

THE DANISH  
INSTITUTE FOR  
HUMAN RIGHTS

A HUMAN RIGHTS  
BASED APPROACH  
TO THE MEANS OF  
IMPLEMENTATION OF  
THE SUSTAINABLE  
DEVELOPMENT GOALS



## A HUMAN RIGHTS BASED APPROACH TO THE MEANS OF IMPLEMENTATION OF THE SUSTAINABLE DEVELOPMENT GOALS

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## ABBREVIATIONS

AAAA	Addis Ababa Action Agenda
ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ADB	Asian Development Bank
AEOI	Automatic Exchange of Information
AMLD	Anti-Money Laundering Directive
ATAF	African Tax Administration Forum
ATI	The Addis Tax Initiative
BEPS	Base Erosion and Profit Shifting
BITs	Bilateral Investment treaties
CICPPP	Committee on Innovation, Competitiveness and Public-Private Partnerships
CRS	Common Reporting Standard
CSOs	Civil society organisations
DAC	OECD Development Assistance Committee
DRM	Domestic revenue mobilisation
DSF	World Bank-IMF Debt Sustainability Framework
ECA	Export credit agency
ECOSOC	Economic and Social Council
EIB	European Investment Bank
ESR	Economic and social rights
EU	European Union
FDI	Foreign direct investment
FfD	Financing for Development
FTA	Free trade agreement
GDP	Gross Domestic Product
GNI	Gross National Income
HIPC	Heavily Indebted Poor Countries
HGA	State-investor contract or host-government agreement
HLPF	High-Level Political Forum
HRBA	A human rights-based approach
IESCR	International Covenant on Economic, Social and Cultural Rights
IFC	International Finance Corporation
IFFs	Illicit Financial Flows
IFI	International financial institution
IMF	International Monetary Fund

IPR	Intellectual property rights
ISDS	Investor-State Dispute Settlement
MDRI	Multilateral Debt Relief Initiative
MOI	Means of Implementation
NGO	Non-governmental organisation
ODA	Official Development Assistance
OECD	Organisation for Economic Cooperation and Development
OHCHR	Office of the High Commissioner for Human Rights
PPPs	Public Private Partnerships
PSI	Private Sector Instruments
SADC	South African Development Community
SIDS	Small-island developing States
SDGs	Sustainable Development Goals
TRIPS	Trade-Related aspects of Intellectual Property
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNECA	United Nations Economic Commission for Africa
UNECE	United Nations Economic Commission for Europe
UNGP	United Nations Guiding Principles on Business and Human Rights
WATAF	West African Tax Administration Forum
WTO	World Trade Organisation

## EXECUTIVE SUMMARY

The 2030 Agenda and the first 16 Sustainable Development Goals cannot be effectively realised without the Means of Implementation that are detailed in SDG 17. The “Means of Implementation” are a mix of enablers of financial resources to support the SDGs, as well as systemic issues. Together, they constitute a set of tools and resources that need to be achieved if the SDGs are to be realised by 2030.

Using human rights standards and principles to guide the Means of Implementation can inform and support more equitable outcomes and effective Means of Implementation. Moreover, there are risks that inadequate consideration of the human rights dimensions and implications of the Means of Implementation may undermine efforts to achieve the SDGs. A human rights-based approach to the Means of Implementation is therefore needed. This report explores some of the issues dealt with by SDG17 from a human rights perspective.

### 1. DOMESTIC RESOURCE MOBILISATION

In order to effectively contribute to the realisation of the SDGs and human rights, domestic resource mobilisation must be based on tax reforms that:

- Raise more revenue for states (in line with SDG target 17.1.)
- Decrease or at least not increase inequality (In line with SDG 10)
- Promote human rights and not in themselves cause further human rights violations

Specifically, states need to:

Improve **tax transparency** through, among other things, public registers of beneficial ownership; mandatory public country-by-country reporting; and constructive engagement in automatic exchange of financial information between countries.

Fight **tax avoidance** by reviewing tax treaty networks to ensure they don't facilitate tax avoidance; removing any tax haven features from their tax laws; and ensuring that tax authorities are adequately resourced to fight tax avoidance.

Improve **domestic tax collection** by broadening the tax base; ending discretionary tax incentives; improving wealth taxes; designing tax policies that promote equality

(including gender equality); and taking human rights impacts into account when drafting new tax policies.

## 2. INVESTMENTS

The UN Guiding Principles on Business and Human Rights firmly establish the relevance of international human rights law and due diligence to **investment laws and policies**, which needs to be taken into account for the implementation of SDG targets 17.3 on foreign direct investment and 17.5 on investment promotion regimes. Indeed, investment law and policy frameworks must align with countries' international human rights obligations and play a positive role in achieving the 2030 Agenda.

To this end:

- **Licensing and state investor contracts** should be compatible with human rights standards, as part of ensuring that they contribute meaningfully to sustainable development.
- **Bilateral Investment treaties (BITs)** need to be negotiated in a transparent manner, contain human rights clauses and provide for access to remedy for rights-holders.
- **International investor-state dispute settlements (ISDS)** disputes are adjudicated before arbitral tribunals, with the resolution process being binding, non-judicial and private. This can be quite problematic and ISDS processes should be reformed to have the same accountability safeguards, impartiality and independence as domestic courts of law.
- **International Financial Institutions** must ensure that performance standards for projects are fully aligned with international human rights standards and the due diligence provisions outlined in the UN Guiding Principles on Business and Human Rights.

## 3. INTERNATIONAL TRADE

**International trade** is another key area of the Means of Implementation and is covered by SDG targets 17.10 on promoting a universal, rules-based, open, non-discriminatory and equitable multilateral trading system; 17.11 on significantly increase the exports of developing countries; and 17.12 on duty-free and quota-free market access for all least developed countries. **Human rights perspectives on trade agreements** mirror many of the issues also raised with regard to investment agreements, including lack of transparency of negotiations, lack of policy coherence between trade objectives and human rights and sustainable development objectives, and adverse human rights impacts resulting from trade agreements.

While international trade can result in economic growth and positively contribute to improved living standards, there are also several human rights issues that need to be considered:

- **Intellectual property rights** pose particular human rights challenges. The WTO's Agreement on Trade-Related aspects of Intellectual Property (TRIPS) sets out the minimum standards of intellectual property protection to be provided by members regarding copyright, patents, trademarks etc. as the Agreement also provides for enforcement and dispute resolution. However, as TRIPS can impact the availability of medicines in poorer countries and have an impact on the right to health as well as the implementation of SDG 3.
- **Agricultural trade liberalisation** and expansion of international trade in agricultural commodities can have growth-enhancing effects. However, these benefits should be balanced against potential adverse impacts on the right to food. It has therefore been argued that the international trade regime needs to do more to recognise the specific characteristics of agricultural products, as opposed to considering these to be simply another type of commodity.
- The **dispute resolution mechanism of the WTO** involves case-specific panels with the priority to settle disputes, preferably through a mutually-agreed solution, within one year. Transparency must be improved, and WTO law must evolve and be interpreted consistently with other bodies of international law, including human rights law, to promote consistency between WTO dispute resolution processes and human rights.

#### 4. OFFICIAL DEVELOPMENT ASSISTANCE (ODA)

**Official Development Assistance (ODA)** is dealt with in SDG target 17.2. A human rights-based approach to development cooperation has been formally adopted by a number of countries and organisations, including the United Nations. ODA can implicitly or explicitly be spent to support the realisation of human rights.

Human rights compliance can also be a condition for ODA to be provided. In essence, this means that sustained violations of human rights may lead to a reduction or withdrawal of development assistance. For example, the European Union has included human rights clauses into its development agreements since the 1990s. However, such conditionality policies have been challenged both on the grounds of undermining effectiveness as well as violating the self-determination of receiving countries.

To ensure that ODA contributes to human rights, states should:

- Take a **human rights-based approach to ODA**, including through the integration of principles such as transparency, participation and accountability;
- Ensure that **ODA is spent on supporting the realisation of human rights**, including projects and initiatives that relates directly to specific human rights obligations.

#### 5. PUBLIC DEBT

Excessive **public debt** and debt repayments can limit the amount of funds states have to finance SDG and human rights interventions. SDG target 17.4. explicitly recognises this and outlines measures for reducing debt distress for highly indebted poor countries.



Protracted high levels of indebtedness can lead to constraints on the finance available for human rights and development interventions and undermine national ownership of development strategies. When economic policy is effectively prescribed by international financial institutions, accountability of the government is towards creditors rather than the population.

Public debt management should be guided by a human rights-based approach, including:

- The systematic integration of **human rights impact assessments** in design of domestic economic reforms introduced to deal with growing public debt, and in debt sustainability assessments and restructuring efforts;
- Principles of **shared responsibility and creditor accountability**: human rights due diligence for lenders and borrowers, mutual responsibility to remedy in situations of unsustainable debt;
- **Safeguards and structured mechanisms for insolvency to protect states.**

## 6. PUBLIC PRIVATE PARTNERSHIPS (PPPS)

An integral part of implementing the SDGs are **Public Private Partnerships (PPPs)**, which are covered by SDG target 17.17. PPPs can be used in various sectors but are most commonly used in infrastructure projects when there is not enough public money to cover the full costs of the project.

- There are a number of human rights issues related to PPPs: While PPPs can provide opportunities for unlocking financing for e.g. larger scale infrastructure projects, all relevant actors need to ensure that human rights standards are respected in the process. **A human rights-based approach (HRBA) is needed when planning a PPP, including a focus on accountability and transparency.** The World Bank and the Organisation for Economic Cooperation and Development's (OECD) have also highlighted the importance for PPPs to consider compliance with e.g. existing land and labour laws when designing projects.
- Meanwhile, the UN Guiding Principles on Business and Human Rights state that **“States should exercise adequate oversight in order to meet their international human rights obligations when they contract [...] business enterprises** to provide services that may impact upon the enjoyment of human rights.” The Guiding Principles further clarify that states ‘do not relinquish their international human rights law obligations when they privatize the delivery of services that may impact upon the enjoyment of human rights.
- To ensure that PPPs do not have a negative human rights impact, Amnesty International recommends that ‘private sector financing and public-private partnerships for sustainable development should likewise be accompanied by **mandatory human rights due diligence standards and processes**, transparency and accountability safeguards in compliance with international human rights standards.’

# THE MEANS OF IMPLEMENTATION OF THE SUSTAINABLE DEVELOPMENT GOALS AND HUMAN RIGHTS

## 1. THE MEANS OF IMPLEMENTATION OF THE SDGS

The 2030 Agenda for Sustainable Development (The 2030 Agenda),<sup>1</sup> adopted by all United Nations Member States in 2015, is an agenda for peace and prosperity for people and the planet, now and in the future. At its heart are the 17 Sustainable Development Goals (SDGs). The goals are interconnected; often the key to success for one will involve tackling issues associated with another.

This publication focuses on SDG 17 (“Strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development”), which outlines the Means of Implementation of the SDGs. It will do so by providing a background to some of the key issues dealt with by the targets related to SDG 17, demonstrate their links to human rights, where relevant provide recommendations for how to ensure a human rights-based approach (HRBA) to the issue at hand, and provide an overview of relevant international processes and work streams as well as suggestions for further reading on each issue.

While the first 16 SDGs focus on specific thematic areas, the 17<sup>th</sup> and final SDG is slightly different in that it outlines the so-called Means of Implementation, i.e., the tools necessary to implement the 2030 Agenda, including the other SDGs. It is therefore a cross-cutting Goal that assumes a significant importance as its implementation will have an impact on all other Goals. As such, it is examined each year as a cross-cutting element of deliberations in the key regional and international SDG forums, notably the High-Level Political Forum, and the Regional Sustainable Development Forums.

