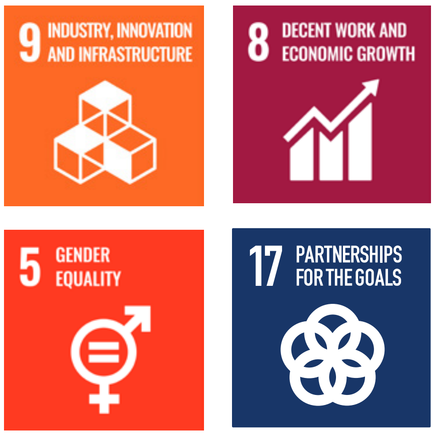
INTERNATIONAL INVESTMENT AGREEMENTS, INDUSTRIALIZATION AND THE RIGHT TO DEVELOPMENT

POLICY BRIEF FOR STATES



The principles and elements of the Declaration on the Right to Development (DRTD) mandate national and international development policies to create an enabling environment for development, thus making it an effective human rights tool to address obstacles posed by international investment agreements. Five key articles have particular bearing on investment protection provisions within international investment agreements: Article 2.3 on the right and duty of States to formulate appropriate national development policies; Article 3.1 on the primary responsibility of States to create national and international conditions favourable to the realization of the right to development; Article 3.3 calling on States to cooperate with each other to ensure development and eliminate obstacles to development, based on principles of human rights, sovereign equality, interdependence and mutual interest; Article 4.2 on the importance of sustained action to promote more rapid development of developing countries by providing them with appropriate means and facilities to foster comprehensive development; and, Article 8.1 highlights the need for economic and social reforms to address all social injustices and equality of opportunity for all people, particularly ensuring an active role for women in the development process.

Agenda 2030 also bears direct relevance to the challenges international investment agreements place on industrial development and economic growth. SDG 9 is focused on achieving inclusive and sustainable industrialization, in part by raising industry's share of employment and gross domestic product (GDP) by 2030 and to double their share in Least Developed Countries (LDCs). SDG 8 promotes sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all. SDG 17 on the means of implementation underscores in target 17.15 the respect States should have for each other's national policy space and leadership to implement policies for poverty eradication and sustainable development. Industrial policy is a potent example of a means of implementation, in that it refers to state-led efforts to direct the economy's production structure towards sectors that are expected to offer growth, employment, productivity and development opportunities. The integral link between industrialisation and development is reaffirmed by various UN processes beyond the SDGs in the Post-2015 Development Agenda, such as the Fourth UN Conference on the LDCs in the 2011 Istanbul Programme of Action and the General Conference of the United Nations Industrial Development Organization (UNIDO) in the 2013 Lima Declaration.

Within the context of a State's right to development, in order to facilitate national industrial development with a view to achieving sustainable development under the 2030 Agenda, there are specific steps that can be considered and taken by four categories of key stakeholders - States, international organisations, the private sector and civil society. Reassessment and reformulation of investor protection measures are imperative to any effort to reform international investment agreements. Such initiatives are already taking place within UNCTAD as well as policy discussions at regional and national levels. A key priority in such a reassessment of investor protections is ensuring the State's ability to regulate in the interest of human rights, environmental regulations and legislation necessary for sustainable development.

AMENDMENT OF INTERNATIONAL INVESTMENT AGREEMENTS

RECOMMENDATION 1

States can pursue the amendment of their investment treaties, which essentially requires that all treaty parties agree to renegotiate with the objective of reaching agreement on an amended text. Provisions on an established procedure are often provided in the text of treaties for the purpose of amendment. However, the absence of such provisions should not hinder an amendment process as long as treaty signatories are in agreement. Once the text is re-opened, States can use the opportunity to renegotiate the clauses that have been recognized as problematic. Through pursuing specific amendments to investor protection measures, States have the opportunity to identify which measures are adversely affecting, or have the potential to adversely affect national industrial and technological development. Amendments entail both positive and negative aspects. Positive elements include, for example, the potential for genuine modification of the international investment agreements, and an assurance that the State is willing to change an international investment agreement provision. In comparison to joint interpretations, amendments have a clearer legal force and are not as constrained by the existing international investment agreement text. Negative factors include, for example, the consumption of considerable resources and time, and a lengthy ratification process which could stall or prevent an international investment agreement from coming into force. Amendments comprise a partial approach when compared to replacing the entirety of an international investment agreement with a new treaty. In international investment agreements with more than one State, an amendment requires the agreement of all States, whereas a State may unilaterally withdraw from an international investment agreement.

