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**Input for Working Group on Business and Human Rights’ report on “Human Rights-compatible International Investment Agreements (IIAs)”**

We, **Dr. Jason Haynes** and **Dr. Antonius Hippolyte**, Co-Lecturers in International Investment Law at the University of the West Indies, Cave Hill Campus, Barbados, are pleased to make representations in respect of the call for submissions on human rights-compatible international investment agreements. Our submissions are made from the perspective of the English-speaking jurisdictions that comprise the Caribbean.

**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?**

No. There are currently no regulatory frameworks at the national or regional level that require the integration of human rights provisions in IIAs in the English-speaking Caribbean.

1. **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?**

Environmental Planning Units play an important role in ensuring that investors conduct environmental impact assessments thereby reducing the possibility of environmental degradation caused by the investors’ investment.[[1]](#footnote-1) As such, greater emphasis should be placed on environmental matters as a precondition for securing planning permission and other related licenses and permits.

Labour Departments should also be established to ensure that the employment rights of locally engaged staff are fully respected, including the right to fair wages. Additionally, National Human Rights Commissions, or, at the very least Ombudsmen, should be established to ensure that investors’ conduct which is inconsistent with human rights principles are appropriately recognised and addressed. Meanwhile, National Investment Authorities/agencies should be established to ensure that investors interests are appropriately balanced with the interests of the state. These agencies should also sponsor legislation which make the principles of corporate social responsibility enforceable and create mechanisms to monitor and ensure investor compliance.

Guyana’s recently concluded BIT with Brazil provides, in Article 18, for the establishment of a Joint Committee, whose responsibilities include supervising the implementation and execution of the agreement, presumably including monitoring investors’ compliance with labour and health regulations under Article 17. The Joint Committee also has power to establish ad hoc working groups, which may presumably assist in ensuring that the IIA does not operate to negatively impact the protection of human rights, labour rights and the environment. The National Focus Points or Ombudsperson, established by Article 19, may presumably also assist in this respect since its role is administer and monitor the implementation of the agreement.[[2]](#footnote-2)

1. **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?**

In the English-speaking Caribbean, very few new generation IIAs adequately preserve States’ domestic regulatory space so as to enable them to meet their international human rights obligations.

Guyana’s BIT with Brazil, in Article 17, makes it clear that investors are obliged to comply with certain “voluntary principles and standards for a responsible business conduct and consistent with the laws adopted by the Host State receiving the investment”, namely, (b) “respect for the internationally recognized human rights of those involved in the enterprises' activities”; and (e) “refrain from seeking or accepting exemptions that are not established in the legal or regulatory framework relating to human rights, environment, health, security, work, tax system, financial incentives, or other issues.”

The agreement goes on to state, in Article 17(2), that “the Parties recognize that it is inappropriate to encourage investment by lowering the standards of their labour and environmental legislation or measures of health. Therefore, each Party guarantees it shall not amend or repeal, nor offer the amendment or repeal of such legislation to encourage the establishment, maintenance or expansion of an investment in its territory, to the extent that such amendment or repeal involves decreasing their labour, environmental or health standards. If a Party considers that another Party has offered such an encouragement, the Parties will address the issue through consultations.”

So whereas other Caribbean States could have used the Brazil-Guyana BIT as a model in their future negotiation of IIAs, the challenge with the foregoing principles is that they are voluntary. In addition, Article 25(3) provides that Article 15, which addresses corporate social responsibility and Article 17(2) which make provision for investors compliance with environment, labour and health standards may not be subject to arbitration.

Article 13 of the Guyana – Brazil BIT also expressly provides that measures taken to preserve public order (presumably the protection of human rights, if broadly construed), if necessary, may not be give rise to the state’s liability if these measures violate the standards of protection outlined in the BIT.