The Means of Implementation are a mix of enablers of financial resources to support the SDGs, as well as more systemic issues. Together they provide a framework, or toolbox, that is needed if the SDGs are to be realised by 2030. In other words, without getting SDG 17 and the Means of Implementation right, we cannot get the other 16 SDGs right.

This publication provides a broad overview of the human rights implications of the financing related targets of the Means of Implementation outlined in SDG 17. This is with a view to providing a better understanding of the human rights dimensions of the issues covered and of the value that a HRBA can bring, as well as of the risks – for human rights as well as for successful achievement of the SDGs – that present themselves when human rights are not adequately taken into account. Given the broad scope of this publication, it does not attempt to provide an exhaustive overview of every aspect of relevance, but does provide recommendations for further reading, as well as tools and guidance of relevance to each section. Each chapter can be read in isolation as stand-alone, and does not necessarily have to be read in the order they are presented in this report.

## **2. HUMAN RIGHTS AND THE 2030 AGENDA FOR SUSTAINABLE DEVELOPMENT**

Overall, human rights and the 2030 Agenda for Sustainable Development are inextricably linked. The 2030 Agenda is explicitly grounded in international human rights treaties. The 17 Sustainable Development Goals (SDGs) “seek to realize the human rights of all”<sup>2</sup> and the pledge to “leave no one behind” mirrors the fundamental human rights principles of non-discrimination and equality.

The strong links between human rights and sustainable development offer enormous potential to make their follow-up better aligned and thus more effective, efficient and accountable. By investing in and implementing the SDGs, states are thus likely to contribute to fulfilling many of their legally binding human rights commitments as well.

Analysis by the Danish Institute for Human Rights shows that more than 92% of SDG targets are linked to specific provisions of international human rights instruments.<sup>3</sup>

Human rights norms and mechanisms offer guidance for the implementation of the 2030 Agenda, as it is underpinned by legally-binding human rights treaties. This is true also for the financial targets of SDG 17, and implementation of these targets must be informed not only by human rights norms and standards, but also guided by good governance, accountability, rule of law, transparency, participation, inclusion, equality and other key principles that are essential for the successful achievement of the SDGs.

### **WHAT IS A HUMAN RIGHTS-BASED APPROACH TO SDG 17?**

While there is no single definition what a HRBA to development is, it is generally agreed that the HRBA fundamentally shifts the core mission of development from charity to the obligation to respect, protect, and fulfil rights.

An HRBA to sustainable development can lead to better, more equitable and more sustainable development outcomes, and ensures coherence of government policies and programmes. According to this approach:

- The objective of development should be to further the realisation of human rights as enshrined in international human rights instruments;
- Human rights standards and the recommendations of human rights oversight mechanisms should guide programming in all sectors and in all phases of the programming process; and
- Development processes should contribute to developing the capacities of 'duty-bearers' to meet their obligations and of 'rights-holders' to claim their rights.

The HRBA can also be applied to the finance-related SDG targets, helping to ensure that SDG funding is raised and spent in a way that furthers human rights and does not negatively impact on human rights that may be connected to, but not the specific focus of, that finance. For example, trade and investment strategies that may result in additional revenue for countries thus potentially generating funds for healthcare or access to other basic services. However, they may also have a negative impact on land rights, the right to an adequate standard of living, or livelihood-related rights of local communities, labour rights, or indeed result in some sectors of the population being left further behind if all human rights considerations related to these trade and investment strategies are not taken into account in a holistic manner.

The key principles underpinning the HRBA are:

- Human rights are universal and inalienable.
- Human rights are indivisible. Whether of a civil, cultural, economic, political or social nature, they are all inherent to the dignity of every human person. Consequently, they all have equal status as rights, and cannot be ranked, a priori, in a hierarchical order.
- Inter-dependence and Inter-relatedness. The realisation of one right often depends, wholly or in part, upon the realization of others.
- Equality and Non-discrimination. All human beings are entitled to their human rights without discrimination of any kind.
- Participation and Inclusion. Every person and all peoples are entitled to active, free and meaningful participation in, contribution to, and enjoyment of civil,

economic, social, cultural and political development in which human rights and fundamental freedoms can be realised.

- Accountability and Rule of Law. States and other duty-bearers are answerable for the observance of human rights. In this regard, they have to comply with the legal norms and standards enshrined in human rights instruments.

### 3. LINKING THE MEANS OF IMPLEMENTATION AND HUMAN RIGHTS

The SDGs will not happen by themselves. Investing in the Means of Implementation will therefore be key to advancing the 2030 Agenda. Without the proper financing – through encouraging sustainable and impactful investment, increasing tax collection improved trade regimes, among other things – countries will not be able to pay for the interventions needed to meet their SDG commitments (and by extension many of their human rights obligations). Without the appropriate legal frameworks and investments in the science, technology, innovation, data collection etc, the SDGs risk remaining noble but unachievable ambitions.

Focusing on and investing in the Means of Implementation is therefore imperative for any country that is serious about achieving the SDGs. Effective use of human rights standards and principles to guide the Means of Implementation can inform and support more equitable outcomes and effective Means of Implementation. However, there are also risks that inadequate consideration of the human rights dimensions and implications of the Means of Implementation may undermine efforts to achieve the SDGs. These risks and opportunities are addressed throughout this publication in connection with the finance-related themes addressed in SDG 17. It is therefore important that as governments address the Means of Implementation that they do so using a Human Rights Based Approach (HRBA).

As stated above, the SDGs are intimately intertwined with legally binding human rights obligations and investing in the SDGs can by extension mean investing in protecting and fulfilling human rights. However, if the ways that the SDGs are implemented – through the Means of Implementation – themselves do not use an HRBA and respect human rights obligations, then SDG implementation risks being in part counter-productive.

### FINANCING FOR DEVELOPMENT (FFD)

Achieving the SDGs requires a surge in financing and investments.<sup>4</sup> In fact, the UN Conference on Trade and Development UNCTAD has estimated that at current rates, there is an annual financing gap of around US\$2.5 trillion if the SDGs are to be achieved.<sup>5</sup> The UN has also recognised that ‘domestic resources are the most sustainable source of investment in national development priorities over the long term and demand is growing for effective, integrated national financing frameworks for the 2030 Agenda.’<sup>6</sup> Mobilisation of “adequate and well-directed” financing

is identified as one of the 10 commitment areas outlined in response to the identified need to “do more, and faster” to achieve the SDGs in the 2019 Political Declaration of the High-Level Political Forum (HLPF).<sup>7</sup> In particular the Declaration highlights that to “close the financing gap for the Sustainable Development Goals, Governments, the private sector and other stakeholders need to increase the level of ambition in domestic, public and private resource mobilization, strengthen the enabling environment for sustainable investments and deliver on commitments to international development cooperation.”<sup>8</sup>

The SDGs are however also grounded in human rights and when approaching the Means of Implementation (MOIs) that focus on financing, we must consider what a human rights based approach to those financing MOIs look like. It would be counter-productive to develop policies to raise sufficient resources to meet the SDGs while ignoring the human rights impact that those policies will have would be.

The financing of the SDGs is covered by the ongoing “Financing for Development” (FfD) process that takes place under the umbrella of the United Nations. It dates back to the first International Conference on Financing for Development held in Monterrey, Mexico in 2002. The third FfD conference was held in Addis Ababa in 2015, and the resulting Addis Ababa Action Agenda (AAAA) established an annual FfD Forum under the Economic and Social Council<sup>9</sup> (ECOSOC). The FfD Forum is held in the first half of the year ahead of the High-Level Political Forum on Sustainable Development (HLPF).<sup>10</sup>

#### **ADDIS ABABA ACTION AGENDA (AAAA)**

The Addis Ababa Action Agenda was adopted at the Third International Conference on Financing for Development (Addis Ababa, Ethiopia, 13-16 July 2015) and subsequently endorsed by the UN General Assembly in its resolution 69/31311 of 27 July 2015. It provides a new global framework for financing sustainable development by aligning all financing flows and policies with economic, social and environmental priorities. It includes a comprehensive set of policy actions, with over 100 concrete measures that draw upon all sources of finance, technology, innovation, trade, debt and data, in order to support the achievement of the Sustainable Development Goals.

#### **STATE OBLIGATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW AND FINANCING FOR THE SDGS**

The AAAA agenda does however not exist in a vacuum, and there are specific human rights obligations that states must consider when implementing the AAAA and the financing aspects of SDG 17.

## THE HUMAN RIGHTS OBLIGATIONS OF STATES IN RELATION TO FINANCING THE SDGS

International law requires states to respect, **protect and fulfil all human rights**. These obligations relate as much to ensuring the availability of adequate financial resources to ensure human rights can be fulfilled as they do to putting other measures and mechanisms in place. In their efforts to realise human rights, states have obligations of both conduct, and result:

- **Obligations of conduct** – relate to the actions that states are expected to take.
- **Obligations of result** – relate to the outcomes that states are expected to achieve, through the actions taken.

Some of these obligations, primarily related to civil and political rights, are immediate, while others will by default have to be achieved progressively. In relation more specifically to economic, social and cultural rights, Article 2(1), of the International Covenant on Economic, Social and Cultural Rights (ICESCR) states that:

“[e]ach Party to the present Covenant undertakes steps, **individually and through international assistance and cooperation**, especially economic and technical, to the **maximum of its available resources**, with a view to achieving progressively the full realization of the rights recognized in the present Covenant [...]” (emphasis added).<sup>12</sup>

The term ‘maximum available resources’ means that states need to take actions to ensure that e.g. their tax, trade and investment policies actually raise enough revenue for the state to meet its human rights obligations.

Ensuring sufficient financial resources are available is however not only applicable to economic, social and cultural rights. Human rights are indivisible and as such governments need to take steps to ensure that also the protection of civil and political rights are adequately resourced, including adequate financing for a well-resourced and effective judicial system, as well as other state institutions key to the protection of civil and political rights.

Ensuring adequate financing for sustainable development also requires **international cooperation**. To this end, the International Covenant on Economic, Social and Cultural Rights (Arts. 2 and 11) specifies states’ duty to take steps including through international cooperation to realise human rights.<sup>13</sup> This also reflects the purposes and principles of the Charter of the United Nations relating to the achievement of international co-operation.

Each of the financing MOIs comes with its own human rights potential and challenges and these are detailed below. This publication focuses on:

- **Domestic resource mobilisation** (Target 17.1)
- **Investments** (Targets 17.3.1. and 17.5.1.)
- **Trade** (Targets 17.10, 17.11 and 17.12)
- **Official Development Assistance** (Target 17.2)
- **Public Debt Sustainability** (Target 17.4)
- **Public Private Partnerships** (Target 17.7)



1.