INTERPRETATIONS OF INTERNATIONAL INVESTMENT AGREEMENTS

RECOMMENDATION 2

If investment provisions are drafted in terms found to be vague, broad or confusing to either State party, an interpretation or clarification may be sought. This will guide and direct arbitrators who will interpret the treaty in the future. According to the Vienna Convention on the Law of Treaties, interpretative statements can be made both before and after the treaty enters into force. Interpretations are easier than either amendments or termination of treaties since they do not require any form of ratification. They have been used by the North American Free Trade Agreement parties (US, Canada and Mexico) and subsequently accepted and applied by the North American Free Trade Agreement tribunals. Interpretations have both positive and negative aspects. On the positive side, for example, a ratification process is not needed. An interpretation is perceived as one of the most straight-forward ways to change the text of an international investment agreement. Some treaties contain a mechanism for interpretation that has already proved helpful. Negative aspects include, for example, the lack of clarity regarding the force or legitimacy tribunals will give to joint interpretations. Interpretations do not necessarily align with the goals of sustainable development and with the right to development, and it is not easy to agree on joint interpretations between States. Interpretations may not be as effective as amendments and those that are too broad may not be useful. Consistency can become an issue if different interpretations of the same provision across various international investment agreements are debated.

EXIT

RECOMMENDATION 3

States can legally terminate their investment treaties without any breach of international law. Unless either party gives written notice of termination, an investment treaty will stay in force for the duration specified in its text, typically 10 to 15 years. After the duration of its enforcement, either party is usually free to terminate the treaty. However, the 'survival clause' of a treaty allows it to continue in effect for another given period for existing investments. Often this period extends the enforcement of investment provisions for another 15 to 20 years. The critical problems associated with investment treaties and the investor-state dispute settlement mechanism in particular have stimulated a wave of actions from both developing and developed countries, with several countries deciding to unilaterally terminate their international investment agreements with other countries. In carrying out the decisions of amendment, interpretation or exit, governments need to bear in mind the most-favoured-nation clause which allows investors to 'treaty shop' among all other treaties the host State is signatory to. The most-favoured-nation clause can thus harm the effectiveness of reforms if a country only terminates or amends some of its investment treaties.

