

IIAs QUESTIONNAIRE replies by the New Wind Association

State duty to protect human rights

1. Are you aware of any regulatory framework at the national or regional level requiring an integration of human rights provisions in IIAs?

Framework of legality requires states to respect, protect and fulfil universally all human rights as "states parties cannot derogate from the obligations under" their UN human rights treaties in any "investment treaties that they may conclude" (1) because "the realms of trade, finance and investment are in no way exempt from human rights" obligations.

States have to review all formulation of all investment "rules in order to ensure that these are consistent with existing treaties, legislation and policies designed to protect and promote all human rights". (2)

2. What mechanisms or processes should exist at the State level (e.g., inter-ministerial committee, ex ante human rights impact assessment) to assess and ensure that IIAs do not impact negatively the protection of human rights and the environment?

All ministries have to ensure that no human rights under their sectors can be adversely affected by investment agreements' provisions.

States shall by human rights impact assessments "identify any potential conflict between their obligations under the Covenant (ICESCR) and under trade or investment treaties, and refrain from entering into such treaties where such conflicts are found to exist". "The obligation to respect economic, social and cultural rights is violated when States parties prioritize the interests of business entities over Covenant rights" by "policies that negatively affect such rights." (3)

States have "to ensure that their international human rights obligations are considered as a matter of priority in their negotiations". In all formulations of investment rights "human rights norms must shape the process of international economic policy formulation". Rights on investment have to "address as a matter of highest priority the impact [...] on the most vulnerable sectors of society as well as on the environment." (4)

3. Do new generation IIAs adequately preserve domestic regulatory space available to States to meet their international human rights obligations? If not, what further changes in IIAs are desirable?

As the newest IIAs do not respect or fulfill what the UN human rights treaties require from states in respect to the corporations' international investments, states have to ensure in respect to investments that rights and obligations of economic activity become from economic human rights on adequate food, water, housing, health, safe environment, ensuring equally for all their means to subsist by work which sustains life, sustained only in its diversity - so that:

- As an activity is economic by how it sustains life, economic rights are rights to use lands, forests and waters to sustain life. And as our life also can not continue without life of diverse plants, animals, microbes, etc. with and by local regeneration of whose diversity people have adapted to live by their local life-heritages or cultures of economy, thus:

Economic rights are people's equal rights to use lands, forests and waters to sustain life as far as people's diverse cultures of economy by which the heritages of life can get life sustained for all in dignity and with life's regenerating diversity - fulfilling economic human rights for all people in culturally equal ways in respect to all their cultures of economy.

- **As far as investment is to be economic activity which does not just waste or consume away resources of life but sets them into life-sustaining, productive use, therefore:**

Right to invest in an area is right to set resources there in economic use that fulfils economic human rights - to food, water, health, housing, work and livelihood - in socioculturally equal ways sustaining area's life in its regenerating diversity - as far as it does not waste money or other resources of life by making them consumed for other purposes

4. How could old IIAs be reformed efficiently to make them compatible with States' international human rights obligations?

"The interpretation of trade and investment treaties currently in force should take into account the human rights obligations of the State, consistent with Article 103 of the Charter of the United Nations and with the specific nature of human rights obligations. States parties cannot derogate from the obligations under the Covenant in trade and investment treaties that they may conclude".

"Impacts on human rights of the implementation of the agreements should be regularly assessed, to allow for the adoption of any corrective measures that may be required" and "to ensure that mechanisms for the settlement of investor-State disputes take human rights into account in the interpretation of investment treaties or of investment chapters in trade agreements". (5)

5. How can States harness the potential of IIAs to accomplish important policy objectives such as achieving gender equality, protection of human rights and the environment, mitigation of climate change and realising the Sustainable Development Goals? Please provide examples if possible.

States have to derive all rights of investment from what sets the lands, waters, forests and life's diversity in them into hands of vulnerable and marginalised communities and women, who can use them economically to secure their rights to food, water, health, housing, work, livelihood and culture sustaining life in its regenerating diversity.