## DOMESTIC RESOURCE MOBILISATION



SDG targets	Associated Human Rights provisions <sup>14</sup>
<p><b>17.1</b> Strengthen domestic resource mobilization, including through international support to developing countries, to improve domestic capacity for tax and other revenue collection</p>	<p><b>Universal Declaration of Human Rights, article 28:</b></p> <p>“Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”</p> <p><b>International Covenant on Economic, Social and Cultural Rights, article 2.1</b></p> <p>“...take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant..”</p> <p><b>International Covenant on Economic, Social and Cultural Rights, article 11.1</b></p> <p>“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”</p>

## BACKGROUND

SDG target 17.1 requires states to ‘Strengthen domestic resource mobilization, including through international support to developing countries, to improve domestic capacity for tax and other revenue collection.’ The two specific indicators focus on total government revenue as a proportion of Gross Domestic Product (GDP), and the proportion of domestic budget funded by domestic taxes.<sup>15</sup>

## THE ADDIS ABABA ACTION AGENDA AND DOMESTIC RESOURCE MOBILISATION

The 2030 Agenda's commitment to improved domestic resource mobilisation is reaffirmed in the AAAA, which states among other things that:

- 'We commit to enhancing revenue administration through modernised, progressive tax systems, improved tax policy and more efficient tax collection.'<sup>16</sup>
- 'We will work to improve the fairness, transparency, efficiency and effectiveness of our tax systems, including by broadening the tax base.'<sup>17</sup>
- 'We will redouble efforts to substantially reduce illicit financial flows by 2030, with a view to eventually eliminating them, including by combating tax evasion and corruption through strengthened national regulation and increased international cooperation.'<sup>18</sup>
- 'We will make sure that all companies, including multinationals, pay taxes to the Governments of countries where economic activity occurs and value is created.'<sup>19</sup>
- 'We [...] commit to addressing excessive tax incentives [...] particularly in extractive industries.'<sup>20</sup>
- 'We commit to scaling up international tax cooperation. We encourage countries, in accordance with their national capacities and circumstances, to work together to strengthen transparency and adopt appropriate policies, including multinational enterprises reporting country-by-country to tax authorities where they operate; access to beneficial ownership information for competent authorities; and progressively advancing towards automatic exchange of tax information among tax authorities.'<sup>21</sup>
- '[...] To end harmful tax practices, countries can engage in voluntary discussions on tax incentives in regional and international forums.'<sup>22</sup>

Domestic revenue mobilisation refers to the generation of government revenue from domestic resources. In particular, this includes taxation, but also royalties, levies or other income, among other things. Domestic resource mobilisation can raise much needed funds to finance the realisation of the SDGs, but also has additional benefits in that it fosters citizen ownership and political accountability for how funds are spent and reduces reliance on increasing debt or on external assistance.

SDG target 17.1 focuses mainly on quantitative variables (such as the revenue-to-GDP ratio<sup>23</sup>). However, the way that the money is raised will also have an impact on sustainable development and the fulfilment of human rights. This is because badly designed tax policies can exacerbate socio-economic inequality and place the burden of taxation disproportionately on poorer segments of society. In contrast, a well-designed tax system can ensure that those better able to pay also contribute more. Efficient and fair tax systems also encourage better tax morale and can be an important component in state and institution building.<sup>24</sup>

## TAX CONCEPTS

**Progressive tax** – This generally refers to a tax policy in which the average tax rate increases as the taxable amount increases. This means that the higher your income is, the higher percentage of overall tax you pay. It can also refer to an overall tax system (income tax, property taxes, capital gains taxes, wealth taxes, etc.) where those with higher incomes and more assets contribute proportionately more tax than those with less income and fewer assets.

**Regressive tax** – This generally refers to the opposite of progressive taxes, i.e., the tax burden falls disproportionately on the poor as a proportion of their income and assets. This can be the case if there is for example a flat income tax, or no or low property, wealth and capital gains taxes.

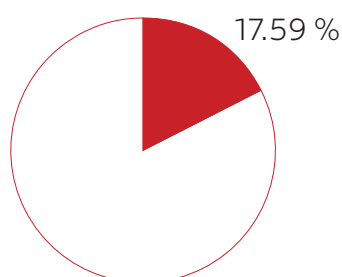
**Tax base** – The tax base is the total income and assets that a government can tax. The more people that don't have an income or assets - or don't declare their income because they work in the informal economy - the smaller the tax base is. The same goes for companies within a country. If a country, for example, decides not to tax property, that makes the tax base smaller. Tax base is different from tax rate. Tax base defines what you tax, tax rate defines how much you tax a particular income or asset.

However, many developing countries do not collect enough tax to provide even basic services for their populations such as road infrastructure, healthcare, education and public safety. Research indicates that at least 15 percent of GDP in revenue is necessary to finance these basic services. However, in almost 30 of the 75 poorest countries, tax revenues are below this 15 percent threshold.<sup>25</sup>

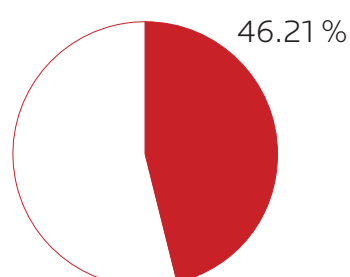
According to data from the International Monetary Fund (IMF), in 2017, the average revenue-to-GDP ratio for emerging markets and developing countries was 25.99%.<sup>26</sup> For sub-Saharan countries, the figure is considerably lower at 17.59%. Meanwhile, the revenue rate for advanced economies is 36.04%, and for countries using the euro it is 46.21%. While there is no exact optimum level for a country's revenue-to-GDP ratio, it is clear most developing countries need to improve their ratio if they are to meet the SDG financing gap.

Country	Revenue-to-GDP expressed in %
<b>Sub-Saharan Africa</b>	17.59
<b>Euro countries</b>	46.21
<b>Examples of developing countries</b>	
Democratic Republic of Congo	10.4
Chad	14.1
Burundi	14
Guatemala	10.99
<b>Examples of developed countries</b>	
France	53.87
Denmark	52.08
Belgium	51.09

**Sub-Saharan Africa**



**Euro countries**



Meanwhile, states are losing large amounts of potential tax revenue to, for example, tax incentives and tax avoidance. According to an IMF Working paper from 2015, tax losses to tax avoidance in developing countries amounts to roughly US\$200bn annually, or around 1.3% of GDP in those countries.<sup>27</sup> A separate study by UNCTAD estimates that developing countries lose around US\$100bn annually from foreign direct investment (FDI) being routed via tax havens.<sup>28</sup> Additionally, research by development NGO ActionAid shows that developing countries give away over US\$138bn in corporate tax breaks (such as a tax exemption, tax deduction or tax credit) alone every year.<sup>29</sup> All of this is money that states could have usefully employed to protect, promote and fulfil human rights as well as addressing the SDG funding gap.<sup>30</sup>

## HUMAN RIGHTS ISSUES

The International Covenant on Economic, Social and Cultural Rights (ICESCR) states that:

‘Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.’<sup>31</sup>

This means that states have a duty to ensure that they have the maximum available resources to progressively realise human rights, meaning they should ensure their domestic resource mobilization is fit for purpose to raise the adequate funds. The article also clearly highlights the importance of international co-operation.

These duties are further reinforced in article 11 of the ICESCR on the right to an adequate standard of living, which outlines that ‘States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation.’<sup>32</sup> Similar wording is used in regional human rights instruments such as the American Convention on Human Rights (ACHR)<sup>33</sup> and the African Charter on Human and Peoples’ Rights (ACHPR).<sup>34</sup>

The UN Committee on Economic, Social and Cultural Rights has further clarified this obligation in General Comment No. 24 (2017) by stating that fulfilling rights requires the ‘mobilization of resources by the State, including by enforcing progressive taxation schemes.’<sup>35</sup> The General Comment further stresses that countries have extra territorial obligations not to impede the fulfilment of the Covenant’s rights, including through the way it negotiates tax treaties.<sup>36</sup> States are also urged to fight – individually and in cooperation with others - tax avoidance and evasion to raise more revenues, and to avoid a race to the bottom on tax rates by employing a minimum corporate tax rate.<sup>37</sup>

In a 2014 report on human rights and tax by the then Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona, stresses that ‘taxation is a key tool when tackling inequality and for generating the resources necessary for poverty reduction and the realization of human rights.’<sup>38</sup> The Special Rapporteur highlights the particular impact of poorly funded public services on the rights to e.g. education, paid work, rest and leisure for women as they disproportionately carry the burden of unpaid care work when public services are not adequately funded.<sup>39</sup>

She also stresses that the way taxes are raised matters for human rights, with progressive tax system likely to decrease inequality both between socio-economic groups and between genders.<sup>40</sup> Consequently, she recommends that states ‘seek to increase tax revenue in a manner compatible with their human rights obligations of

non-discrimination and equality, and increase the allocation of revenues collected to budget areas that contribute to the enjoyment of human rights.’<sup>41</sup>

Importantly, the Special Rapporteur specifically calls for states to ‘ensure accessible channels for accountability and remedy for any negative human rights impact of fiscal policy, including by strengthening the capacity of the judicial system and national human rights institutions to address fiscal policy.’<sup>42</sup>

On extraterritoriality, the Special Rapporteur recommends that ‘each state should refrain from any conduct that impairs the ability of another state to raise revenue as required by their human rights commitments,’<sup>43</sup> and she calls on International Financial Institutions to ‘consider human rights obligations and impact when setting conditions and policies in the area of fiscal policy,’ including tax policies.<sup>44</sup>

## **WAYS TO IMPROVE THE EFFECTIVENESS OF DOMESTIC RESOURCE MOBILISATION**

In order to make the fullest contribution to achievement of both human rights and SDGs, tax reforms would thus need to:

- Raise more revenue for states (in line with SDG 17.1);
- Decrease or at least not increase inequality (In line with SDG 10); and
- Promote human rights and not in themselves cause further human rights violations.

### **THE MBEKI PANEL ON ILLICIT FINANCIAL FLOWS**

The impacts of illicit financial flows on the implementation of the SDGs and on human rights has been dealt with by the African Union. A 2015 report commissioned by the African Union<sup>45</sup> and the UN Economic Commission for Africa<sup>46</sup> - the so called Mbeki Panel - identified Illicit Financial Flows<sup>47</sup> (IFFs) as a key issue draining financial resources from African countries. It estimated that IFFs from Africa were at least US\$50-60bn per year.<sup>48</sup> The report concluded that most IFFs from Africa were trade based (such as for example trade mis-invoicing<sup>49</sup> to evade customs duties, VAT or income taxes) and that addressing these flows should be given primacy.<sup>50</sup> The report further states that ‘illicit financial outflows whose source is Africa end up somewhere in the rest of the world. Countries that are destinations for these outflows also have a role in preventing them and in helping Africa to repatriate illicit funds and prosecute perpetrators.’<sup>51</sup>

This links back to the provision in the ICESCR regarding international cooperation in ensuring the maximum available resources for human rights protection and promotion. In fact, referring to IFFs, the report states that ‘united global action is necessary to end them.’<sup>52</sup> Making the connection with the SDGs explicit, the report concludes that the ‘Panel is convinced that Africa’s retention of the capital that is generated on the continent and should legitimately be retained in Africa must be an important part of the resources to finance the Post-2015 Development Agenda.’<sup>53</sup>

Regarding specific reforms to improve domestic resource mobilisation, there is a number of steps that states can take individually or collectively:

## 1. TAX TRANSPARENCY

Transparency is a key requirement, as it can address the informational asymmetry between taxpayers (such as companies) and tax authorities, where tax authorities do not have access to full information about taxpayers' tax affairs. This creates opportunities for abuse of the tax system, which by extension affects domestic resource mobilisation negatively. Tax transparency also helps the public - including the media and civil society - to monitor, analyse and report on tax behaviour, which creates public pressure against tax abuses and reputational risks for companies and others to engage in e.g. tax avoidance.