1. **How could old IIAs be reformed efficiently to make them compatible with States’ international human rights obligations?**

Old BITs could be reformed to make them compatible with States’ international human rights obligations by:

1. Expressly fleshing out as part of the content of the legality requirement an obligation on investors to comply states’ domestic laws, including human rights obligations directly applicable (in Monist jurisdictions) or those that have been incorporated into domestic law (in Dualist jurisdictions).
2. Expressly including in the precluded measures/security interest exception reference to the state’s international human rights obligations (instead of simply referring to “public order”).
3. Including provisions which prohibit forced or child labour or human trafficking in supply chains in IIAs.
4. Including provisions which account for the establishment of internationally comparable minimum livable wages in IIAs. For instance, the U.S. Department of State, for several years, advertised Saint Lucia as an investment destination with a low minimum wage.

1. **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.**

BITs may harness the potential of IIAs to accomplish important policy objectives by:

1. Expressly stipulating, in the preamble of said instruments, that their objective is, in part, to assist in the achievement of gender equality, protection of human rights and the environment, mitigating climate change and realizing sustainable development goals. In this way, tribunals, when interpreting BITs, may have regard to the object and purpose of said instruments, in accordance with Article 31 of the Vienna Convention on the Law of Treaties, as confirmed in **Lemir v Ukraine** **ICSID Case No. ARB/06/18 (**which concerned the protection of cultural heritage).
2. Expressly including provisions to the effect that investors must comply with the state’s domestic laws on gender equality, protection of human rights and the environment, mitigating climate change and realizing sustainable development goals. In addition, as Guyana and Brazil have done in their BIT, expressly stipulating that the States Parties would not lower their standards in this connection in order to encourage investment.
3. Expressly include in the essential security/precluded measures exception a provision that necessary state measures aimed at achieving these objectives would not constitute a breach of investor protection standards, if, of course, they are non-discriminatory and proportionately applied.
4. IIAs should carve out an exception to the general prohibition against performance requirements to the effect that measures taken to protect gender equality will not constitute an unlawful gender requirement.
5. **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?**

IIAs should include an express provision to the effect that the State would not lower its human rights standards to accommodate investors, and that investors are required to comply with all domestic laws which touch and concern their investment, including human rights laws.

The state should make it a binding undertaking that the investor will comply with human rights obligations as it relates to matter such as forced labour, child labour human trafficking etc, before being admitted to the special economic zone.

1. **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?**

The current Investor-State Dispute Settlement is not fit for the purpose of addressing complaints related to human rights abuses linked to investment projects. The extant system is asymmetrical in nature, and therefore privileges the interests of investors vis-a-viz their relations with host states. In so far as human rights matters are concerned, it is only where jurisdictional clauses are broadly drafted that tribunals are able to countenance counter-claims. In **Pezold v Zimbabwe**, the ICSID tribunal held that human rights have no relevance in investment law.[[3]](#footnote-3)

Although the tribunal in the **Urbaser v Argentina[[4]](#footnote-4)** was prepared to accept jurisdiction over Argentina’s counterclaim based on human rights and was even prepared to go as far as to suggest that the right to water was a human right under international law, it stopped short of finding that the investor was liable for a breach of that right. The tribunal’s ruling was limited to recognizing the existence of positive and negative obligations imposed by international human rights law on the state but failed to go as far as to suggest that investors may be directly bound by the obligations imposed by international human rights law.

In addition to what has been suggested above at question 5, one useful way of rebalancing the extant asymmetrical approach of international investment law might be for home states to place human rights obligations (through the common law) on their investors who invest abroad. This arose as a possibility in the recent Canadian Supreme Court decision of **Nevsun Resources Ltd. V. Araya SCC 5**, a striking out application, in which the Supreme Court of Canada held, in a 5–4 decision, that a private corporation may be liable under Canadian law for breaches of customary international law committed in other countries.[[5]](#footnote-5)

1. **Does the COVID-19 pandemic offer any lessons for reform of IIAs and/or ISDS? Please provide examples.**

Yes, Covid-19 has demonstrated that the asymmetrical nature of old BITs does not augur well for developing countries, and Caribbean states, in particular. The failure of most BITs to create a sui generis exception for public health related emergencies (most regional BITs do not contain an essential security exception) is cause for concern as it means that the customary international law standard of necessity would apply in the event of a claim brought by an investor. This standard requires a higher threshold to be proved by respondent states; namely that the measure in question was the only way to achieve the objective of security public health, which may pose serious challenges for Caribbean countries, which have adopted a range of measures,[[6]](#footnote-6) including:

* Providing for the compulsory requisitioning of medical supplies, buildings and transportation facilities
* Restrictions on entry of management/staff
* Closure of businesses
* Radical alteration of legal/regulatory landscape e.g., restrictions on transfer of funds outside of jurisdiction
* Revocation of licenses / permits
* Revocation / suspension of concessions
* Imposition of penalties for breaches of covid-19 protocols (arrests, imprisonment and fines)
* Imposition of electronic monitoring and reporting requirements
* Seizure of business equipment without compensation

Moreover, Caribbean countries, in negotiating future IIAs should negotiate IIAs which contain emergency exceptions. Therefore, in times of international emergencies such as that posed by the COVID-19 pandemic, states would be empowered by such IIAs to make recourse to emergency measures to protect their domestic space in light of such emergencies, without the host-state becoming liable compensate to investors.

**INVESTORS’ RESPONSIBILITY TO RESPECT HUMAN RIGHTS**

1. **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?**

No. This has not been the case principally because these human rights provisions, wherever they exist, are couched in merely hortatory terms. The voluntary nature of these rights provide little incentive to recalcitrant investors who might be relentless in their pursuit of economic value for their investment at all cost.

One way to correct this approach is to include a broad jurisdictional clause that allows for host states to bring counter-claims against investors (in respect of human rights breaches), and to possibly also create human rights carve outs/exceptions as part of the essential security exception in BITs. Moreover, a more radical option for reform may be for the rules regulating investment tribunals and/or IIAs to be augmented to provide for host-states to bring suit against foreign investors in respect human rights abuses, if not for other investment related matters.

1. **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?**

Yes. Without these legally binding human rights responsibilities, investors will have very little incentives to monitor and control the adverse impact of their investment activity in host states. Host-states may establish human rights monitoring committees, which derive their jurisdiction by IIAs, whose mandate it is to ensure investors’ compliance with the obligations set out by IIAs as it relates to human rights and to provide such committees with the jurisdiction to impose penalties for non-compliance.

1. **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?**

Yes. Absolutely, IIAs should require investors to conduct gender-response human rights due diligence or environmental and human rights impact assessments. This may be achieved through making this an explicit requirement in IIAs, or, in the alternative, affording National Investment Authorities the power to reject applications for admission made by investors who do not undertake to act accordingly. Perhaps, also, performance requirements should be included in BITs (at the admission phase) so as to ensure that gender, human rights and environmental matters are properly taken into account by investors when making investments.

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

IIAs should require that investors’ investments are human rights compliant as a condition of admission. For instance, Antigua’s Investment Authority Act, which carves out labour, environmental and related public interest exceptions.

IIAs can expressly place an obligation on the state not to lower human rights standards to encourage investors (as Guyana’s BIT with Brazil has done), and/or deny investors IIA protection, similar to the denial of benefits clauses contained in IIAs, if they do not comply with human rights standards.

**ACCESS TO REMEDY**

1. **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?**

IIAs certainly undermine the ability of States and/or affected communities to hold investors accountable for human rights abuses linked to investment-related projects because they are asymmetrical in nature in that they do not allow the host state to bring a claim against the investor in international investment law (for instance for human rights abuses) similar to the way in which the investor can bring a claim against the host-state. Although tribunals may deny jurisdiction where investors act inconsistently with host state’s laws (including on human rights), there have been very few instances in which this approach has been countenanced, as most tribunals (e.g. **South American Silver v Bolivia** **PCA Case No. 2013-15**) tend to rule that the host state has not shown that the alleged violations went to the essence of the investment such that it must be considered illegal. Similarly, at the merits phase, where human rights abuses are alleged, tribunals would much prefer to make a finding of contributory negligence than to outrightly rule against investors.

