevant to rankings. Consequently, such a ranking can push States to relax labour rights and environmental standards or provide overgenerous tax breaks.

II. Concerns related to international investment agreements

14. As at 30 June 2021, the international investment agreement universe comprised 2,852 bilateral investment treaties and 420 treaties with investment provisions, of which 2,298 and 324, respectively, were in force.[13] Most of the agreements were concluded between 1990 and 2009.[14]

15. International investment agreements, especially the first-generation agreements concluded before 2010, are an embodiment of three characteristics: imbalance, inconsistency and irresponsibility. Two illustrative examples should suffice to show the imbalance inherent in such agreements. First, most agreements confer legally enforceable rights upon investors, but hardly any obligations or responsibilities regarding human rights and the environment. Second, despite being third parties to the agreements, investors can rely on them to initiate arbitration proceedings against States for an alleged breach of investment protection standards, including by using "third-party funding".[15] However, States or other third parties such as individuals and communities affected by investment-related projects do not enjoy such an option.

16. Inconsistency is another element embedded in the architecture of international investment agreements. Investors and proponents of such agreements justify the need for the investor-State dispute settlement process because of their distrust of the legal system in host States. At the same time, when affected communities pursue claims against investor companies for human rights abuses, these investors plead for cases to be heard by the very legal system that they label as unreliable and unsuitable. Moreover, whereas the dispute settlement mechanism allows parent investors as shareholders to claim damages from the State as "reflective loss", parent companies invoke the principle of separate legal personality when sued for the conduct of their subsidiaries.[16] Inconsistency is also seen in arbitration awards delivered by a dispute-specific group of party-appointed arbitrators who are not bound by any precedential system.[17]

17. These imbalances and inconsistencies deeply embedded in international investment agreements contribute to irresponsibility on the part of investors. The asymmetrical protection offered by agreements and the lack of general transparency in investor-State processes create incentives for investors to focus on the protection of their investment and pay inadequate attention to their human rights responsibilities under local laws and international standards. In some cases, investors invoke

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[12] See www.doingbusiness.org/en/rankings. The methodology of this index is currently under review (see https://consultations.worldbank.org/consultation/seeking-feedback-doing-business-methodology-review-external-panel).

[13] See https://investmentpolicy.unctad.org/international-investment-agreements.

[14] United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2021: Investing in Sustainable Recovery* (New York, 2021), p. 122.

[15] Brooke Guven and Lise Johnson, "The policy implications of third-party funding in investor-State dispute settlement", Columbia Center on Sustainable Investment Working Paper 2019 (May 2019).

[16] David Gaukrodger, "Investment treaties as corporate law: shareholder claims and issues of consistency", Organisation for Economic Co-operation and Development (OECD) Working Papers on International Investment, No. 2013/03 (OECD Publishing, 2013).

[17] Lise Johnson and Lisa Sachs, "Inconsistency's many forms in investor-State dispute settlement and implications for reform", Columbia Center on Sustainable Investment Briefing Note (November 2018).

protection under international investment agreements to thwart attempts by affected communities to hold them accountable for human rights abuses. Moreover, given the lack of explicit investor obligations concerning human rights and the environment in the agreements, arbitrators tend to treat them as an autonomous and self-contained regime that prevails over other regulatory regimes.

18. Three broad sets of concerns concerning international investment agreements are outlined below: regulatory constraints, investors' rights without obligations and privileged access to remedy for investors. These concerns can be linked respectively to the "protect", "respect" and "remedy" pillars of the Guiding Principles.

19. As the number of newly concluded international investment agreements has been less than the number of terminated agreements in recent years[18] and most of the arbitration claims are brought under agreements concluded before the 1990s,[19] it is critical to address the three characteristics (imbalance, inconsistency and irresponsibility) in the old agreements as well. Moreover, ways should be found to neutralize the "survival clauses" in old agreements.

A. Regulatory constraints

20. All States have a sovereign right to regulate investment and the conduct of investors. An assertion of such a right, however, hides two critical aspects. First, States may not be able to exercise this right in practice, for their power to act may be constrained by international investment agreements or arbitration claims brought against them.[20] For instance, some tribunals have interpreted the "fair and equitable treatment" clause in such agreements very broadly,[21] which in turn may undermine States' ability to pursue legitimate public policy goals. Moreover, in conflict settings, the clause can prevent or undermine plans for transitional justice, including measures aimed at addressing the underlying causes of the conflict.[22]

21. As far as the effect of arbitration claims on States' right to regulate is concerned, reference may be made to the fossil fuel companies relying on the Energy Charter Treaty to challenge government measures aimed at mitigating climate change.[23] In the past, tobacco companies have also initiated arbitration claims against States for taking legitimate measures to protect the right to health.[24] Even if the States concerned had been able to justify their measures in the end, the process entailed spending unnecessary time and resources in defending claims that should not have existed in

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[18] UNCTAD, *World Investment Report 2021*, pp. 122 and 123.

[19] Ibid., p. 130.

[20] Jesse Coleman, Kaitlin Y. Cordes and Lise Johnson, "Human rights law and the investment treaty regime", in *Research Handbook on Human Rights and Business*, Surya Deva and David Birchall, eds. (Cheltenham, United Kingdom, Edward Elgar Publishing, 2020), p. 290, at pp. 297–298.

[21] Gus Van Harten, "Leaders in the expansive and restrictive interpretation of investment treaties: a descriptive study of ISDS awards to 2010", *European Journal of International Law*, vol. 29, No. 2 (2018), p. 507, at p. 518.

[22] Tara Van Ho, "Is it already too late for Colombia's land restitution process? The impact of international investment law on transitional justice initiatives", *International Human Rights Law Review*, vol. 5, No. 1 (2016), pp. 60–85.

[23] *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, International Centre for Settlement of Investment Disputes case No. ARB/21/4. See also Nathalie Bernasconi-Osterwalder, "How the Energy Charter Treaty could have costly consequences for Governments and climate action", 19 June 2018; available at www.iisd.org/articles/how-energy-charter-treaty-could-have-costly-consequences-governments-and-climate-action.

[24] *Philip Morris Asia Limited v. The Commonwealth of Australia*, Permanent Court of Arbitration case No. 2012-12; and *Philip Morris Brand Sàrl (Switzerland)*, *Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, International Centre for Settlement of Investment Disputes case No. ARB/10/7.

the first place. Such claims also tend to create a regulatory chill not only in States involved in such claims but also in bystander States.[25]

22. Second, States in fact have a duty to regulate investors' conduct in such a way that investments do not result in human rights abuses or environmental pollution. Unlike States' discretionary right to regulate investment and investors, the duty to act to protect human rights is a mandatory obligation.[26] States may discharge this duty, for example, by stipulating the human rights obligations of investors and enforcing them effectively.

23. Some States have begun terminating old international investment agreements to break free from their regulatory constraints. Pakistan[27] recently joined other States such as Ecuador, India, Indonesia and South Africa in unilaterally terminating their imbalanced international investment agreements.[28] Moreover, in May 2020, 23 States members of the European Union signed an agreement to terminate the agreements concluded among them. This termination was triggered by a decision of the Court of Justice of the European Union in March 2018 in *Slovak Republic v. Achmea BV* (case C-284/16), in which the Court held that investor-State dispute settlement clauses in intra-European Union international investment agreements had an adverse effect on the autonomy of the European Union and were thus incompatible with European Union law.