- States can improve **tax transparency** through introducing **public registers of beneficial ownership**. Beneficial ownership refers to the person (or persons) who ultimately owns or controls an asset (for example, a property or a company), and benefits from it. Knowing who the ultimate owner of an asset is provides transparency and plays an important role in the fight against corruption, tax evasion and money laundering. In recent years, there have been steps taken unilaterally and multilaterally to introduce such registers. This includes a 2014 commitment at the G20 on High Level Principles on Beneficial Ownership Transparency.<sup>54</sup> In late 2017, the EU's fourth Anti-Money Laundering Directive (AMLD) was agreed. This requires EU states to introduce public registers of beneficial ownership.<sup>55</sup>
- States can also unilaterally introduce **public country-by-country reporting** requirements for companies headquartered or in-other-ways-present in their jurisdiction. Such reporting requirements force multinationals to disclose information about their economic activities in the jurisdictions that they are present in.
- In recent years, the Organisation for Economic Cooperation and Development (OECD) has been developing a new Common Reporting Standard (CRS) for the **Automatic Exchange of Information (AEOI)** on the financial accounts and investments of residents in different countries. More than 100 countries are signed up to the CRS.<sup>56</sup> The idea is that participating jurisdictions that implement AEOI send and receive pre-agreed information each year, without having to send a specific request. Jurisdictions themselves receive the relevant financial information directly from e.g. banks, insurance and investment companies.

## 2. ACT ON TAX AVOIDANCE

A starting point for addressing tax avoidance is to engage with and implement the Actions in the multilateral Base Erosion and Profit Shifting (BEPS) process<sup>57</sup> that OECD had led on in recent years. BEPS deals with several technical aspects of tax avoidance such as how to tax the digital economy, how to prevent tax treaty abuse, how to establish if a company has a taxable presence in a country (so called 'permanent establishment') and how to make sure companies don't avoid tax by



manipulating the price paid when different subsidiaries of the same company trade with each other (so called transfer pricing). However, states should consider going beyond BEPS to address tax avoidance by, for example:

- Reviewing their **tax treaty network**. A tax treaty is a bilateral agreement made by two countries primarily to regulate tax issues for companies and individuals who are residents in one country while having economic activities, income or assets in another country. Tax treaties can usefully avoid that the same income or asset is being tax in both countries (double taxation). However, they can often have the effect of radically restricting or removing taxing rights for both countries altogether. If not reviewed to ensure that they are up-to-date and fit for purpose, tax treaties can cost countries dearly in forfeited tax revenues.
- Reviewing their own tax systems to ensure they don't have any **tax haven** features (such as financial secrecy and low or no taxes on specific income and transactions). Such features can be misused by companies and individuals to lower their tax contributions elsewhere. Likewise, states should review agreements with other countries, including countries with tax haven features in their tax systems, to ensure that their own resident companies and individuals are not avoiding paying tax by using tax havens.
- Ensure that their **tax authorities** have the human, knowledge and financial resources to enforce existing legislation to stop tax avoidance.

### 3. IMPROVE DOMESTIC TAX COLLECTION

To improve domestic resource mobilisation, states need to look not only at potential tax revenue leaving the country untaxed, but also what **tax is collected domestically**. While there is no ideal level of personal and corporate income tax, states need to ensure that these are fit for purpose and contribute towards mobilising resources domestically while not contributing to a race to the bottom on tax rates globally.

Additionally, states need to ensure that they:

- Have a broad tax base – i.e., that they don't rely on a small number of companies or individuals to raise tax revenue. This includes ways to formalise the informal economy, which do not hurt the poorest in society.
- Implement wealth taxes as appropriate, including capital gains taxes, property taxes and inheritance tax. These taxes are often unpopular with wealthier citizens but contribute towards the overall pot of domestic resources available for human rights and SDG interventions, and also counteract rising economic inequality.
- Provide the tax authorities with the human, knowledge and financial resources to implement existing tax laws so that tax can be collected in a correct and fair manner.
- Avoid handing out discretionary tax incentives, i.e., specific tax breaks for individual companies, often negotiated behind closed doors. Combined with statutory tax incentives (i.e. those who apply to all companies within, for example,

a specific sector or geographical location) and ever lower corporate tax rates generally, this contributes to a race to the bottom on tax rates. Christine Lagarde, the former head of the IMF, has pointed out that 'by definition, a race to the bottom leaves everybody at the bottom.'<sup>58</sup>

It is also important that states design tax systems that do not exacerbate inequality – including that the gendered impacts of fiscal policy are fully understood and inform tax policies - or impact negatively on the ability of the poorest in society to meet their basic needs. That means that states should consider how, for example, sales taxes such as VAT on basic items such as food and clothes impact on the poorest in society, as well as considering thresholds under which those earning less do not pay income tax.

To ensure that tax systems are fit for purpose and leave no-one behind, states should consider consulting human rights actors such as **national human rights institutions and civil society organisations**, when designing or making changes to their tax systems. States would also carry out human rights impact assessments of existing tax policies as well as a gender audit of the impacts of current and proposed tax laws.

#### **ADDIS TAX INITIATIVE**

The Addis Tax Initiative (ATI) is a multi-stakeholder partnership aiming at enhancing domestic revenue mobilisation (DRM) in partner countries.<sup>59</sup> The ATI was initiated in 2015 by the governments of Germany, the Netherlands, the United Kingdom and the United States at the Third International Conference on Financing for Development in Addis Ababa, Ethiopia.<sup>60</sup> The countries<sup>61</sup> that have signed up to the ATI seek to increase reliance on domestic revenue to fund their development agenda and meet the SDGs. In practice, the ATI focuses heavily on needs-based matching of countries to collaborate on specific tax related issues to increase and improve domestic resource mobilisation for the SDGs.

The ATI is supported by amongst others the African Tax Administration Forum (ATAF), the Asian Development Bank (ADB), the International Monetary Fund (IMF), the Organisation for Economic Co-operation and Development (OECD), the West African Tax Administration Forum (WATAF), and the World Bank.

### KEY INTERNATIONAL PROCESSES AND WORKSTREAMS

- Financing for Development (FfD) - <http://www.un.org/esa/ffd/index.html>
- UN Tax Committee - <http://www.un.org/esa/ffd/ffd-follow-up/tax-committee.html>
- Addis Tax Initiative <https://www.addistaxinitiative.net/about>
- OECD/BEPS - <http://www.oecd.org/tax/beps/>
- Global Forum on Tax Transparency - <http://www.oecd.org/tax/transparency/>
- OECD Tax and Development Forum / <https://www.oecd.org/dac/tax-and-development.htm>
- Platform for Collaboration on Tax - <http://www.worldbank.org/en/programs/platform-for-tax-collaboration> + <http://www.worldbank.org/en/news/statement/2018/02/16/platform-for-collaboration-on-tax-first-global-conference-on-taxation-and-sdgs>
- UNECA - <https://www.uneca.org/iff>

### KEY RESOURCES AND READING

- Independent Commission for the Reform of International Corporate Taxation <https://www.icrict.com/icrict-documentsfour-ways-to-tackle>
- ActionAid 'Progressive Taxation Briefings' <https://actionaid.org/publications/2018/progressive-taxation-briefings>

2.

## INVESTMENTS



SDG targets	Associated Human Rights provisions <sup>62</sup>
<p><b>17.3</b> Mobilize additional financial resources for developing countries from multiple sources</p>	<p><b>Universal Declaration of Human Rights, article 28:</b></p> <p>“Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”</p> <p><b>International Covenant on Economic, Social and Cultural Rights, article 2.1</b></p> <p>“...take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant..”</p> <p><b>International Covenant on Economic, Social and Cultural Rights, article 11.1</b></p> <p>“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”</p>
<p><b>17.5</b> Adopt and implement investment promotion regimes for least developed countries</p>	<p><b>Universal Declaration of Human Rights, article 28:</b></p> <p>“Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”</p> <p><b>International Covenant on Economic, Social and Cultural Rights, article 11.1</b></p> <p>“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”</p>

## TERMINOLOGY

**Foreign direct investment (FDI):** FDI is generally an investment made by a company or individual in one country into business interests located in another country. Foreign direct investments are different from so-called portfolio investments in which an investor merely purchases equities of foreign-based companies.

**Bilateral investment treaty (BIT):** A BIT is an agreement establishing the terms and conditions under which individuals and companies of one country invest in the other, including their rights and protections in that other country.

**Free trade agreement (FTA):** FTAs are international treaties between two or more countries that reduce barriers – such as tariffs or regulations - to cross-border trade and investment.

**Investor-State Dispute Settlement (ISDS):** A procedural mechanism that allows an investor from one country to bring arbitral proceedings directly against the country in which it has invested.

**International financial institution (IFI):** Financial institutions established by more than one country, and subject to international law. Usually owned by a group of countries. Includes the World Bank, the European Investment Bank etc

**Export credit agency (ECA):** An export credit agency is a financial institution that offers financing for domestic companies' international export operations and other activities.

**State-investor contract or host-government agreement (HGA):** A 'State-investor contract' is an agreement between the state, or an entity representing the state, where an investment will take place (host state), and the business investor or investors.

## BACKGROUND

The 2030 Agenda for Sustainable Development clearly recognises the role of investment, including in the form of Foreign Direct Investment (FDI), in achieving its objectives, especially through Target 17.3 on mobilising additional financial resources for developing countries from multiple sources; and Target 17.5 on adopting and implementing investment promotion regimes for least developed countries.

The need for a better investment climate for sustainable development is also detailed in the Addis Ababa Action Agenda (AAAA) in which states commit to:

- 'promote and create enabling domestic and international conditions for inclusive and sustainable private sector investment, with transparent and stable rules and standards and free and fair competition, conducive to achieving national development policies';<sup>63</sup> and
- 'recognize the important contribution that direct investment, including foreign direct investment, can make to sustainable development, particularly when projects are aligned with national and regional sustainable development strategies.'<sup>64</sup>

The AAAA further 'encourages increased investments in female-owned companies or businesses.'<sup>65</sup>

## HUMAN RIGHTS ISSUES

Traditionally, investment law and international human rights have been considered as two distinct bodies of international law. However, that is changing. Moreover, the notions that FDI *per se* contributes to economic growth and that contribution to economic growth through FDI is inextricably linked to human rights enhancement are being questioned.<sup>66</sup> Instead, there is an increasing focus on what the conditionalities must be for FDI to make a positive contribution to human rights enjoyment and sustainable development.<sup>67</sup> This has included attention to issues such as: the compatibility of investment treaties and contracts with international human rights law; critiques and reform initiatives of ISDS; and analysis of the functionalities and effectiveness of investment incentives. Likewise, the role of international financial institutions (IFIs) in promoting sustainable investment through the effective implementation of environmental and social safeguards and accompanying remedy mechanisms is highlighted.

The UN Guiding Principles on Business and Human Rights (UNGPs) <sup>68</sup> firmly establish the relevance of international human rights law and due diligence to investment law and policy by emphasising the need for policy coherence. Moreover, they require 'heightened' due diligence where investment is supported directly by the State. This approach is reaffirmed in the 2030 Agenda, which, emphasises that investment must be targeted where the need is greatest, and meet certain prerequisites to ensure that it effectively contributes to sustainable development.

## THE UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

In 2008, the then UN Special Representative on Business and Human Rights, presented a report called 'Protect, Respect and Remedy: a Framework for Business and Human Rights' (UN Protect, Respect and Remedy Framework). Unanimously welcomed by the UN Human Rights Council in 2008, the Framework rests on three complementary and interrelated pillars:

- **Pillar 1:** The State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation and adjudication;
- **Pillar 2:** The corporate responsibility to respect human rights, which means that companies are expected to avoid infringing on the human rights of others and to address adverse human rights impacts with which they are involved; and
- **Pillar 3:** Access to remedy, which requires both States and businesses to ensure greater access by victims of business-related human rights abuses to effective remedy, both judicial and non-judicial.

Through this division of duties and responsibilities, the UN Protect, Respect and Remedy Framework clarifies the baseline expectations and obligations of both States and businesses in respect of business-related human rights impacts. The Framework was then operationalised through the 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (UN Guiding Principles) in 2011.