6. What special mechanisms or processes could be built-in in IIAs to safeguard human rights in cases where investment may take place in special economic zones or in conflict and post-conflict settings?

The rights to invest must be determined as international "co-operation, especially economic" by which each state has to set "the maximum of its available resources" to become used for "achieving progressively the full realization of the rights" to food, water, health, housing, work, livelihood, culture, etc. "by all appropriate means, including [...] legislative measures" (6), "directing the efforts of business entities towards the fulfilment of" such rights (7) also in SEZ/conflict areas.

7. Is the current Investor-State Dispute Settlement (ISDS) regime "fit for the purpose" to address complaints related to human rights abuses linked to investment projects? If not, what are the alternatives for a legitimate, transparent and effective dispute resolution system to address such complaints?

ISDS and (CETA-type) ICS have not been enacted to have due competence to ensure that human rights and obligations related to them or to the whole of the international law get fully respected so that each state shall also in international economic co-operation "to the maximum of its available resources" act for "achieving progressively the full realization of the" ESC human rights by all means, including" legislation - ensuring also such self-determination of people over their natural wealth and resources that "in no case may a people be deprived of its own means of subsistence". (8)

ISDS can take away resources from such realisation of ESC human rights which can currently get limited unduly in their implementation due to the ISDS and ICS orders even though the ICESCR requires that "the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights" to promote "general welfare in a democratic society". (9) No investment measure shall thus limit such "human well-being to which the international human rights instruments give legal expression" and in respect to which the investment and "trade liberalization must be understood as a means, not an end." (10)

As human rights of the majority of world's people are now crucially affected by the global economy, UN human rights treaty law has to be respected, binding and enforced also in global economy compliant to what UN human rights treaties require in respect to the activities of global economy.

8. Does the COVID-19 pandemic offer any lessons for reform of IIAs and/or ISDS? Please provide examples. Investors' responsibility to respect human rights.

Covid-19 shows the conditions in which few arbitrators could rule merely on basis of corporations' commercial rights huge amounts from states' health budgets to be transferred to the corporations.

Investors' responsibility to respect human rights

9. Are human rights provisions in existing IIAs effective in encouraging investors to respect all internationally recognised human rights? If not, what should be done to strengthen their efficacy?

Existing IIAs set up a process where the implementation of human rights get ordered to be subordinated under the priority of corporations' commercial rights.

Economic human rights shall be integrated to investment agreements not as exceptions but as the basis from which the rights on investments must be derived and determined as they can not be rights of dead coins or wares to move in markets but they can be only rights of human beings as equal in respect to their rights.

10. Should IIAs include legally binding human rights responsibilities of investors to prevent and mitigate potential negative impacts of their investment on individuals or communities? What measures and/or mechanisms could ensure that these provisions are complied with by investors in practice?

IIAs shall include for investors legally binding human rights responsibilities which shall be used in IIAs however maximally already in defining the right to invest so that human rights must determine what is investment and what is not and determine the rights to invest thus as derived from human rights and respective obligations on them so that:

Right to invest in an area shall be right to set resources there in such economic use that fulfils economic human rights to food, water, health, housing, work and livelihood in socioculturally equal ways sustaining area's life in its regenerating diversity - as far as that does not waste money or other resources of life by making them consumed for other purposes.

IIAs have to built mechanisms to control that only these kind of activities are treated as investments and have right to be carried out as investment. As far as a corporation tries to do something else in the name of its right to invest, it affects adversely human rights but also unfairly violates other actors' rights to invest in that area and has to be sanctioned to pay both for its adverse human rights impacts and for the damage it may cause to other actors' right to invest.

11. Should IIAs require investors to conduct a gender-responsive human rights due diligence (HRDD) or environmental and human rights impact assessment prior to, as well as during, their investment? If so, how could such processes ensure meaningful participation of impacted communities, particularly marginalized groups and individuals?

