

## Concept Note

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

29 April 2021, 15h00 – 17h00 CET

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#### 1. Background

Under the right circumstances foreign investment should support State efforts to “bring the SDGs and goals of the Paris Agreement to life for all people, everywhere.”<sup>1</sup> However, achievement of these objectives could slow down when the investor-State dispute settlement (ISDS) mechanisms included in international investment agreements (IIAs), such as bilateral investment treaties and investment chapters in free trade agreements, are used to challenge sovereign regulatory measures. The threat posed by investment-related claims also drives a ‘regulatory chill’ that hampers the ability of States to achieve the SDGs and advance human rights,<sup>2</sup> as well as to fulfill climate change commitments.

Similarly, the excessive compensations awarded by ISDS tribunals, and cost associated with the litigation stage, have impaired public expenditure intended to reduce inequality and promoting economic and social justice. Some of these arbitral awards have amounted to almost a third of the official aid for development received by developing States in 2018<sup>3</sup>.

Nevertheless, in the current scenario marked by the impact of the COVID-19 pandemic, foreign direct investment can become a valuable source of financing a better and more inclusive recovery, through human rights compliance. This potential could be realized through rethinking the international investment regime, including by reforming its substantive rules and standards; as well as of the ISDS mechanisms embedded in existing IIAs. The United Nations Guiding Principles on Business and Human Rights (the Guiding Principles), endorsed by the Human Rights Council in resolution 17/4 of 16 June 2011 recognizes that:

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<sup>1</sup> United Nations, UNSG Roadmap for Financing the 2030 Agenda for Sustainable Development (2019-2021) in <https://www.un.org/sustainabledevelopment/wp-content/uploads/2019/07/UN-SG-Roadmap-Financing-the-SDGs-July-2019.pdf>

<sup>2</sup> See Lorenzo Cotula, “Rethinking investment treaties to advance human rights”, International Institute for Environment and Development Briefing, September 2016. Available from <https://pubs.iied.org/17376IIED/>. 168. See also documents A/CN.9/WG.III/WP.149 and A/CN.9/WG.III/WP.151-153, available on the UNCITRAL website [https://uncitral.un.org/en/working\\_groups/3/investor-state](https://uncitral.un.org/en/working_groups/3/investor-state).

<sup>3</sup> In one of the most well-known ISDS cases, the arbitral tribunal awarded nearly USD 50 billion to the claimant investors, while the Official Development Assistance (ODA) received for 2018 amounted to USD 153 billion. See *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227

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.<sup>4</sup>

Therefore, there is a need for serious discussions on the objectives and a pro-development design of investment agreements for enabling and attracting foreign investment that adds value to the sustainable developmental processes of host States, promote human rights and responsible business conduct.

The Working Group on human rights and transnational corporations and other business enterprises (WGBHR) has conducted several virtual consultations with the objective of informing the WGBHR General Assembly Report focusing on providing practical guidance to States on negotiating human rights compatible IIAs in line with the UNGPs.<sup>5</sup>

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

In line with such efforts, this virtual consultation as a platform to identify and assess the different challenges developing countries face while negotiating or reforming IIAs and the compatibility with human rights obligations of the normative outcomes of such processes. The virtual consultation is convened by the WGBHR and organized by the South Centre.

## 2. Objectives of the Virtual Consultation

This virtual consultation aims to highlight and discuss some of the most common concerns and challenges that developing countries face in the promotion of responsible investment practices, including how to balance the rights and obligations of investors in IIAs and safeguarding the sovereign right of States to regulate in the public interest, particularly in the context of building back better in face of the COVID-19 pandemic.

### Issues to be addressed

#### **Panel I - Experiences and challenges from the negotiation of international investment treaties and their compatibility with international human rights law and Sustainable Development Goals**

The first panel will highlight the experiences and challenges that developing countries have faced and are facing in the negotiation of IIAs and their compatibility with international human rights law and the sustainable development goals.

Discussants will review the current state of play of existing IIAs and how a new generation of IIAs could achieve a better balance between promotion and protection of foreign investment,

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<sup>4</sup> United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN Doc. A/HRC/17/31, Principle 9.