Following the conclusion of the mandate of the UN Special Representative on Business and Human Rights in 2011, the UN Human Rights Council established the Working Group on the issue of human rights and transnational corporations and other business enterprises (UN Working Group on Business and Human Rights)<sup>69</sup> to continue the work on business and human rights at the UN level.

Some of the human rights issues associated with the international investment regime are:

### 1. INVESTMENT AND HUMAN RIGHTS POLICY ALIGNMENT: POLICY COHERENCE AND THE STATE-BUSINESS NEXUS

The 2030 Agenda clearly notes the importance of policy coordination and coherence as part of enhancing global macroeconomic stability (e.g., SDG 17.13). Yet, in many national contexts there is a discrepancy between a country's human rights objectives and commitments and its actual investments. The UNGPs<sup>70</sup> also address this, and in Guiding Principle 8, for instance, emphasise that States are obliged to ensure law and policy coherence, including by ensuring that trade and development objectives are aligned. This implies that trade objectives must



not be in contradiction of state commitments to international human rights and sustainable development objectives.<sup>71</sup> In response, some countries and regions are seeking stronger alignment between these different law and policy areas. For example, the European Union issued guidance in 2016 on integrating human rights considerations in trade sustainability assessments.<sup>72</sup>

If investment law and policy frameworks are to align with countries' international human rights obligations and play a positive role in achieving the 2030 Agenda, it is essential that stronger policy coherence is promoted between these different legal and policy frameworks. In particular, it is important that investment governance is reviewed to enhance compliance of investment with states' commitments to international human rights standards and the equitability and sustainability expectations of the 2030 Agenda.

### **LICENSING REGIMES AND STATE-INVESTOR CONTRACTS**

Broadly speaking, FDI projects can be governed by licensing or contractual regimes. In a licensing regime, FDI projects are governed by the generally applicable law. In a contractual regime, individual investments are governed by a State-investor contract – an agreement between a host government and foreign investor that governs the fiscal, regulatory and other governance aspects of the FDI project.<sup>73</sup> Whilst there is a trend towards using the generally applicable domestic law of a country to govern FDI projects,<sup>74</sup> state-investor contracts remain prominent in some global regions and industries, for example, the extractive industries. The content of such contracts can have significant human rights implications. For instance, the contract can contain provisions for the State to monitor the project; or contain contractual commitments that security arrangements for the project will follow standards that are consistent with international human rights. Therefore, 2030 Agenda strategies for promoting investment in specific economic sectors and regions should pay careful attention to the human rights compatibility of the governance frameworks in place to regulate such investments, as part of ensuring that they contribute meaningfully to sustainable development.

## **2. BILATERAL INVESTMENT AGREEMENTS (AND INVESTMENT CHAPTERS IN FREE TRADE AGREEMENTS)**

A bilateral investment treaty (BIT) is an agreement establishing the terms and conditions for private investment by nationals and companies of one state in another state. Currently, it is estimated that there is a network of over 3,000 partially overlapping treaties governing international investment.<sup>75</sup>

BITs and investment chapters in free trade agreements have been criticised from human rights perspectives, in part because rights-holders have no or limited access to remedy for human rights abuses resulting from the BIT. Agreement

negotiations are almost always confidential, as are many of the actual agreements themselves.

Means to ensure greater attention to human rights in the content of these agreements could include **‘human rights clauses’** as such, and/or the inclusion of clauses that speak to human rights-related topics, such as labour rights or environmental management. More recent treaties show an increase in clauses addressing environmental and labour matters.<sup>76</sup>

**Strengthening human rights-relevant provisions** could help to set clear expectations that projects respect human rights. There have also been initiatives for ‘model bilateral investment treaties’, such as that of the South African Development Community (SADC)<sup>77</sup>, which include explicit aims of greater environmental and human rights protections. Further attention to environmental protection, labour rights and other human rights matters in such agreements would also be consistent with the calls in the 2030 Agenda for protecting labour rights and environmental and health standards in fostering the business sector and investment.<sup>78</sup>

**Lack of transparency** has also been a key point of critique. On this point, the UN Conference on Trade and Development (UNCTAD) through its 2015 Investment Policy Framework for Sustainable Development provides a number of concrete suggestions for improving the transparency of international investment agreements.<sup>79</sup> Another initiative to enhance transparency is the Resource Contracts Project, which includes a public website listing of investment agreements.<sup>80</sup> Such measures may go some way to realising the clear requirements for transparency also noted in the 2030 Agenda (e.g., SDG Target 16.6).

Lastly, it is worth noting that despite the overall rapid increase in BITs over the last two decades, **a number of countries have recently unilaterally cancelled their BITs**, in part due to a dissatisfaction with environmental and social performance of projects protected by these agreements and the interpretation of particular contractual clauses in ISDS proceedings.<sup>81</sup> Such measures emphasise that if investment and FDI are to make a meaningful contribution to the 2030 Agenda, strategies for ensuring the human rights compatibility of such agreements must be put in place.

### **3. INTERNATIONAL INVESTMENT DISPUTE RESOLUTION (ISDS)**

One of the most contentious aspects of the international investment regime is the recourse to international investor-state dispute settlement (ISDS). In ISDS, disputes are adjudicated before arbitral tribunals – the resolution process is binding, non-judicial and private.<sup>82</sup> In both its processes and outcomes, international arbitration has been described as a system which “removes issues that directly affect citizens to a system that is inaccessible and structurally isolated from public input.”<sup>83</sup>

## HUMAN RIGHTS CRITICISMS OF INTERNATIONAL INVESTMENT DISPUTE RESOLUTION (ISDS)

Investor-state arbitration has been criticised for lack of transparency, limited stakeholder participation, as well as a bias in favour of investors. For example, in *Philip Morris v Australia* the tobacco company sued Australia for plain packaging of tobacco products, a measure introduced to reduce smoking and associated health implications. In *Vattenfall v Germany*, the energy company brought an international arbitration claim against Germany regarding Germany's decision to phase out nuclear power. Such cases have called into question the power attributed to ISDS in the face of bona fide domestic law and policy measures implemented with the view to protecting human rights and promoting sustainable development.

**Investment arbitration** has been criticised on the basis that it does not have the same accountability safeguards, impartiality and independence as domestic courts of law.<sup>84</sup> Regarding due process, investment arbitration panels operate outside the formal legislative process while effectively serving an adjudicatory and standard-setting function that affects the economic and social values of the general public.<sup>85</sup> In investment arbitration there is no official system of precedent, resulting in a lack of consistency in arbitral decisions.<sup>86</sup> Decisions are taken by international arbitrators (often appointed by the parties), rather than independent judges. The fact that arbitrators have a significant financial stake in arbitration is also a weakness, arguably reducing their impartiality and independence.<sup>87</sup> Lastly, in terms of language used (usually English), resources and costs, international arbitration has a Global North bias.<sup>88</sup> As a result, the outcomes of investment disputes are often weighted in favour of international investors and against host state interests.<sup>89</sup>

In light of such critiques, **several reform processes are underway**. For example, in 2017 the United Nations Commission on International Trade Law (UNCITRAL) entrusted its Working Group III with a broad mandate to identify concerns regarding ISDS, consider whether reform is necessary and develop relevant solutions to be recommended to the Commission.<sup>90</sup> Another reform initiative is being led by the International Centre for the Settlement of Investment Disputes (ICSID), which in 2017 published a list of 16 potential areas for reform in the process of revision of its rules of procedure for arbitration.<sup>91</sup>

## 4. FINANCIAL INSTITUTIONS: ENVIRONMENTAL AND SOCIAL SAFEGUARDS AND COMPLAINTS MECHANISMS

Many FDI projects are made possible through the financial backing of international financial institutions (IFIs) such as the World Bank,<sup>92</sup> the World Bank linked International Finance Corporation (IFC),<sup>93</sup> and regional banks, such as the European Investment Bank (EIB).<sup>94</sup> Most clients of these banks are governments or government-linked enterprises. Such institutions provide loans, risk insurance and

guarantees for FDI projects. Usually, such financing is conditional upon a project meeting a set of environmental and social 'safeguard' standards. The compliance of a project with the safeguard standards is subsequently ensured through monitoring and auditing. The Performance Standards of the IFC, for example, are commonly considered to be a global 'good practice' standard.<sup>95</sup>

However, whilst these standards address a number of important human rights aspects, they do not always fully align with international human rights law and the due diligence expectations of the UNGPs.

Human rights due diligence, as outlined by the UNGPs, is a process to identify, prevent, mitigate and account for how a business avoids and addresses adverse human rights impacts which it causes or contributes to, or which are directly linked to its operations, products or services through business relationships. As such, project compliance may go some way to ensuring respect for human rights but should not be taken as a substitute for full human rights due diligence.

It is also worth noting that in terms of financial volume, other financial actors, for example export credit agencies (ECAs), exceed those passing through more 'known' financial institutions, such as the IFC. ECAs are public entities that provide corporations with government-backed loans, guarantees, credits and insurance to support exports and foreign investments.<sup>96</sup> Similarly to IFIs, ECAs have been criticised for inadequate human rights due diligence.<sup>97</sup> A key governance framework for ECAs is the OECD Common Approaches on Export Credits, which outlines the due diligence framework that OECD ECAs are expected to have in place.<sup>98</sup> The updated version from 2016 includes provisions on human rights, as well as a requirement for the public reporting of ECAs on their conformance with the Common Approaches.<sup>99</sup>

#### **ACCOUNTABILITY MECHANISMS OF FINANCIAL INSTITUTIONS TO PROMOTE ACCESS TO REMEDY**

Most international financial institutions have an accountability (or grievance) mechanism that can receive complaints from adversely impacted workers and community members. These accountability mechanisms can undertake a compliance investigation or engage in a dialogue/mediation process to resolve the complaint. In recent years, much attention has been paid to the accountability mechanisms of financial institutions, including reviews of their effectiveness against the eight effectiveness criteria for non-judicial grievance mechanisms stipulated by the UN Guiding Principles on Business and Human Rights, identifying areas for improvements.

To ensure that projects backed by international financial institutions respect human rights and contribute to sustainable development, it is necessary that performance standards are fully aligned with international human rights standards and the due diligence provisions outlined in the UN Guiding Principles.

### KEY INTERNATIONAL PROCESSES AND WORKSTREAMS

- UNCTAD, including Investment Policy Framework for Sustainable Development: [http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/IIA-IPFSD.aspx](http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/IIA-IPFSD.aspx)
- IFC, including IFC Performance Standards and Guidance Notes: [http://www.ifc.org/wps/wcm/connect/Topics\\_Ext\\_Content/IFC\\_External\\_Corporate\\_Site/Sustainability-At-IFC/Policies-Standards/Performance-Standards](http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Sustainability-At-IFC/Policies-Standards/Performance-Standards)
- Office of the Compliance Advisor Ombudsman: <http://www.cao-ombudsman.org/>
- International Centre for Settlement of Investment Disputes (ICSID), Amendment of ICSID's Rules and Regulations: <https://icsid.worldbank.org/en/Pages/about/Amendment-of-ICSID-Rules-and-Regulations.aspx>
- United Nations Commission on International Trade Law, including Working Group III on Investor-State Dispute Settlement Reform: <http://www.uncitral.org/>
- United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention): [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XXII-3&chapter=22&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XXII-3&chapter=22&lang=en)
- OECD and ECAs, including OECD Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence: <http://www.oecd.org/tad/xcred/oecd-recommendations.htm>
- Financing for Development (FfD) III/Addis Ababa Action Agenda (II.B): <http://www.un.org/esa/ffd/index.html>

### KEY RESOURCES AND READINGS

- Human Rights and State-Investor Contracts, Danish Institute for Human Rights (DIHR), <https://humanrights.dk/tools/human-rights-state-investor-contracts>
- National Action Plans on Business and Human Rights mapping, DIHR, <https://humanrights.dk/tools/globalnapsorg>
- Sustainable Development through human rights due diligence, DIHR, <https://humanrights.dk/tools/sustainable-development-through-human-rights-due-diligence>
- Resource Contracts: A directory of Petroleum & Mineral Contracts: <http://resourcecontracts.org/>
- Principles for Responsible Contracts: [http://www.ohchr.org/Documents/Publications/Principles\\_ResponsibleContracts\\_HR\\_PUB\\_15\\_1\\_EN.pdf](http://www.ohchr.org/Documents/Publications/Principles_ResponsibleContracts_HR_PUB_15_1_EN.pdf)
- Rethinking Investment Incentives: Trends and Policy Options: <http://ccsi.columbia.edu/2015/11/25/rethinking-investment-incentives-trends-and-policy-options/>
- SADC Model Bilateral Investment Treaty Template with Commentary: <http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf>
- Karl P. Sauvant and Howard Mann, Towards an Indicative List of FDI Sustainability Characteristics: <http://ccsi.columbia.edu/files/2017/10/KPS-HM-Towards-an-Indicative-List-of-FDI-Sustainability-Characteristics-17-Oct.-17-FINAL.pdf>

3.