B. Investors' rights without obligations

24. Most international investment agreements do not contain provisions imposing human rights responsibilities or obligations on investors.[29] Not even all post-2010 new-generation agreements include such specific provisions or put investors' obligations on a par with their rights. The 2020 Regional Comprehensive Economic Partnership Agreement between the Association of Southeast Asian Nations, Australia, China, Japan, New Zealand and the Republic of Korea is an example of the former. On the other hand, the 2021 European Union-China Comprehensive Agreement on Investment illustrates the latter scenario: while it contains several provisions concerning sustainable development, corporate social responsibility and labour standards, all these provisions have been excluded from the ambit of the State-to-State dispute settlement mechanism put in place to resolve investment-related disputes.[30]

25. This general blankness in international investment agreements, or even the tokenistic insertion of human rights provisions in such agreements, exacerbates the existing asymmetry between rights and obligations of investors. It also contributes to arbitrators ignoring human rights responsibilities of investors that are well established in other branches of international law but absent in the text of the relevant agreements.

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[25] Jane Kelsey, "Regulatory chill: learnings from New Zealand's plain packaging tobacco law", *QUT Law Review*, vol. 17, No. 2 (2017), pp. 21–45.

[26] See International Covenant on Civil and Political Rights, art. 2, and International Covenant on Economic, Social and Cultural Rights, art. 2; see also Committee on Economic, Social and Cultural Rights, general comment No. 24 (2017).

[27] Mushtaq Ghumman, "Most of BITs to be scrapped", 25 March 2021; available at www.brecorder.com/news/40077403.

[28] International Institute for Sustainable Development, "Terminating a bilateral investment treaty" (Winnipeg, Canada, 2020), pp. 7 and 8; available at www.iisd.org/system/files/publications/terminating-treaty-best-practices-en.pdf.

[29] A search on the UNCTAD database of international investment agreements on 12 July 2021 revealed that, of 2,575 agreements, 40 had corporate social responsibility provisions in the main text, 112 contained labour standards, 120 had provisions regarding the non-lowering of standards and 317 included provisions about health and the environment (see https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping).

[30] See https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237.

C. Privileged access to remedy for investors

26. Although local communities have a lot at stake in foreign investment projects and the disputes related to these projects, they "are invisible under the current international investment agreement system".[31] International investment agreements contribute to this injustice. States that have concluded such agreements confer upon investors, who are third parties to these State-to-State agreements, a privilege to bypass all normal remedial mechanisms and seek a fast-track remedy against States through binding arbitration. Moreover, investors are also able to invoke the agreements as shields against claims of human rights abuses.[32] On the other hand, affected communities as another set of third parties to such agreements remain excluded, or at the periphery at best if allowed to submit amicus briefs, from the agreements as well as the investor-State dispute settlement mechanism.

27. Such a model of privileged access to remedy, which might have been rationalized for developing States as a pathway to attracting investment and achieving economic development, is plainly unjust and indefensible.[33] If any specialized mechanism to settle disputes is created, it should not be unidirectional. Rather, it should also allow States and affected communities to resolve their investment-related grievances on an equal footing. In other words, a dispute settlement mechanism operating under international investment agreements should strengthen national rule of law for all affected parties rather than only for the selected few.[34]

III. State of play concerning human rights and international investment agreements

28. Section III contains a review of efforts being made in various forums and settings to reform international investment agreements and make them compatible with international law concerning human rights, labour rights and the environment.

A. United Nations Conference on Trade and Development

29. In the *World Investment Report 2012*, UNCTAD noted that a "new generation" of investment policies, aimed at systematically integrating sustainable development, had started to emerge.[35] At the same time, it highlighted challenges in international investment policymaking, including how international investment agreements could unduly constrain national economic development policymaking, the need to strike a balance between the rights and obligations of investors and ensuring effective policy coherence with other public policies.[36] The report also contained proposals for 11 core

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[31] Nicolás Perrone, "The 'invisible' local communities: foreign investor obligations, inclusiveness, and the international investment regime", *American Journal of International Law Unbound*, vol. 113 (2019), pp. 16–21.

[32] Columbia Center on Sustainable Investment and Working Group on the issue of human rights and transnational corporations and other business enterprises, "Impacts of the international investment regime on access to justice", Roundtable Outcome Document (September 2018), pp. 11 and 12; available at www.ohchr.org/Documents/Issues/Business/CCSI_UNWGBHR_InternationalInvestmentRegime.pdf.

[33] Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge, United Kingdom, Cambridge University Press, 2015).

[34] Sergio Puig and Gregory Shaffer, "Imperfect alternatives: institutional choice and the reform of investment law", *American Journal of International Law*, vol. 112, No. 3 (2018), p. 361.

[35] UNCTAD, *World Investment Report 2012: Towards a New Generation of Investment Policies* (New York, 2012), p. 102.

[36] Ibid., pp. 103 and 104.

principles for investment policymaking for sustainable development[37] and served to launch the Investment Policy Framework for Sustainable Development.[38] These proposals could be regarded as setting the foundation for UNCTAD recommendations on reforming international investment agreements in years to come.

30. Building on the previous work, UNCTAD laid out an "action menu" in 2015 covering substantive, procedural and systemic aspects of international investment agreement reform.[39] It proposed concrete options to achieve the five reform objectives: safeguarding the right to regulate, reforming investment dispute settlement, promoting and facilitating investment, ensuring responsible investment and enhancing systemic consistency. It also outlined eight reform tools – from adding new provisions in international investment agreements to eliminating or omitting certain existing provisions, carving out ways to limit the scope of the agreements, conditioning protection upon investors' behaviour, strengthening sustainability aspects of the agreements and referring to other bodies of law to improve cohesiveness.[40] Moreover, UNCTAD stressed that strong protection clauses and effective flexibilities for contracting parties could coexist to "achieve a balanced agreement that meets the needs of different investment stakeholders".[41]

31. In 2018, UNCTAD brought together its three-phase road map for international investment agreement reform: designing sustainable development-oriented agreements (phase 1), modernizing the existing stock of agreements (phase 2) and promoting coherence between agreements and other sites of investment policymaking (phase 3).[42] As old-generation agreements contain broad and vague protection for investors and "bite" States by providing a basis to pursue arbitration claims, UNCTAD proposed 10 options to reform them.[43] These include jointly interpreting treaty provisions, amending treaty provisions, replacing outdated treaties, referencing global standards, abandoning unratified old treaties and terminating existing old treaties.