Assessment of all impacts on human rights, gender and environment where all the affected people can participate must be integral to the right to invest because:

One can genuinely invest in an area only as far as one sets resources there in such economic use that fulfils economic human rights in socioculturally equal ways sustaining area's life in its regenerating diversity. To duly verify whether an act would be an investment in an area requires thus an assessment by all people whose rights get affected or who are adapted to live by the regeneration of area's diversity of life.

12. How could IIAs encourage cohesive and human rights-compatible business practices (e.g., investors not lobbying States to lower human rights standards)?

When the rights to invest become revised and derived from what fulfils economic human rights in socio-culturally equal ways so that IIAs determine investment and rights to it accordingly and control their implementation accordingly and treating in culturally equal ways diverse cultures of economy this encourages human rights-compatible business practices.

Access to remedy

13. How do IIAs undermine the ability of States and/or affected communities to hold investors accountable for human rights abuses linked to investment-related projects?

When investors are now enacted in IIAs such rights to invest which are not derived from what realises equal economic human rights, investors are provided rights to act in ways which are not planned or targeted to realise equal economic human rights and are thus not secured to comply with human rights.

As far as investors are thus provided by IIAs rights to act in ways which do not comply with human rights, they can not be made duly accountable to comply with or to respect human rights.

14. Should IIAs provide mechanisms to allow individuals or communities affected by investment-related projects to seek effective remedy against investors? If so, what should the nature of such mechanisms and where should they be located (e.g., in host or home countries)?

Investments' host and home countries have to be involved in UN guided international arrangement which secures that individuals or communities affected by investment-related projects obtain effective remedy against investors so that both home and host countries have their own obligations to secure that investors respect human rights and that effective remedies are available as demonstrated in CESCR General Comment 24.

15. Have counter-claims brought by States against investors been effective in addressing human rights abuses linked to their investment? If yes, please provide details.

Counter-claims brought by States against investors have mostly not been effective and can not be effective as long as the current model of IIAs prevail.

16. What is your experience, if any, with filing amicus briefs before ISDS or dispute settlement processes? Does this process provide an effective opportunity for affected individuals and communities to seek remedy?

Under the current IIAs and ISDS models amicus briefs do not provide an effective opportunity for affected individuals and communities to seek remedy.

17. Are you aware of operational-level grievance mechanisms established by investors to address human rights concerns related to their investment? If so, are these mechanisms effective in terms of both process and remedial outcomes? What role could IIAs play in strengthening such mechanisms?

Grievance mechanisms established by investors are not impartial just procedures to address human rights concerns but can distort human rights.

Good practices and other comments

18. Are there any good practices regarding the integration of human rights issues in IIAs that you would like to share with the Working Group? Any other comments or suggestions about the forthcoming report are also welcome.

UN has to derive from economic human rights such definitions for economic activity and investment by which these will maximally implement economic human rights in ways which sustain life in its locally regenerating diversity and are socioculturally equal for all cultures of economy and for all heritages of life.

Notes and References

1. E/C.12/GC/24, para 13
2. E/2000/22, page 129, Annex VII, CESCR statement on WTO ministerial, paragraphs 2 and 6
3. E/C.12/GC/24, paragraphs 12-13
4. E/2000/22, pages 128-129, Annex VII, CESCR statement on WTO ministerial, paragraphs 2, 5 and 8
5. E/C.12/GC/24, para 13
6. ICESCR article 2.1
7. E/C.12/GC/24, para 24
8. ICESCR, articles 1.2 and 2.1
9. ICESCR, article 4
10. E/2000/22, page 129, Annex VII, CESCR statement on WTO ministerial, paragraph 6 and E/CN.4/Sub.2/2003/9, Human rights, trade and investment, Report of the High Commissioner for Human Rights, 2 July 2003, paragraphs 24 and 37