## TRADE



SDG targets	Associated Human Rights provisions <sup>100</sup>
<p><b>17.10</b> Promote a universal, rules-based, open, non-discriminatory and equitable multilateral trading system.</p> <p><b>17.11</b> Significantly increase the exports of developing countries.</p> <p><b>17.12</b> Duty-free and quota-free market access on a lasting basis for all least developed countries.</p>	<p><b>Universal Declaration of Human Rights, article 28:</b></p> <p>“Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”</p> <p><b>International Covenant on Civil and Political Rights, article 2.2</b></p> <p>“... take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”</p> <p><b>International Covenant on Economic, Social and Cultural Rights, article 11.1</b></p> <p>“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”</p> <p><b>International Covenant on Economic, Social and Cultural Rights, article 11.2</b></p> <p>“The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed.”</p>

## BACKGROUND

Trade involves the buying and selling of goods or services. International trade is regulated by the World Trade Organisation (WTO)<sup>101</sup> and through bilateral or multilateral trade agreements. Trade has been increasing, particularly since the late 20<sup>th</sup> century and the creation of the WTO in 1995.

Trade plays a significant role in the global economy. Between 2006 and 2015, the value of merchandise and trade in commercial services roughly doubled.<sup>102</sup>

Merchandise exports of WTO members totalled US\$16.2 trillion in 2015.<sup>103</sup> Asia, Europe and North America accounted for 88% in total merchandise trade<sup>104</sup> of WTO members in the period 2005-2015.<sup>105</sup>

Trade is covered by SDG targets 17.10 – 17.12. These outline a vision for a rules-based, non-discriminatory global trading system which is more favourable to developing countries than is currently the case.

Trade has been an integral part of the sustainable development agenda since the Agenda 21 was adopted in Rio in 1992.<sup>106</sup> This was further confirmed by its prominent role in the Johannesburg Plan of Implementation<sup>107</sup> which was adopted in 2002. The 2015 Addis Ababa Agenda (AAAA) further contextualises the role of trade within sustainable development.<sup>108</sup>

Trade is also covered extensively by the Addis Ababa Action Agenda (AAAA), which states among other things that:

#### **BOX: WORLD TRADE ORGANISATION**

The WTO is an intergovernmental organisation that regulates international trade. It deals with regulation of trade in goods, services and intellectual property between participating countries by providing a framework for negotiating trade agreements and a dispute resolution process aimed at enforcing participants' adherence to WTO agreements.

"With appropriate supporting policies, infrastructure and an educated work force, trade can also help to promote productive employment and decent work, women's empowerment and food security, as well as a reduction in inequality, and contribute to achieving the sustainable development goals."<sup>109</sup>

States also agreed to endeavour to significantly increase world trade in a manner consistent with the sustainable development goals, including exports from developing countries, in particular from least developed countries with a view towards doubling their share of global exports by 2020.

#### **HUMAN RIGHTS ISSUES**

While international trade can result in economic growth and positively contribute to improved living standards, there are also some human rights issues that need to be considered.



## **1. INTELLECTUAL PROPERTY RIGHTS, ACCESS TO MEDICINES AND THE RIGHT TO HEALTH**

Intellectual property rights (IPR)<sup>110</sup> pose particular human rights challenges. The WTO's Agreement on Trade-related Aspects of Intellectual Property (TRIPS)<sup>111</sup> sets out the minimum standards of protection to be provided by members regarding each of the main areas of intellectual property covered by the agreement (copyright, patents, trademarks etc.); as well as providing for enforcement and dispute resolution.<sup>112</sup>

There are many sectors where the TRIPS agreement has an impact on human rights, one example of which is the pharmaceutical sector. The impacts on access to medicines and the right to health are of particular interest from a human rights perspective and in light of the objectives of SDG 3 on good health and wellbeing.<sup>113</sup> The TRIPS provisions have been criticised for hindering the development and distribution of generic essential medicines, impacting on people's right to health, in particular in the Global South. For example, the TRIPS agreement requires WTO members to provide patent protection for a minimum of 20 years and to patent both process and product. Prior to TRIPS, many countries had shorter patent periods in place focusing only on process, enabling manufacturers to make generic versions of patented medicines.<sup>114</sup>

Relatedly, data exclusivity provisions in TRIPS mean that generic manufacturers are not allowed to rely on drug testing data of the originator (original manufacturer, usually larger brands) to obtain licenses, delaying generic medicines entering the market.<sup>115</sup> Whilst there have been transition periods granted since TRIPS came into force in 1995, right to health advocates have argued that the agreement facilitates wealth concentration in those regions with stronger intellectual property rights (i.e. the Global North, large pharmaceutical companies) at the expense of developing country producers and access to basic essential medicines in the Global South. In response to such critiques, an amendment to TRIPS came into place in January 2017 with the objective of meeting the public health needs of people in the Global South.<sup>116</sup>

The amendment empowers importing developing and least developed countries facing public health problems and lacking the capacity to produce drugs generically to seek such medicines from third country producers under 'compulsory licensing' arrangements.<sup>117</sup> Compulsory licensing is a government's authorisation to someone to produce a patented product or process without the consent of the patent owner. These licences usually apply to domestic markets only, but pursuant to the 2017 amendment to the TRIPS, exporting countries can grant compulsory licenses to generic suppliers exclusively for the purpose of manufacturing and exporting needed medicines to countries lacking production capacity.<sup>118</sup> This has the potential to greatly improve access to vital medicines for those who need it, impacting positively on their right to health.

### TRADE LIBERALISATION, AGRICULTURE AND FOOD SECURITY

A second key area of critique has been around the impacts of agricultural trade liberalisation on the right to food. This topic – heavily affecting SDG 2 on ‘Zero Hunger’<sup>119</sup> - has been the focus of numerous organisations, scholars and the UN Special Rapporteur on the right to food.<sup>120</sup> It has been argued that whilst expansion of international trade in agricultural commodities can have growth-enhancing effects, these benefits should be balanced against other potential adverse impacts on the right to food.<sup>121</sup> Such impacts may include: the increased dependency on international trade of global supply chains involving agriculture and food; an increase in the role of and reliance on large transnational corporations, as opposed to, for example, subsistence farming or small-scale farming; and inadequate attention to the linkages between agriculture, environmental impacts and the right to health in trade negotiations, despite the direct links of these issues to the right to food.<sup>122</sup> It has therefore been argued that the international trade regime needs to do more to recognise the specificity of agricultural products given the potential impacts on people’s ability to feed themselves, as opposed to considering these to be simply another type of commodity.<sup>123</sup>

One tool that has been applied in the context of trade and investment agreements and the right to food is **human rights impact assessment**. For example, in 2011, the Special Rapporteur on the Right to Food developed a set of principles for human rights impact assessment of trade and investment agreements, aimed at providing states with guidance on how to ensure that agreements concluded are consistent with states’ obligations under international human rights instruments.<sup>124</sup> There are also several examples of civil society organisations applying a human rights impact assessment approach to focus on the right to food in the context of trade and investment agreements.<sup>125</sup>

## 2. INTERNATIONAL HUMAN RIGHTS LAW AND THE WTO DISPUTE RESOLUTION MECHANISM

The dispute resolution mechanism of the WTO<sup>126</sup> involves case specific panels with the priority to settle disputes, preferably through a mutually agreed solution, within one year. It is generally considered to be more transparent than practices under bilateral investment treaties and free trade agreements, but has nevertheless been subject to criticism for lack of equal access to justice, impartiality and independence.<sup>127</sup> Critics have pointed out that there is a tendency to appoint government officials as panellists; that panel hearings are usually closed; and that due to the high costs of specialised international law firms, the poorest countries are **de facto** blocked from making effective use of the dispute settlement regime at the WTO.<sup>128</sup> It has also been argued that WTO law must evolve and be interpreted consistently with other bodies of international law, including human rights law, to promote consistency between WTO dispute resolution processes and human rights.<sup>129</sup>

The so-called Doha round of trade negotiations within the WTO, which was launched at the WTO's Fourth Ministerial Conference in November 2001, included a focus on reviewing and improving the dispute settlement mechanism, however, members did not complete the review on time. The review is currently being carried out within a framework of 12 thematic areas, including human rights relevant topics such as third-party rights, confidentiality of information, transparency and *amicus curiae* briefs, and focus on developing country interests, including special and differential treatment.<sup>130</sup>

### 3. HUMAN RIGHTS IN PREFERENTIAL TRADE AGREEMENTS AND OTHER TRADE AGREEMENTS

Human rights perspectives on trade agreements mirror many of the issues also raised with regard to investment agreements, including lack of transparency of negotiations, lack of policy coherence between trade objectives and human rights and sustainable development objectives, and adverse human rights impacts resulting from trade agreements. There have been suggestions to include and improve human rights clauses in trade agreements as part of promoting policy coherence.<sup>131</sup> Most recently, the UN Independent Expert on the promotion of a democratic and equitable international order called on states and parliaments to ensure that all future trade agreements stipulate the primacy of human rights and that existing treaties be revised to ensure that they do not conflict with states' human rights duties.<sup>132</sup>

#### KEY INTERNATIONAL PROCESSES AND WORKSTREAMS

- WTO on TRIPS [https://www.wto.org/english/tratop\\_e/trips\\_e/pharmpatent\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/pharmpatent_e.htm) and [https://www.wto.org/english/tratop\\_e/trips\\_e/tripsfactsheet\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/tripsfactsheet_e.htm) and Agriculture [https://www.wto.org/english/tratop\\_e/agric\\_e/negoti\\_e.htm](https://www.wto.org/english/tratop_e/agric_e/negoti_e.htm) and [https://www.wto.org/english/tratop\\_e/dda\\_e/status\\_e/agric\\_e.htm](https://www.wto.org/english/tratop_e/dda_e/status_e/agric_e.htm) and [https://ec.europa.eu/agriculture/wto/doha-round\\_en](https://ec.europa.eu/agriculture/wto/doha-round_en)
- European Commission Trade and Sustainability Impact Assessment and huri focus in this [http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc\\_153591.pdf](http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf)
- Aid for Trade [https://www.wto.org/english/tratop\\_e/devel\\_e/a4t\\_e/aid4trade\\_e.htm](https://www.wto.org/english/tratop_e/devel_e/a4t_e/aid4trade_e.htm)
- Cotonou Agreement [https://ec.europa.eu/europeaid/regions/african-caribbean-and-pacific-acp-region/cotonou-agreement\\_en](https://ec.europa.eu/europeaid/regions/african-caribbean-and-pacific-acp-region/cotonou-agreement_en)
- Everything but Arms
- [https://www.swp-berlin.org/fileadmin/contents/products/comments/2017C39\\_scm.pdf](https://www.swp-berlin.org/fileadmin/contents/products/comments/2017C39_scm.pdf)
- Special Rapporteur on right to food <http://www.ohchr.org/EN/Issues/Food/Pages/FoodIndex.aspx>

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- De Schutter, O (2009). 'International trade in agriculture and the right to food'. Dialogue on Globalisation, Occasional Papers Geneva No. 46, Friedrich-Ebert-Stiftung. <http://www.europarl.europa.eu/document/activities/cont/201307/20130715ATT69800/20130715ATT69800EN.pdf>
- Walker, Simon (2009). 'The Future of Human Rights Impact Assessments of Trade Agreements', School of Human Rights Research Series, vol. 35. <https://dspace.library.uu.nl/bitstream/handle/1874/36620/walker.pdf?sequence=2>
- Buergi Bonanomi, Elisabeth (2014). 'EU Trade Agreements and Their Impacts on Human Rights'. Centre for Development and Environment (CDE) Working Paper 1. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2536929](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2536929)
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- Schillinger, H R. (2016). 'In Need of Rethinking Trade Policies in Times of De-Globalisation'. Perspective, Friedrich-Ebert-Stiftung. <https://library.fes.de/pdf-files/iez/global/12761.pdf>
- EU HuRi clauses in trade and investment agreements <http://www.europarl.europa.eu/cmsdata/86031/Study.pdf>

4.