32. In 2020, UNCTAD launched the International Investment Agreements Reform Accelerator to assist States in modernizing the old-generation agreements, because reform "of the existing stock of 2,500 old-generation treaties in force today has not yet taken off on a large scale".[44] The Reform Accelerator is focused on eight aspects of the agreements that are most in need of reform: definition of investment, definition of investor, national treatment, most-favoured-nation treatment, fair and equitable treatment, full protection and security, indirect expropriation and public policy exceptions.[45]

B. United Nations Commission on International Trade Law

33. UNCITRAL Working Group III has been working on possible reform of investor-State dispute settlement since 2017 (see A/72/17, para. 264). However, UNCITRAL had engaged with the issue even prior to 2017. For example, it drafted the 2014 Rules

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[37] The core principles included investment for sustainable development, policy coherence, balanced rights and obligations, the right to regulate and corporate governance and responsibility.

[38] UNCTAD, *World Investment Report 2012*, pp. 107–110 and 143–159.

[39] UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* (New York, 2015), pp. 120–171.

[40] Ibid., pp. 132–135.

[41] UNCTAD, *Investment Policy Framework for Sustainable Development* (New York, 2015), p. 89.

[42] UNCTAD, *UNCTAD's Reform Package for the International Investment Regime* (New York, 2018) p. 9.

[43] Ibid., pp. 72–92.

[44] UNCTAD, "International investment agreements: Reform Accelerator" (New York, 2020), p. 2.

[45] Ibid., pp. 9–28.

on Transparency in Treaty-based Investor-State Arbitration to address concerns about the lack of transparency in the investor-State dispute settlement process to take cognizance of public interest considerations. Despite being entrusted with a broad mandate, Working Group III has been focusing mostly on various procedural or institutional reforms concerning: (a) tribunals, ad hoc and standing multilateral mechanism; (b) arbitrators and adjudicators appointment methods and ethics; (c) treaty parties' involvement and control mechanisms on treaty interpretation; (d) dispute prevention and mitigation; (e) cost management; and (f) third-party funding.[46] UNCITRAL and the International Centre for Settlement of Investment Disputes are also developing a code of conduct for adjudicators to enhance their independence and impartiality, including by disclosing conflicts of interest.[47]

34. In March 2019, several United Nations human rights experts sent a letter to UNCITRAL stressing the need to bring "systemic structural changes to the architecture" of investor-State dispute settlement.[48] Working Group III, however, claims that "existing concerns about substantive standards in investment agreements" are not within its mandate, although it should remain flexible to adapt to any developments concerning the substance of international investment agreements (see A/CN.9/WG.III/WP.166, para. 7). This position has triggered concerns about the UNCITRAL reform process focusing mostly on procedural aspects or adopting a "single undertaking" negotiation principle to approve reforms.[49] It has also been pointed out that, in the proposed workplan of Working Group III, "certain cross-cutting issues are not allotted any time at all, including work on damages and efforts to address the negative impacts [that investor-State dispute settlement] can have on the rights and interests of non-parties".[50] It would be a missed opportunity if human rights are not central to this multilateral reform process of investor-State dispute settlement.

C. National action plans on business and human rights

35. National action plans on business and human rights "are policy documents in which States outline strategies and instruments to comply with their duty to prevent and redress corporate-related human rights abuses, as laid down in international human rights law and restated in the first and third pillars of the Guiding Principles".[51] The Working Group "strongly encourages all States to develop, enact and update" a national action plan "as part of the State responsibility to disseminate and implement" the Guiding Principles.[52] Therefore, these national action plans should give a sense of how States envisage implementing principle 9.

36. As at 30 June 2021, 25 States had adopted a stand-alone national action plan on business and human rights. Except for the national action plans of four States (Chile, Peru, Slovenia and United States of America), the remaining plans include some

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[46] See A/CN.9/WG.III/WP.166, paras. 5 and 6; see also https://uncitral.un.org/en/working_groups/3/investor-state.

[47] United Nations Commission on International Trade Law (UNCITRAL) and International Centre for Settlement of Investment Disputes, "Draft code of conduct for adjudicators in international investment disputes", version 2.

[48] See www.ohchr.org/Documents/Issues/Development/IEDebt/OL_ARM_07.03.19_1.2019.pdf.

[49] Daniel Uribe and Danish, "UNCITRAL Working Group III: moving forward towards consensus or loosing balance?", South Centre Investment Policy Brief No. 23 (July 2021).

[50] Lisa Sachs and others, "The UNCITRAL Working Group III work plan: locking in a broken system?", 4 May 2021; available at https://ccsi.columbia.edu/news/uncitral-working-group-iii-work-plan-locking-broken-system.

[51] Daniel Augenstein and others, "The UNGPs in the European Union: the open coordination of business and human rights?", *Business and Human Rights Journal*, vol. 3, No. 1 (2018), p. 1, at p. 2.

[52] See www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx.

specific provisions about the intersection of international investment agreements and human rights.[53] The nature of these provisions varies from general aspirational provisions to stressing the importance of achieving policy coherence or preserving regulatory space, conducting a human rights impact assessment of international investment agreements and consulting affected communities and civil society organizations. A few States also commit to bringing their existing and future agreements into conformity with international human rights law.

37. In the national action plan of Denmark, for instance, it is noted that principles and standards on responsible business conduct such as the OECD Guidelines for Multinational Enterprises are "reflected in negotiations for free trade agreements that include the area of investment".[54] Similarly, Italy considers it a priority to promote the implementation of existing international standards "with regard to the negotiation of international treaties and agreements".[55] Some other national action plans include such a commitment in more concrete terms. For example, it is noted in the national action plan of Sweden that the country will act to ensure that the European Union includes references to the Guiding Principles "in the sustainability chapters of its bilateral and regional trade agreements, investment agreements and partnership and cooperation agreements".[56] Norway also seeks "to ensure that provisions on respect for human rights, including fundamental workers' rights, and the environment are included in bilateral free trade and investment agreements".[57] In its national action plan, France similarly undertakes to promote the Guiding Principles "in its trade relations with other States and confirms its commitment to the hierarchy of norms when signing trade and investment agreements".[58] The Government of Japan, in its national action plan, commits to continuing to undertake efforts towards concluding investment agreements "that benefit not only industry but also a wide range of people, including workers".[59]

38. The importance of achieving policy coherence or preserving regulatory space is found in some national action plans. Switzerland, for example, "advocates the inclusion of consistency provisions when negotiating investment protection agreements".[60] It also notes that the "federal Government should ensure that these agreements provide sufficient domestic policy scope to fulfil the human rights obligations of both Switzerland and the contracting partner".[61] Denmark, in its national action plan,

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[53] Surya Deva, "International investment agreements and human rights: assessing the role of the UN's business and human rights regulatory initiatives", in *Handbook of International Investment Law and Policy*, Julien Chaisse, Leïla Choukroune and Sufian Jusoh, eds. (Singapore, Springer, 2021), pp. 11–16.

[54] Denmark, "Danish national action plan: implementation of the UN Guiding Principles on Business and Human Rights" (March 2014), p. 31; available at www.ohchr.org/Documents/Issues/Business/NationalPlans/Denmark_NationalPlanBHR.pdf.

[55] Italy, "Italian national action plan on business and human rights 2016–2021" (December 2016), p. 25; available at http://cidu.esteri.it/resource/2016/12/49117_f_NAPBHRENGFINALEDEC152017.pdf.