OPTIONS ON PERFORMANCE REQUIREMENTS

RECOMMENDATION 4

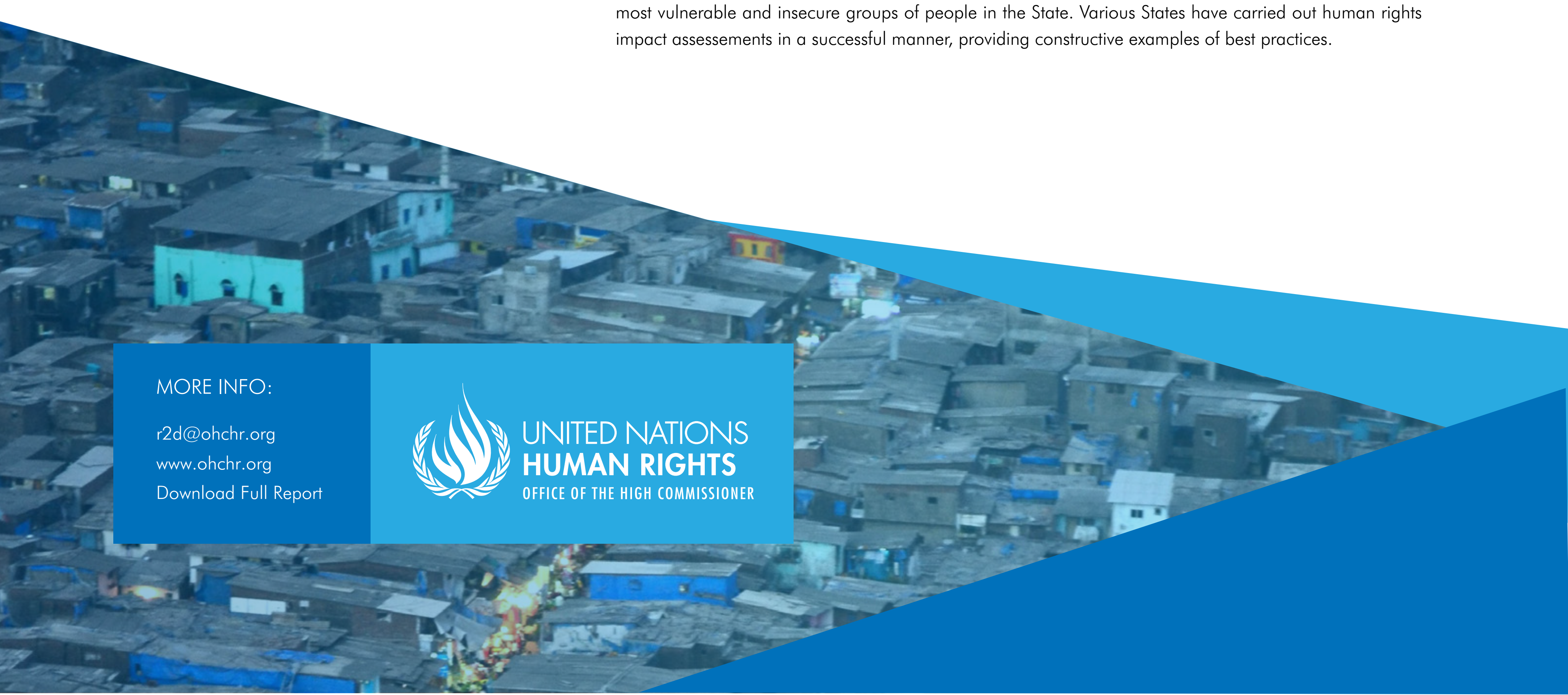
If investment provisions are drafted in terms found to be vague, broad or confusing to either. Legally, there is no obligation under international law to include a clause on performance requirements in international investment agreements. The most effective approach a State can take is to refrain from prohibitions or limitations to performance requirements when negotiating and agreeing to international investment agreements. This approach has the advantage of allowing States to retain the flexibility needed to pursue national policies for industrial and sustainable development. Where prohibitions on performance requirements are agreed upon in international investment agreements, States may decide to make certain stipulations, such as: (a) restrict only mandatory performance requirements rather than all of them; (b) expressly exclude national treatment and most favoured nation treatment from the scope of the prohibition on performance requirements; (c) exempt existing performance requirements in order to be able to maintain them, and safeguard future amendments made to existing measures; (d) create a list of sectors to which prohibitions on performance requirements do or do not apply (such an exercise requires analysis of sensitive and priority sectors for the host State); and, (e) specifically exclude prohibitions on performance requirements from the Investor-state dispute settlement mechanism.

HUMAN RIGHTS IMPACT ASSESSMENTS OF TRADE AND INVESTMENT AGREEMENTS

RECOMMENDATION 5

States can commission human rights impact assessments of the impacts of their IIAs on their human rights obligations at both the international and national levels. The UN Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements is a key instrument in this regard. Prior to recognition as a separate form of assessment, human rights impact assessements were considered as aspects of social impact assessments.

Human rights impact assessements have several advantages over social impact assessments, for example:(a) impact measurement according to legal obligations entrenched in international human rights instruments; (b) the interdependence and inter-relatedness of human rights, helps to assess multiple impacts (e.g. on health, education and housing simultaneously) rather than focus on single elements; (c) pressure on duty-bearers to act to protect the rights of 'rights-holders' and provide justifications for their policies in human rights terms; (d) engaging international and national human rights actors; (e) highlighting the importance of transparency, participation and empowerment in the process of conducting human rights impact assessements as well as in the negotiation and implementation of the international investment agreement itself; and, (e) focusing on social impacts on the most vulnerable and disadvantaged persons and groups in society. As such, the human rights impact assessement process shifts the focus from aggregate costs and benefits for the State as a whole to the impacts of the international investment agreements on the most vulnerable and insecure groups of people in the State. Various States have carried out human rights impact assessements in a successful manner, providing constructive examples of best practices.



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