## The Right to Development in International Investment Law

The Expert Mechanism on the Right to Development is seeking input for its study on the Right to Development in International Investment Law. The areas on which contributions are requested are set out in the Questionnaire on the Right to Development in International Investment Law, which is contained in the annex.

In addition, the EMRDT welcomes offers to act as **voluntary advisors** to the study. The views of the circle of advisors will be sought at various stages of the production of the study.

### Objective of the Study

This study will explore the current and potential relevance of the right to development and sustainable development in international investment law. It will do so in the context of: (a) domestic obligations of each state to protect the human rights of its population, not only economic, social and cultural rights but also civil and political rights, as well as the right to development, (b) the role of investors as duty holders in complying with human rights obligations in the context of international investment law, and (c) the obligations of international cooperation and advancement of sustainable development and goals by states when entering in international investment treaties or agreements.

Related to the above, the study will consider the role of *amicus curiae* in the advancement of sustainable development in international investment law. It will also address the question of whether arbitrators should have a proven record of human rights expertise (including in sustainable development goals) as a pre-requisite to their appointment to adjudicate investment disputes, which raise human rights and sustainable development goals.

### Method

There will be both a desk-study and fieldwork. The **desk-study** will look at, amongst other things, state practices and jurisprudence arising out of existing trade agreements and bilateral investment treaties, the emergence of Investment Cooperation and Facilitation treaties as well as Model BITs.

The **fieldwork** will include site visits and/or interviews with relevant actors, including, amongst others:

1. states that have established good practices by incorporating sustainable development in their new investment treaties or their Model BITs;
2. investors that have expressed willingness to engage with sustainable development goals in their foreign investments;
3. local stakeholders, the consultation of whom may be essential to the realization of the Right to Development; and
4. intergovernmental organizations whose input is required in order to enhance the capacity of civil society to engage with human rights issues, and particularly sustainable development, in the context of international investment disputes and connected disputes.

### Projected Timeline

Please note that this projected timeline may be subject to change due to COVID-related or other circumstances:

* Selection of the sites for the fieldwork: at October 2021 EMRDT session;
* Presentation first draft desk-study: at April 2022 EMRDT session;
* Fieldwork: throughout 2022.
* Presentation first draft site-visit study: at October 2022 EMRDT session;
* Presentation full draft: at April 2023 EMRDT session; study finalized end of April 2023 (= end of current EMRDT term);
* Submission of the study to the Human Rights Council: subsequently, in 2023.

### Annex: QUESTIONNAIRE ON THE RIGHT TO DEVELOPMENT IN INTERNATIONAL INVESTMENT LAW

*In answering the questions below, please provide reasons for your answers and identify any International Investment Agreements (IIAs) which support your view.*

### Sustainable Development and the Right to Development (RtD) in IIAs

1. Are you aware of IIAs which promote and channel investment that contributes to sustainable development? If so, please give examples.
2. Please give examples of IIAs, which:
   1. allow for the advancement of sustainable development goals;
   2. undermine the advancement of sustainable development goals;
   3. promote international cooperation; and/or
   4. impede international cooperation.
3. Should IIAs withhold protections or other benefits from investors whose investments undermine and/or do not advance sustainable development and sustainable development goals?
4. Should IIAs include provisions obliging investors to advance sustainable development?
5. Should IIAs expressly impose a duty on the state to do the following, which may also give rise to a defence for a state to a claim by an investor:
   1. advance sustainable development;
   2. advance sustainable development goals; and/or
   3. implement the right to development?
6. In your opinion, which if any of the duties listed above at 5.1 to 5.3 would:
   1. help to protect the investor’s right to stability;
   2. undermine the investor’s right to stability; or
   3. have no effect on the investors’ right to stability?
7. Should IIAs define ‘investment’ to include a requirement that the investment be in line with sustainable development goals?
8. Should IIAs expressly list types of investment to which they do not afford protection? If so, which types of investment should be included in that list?
9. Should IIAs impose a duty on investors to undertake a ‘sustainability’ impact assessment prior to making their investments? If so, which particular aspects of sustainable development should that include?
10. Should IIAs expressly render investors liable before the courts of their home state for any breach of human rights committed by them in the host state?
11. Do existing IIAs reflect the right to development? If they do, please provide examples.
12. Can states invoke the right to development in their regulatory capacity vis-à-vis foreign investors? If not, please explain why.
13. Should states be able to invoke the right to development in their regulatory capacity vis-à-vis foreign investors?
14. Should IIAs expressly refer to the right to development? If so, how?
15. Should states’ right to regulate include an obligation to consult? If so, whom?
16. Should future IIAs expressly require that before permitting a foreign investor to make an investment in its territory, a state must consult stakeholders in their own civil society? If so, please specify those categories of investment and types of stakeholder.

### Amicus Curiae and Human Rights

1. Are interventions by amicus curiae an effective way of promoting human rights and sustainable development in international investment law? If not, what could be the effective ways?
2. In your opinion, what should happen to the role of amicus curiae in international investment law and why:
   1. stay as it is;
   2. increase; or
   3. decrease?

### Arbitrators and Human Rights Expertise

1. In your opinion, do arbitrators in investor-state disputes generally possess sufficient qualifications, experience or expertise to determine human rights issues which may be raised in the dispute?
2. Should a proven record of human rights expertise (including in sustainable development goals) be made a necessary requirement for any arbitrator to be appointed to adjudicate in:
   1. investor-states disputes; and/or
   2. inter-state investment disputes?