[56] Sweden, "Action plan for business and human rights" (August 2015), p. 29; ; available at www.government.se/contentassets/822dc47952124734b60daf1865e39343/action-plan-for-business-and-human-rights.pdf.

[57] Norway, "Business and human rights: national action plan for the implementation of the UN Guiding Principles" (October 2015), pp. 26 and 27; available at www.regjeringen.no/globalassets/departementene/ud/vedlegg/mr/business_hr_b.pdf.

[58] France, "National action plan for the implementation of the United Nations Guiding Principles on Business and Human Rights" (April 2017), p. 21; available at www.ohchr.org/Documents/Issues/Business/NationalPlans/NAP_France_EN.pdf.

[59] Japan, "National action plan on business and human rights: 2020–2025" (October 2025), p. 21; available at www.ohchr.org/Documents/Issues/Business/NationalPlans/Japan-NAP.pdf.

[60] Switzerland, "UN Guiding Principles on Business and Human Rights: Swiss national action plan 2020–23" (January 2020), p. 19; available at www.ohchr.org/Documents/Issues/Business/NationalPlans/Beilage01PrincipesdirecteursdeONUrelatifsauxentreprisesdroitshomme_Suisse.pdf.

[61] Ibid., p. 18.

similarly acknowledges the existing practice of preserving space "to adopt and enforce measures necessary to pursue legitimate public policy objectives".[62]

39. The Government of Thailand commits to considering "human rights impacts before signing international trade or investment agreements and treaties".[63] In the same vein, Germany notes in its national action plan that "comprehensive impact assessments should be conducted before negotiations begin, so as to guarantee that the findings of the assessments can influence the negotiations".[64] On the other hand, the Netherlands[65] and Belgium[66] acknowledge the importance of consultations with civil society organizations before concluding international investment agreements. Ireland goes one step further in its national action plan and encourages "companies operating abroad to adopt good practice with regard to consultation with human rights defenders and civil society in local communities, particularly on environmental and labour conditions".[67]

40. There are also a few national action plans in which States commit to reviewing their existing as well as future international investment agreements to bring them into conformity with international human rights law. Kenya, in its national action plan, makes a commitment to review "current trade and investment promotion agreements and bring them into compliance with the Constitution and international human rights standards".[68] France also commits to checking "that all trade and investment agreements comply with international human rights law".[69]

D. New-generation international investment agreements and model bilateral investment treaties

41. A new generation of more balanced international investment agreements has started to emerge in recent years.[70] Some of these agreements include human rights, corporate social responsibility or sustainable development provisions in the main text, but mostly in hortatory rather than legally binding terms.[71] For example, "the importance of each party encouraging enterprises operating within its area to

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[62] Denmark, "Danish national action plan: implementation of the UN Guiding Principles on Business and Human Rights", p. 31.

[63] Thailand, "First national action plan on business and human rights (2019–2022)" (October 2019); available at www.ohchr.org/Documents/Issues/Business/NationalPlans/NAPThailandEN.pdf.

[64] Germany, "National action plan: implementation of the UN Guiding Principles on Business and Human Rights 2016–2020" (December 2016), p. 13; available at www.ohchr.org/Documents/Issues/Business/NationalPlans/NAP_Germany.pdf.

[65] Netherlands, "National action plan on business and human rights" (December 2013), p. 20; available at www.ohchr.org/Documents/Issues/Business/NationalPlans/Netherlands_NAP.pdf.

[66] Belgium, "Plan d'action national : enterprises et droits de l'homme" (23 June 2017), action point 17; available at www.sdgs.be/sites/default/files/publication/attachments/20170720_plan_bs_hr_fr.pdf.

[67] Ireland, "National plan on business and human rights 2017–2020" (November 2017), p. 21; available at www.dfa.ie/media/dfa/alldfawebsitemedia/National-Plan-on-Business-and-Human-Rights-2017-2020.pdf.

[68] Kenya, "National action plan on business and human rights" (June 2019), p. 21; available at www.ohchr.org/Documents/Issues/Business/NationalPlans/2019_FINAL_BHR_NAP.PDF.

[69] France, "National action plan for the implementation of the United Nations Guiding Principles on Business and Human Rights", p. 22.

[70] For example, all international investment agreements "concluded in 2020 contain reform-oriented provisions aimed at preserving regulatory space and promoting sustainable investment"; UNCTAD, *World Investment Report 2021*, p. 131. See also Kathryn Gordon and others, "Investment treaty law, sustainable development and responsible business conduct: a fact finding survey", OECD Working Papers on International Investment, No. 2014/01 (2014), pp. 10–14.

[71] Barnali Choudhury, "Investor obligations for human rights", *ICSID Review*, vol. 35, Nos. 1–2 (2020), p. 82, at pp. 88–92; and Isabella Seif, "Business and human rights in international investment law: empirical evidence", in *Handbook of International Investment Law and Policy*, Julien Chaisse, Leïla Choukroune and Sufian Jusoh, eds. (Singapore, Springer, 2021), pp. 6–17; available at https://doi.org/10.1007/978-981-13-5744-2_26-1.

voluntarily incorporate into their internal policies those internationally recognized standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that party" is reaffirmed in article 16 of the Chile-Hong Kong Special Administrative Region bilateral investment treaty. Some variation of such a clause is found in other recent agreements such as the Colombia-France bilateral investment treaty, the Brazil-Mexico bilateral investment treaty, the European Union-Georgia Association Agreement and the Canada-Mongolia bilateral investment treaty. However, a breach of such a clause is often excluded from the purview of binding arbitration.

42. Some recent international investment agreements are also focused on preserving regulatory space for States. For example, article 4 (2) of the Bangladesh-Turkey bilateral investment treaty provides for each contracting party to have "the right to exercise all legal measures in case of loss, destruction or damages with regard to its public health or life or the environment by investments of the investors of the other contracting party". Similarly, article 18 (1) of the Burkina Faso-Canada bilateral investment treaty provides that a party may adopt or enforce a measure necessary "to protect human, animal or plant life or health". Although the recent Brazil-India bilateral investment treaty is not yet in force, articles 22 and 23 contain broad public policy grounds to assert a right to regulate investment and investors. Article 14 of the Pan-African Investment Code also lists general exceptions to allow States to adopt non-discriminatory regulatory measures. However, it should be noted that such a right to regulate clauses will not be effective unless international investment agreements also limit broad standards of investor protection.

43. To counter a race to the bottom, the contracting States parties to some international investment agreements agree not to lower standards to attract investment. The Colombian model bilateral investment treaty and the Morocco-Nigeria bilateral investment treaty are a case in point. There are also agreements aimed at reinforcing the need for investors to observe laws of host States related to labour rights, health and the environment. Moreover, some recent agreements include recommendations for investors to adopt international corporate social responsibility standards. Article 12 of the Belarus-India bilateral investment treaty, for example, provides that "investors and their enterprises operating within the territory of each party shall endeavour to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies".