## OFFICIAL DEVELOPMENT ASSISTANCE



SDG targets	Associated Human Rights provisions <sup>133</sup>
<p><b>17.2</b> Developed countries to implement fully their official development assistance commitments, including the commitment by many developed countries to achieve the target of 0.7 per cent of ODA/GNI to developing countries and 0.15 to 0.20 per cent of ODA/GNI to least developed countries.</p>	<p><b>Universal Declaration of Human Rights, article 28:</b></p> <p>“Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”</p> <p><b>International Covenant on Economic, Social and Cultural Rights, article 2.1</b></p> <p>“...take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant..”</p> <p><b>International Covenant on Economic, Social and Cultural Rights, article 11.1</b></p> <p>“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”</p>

## BACKGROUND

Official Development Assistance (ODA) is dealt with in SDG target 17.2, but also in the Addis Ababa Action Agenda where states ‘reiterate that the fulfilment of all ODA commitments remains crucial. ODA providers reaffirm their respective ODA commitments.’<sup>134</sup>

ODA is generally provided by **official agencies**, including state and local governments. ODA aims to promote the economic development and welfare of **developing countries** and is **concessional in character**.<sup>135</sup> It can take various forms, including non/repayable grants, ‘soft loans’ which are repayable, but at below market interest rates. Recent changes in how ODA is calculated has also clarified how to count peace, security and in-country refugee costs towards a country’s ODA contributions.<sup>136</sup>

ODA represents a significant source of external funding for sustainable development around the world with least developed countries receiving an

estimated average of 4.6% of their income from ODA in 2017,<sup>137</sup> and has an important role to play in the implementation of the SDGs. Outside the sphere of projects that are marketable for profit-oriented investors, ODA is critical to promote the fulfilment of human rights, including by providing vital infrastructure and public services. It also has the advantage of being counter-cyclical, relatively stable and predictable, and being the main funding flow that is specifically ringfenced for poverty reduction, sustainable development, and protecting and promoting human rights.

It is also important to distinguish between the **quantity** of aid – i.e., how much is given - and the **quality** of aid, including for what it is given and to/through whom it is given, and ultimately what the impact of the aid provided is, including for realising the SDGs and ensuring maximum available resources for meeting human rights obligations.

In terms of quantity, ODA is today at an all-time high in absolute terms; the 30 members of the OECD's Development Assistance Committee (DAC)<sup>138</sup> together provided more than US\$153bn in development assistance in 2018.<sup>139</sup> However, measured as a share of Gross National Income (GNI),<sup>140</sup> ODA has been stagnating over the past decades. ODA by DAC countries currently amounts to around 0.31% of their combined GNI.<sup>141</sup> While this is an improvement from the all-time low of 0.21% in the late 1990s, it is far from the 0.54% spent in 1961 and even further from the internationally agreed goal of 0.7% of GNI.<sup>142</sup>

### DEVELOPMENT ASSISTANCE COMMITTEE

The DAC is the primary international forum for the largest aid donors (29 states and the EU), with the World Bank, IMF, and UNDP participating as observers. It defines and monitors global standards for development assistance and decides over what constitutes ODA. Members conduct periodic peer reviews to mutually assess development cooperation efforts, examining both policies and their implementation.

This 0.7% goal was first endorsed by the international community through General Assembly Resolution 2626 (XXV) in 1970. As of 2018, only seven countries fulfil this pledge: Denmark, Luxembourg, Norway, Sweden, the United Kingdom, Turkey and the United Arab Emirates.<sup>143</sup>

The definitions and regulations of what counts as ODA have notably changed throughout the past decades. Most recently, adjustments were made to enable the use of ODA to combat extremism and maintain peace and security.<sup>144</sup> The changes were criticised by some civil society actors for the risk of diverting funds from poverty eradication efforts.<sup>145</sup> Similar critiques have been raised regarding the use



of ODA to accommodate refugees in donor countries – a cost which should be not be recorded as ODA - as well as the increasing focus on using ODA as a catalyst and incentive to leverage funding from the private sector.<sup>146</sup>

The issue of ‘tied aid’, where aid can effectively only be used to buy goods or services from the country providing the aid – has also proved problematic, with civil society organisations (CSOs) criticising it for being inefficient and potentially even having a negative impact on the lives of people living in poverty.<sup>147</sup> Tied aid tends to be considerably more costly than other aid,<sup>148</sup> and less effective – in part because it is not locally determined and led and because it doesn’t provide the added value that procuring goods and services locally have on economic growth and job creation. This in turn has an impact on the resources available for a country to meet its human rights obligations.

The issue of whether ‘private sector instruments’ (PSI) should be included as ODA is also important to discussions about the quality and quantity of aid. PSIs such as equity investments and guarantees by the public sector are typically offered to private companies at or near market terms, in order to avoid distorting markets. They thus fail one of the fundamental tests of ODA, which is that all its transactions must be “concessional in character;” in other words, they must reflect real government effort and give something of value away.<sup>149</sup> At the time of writing, the issue of whether they should count as ODA remains unresolved.

## HUMAN RIGHTS ISSUES

### 1. THE HUMAN RIGHTS-BASED APPROACH TO DEVELOPMENT COOPERATION

As mentioned previously, not only the quantity but also the quality of ODA is important to ensure it protects, promotes and fulfils human rights. A human rights-based approach (HRBA)<sup>150</sup> to development cooperation has been formally adopted by a number of countries and entities, including the United Nations. The UN Development Group adopted a Common Understanding in 2003 to mainstream human rights across its programmes and activities.<sup>151</sup> Following this trend, an increasing number of donor countries has formalised their commitment to a rights-based approach in their ODA strategies. For example, Canada passed a Development Assistance Accountability Act in 2008 that stipulates consistency with international human rights principles as one of three criteria for its ODA.<sup>152</sup> With the emergence of the 2030 Agenda, a number of OECD countries have committed to mainstreaming the principle of “leaving no one behind” in their development strategies.<sup>153</sup>

### 2. ODA SUPPORTING THE REALISATION OF HUMAN RIGHTS

ODA can implicitly or explicitly be spent to support the realisation of human rights. An example of explicit support for supporting civil and political rights is the UK’s programme on human rights, democracy and the rule of law<sup>154</sup> which aims among other things to support promoting the right to freedom of expression; prevention



of torture; working for abolition of the death penalty; and supporting human rights defenders in ODA eligible countries. Meanwhile on the economic, social and cultural rights front, the German Government explicitly links human rights and the SDGs to its support for the right to health, which amounts to over €1bn per year. To help realise the right to health in the countries it supports, German aid focuses particularly on, for example, strengthening health systems; eliminating HIV/AIDS; preventing infectious diseases and epidemics; and strengthening maternal and child health as well as sexual and reproductive health and rights.<sup>155</sup>

### **3. HUMAN RIGHTS CONDITIONALITY**

Human rights also guides ODA through the principle of conditionality which some countries tie to their aid. In essence, this means that sustained violations of human rights may lead to a reduction or withdrawal of development assistance. For example, the European Union has included human rights clauses in its development agreements since the 1990s. This now applies to its cooperation with over 120 countries. However, such conditionality policies have been challenged both on the grounds of undermining effectiveness as well as violating the self-determination of receiving countries.<sup>156</sup> Tying aid to specific policies can also pose a threat to human rights, such as the policy introduced by the USA not to provide ODA to civil society organisations who provide or refer women to safe and legal abortions.<sup>157</sup>

## **KEY INTERNATIONAL WORK STREAMS AND INSTITUTIONS**

### **THE GLOBAL PARTNERSHIP FOR EFFECTIVE DEVELOPMENT COOPERATION**

A key process in promoting quality development co-operation – including ODA – is the Global Partnership for Effective Development Cooperation, which was established at the Fourth High-Level Forum on Aid Effectiveness in Busan in 2011. The Busan Declaration stated “that promoting human rights, democracy and good governance are an integral part of our development efforts.”<sup>158</sup>

The Global Partnership explicitly aims to improve the mobilization of resources to implement the SDGs.<sup>159</sup> It strives to enhance the efficiency and by extension quality of development co-operation. The initiative builds on the 2005 Paris Declaration on Aid Effectiveness<sup>160</sup> that established a set of principles for international development cooperation, such as inclusive (i.e. including also civil society, trade unions, etc.) national ownership of development strategies as well as mutual accountability between donor and recipient countries and their respective citizens. The Global Partnership crucially has a Global Monitoring Mechanism, which tracks country-level progress in implementing the four internationally-agreed effective development co-operation principles:

1. country ownership,
2. a focus on results,
3. inclusive partnerships; and
4. transparency and mutual accountability to one another.

Reporting to the framework is voluntary and country-led, based on developing countries own data and information systems.<sup>161</sup> The Global Partnership has however come under criticism for not integrating a stronger human rights approach to its work.<sup>162</sup>

### KEY RESOURCES AND READINGS

- OHCHR. 2006. Frequently Asked Questions On A Human Rights-Based Approach To Development Cooperation. [www.ohchr.org/Documents/Publications/FAQen.pdf](http://www.ohchr.org/Documents/Publications/FAQen.pdf)
- UN Development Group. UN Practitioners' Portal on Human Rights Based Approaches to Programming. <http://www.hrbaportal.org>
- OECD and World Bank. 2013. Integrating Human Rights Into Development: Donor Approaches, Experiences, And Challenges. Second Edition. Washington, D.C.
- Global Partnership for Effective Development Co-operation. <http://effectivecooperation.org>
- CONCORD AidWatch 2018. [https://concordeurope.org/wp-content/uploads/2018/10/CONCORD\\_AidWatch\\_Report\\_2018\\_web.pdf?318a44&318a44](https://concordeurope.org/wp-content/uploads/2018/10/CONCORD_AidWatch_Report_2018_web.pdf?318a44&318a44)

5.