<sup>5</sup> See: <https://www.ohchr.org/EN/Issues/Business/Pages/IIAs.aspx>

upholding human rights, achieving sustainable development and supporting developing states' COVID-19 response efforts.

**Panel II - Multilateral and regional efforts towards aligning international investment treaties and standards arising from international human rights law**

The second panel will consider the different efforts that multilateral and regional organizations have undertaken for the reform of existing IIAs, including for ensuring their compatibility with international human rights obligations.

Discussants will have the opportunity to identify future steps which could help support States' efforts to make their IIAs compatible with international human rights standards, and assist developing countries in achieving a better and fairer recovery from the COVID-19 pandemic.

**3. Agenda (tentative)**

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| <p><b>15h00-15h10</b></p> | <p><b>Welcoming Remarks</b></p> <ul style="list-style-type: none"> <li>▪ <i>Prof Carlos Correa, Executive Director, South Centre</i></li> <li>▪ <i>Prof Surya Deva, Vice-Chair, United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises</i></li> </ul>  |
| <p><b>15h10-15h20</b></p> | <p><b>Keynote Speaker</b></p> <ul style="list-style-type: none"> <li>▪ <i>H.E. Mr. Luis Gallegos, Chair of the United Nations Institute for Training and Research Board of Trustees and Former Minister of Foreign Affairs of the Republic of Ecuador</i></li> </ul>  |
| <p><b>15h20-15h40</b></p> | <p><b>Panel I - Experiences and challenges from the negotiation of international investment treaties and their compatibility with international human rights law and Sustainable Development Goals</b></p> <ul style="list-style-type: none"> <li>▪ <i>Rene Gonzalo Orellana Halkyer, Former Minister of Development Planning, Bolivia.</i></li> <li>▪ <i>Gladice Pickering, Executive Director, Ministry of Justice, Namibia</i></li> <li>▪ <i>Hamed El-Kady, International Investment Policy Officer at United Nations Conference on Trade and Development (UNCTAD).</i></li> </ul> |
| <p><b>15h40-16h00</b></p> | <p><i>Q&amp;A Session – First Panel</i></p>   |
| <p><b>16h00-16h20</b></p> | <p><b>Panel II - Multilateral and regional efforts towards aligning international investment treaties and standards arising from international human rights law</b></p> <ul style="list-style-type: none"> <li>▪ <i>Chantal Ononaiwu, Trade Policy &amp; Legal Specialist, Office of Trade Negotiations (OTN), CARICOM Secretariat.</i></li> </ul>  |

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|                    | <ul style="list-style-type: none"> <li>▪ <i>Roslyn Ng'eno, Senior Investment Expert, AfCFTA Negotiating Support Unit, Department of Trade and Industry, African Union Secretariat.</i></li> <li>▪ <i>Daniel Uribe, Lead Programme Officer, Sustainable Development and Climate Change Programme, South Centre.</i></li> </ul> |
| <b>16h20-16h40</b> | <b><i>Q&amp;A Session – Second Panel</i></b>  |
| <b>16h40-17h00</b> | <p><b>Concluding Remarks</b></p> <ul style="list-style-type: none"> <li>▪ <i>Prof Surya Deva, Vice-Chair, United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises.</i></li> <li>▪ <i>Prof Carlos Correa, Executive Director, South Centre.</i></li> </ul>     |

#### 4. Format of the Virtual Consultation

The virtual consultation will be open to developing countries' officials from Member States of the South Centre and the Group of 77 and China; other stakeholders may be invited as observers. The Consultation will follow the Chatham House Rule, meaning that participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), or that of any other participant, may be revealed.

The South Centre will prepare a report of discussions that could provide inputs to the Working Group on the issue of human rights and transnational corporations and other business enterprises and would be published by the South Centre and on the WGBHR webpage dedicated to the project.

#### 5. Contact Information and Registration

For further details or written inputs please contact **Mr. Daniel Uribe** ([uribe@southcentre.int](mailto:uribe@southcentre.int)) and **Mr. Danish** ([danish@southcentre.int](mailto:danish@southcentre.int)) or call to +41 22 791 80 50.

To confirm your participation, please use the following link: <https://bit.ly/2PQE0fb>