44. The Morocco-Nigeria bilateral investment treaty, though not yet in force, offers a glimpse of how international investment agreements could strike a better balance between investors' rights and obligations. It is acknowledged in article 15 that "it is inappropriate to encourage investment by relaxing domestic labour, public health or safety" standards. This article also provides that each party "shall ensure that its laws and regulations provide for high levels of labour and human rights protection appropriate to its economic and social situation". In article 18, the treaty also imposes direct obligations on investors so that they "shall uphold human rights in the host State" and "shall act in accordance with core labour standards". Crucially, according to article 20, investors "shall be subject to civil actions for liability in the judicial process of their home State for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host State".

45. In addition to concluded international investment agreements, recent model bilateral investment treaties also contain indications of winds of change towards a more holistic approach to investment policymaking. Since the Human Rights Council endorsed the Guiding Principles in 2011, at least 20 States have adopted a model bilateral investment treaty.[72] In a few of these model agreements, such as those of

[72] See https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements.

Canada (2021), the Netherlands (2019) and Norway (2015), the Guiding Principles are expressly referred to as a reference point for responsible business conduct or corporate social responsibility. It is worth noting that progressive human rights provisions contained in model bilateral investment treaties may not always translate into actual provisions in international investment agreements negotiated by States, as multiple variables are at play during negotiations.

46. Although the 2019 model bilateral investment treaty of the Netherlands has not yet been applied to conclude any international investment agreements with the country, it contains useful progressive elements. The importance of contracting parties encouraging investors to "incorporate into their internal policies those internationally recognized standards, guidelines and principles of corporate social responsibility" is reaffirmed in article 7 (2). In article 7 (3), "the importance of investors conducting a due diligence process to identify, prevent, mitigate and account for the environmental and social risks and impacts of its investment" is stressed. Article 20 (5) is also relevant because it reminds the appointing authority to "make every effort to ensure that the members of the tribunal … possess the necessary expertise in public international law, which includes environmental and human rights law". Moreover, article 23 provides that an arbitration tribunal, "in deciding on the amount of compensation, is expected to take into account non-compliance by the investor with its commitments" under the Guiding Principles and the OECD Guidelines for Multinational Enterprises.

47. A brief review of the new generation of international investment agreements and model bilateral investment treaties reveals that, while they may not yet "seem to move towards including clear and precise binding human rights obligations for investors",[73] some evidence of rebalancing between the rights and responsibilities of investors is visible. However, as recommended below, more ambitious and holistic reforms of international investment agreements are urgently needed.

E. Arbitration awards featuring human rights issues

48. In recent years, human rights issues have gained increasing traction in investment arbitration awards. In a 2014 study, OECD found that 287 of the 1,113 decisions surveyed contained a reference to at least once one of the responsible business conduct issues, such as human rights, environment, corruption and labour.[74] In some of these decisions, there were also references to international human rights law or international environmental law instruments.[75] While the data suggest that the international investment agreement regime could interact with other relevant regimes, it does not necessarily mean that human rights considerations have received adequate weight from arbitrators.[76] Even in the much-discussed *Urbaser* decision, the arbitration tribunal ultimately held that the investor had no positive obligation to provide water to the people living in the area of the concession.

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[73] Markus Krajewski, "A Nightmare or a noble dream? Establishing investor obligations through treaty-making and treaty-application", *Business and Human Rights Journal*, vol. 5, No. 1 (2020), p. 105, at p. 128.

[74] Kathryn Gordon and others, "Investment treaty law, sustainable development and responsible business conduct: a fact finding survey", p. 23.

[75] Ibid., pp. 24–25.

[76] Peter Muchlinski, "The impact of a business and human rights treaty on investment law and arbitration", in *Building a Treaty on Business and Human Rights: Context and Contours*, Surya Deva and David Bilchitz, eds. (Cambridge, United Kingdom, Cambridge University Press, 2017), p. 346, at pp. 352–361. See also Lorenzo Cotula and Mika Schröder, *Community Perspectives in Investor-State Arbitration* (London, International Institute for Environment and Development, 2017).

49. While interpreting international investment agreements, arbitration tribunals – especially if they include human rights experts – could articulate human rights obligations of investors in three ways: (a) by using the "other applicable law" hook of such agreements to embed obligations in relation to international human rights law;[77] (b) by interpreting certain provisions of the agreements to read human rights into them; and (c) by building on explicit human rights provisions in the agreements.[78] Of these pathways, the third option is likely to be most effective in ensuring that human rights are mainstreamed into investment arbitration decisions. Explicit provisions in international investment agreements that "mandate the tribunal to look at human rights issues in the course of claims made under the agreement" should be able to clear the current "bottleneck" in receiving human rights arguments, issues and norms in investment arbitrations.[79]

F. Draft legally binding international instrument

50. The relationship between international investment agreements and human rights has also been a key issue in negotiations of the proposed "international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises" (see Human Rights Council resolution 26/9). All three drafts released so far had provisions aimed at some form of harmonization of the agreements with the proposed instrument. For example, article 14 (5) (a) of the second revised draft, released in August 2020, provides that States "shall ensure that … any existing bilateral or multilateral agreements, … including trade and investment agreements, shall be interpreted and implemented in a manner that will not undermine or limit their capacity to fulfil their obligations under this (legally binding instrument) and its protocols, as well as other relevant human rights conventions and instruments". Clause (b) further provides that any "new bilateral or multilateral trade and investment agreements shall be compatible with the States parties' human rights obligations under this (legally binding instrument) and its protocols, as well as other relevant human rights conventions and instruments".[80]

51. This draft provision, which "seems to apply the principle of systemic integration of international law",[81] covers both existing and new international investment agreements and puts States on notice that they must ensure that such agreements are compatible with their international human rights obligations. However, it lacks details on how States could achieve this goal, perhaps with a view to giving States some flexibility on this. Although it is uncertain at this stage how the process of negotiating the proposed legally binding international instrument will unfold, this instrument

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[77] See Vienna Convention on the Law of Treaties, art. 31 (3) (c).

[78] Markus Krajewski, "A Nightmare or a noble dream? Establishing investor obligations through treaty-making and treaty-application", pp. 121 and 122.

[79] Peter Muchlinski, "The impact of a business and human rights treaty on investment law and arbitration", p. 361.

[80] Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, "Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises", 2nd revised draft (6 August 2020); available at www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf.

[81] Daniel Uribe, "Bolstering human rights within international economic agreements: reconciling two 'separate regimes'?", OpinioJuris, 10 September 2020; available at http://opiniojuris.org/2020/09/10/bhr-symposium-bolstering-human-rights-within-international-economic-agreements-reconciling-two-separate-regimes.

could encourage States to negotiate human rights-compatible international investment agreements in diverse ways.[82]

IV. Reform trajectory

52. A review of the main concerns related to international investment agreements reveals that international investment law suffers from systemic and structural problems. Therefore, an ambitious and transformative reform agenda is desirable.[83] The present section contains an outline of some key elements of such an agenda as well as recommendations for potential pathways to achieve those regulatory goals. The suggestions noted below are relevant to both negotiating new agreements and reforming old agreements.