1. **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)?**

Yes. Certainly. IIAs should provide mechanisms to allow individuals or communities affected by investment-related projects to seek effective remedy against investors. This could be achieved through an express requirement stipulated in the IIA that where human rights abuses are alleged, the matter must be resolved in the domestic courts of the host state instead of arbitration, which will afford private persons affected by investors’ conduct standing in domestic courts. Furthermore, home states’ courts, as the case of **Nevsun v Arya** demonstrates, also have an important role to play in fashioning sui generis causes of action/remedies to hold investors liable for human rights abuses committed by investors in the host state. Perhaps, a provision which has similar effect can be inserted in IIAs.

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

Very few counter-claims have been brought by states to date against investors. Sadly, in the vast majority of these cases, no revolutionary outcome has been achieved. In **Urbaser v Argentina ICSID Case No. ARB/07/26**, for example, although the tribunal accepted jurisdiction over the claim by the state regarding the investor’s breach of the right to water, it did not go as far as to rule that international human rights obligations, including the right to water, are directly binding on foreign investors in the host state. That said, the tribunal seemed to have left the door ajar for countenancing a possible future counter-claim where a negative obligation imposed by international human rights law might have been breached by a foreign investor.

1. **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?**

While we have not filed any amicus briefs before ISDS to date (principally because there have been very few cases involving Caribbean parties), we believe that these briefs provide some, even if limited, opportunity for affected individuals and communities to seek a remedy. The challenge with these briefs, however, is that submissions made are necessarily restricted to the matters canvassed by the main parties to the dispute; there is no entitlement that, even if the point raised in the brief is an important one, that it will be countenanced by the tribunal; and where a settlement is arrived at between the parties or for some other reason the proceedings are terminated, amicus becomes of little practice utility.

1. **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?**

No. We are not aware of any such mechanisms adopted by investors investing in the English-speaking Caribbean. Normal grievance procedure usually applies, as mandated by domestic employment law provisions, and does not generally relate to concerns raised by persons who are not employed by the relevant company.

**GOOD PRACTICES AND OTHER COMMENTS**

1. **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**.

Brazil BIT with Guyana’s (as well as Brazil’s BIT with Suriname) provides a good starting point for the integration of human rights into IIAs. The decision of **Nevsun Resources v Arya** is also a potentially important one, as it could significantly influence the creation of new torts in other jurisdictions that seek to hold investors liable for human rights abuses committed in host states.

1. Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya, ICSID Case No. ARB/15/29 [↑](#footnote-ref-1)
2. The BIT between Brazil and Suriname, which is non-English speaking but also a Caribbean Community (CARICOM) member state contains virtually the same provisions as the Brazil Guyana BIT. [↑](#footnote-ref-2)
3. Bernhard von Pezold v Zimbabwe, Case No. ARB/10/15. See also Border Timbers Limited and Others v Zimbabwe, ICSID Case No. ARB/10/25 Procedural Order 2 at 57 – 59; [↑](#footnote-ref-3)
4. Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26 [↑](#footnote-ref-4)
5. Jason Haynes, ‘The confluence of national and international law in response to multinational corporations’ commission of modern Slavery: Nevsun Resources Ltd. V. Araya’ (2020) Journal of Human Trafficking 1 – 10 <https://www.tandfonline.com/doi/full/10.1080/23322705.2020.1832785> [↑](#footnote-ref-5)
6. Barbados Emergency Management (Covid-19) Order, 2020; Grenada Emergency Powers (COVID-19) (No. 3) Regulations; Jamaica Disaster Risk Management (Enforcement Measures) (No. 6) Order, 2020; St Lucia Covid-19 (Prevention and Control) Bill; Trinidad And Tobago Public Health [2019 Novel Coronavirus (2019-ncov)] (NO. 29) Regulations, 2020; Guyana Public Health Ordinance, Cap. 145; Belize Quarantine (Prevention of the Spread Of Infectious Disease) (Covid-19) Regulations, 2020; Antigua and Barbuda Public Health Act (Dangerous Infectious Disease) (Amendment) (No. 6) Regulations 2020 [↑](#footnote-ref-6)