A. Reorientation of the purpose of investment

53. Realizing human rights should be a core purpose of attracting foreign investment, rather than human rights merely becoming an exception in international investment agreements to justify the host State's regulation of investment and investors. In addition, States should ensure that investment contributes to inclusive and sustainable development and that the provisions of agreements are designed to achieve this goal. For instance, it is made clear in article 1 of the Pan-African Investment Code that the objective of the code is "to promote, facilitate and protect investments that foster the sustainable development of each Member State". In a similar vein, paragraph XI.1 of the International Chamber of Commerce Guidelines for International Investment provides that investors should "seek to create shared value by developing business opportunities that contribute to the economic, social and environmental progress of the host country".

54. Certain constitutions also expressly require States to negotiate international agreements or attract foreign investment to promote sustainable development. Article 43 (3) of the Constitution of Ethiopia is a case in point. It provides that "international agreements entered into or relations formed by the State shall be such as to guarantee the right to the sustainable development of Ethiopia". It is mandated in article 99 of the Constitution of Namibia, read with section 2 of the Namibia Investment Promotion Act, that foreign investments should promote sustainable development.

55. Attracting foreign investment that facilitates sustainable development would, however, require ensuring vertical and horizontal coherence and developing an investment policy from the bottom up with the meaningful participation of all stakeholders, including civil society organizations, women's organizations and trade unions. The current top-down model of investment does not especially consider the needs and preferences of marginalized communities such as indigenous peoples. Consequently, indigenous peoples suffer disproportionately because of foreign investment-related development projects (see A/70/301 and A/HRC/33/42).

56. Therefore, instead of treating the attraction of foreign investment as an end in itself, States should harness the potential of foreign investment to contribute to

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[82] Markus Krajewski, "Ensuring the primacy of human rights in trade and investment policies: model clauses for a UN treaty on transnational corporations, other businesses and human rights" (Coopération Internationale pour le Développement et la Solidarité, Brussels, 2017). See also Peter Muchlinski, "The impact of a business and human rights treaty on investment law and arbitration".

[83] Emma Aisbett and others, *Rethinking International Investment Governance: Principles for the 21st Century* (Boston, United States of America, Boston College Law School, 2018).

achieving the Sustainable Development Goals. This would require designing international investment agreements that go beyond causing no harm to human rights.[84] Rather, they should also promote the human rights of all, thus leaving no one behind. Foreign investment should contribute to bridging gaps to address economic inequality rather than entrenching it further. In this context, it is noteworthy that it is stipulated in article 24 (e) of the Pan-African Investment Code that investors should "ensure equitable sharing of wealth derived from investment". In the same vein, foreign investment has the potential to contribute to achieving substantive gender equality[85] and other common societal goals such as mitigating climate change. However, existing agreements rarely contain provisions "aimed at ensuring gender equality".[86] This must change in future.

B. Preservation of space to exercise the duty to regulate

57. Under international human rights law, States have a duty – not merely the right – to regulate investors and their investment in such a way that all internationally recognized human rights are adequately protected. Hence, States must ensure that international investment agreements do not undermine their ability to exercise this duty. The agreements should only confer the minimum protection necessary to deter opportunistic conduct by host States and not put constraints on States to introduce legitimate legal and policy changes.[87]

58. Owing to the fragmented nature of international law, obligations under international investment agreements may collide or conflict with States' obligations under international human rights law or environmental law. To minimize adverse impacts flowing from such a collision or conflict, States should negotiate agreements under the shadow of international human rights law. They should be conscious of their obligations to both people and the planet, and "international human rights should, at a minimum, be regarded as primus inter pares (first among equals) among different branches of international law".[88] Legitimate expectations of investors should be balanced with, and construed in the light of, the human rights of individuals and communities.[89]

59. The scope of what is protected as investment under international investment agreements should be defined narrowly.[90] The "most-favoured-nation" standard should be articulated precisely, while the "fair and equitable treatment" clause should be replaced with a clearer standard of investor protection. Moreover, investment in breach of national laws or international human rights standards should be excluded from protection under such agreements. States may incorporate explicitly the "clean

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[84] Mavluda Sattorova, "The foreign investor as a good citizen: investor obligations to do good", in *Investors' International Law*, Jean Ho and Mavluda Sattorova, eds. (Oxford, United Kingdom, Hart Publishing), pp. 45–69.

[85] UNCTAD, *Multinational Enterprises and the International Transmission of Gender Policies and Practices* (New York, 2021).

[86] UNCTAD, *World Investment Report 2021*, p. 132.

[87] Emma Aisbett and Jonathan Bonnitcha, "A Pareto-improving compensation rule for investment treaties", *Journal of International Economic Law*, vol. 24, No. 1 (2021), pp. 181–202.

[88] Surya Deva, "Investors' international law: beyond the present" in *Investors' International Law*, Jean Ho and Mavluda Sattorova, eds. (Oxford, United Kingdom, Hart Publishing, 2021), p. 313, at p. 321.

[89] Peter Muchlinski, "Corporate social responsibility", in *The Oxford Handbook of International Investment Law*, Peter Muchlinski, Federico Ortino and Christoph Schreuer, eds. (Oxford, United Kingdom, Oxford University Press, 2008), p. 637, at pp. 640 and 641. See also Bruno Simma, "Foreign investment arbitration: a place for human rights?", *International and Comparative Law Quarterly*, vol. 60, No. 3 (2011), pp. 573–596.

[90] UNCTAD, "International investment agreements: Reform Accelerator", pp. 10–13.

hands doctrine" in the agreements: investors not conducting meaningful human rights due diligence or involved with human rights abuses could be barred from pursuing any arbitration claims against States to enforce their rights under the agreements.[91] The Colombian model bilateral investment treaty, for example, includes the possibility of a contracting party denying the benefit of a given agreement if the investor "committed serious human rights violations", "caused serious environmental damage in the territory of the host party" or "caused grave violations of the host party's labour laws". In addition, agreements may provide that the amount of damages awarded by arbitration tribunals will be reduced by loss suffered owing to human rights abuses or environmental pollution caused by the investor.

60. The definition of investors should be appropriately calibrated to avoid the risk of unintended beneficiaries exploiting international investment agreements to their advantage by resorting to the practice of "treaty shopping". Mere shell incorporation in the home State should not generally suffice for an investor to claim nationality and in turn protection under an agreement. Rather, investors should be required to have the "real seat" in the home State, demonstrating a genuine link and substantial activities to claim the benefits of an agreement.[92]

61. Including public policy exceptions explicitly in international investment agreements will also assist States in taking legal and policy measures to regulate investment to promote human rights, protect the environment or realize the Sustainable Development Goals. Moreover, the threshold to invoke these exceptions should not be unreasonably high:[93] if certain measures are deemed appropriate, that should suffice.

62. The process of negotiating international investment agreements also has a bearing on preserving regulatory space. For instance, if "citizens' rights to access information and participate in public decisions" are safeguarded in negotiating the agreements,[94] that should go a long way in getting the balance right in them. Moreover, States should conduct ex ante impact assessments of international investment agreements on human rights and the environment as well as on the regulatory space available to them under national and international laws. Such an assessment should also be done during the life of the agreements and prior to their extension or renewal. Conducting an impact assessment, in line with the guiding principles on human rights impact assessments of trade and investment agreements (see A/HRC/19/59/Add.5), should assist States in preserving regulatory space required to discharge their duties under international human rights law.

C. Inclusion of human rights obligations of investors

63. International investment agreements should maintain parity between rights and obligations of foreign investors. Considering that the agreements confer legally enforceable rights on investors, they should also include legally enforceable

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[91] Isabella Seif, "Business and human rights in international investment law: empirical evidence", pp. 18–20.

[92] Anil Yilmaz Vastardis, *The Nationality of Corporate Investors under International Investment Law* (Oxford, United Kingdom, Hart Publishing, 2020), pp. 230–243. See also Chin Leng Lim, Jean Ho and Martins Paparinskis, *International Investment Law and Arbitration: Commentary, Awards and Other Materials* (Cambridge, United Kingdom, Cambridge University Press, 2021), pp. 323–327.

[93] UNCTAD, "International investment agreements: Reform Accelerator", p. 26.

[94] Lorenzo Cotula, "Rethinking investment treaties to advance human rights", International Institute for Environment and Development Briefing (September 2016).

obligations regarding human rights and the environment.[95] The idea of including human rights obligations of investors in the agreements could be supported in a historical context, at the normative level and as a matter of emerging practice.

64. Historically, when the United Nations started the process of developing the Code of Conduct on Transnational Corporations in the mid-1970s, it included both rights and responsibilities of foreign investors. The deadlock over the code – along with the development of the soft responsibilities of multinational enterprises by OECD and the International Labour Organization and the sharp rise in the number of international investment agreements concluded between 1990 and 2010 – resulted in a "decoupling" of rights and responsibilities of investors.[96]

65. At the normative level, it is arguable that international human rights law applies to investors at least by implication,[97] for it would be an anomaly to hold that non-State actors could do what States could not. Moreover, the human rights responsibilities of investors under international investment agreements should be on par with their rights. Therefore, if the agreements confer legally enforceable rights on investors, they should also impose legally enforceable human rights obligations – not merely soft responsibilities lacking any teeth – on investors.

66. Moreover, as a matter of practice too, the idea of businesses having binding human rights obligations is gaining traction in various settings. The emergence of mandatory human rights due diligence laws in several States in Europe as well as at the European Union level is a case in point. In addition, courts in recent years have held that parent corporations may have a direct duty of care in certain circumstances for abuses linked to their subsidiaries.[98] Some companies and investors have also publicly supported civil society calls for binding human rights obligations of businesses to create a level playing field globally.

D. Provision of access to remedy pathways for affected communities

67. Merely including human rights obligations of investors in international investment agreements will not suffice: an effective mechanism to enforce these obligations should also be created. Moreover, communities should be able to seek remedy against investors directly, because the reliance on States to protect their rights may not always come to fruition owing to corruption or corporate capture of the State.

[95] Barnali Choudhury, "Investor obligations for human rights"; Nathalie Bernasconi-Osterwalder and others, "Harnessing investment for sustainable development: inclusion of investor obligations and corporate accountability provisions in trade and investment agreements", background document for the expert meeting co-hosted by the International Institute for Sustainable Development and the Friedrich-Ebert-Stiftung (2018); and J. Anthony VanDuzer and others, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators* (London, Commonwealth Secretariat, 2013).

[96] Surya Deva, "International investment agreements and human rights: assessing the role of the UN's business and human rights regulatory initiatives", pp. 5–8. See also Nicolás M. Perrone, *Investment Treaties and the Legal Imagination: How Foreign Investors Play by Their Own Rules* (Oxford, United Kingdom, Oxford University Press, 2021).

[97] The arbitration tribunal in *Urbaser* ruled that "it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law". *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partuergoa v. The Argentine Republic*, International Centre for Settlement of Investment Disputes case No. ARB/07/26, para. 1195.

[98] See, for example, *Chandler v. Cape* [2012] EWCA Civ 525; *Choc v. Hudbay Minerals Inc.* 2013 ONSC 1414; *Vedanta Resources PLC v. Lungowe* [2019] UKSC 20; *Four Nigerian Farmers and Milieudefensie v. Shell* ECLI:NL:GHDHA:2021:132, ECLI:NL:GHDHA:2021:133 and ECLI:NL:GHDHA:2021:134; and *Okpabi v. Royal Dutch Shell Plc* [2021] UKSC 3.

68. It is in this context that the “all roads to remedy” approach outlined by the Working Group in its 2017 report has direct relevance to address the asymmetrical nature of international investment agreements regarding access to remedy (see A/72/172, paras. 55, 56 and 75–78). For example, companies that are part of a multinational enterprise become “connected” when seeking protection under international investment agreements, but they claim to be “separate” when sued by affected communities for human rights abuses.[99] Similarly, while investors demand “fair and equal treatment” for themselves, they do not hesitate to invoke the agreements to defeat legitimate claims of rights holders to seek justice through other judicial or non-judicial mechanisms.

69. States could address this asymmetry by creating access to remedy pathways for affected communities within international investment agreements.[100] For example, States may negotiate agreements that expressly allow communities affected by investment-related projects – who, like investors, are third parties to the agreements – to pursue international arbitration claims against investors for human rights abuses. As noted below, while investor-State dispute settlement may not be an ideal mechanism to address human rights abuses related to investors, such an interim reform is necessary because the current mechanism of States filing counterclaims or communities submitting amicus briefs before arbitration tribunals has proved to be inadequate in securing justice for the affected rights holders.

70. Another option for contracting parties to an international investment agreement may be to incorporate a clause “to grant jurisdiction before their courts to plaintiffs from the other parties alleging to have suffered damages caused by a subsidiary that is owned or controlled by a company under their jurisdiction”.[101] This possibility is contemplated in article 17 of the Supplementary Act on Investments of the Economic Community of West African States, as well as the model bilateral investment treaty of the Netherlands. To make such provisions operational, the relevant States may need to put in place implementing legislation and remove other barriers to access to remedy in a transnational context. Under article 29 of the Supplementary Act on Investments, home States are required to ensure that their legal systems and rules allow for civil liability of investors for damages resulting from their investments in the territory of host States.

71. The rationale for such a provision, among others, lies in parity in access to an effective remedial mechanism. If courts in host States are not good enough for investors to enforce their legal rights, affected communities should not be forced to seek remedies there. Rather, they should be allowed an option to pursue claims in the home States of investors without being worried about overcoming the hurdles posed by the *forum non conveniens* doctrine and the separate legal personality principle.

E. Replacement of investor-State dispute settlement with a mechanism fairer for all

72. While some disputes between States and investors about investment are inevitable, investor-State dispute settlement does not provide a mechanism that is fair to all parties.

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[99] Pablo Agustín Escobar Ullauri, “Reconciling the rights of multinational companies under IIAs with the tort liability caused by their subsidiaries”, 19 December 2020.

[100] Penelope Simons and J. Anthony VanDuzer, “Using international investment agreements to address access to justice for victims of human rights violations associated with transnational resource extraction”, in *Corporate Citizen: New Perspectives on the Globalized Rule of Law*, Oonagh Fitzgerald, ed. (Montreal, Canada, McGill-Queen’s University Press, 2020), p. 279. See also Jose Daniel Amado, Jackson Shaw Kern and Martin Doe Rodriguez, *Arbitrating the Conduct of International Investors* (Cambridge, United Kingdom, Cambridge University Press, 2017).

[101] Pablo Agustín Escobar Ullauri, “Reconciling the rights of multinational companies under IIAs with the tort liability caused by their subsidiaries”.

The “system of appointment of arbitrators creates perverse incentives” and “there is no appeal mechanism to provide for consistency and a check on poor decisions”.[102] The practice of a “revolving door” also raises concerns about the integrity and independence of arbitrators.[103] Arbitration tribunals do not seem to give adequate attention to irresponsible conduct of foreign investors in clear breach of international standards.[104] Moreover, the mechanism does not offer any direct access to remedy for communities affected by investment-related projects. Nor is the investment arbitration affordable for all States parties, with an average cost of over $10 million.[105]

73. States, therefore, should replace the investor-State dispute settlement mechanism with an alternative system. A State-to-State dispute settlement process or establishing an international investment court are two of the alternatives currently being considered.[106] It would be critical, however, to ensure that the new mechanism does not inherit defects of the old system. The new mechanism should satisfy several key principles: it should be able to handle all investment-related disputes, be staffed with independent adjudicators, be accessible to marginalized or vulnerable communities, contribute to policy coherence by adopting a holistic view of disputes, deliver consistent decisions and have an in-built appeal system.[107] The effectiveness criteria outlined in principle 31 of the Guiding Principles could also provide useful guidance to develop a human rights-compatible dispute settlement grievance mechanism (see A/HRC/44/32).

V. Conclusions and recommendations

A. Conclusions

74. **Most international investment agreements protect investors and their rights to the exclusion of the rights of individuals and communities. They also constrain the regulatory ability of States to act robustly to discharge their international human rights obligations. Moreover, they offer investors a special privilege to enforce their rights through binding international arbitration, but do not provide a similar right to rights holders affected by investment-related projects. In short, international investment agreements, especially the old-generation treaties that represent the majority of agreements in force, not only embody imbalance and inconsistency but also incentivize investor irresponsibility. Systemic, holistic and transformative reforms of such agreements are urgently needed to ensure that they contribute to achieving inclusive and sustainable development.**

75. **There are of course limits to what international investment agreements could do to encourage investors to respect human rights and hold them accountable if they fail to be encouraged. However, States have not yet made full use of the potential of such agreements, even within these limits. In the present report, the Working Group unpacks the implications of principle 9 of the Guiding Principles and provides practical recommendations for harnessing the**

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[102] Sergio Puig and Gregory Shaffer, “Imperfect alternatives: institutional choice and the reform of investment law”, p. 408.

[103] Malcolm Langford and others, “The revolving door in international investment arbitration”, *Journal of International Economic Law*, vol. 20, No. 2 (2017), pp. 301–332.

[104] Nicolás Perrone, “The ‘invisible’ local communities: foreign investor obligations, inclusiveness, and the international investment regime”, pp. 19–21.

[105] Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen and Michael Waibel, *The Political Economy of the Investment Treaty Regime*, p. 87.

[106] UNCTAD, *UNCTAD’s Reform Package for the International Investment Regime*, pp. 55–58.

[107] Surya Deva, “Investors’ international law: beyond the present”, pp. 324 and 325.

power of international investment agreements to promote responsible conduct on the part of foreign investors.

B. Recommendations

76. **The Working Group recommends that States:**

(a) **Refrain from treating international investment agreements as a panacea for attracting foreign investment or achieving economic development;**

(b) **Harness the potential of international investment agreements to realize human rights and the Sustainable Development Goals, as well as to promote responsible business conduct;**

(c) **Terminate or reform urgently all existing international investment agreements in line with the recommendations made by UNCTAD and in the present report;**

(d) **Utilize the UNCITRAL Working Group III reform process to bring substantive and systemic changes to international investment agreements in a multilateral setting;**

(e) **Negotiate in future only such international investment agreements that are compatible with their international human rights obligations as well as national development needs and priorities;**

(f) **Build the capacity of officials negotiating international investment agreements and facilitate peer learning to enable them to take a more holistic approach to investment policymaking;**

(g) **Conduct, in line with the guiding principles on human rights impact assessments of trade and investment agreements, ex ante and ex post impact assessments of international investment agreements on human rights and the environment as well as on the regulatory space available to them under national and international laws;**

(h) **Define narrowly the meaning of "investment" and "investors" protected under international investment agreements;**

(i) **Extend protection under international investment agreements only to those investors who comply with applicable laws and practise responsible business conduct in line with the Guiding Principles and other relevant national, regional and international standards;**

(j) **Include explicitly in international investment agreements detailed public policy exceptions to justify regulatory interventions to protect human rights or the public interest more generally;**

(k) **Publish draft texts of international investment agreements and invite all stakeholders, including civil society organizations from all relevant jurisdictions, to provide comments before concluding such agreements;**

(l) **Replace investor-State dispute settlement with a dispute resolution mechanism that is fair, transparent, independent, predictable and accessible to all parties on an equal footing and operates consistently;**

(m) **Appoint adjudicators with expertise and experience in international law concerning human rights, labour rights and the environment and consider various diversity dimensions in making such appointments;**

(n) **Translate into practice their commitments related to the reform of international investment agreements made in national action plans on business and human rights.**

77. **The Working Group recommends that investors:**

(a) **Adopt an "investment for sustainable development" mindset;**

(b) **Take their human rights responsibilities seriously throughout an investment cycle irrespective of the location or context of an investment;**

(c) **Act consistently with their responsibility to respect human rights when pursuing arbitration claims against States or invoking international investment agreements to contest proceedings brought by affected communities to seek remedies for alleged human rights abuses;**

(d) **Conduct gender-responsive human rights due diligence, in meaningful consultation with all relevant stakeholders, prior to making an investment and throughout its life cycle;**

(e) **Comply with all human rights- and environment-related laws and other relevant international standards.**

78. **The Working Group recommends that adjudicators of investment-related disputes:**

(a) **Interpret international investment agreements in a holistic manner, considering in particular the international human rights obligations of States, the human rights responsibilities and obligations of investors and the human rights of individuals and communities;**

(b) **Invite affected communities and civil society organizations, or allow their request, to submit amicus briefs about any alleged adverse impacts of investment-related projects on human rights or the environment and attend arbitral proceedings;**

(c) **Invite expert witnesses, if needed, to provide guidance on human rights dimensions of investment disputes;**

(d) **Declare any actual or potential conflict of interest that may be seen to undermine their independence and impartiality.**

79. **The Working Group recommends that civil society organizations:**

(a) **Actively engage with States in negotiating international investment agreements that are compatible with their human rights obligations;**

(b) **Continue their advocacy to ensure that investors take their human rights responsibilities and obligations seriously and are held accountable for causing any harm to people or the planet.**