## PUBLIC DEBT SUSTAINABILITY



SDG targets	Associated Human Rights provisions <sup>163</sup>
<b>17.4</b> Assist developing countries in attaining long-term debt sustainability through coordinated policies aimed at fostering debt financing, debt relief and debt restructuring, as appropriate, and address the external debt of highly indebted poor countries to reduce debt distress.	<p><b>Universal Declaration of Human Rights, article 28</b></p> <p>“Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”</p> <p><b>International Covenant on Economic, Social and Cultural Rights, article 11.1</b></p> <p>“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”</p>

## BACKGROUND

Excessive public debt and debt repayments can limit the amount of funds that states have to finance SDG and human rights interventions. SDG target 17.4. explicitly recognises this and outlines measures for reducing debt distress for highly indebted poor countries. Public debt is also addressed in the Addis Ababa Action Agenda (AAAA), in which states ‘recognize the need to assist developing countries in attaining long-term debt sustainability through coordinated policies aimed at fostering debt financing, debt relief, debt restructuring and sound debt management.’<sup>164</sup> The AAAA also stresses that ‘successful debt restructurings enhance the ability of countries to achieve sustainable development and the Sustainable Development Goals.’<sup>165</sup>

Public debt usually refers to money owed by the central government in a country. The term sometimes also includes money owed by sub-national entities such as provinces, regions, states and municipalities. Public debt is sometimes also referred to as sovereign debt. Public debt constitutes money owed both to domestic and foreign creditors, that can be both private actors (such as banks) and public actors (such as foreign governments). Public debt should not be confused with external debt, which is how much governments **and** the private sector owe foreign creditors.

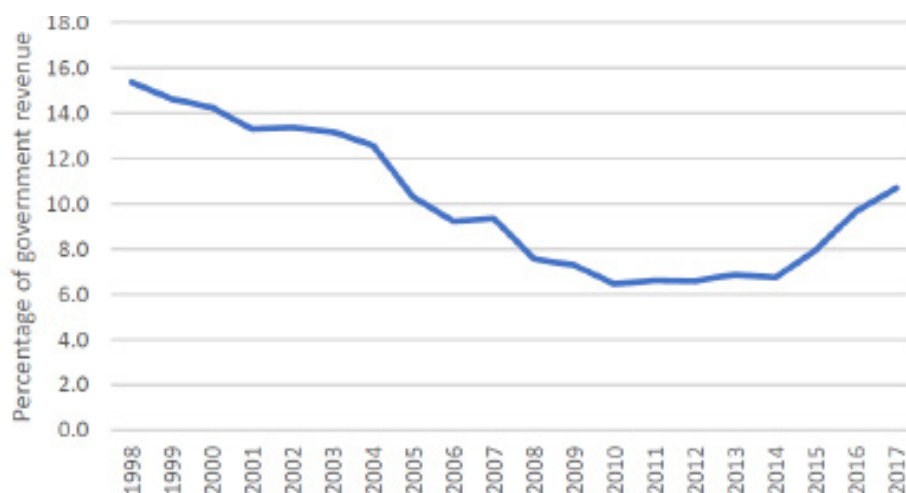
Public debt is usually created by one-off or ongoing deficits in annual government budgets. Such deficits are in developing country contexts usually the result of domestic resource mobilisation (such as taxes) and development aid not covering all the expenditure in the budget. As access to credit is usually more restricted in

developing countries than in richer countries, developing country governments tend to have proportionally higher costs for servicing their debt (for example, through higher interest rates) than richer countries.

The size of public debt is only part of the story though, as it is the country's ability to service its debt (i.e., keep up with interest payments and repayments) that ultimately affects its debt sustainability, and its ability to fund the public service and infrastructure investments needed to fulfil the SDGs and meet its human rights obligations. For example, according to IMF data, G20 countries on average have a public debt of around 91.5% of their GDP, while low-income countries' equivalent is 48.2%.<sup>166</sup> At the time of writing, Japan has public debt of about 248% of GDP while Mozambique has around 99%. Yet, Mozambique has been thrown into a debt crisis<sup>167</sup> while Japan has not (yet). This is in large part because most of the Japanese public debt is owed to members of the Japanese people and domestic financial institutions who have confidence in the state's ability to service its debt (i.e. there is market confidence). In contrast, Mozambique's debt is mainly external, with foreign creditors less confident that the volatile Mozambique economy will allow the government to sustainably service its debt – which it indeed hasn't been able to.<sup>168</sup>

Since 2014, public debt and especially external debt has risen rapidly in developing countries. The policy responses of advanced economies to the 2008 Global Financial Crisis, characterised by unconventional monetary policy (e.g. through 'quantitative easing'<sup>169</sup> and the maintenance of low interest rates) have fuelled a lending boom. Commodity price spikes in the wake of the crisis, and the absence of capital controls, have seen investors searching for returns in emerging and low-income economies. At the same time, international financial institutions have been encouraging a greater number of poor countries to raise funds from private capital markets, at a moment of falling aid flows and weak revenues from domestic taxation. A consequence of these trends has been growing debt burdens with higher servicing costs for many developing countries.

## DEVELOPING COUNTRY GOVERNMENT AVERAGE EXTERNAL DEBT PAYMENTS, 2000-2017



Source: Jubilee Debt Campaign <https://jubileedebt.org.uk/press-release/developing-country-debt-payments-increase-by-60-in-three-years> . This shows how developing country external debt payments have started to rise fairly sharply in the wake of the 2008/2009 financial crisis.

A 2018 report of the Inter-Agency Task Force on Financing for Development<sup>170</sup> found that rising public debt represents a significant obstacle to the realisation of the SDGs. In an overview of recent trends, it argued that “[d]espite a more favorable global economic outlook, emerging debt challenges in developing countries have intensified [...]. Debt-service indicators among developing countries have deteriorated in a widespread manner, and vulnerabilities have increased across developing countries [...] Many natural resource-producing countries have seen rapid debt accumulation as Governments have attempted to cushion the shock from falling commodity prices. Strains are also evident in several countries experiencing conflicts or political unrest, and in some small island developing States (SIDS), which remain vulnerable to disasters.”<sup>171</sup>

When accumulated debt becomes so high that servicing that debt requires a significant share of the national budget, and new loans have to be taken or sovereign bonds issued merely to service existing debt, a state can be considered over-indebted. This may be the result of a liquidity crisis, where a state cannot meet its short-term debt payments, or a more serious solvency issue, where the sustainability of debt in the medium to longer term is unlikely. When a state faces a debt crisis, it can pursue a number of options including: borrowing from the IMF, often with austerity conditionalities attached, a debt restructuring, or default on the debt. Such austerity conditionalities mean that the IMF rather than the government set much of the country’s economic policy and the government becomes accountable to the IMF rather than its own population for its economic policies.

Restructuring may involve the government managing to negotiate a (partial) debt cancellation/reduction (sometimes referred to as a “haircut”<sup>172</sup>), or deferment/ extending the repayment schedule to stabilise the national budget. A default occurs when state misses payments due to lenders. In the latter case, creditors could pursue litigation, and technically lay claim to state assets, although in practice this is only feasible for assets that are located outside the state in question. However, the process of default will likely cause capital flight, and temporarily prevent such a state from borrowing money on the world market.<sup>173</sup> The risk of litigation means states are increasingly opting to continue to borrow to service debts, in conjunction with domestic austerity, rather than seek a restructuring or defaulting. This can have a highly detrimental effect on the realisation of human rights, particularly economic and social rights.

## **HUMAN RIGHTS ISSUES**

Public debt and how it is approached could affect several aspects of the fulfilment of human rights as well as fundamental human rights principles, such as accountability.

### **1. FULFILLING HUMAN RIGHTS OBLIGATIONS**

Protracted situations of over-indebtedness can lead to constraints on the finance available for human rights and development interventions. This means that unsustainable debt situations can put the realization of particularly economic and social (ESR) rights such as the rights to food, education, health, adequate housing, and decent work at risk.<sup>174</sup>

### **2. ACCOUNTABILITY**

Protracted high levels of indebtedness undermine national ownership of development strategies. When economic policy is effectively prescribed by international financial institutions, accountability of the government is towards creditors rather than the population. Opportunities for effective democratic participation come under pressure across the board.

### **3. A HUMAN RIGHTS-BASED APPROACH TO PUBLIC DEBT ASSESSMENT**

Debt sustainability assessments such as the joint World Bank-IMF Debt Sustainability Framework (DSF) primarily focus on an indebted state's projected capacity to service its debt. This kind of analysis offers little or no consideration as to whether it is able to fulfil its human rights obligations to provide basic services to citizens, or, for that matter, implement corresponding development goals.<sup>175</sup>

An HRBA to public debt management should mean:

- The systematic integration of human rights impact assessments in debt sustainability assessments and restructuring efforts, including consideration of gender and impact on vulnerable groups;<sup>176</sup>
- Principles of shared responsibility and creditor accountability: due diligence for

lenders and borrowers to ensure borrowing countries don't lend more than they are able to repay, mutual responsibility to remedy in situations of unsustainable debt;

- Safeguards and structured mechanisms for insolvency to protect states, that respect international human rights law; and
- The systematic use of gender-sensitive human rights impact assessments in the design of domestic economic reforms introduced to deal with growing public debt.

The AAAA also stresses the importance of enhancing transparency in debt sustainability management, suggesting that states provide public data on public debt.<sup>177</sup> Moreover, it is acknowledged that maintaining public debt levels is a responsibility that lenders have a share in, with reference to the UNCTAD principles on responsible sovereign lending and borrowing.<sup>178</sup>

Civil society organisations have long been calling for the primacy of human rights in debt sustainability analysis and debt restructuring. This was also emphasised by the UN General Assembly in 2015 when it took a new step towards a rules-based sovereign insolvency procedure by adopting Resolution 69/319, outlining nine “Basic Principles on Sovereign Debt Restructuring Processes”<sup>179</sup>. Principle 8 holds that sovereign debt restructuring should aim to promote sustainable development and respect for human rights. “The set of principles on debt restructuring passed today by the UN General Assembly reflects customary law and general principles of international law to a large extent and, as such, are legally binding,” said Juan Pablo Bohoslavsky, the former UN Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, particularly economic, social and cultural rights. However, the Principles have not been universally accepted, impacting the possibility for their maturity into rules of customary international law, as the former Special Rapporteur had argued they should.

## KEY INTERNATIONAL WORKSTREAMS AND INSTITUTIONS

- **Heavily Indebted Poor Countries (HIPC) Initiative and Multilateral Debt Relief Initiative (MDRI):** the HIPC Initiative was first launched by the World Bank and the IMF in 1996, with a comprehensive review in 1999. It was complemented with the MDRI in 2005 to accelerate the process of debt relief. The initiative is joined by other multilateral institutions as well as bilateral creditors. It provides debt relief conditional on the implementation of a set of macroeconomic policies and structural reforms. As of 2017, 36 countries have received the full amount of debt relief they were eligible for, with a total volume of US\$76bn. The initiative is therefore nearly complete. Read more at: <https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/11/Debt-Relief-Under-the-Heavily-Indebted-Poor-Countries-Initiative><sup>180</sup>



### KEY RESOURCES AND READINGS

- Lumina, Cephas. Sovereign Debt and Human Rights. In: OHCHR 2013. Realizing the Right to Development. Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development. [www.ohchr.org/Documents/Publications/RightDevelopmentInteractive\\_EN.pdf](http://www.ohchr.org/Documents/Publications/RightDevelopmentInteractive_EN.pdf)
- UN Human Rights Council, 2010. Report of the independent expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephas Lumina (A/HRC/14/21). Available at: <http://undocs.org/A/HRC/14/21>.
- Inter-agency Task Force on Financing for Development, Financing for Development: Progress and Prospects 2018. Available at: [https://developmentfinance.un.org/sites/developmentfinance.un.org/files/Report\\_IATF\\_2018.pdf](https://developmentfinance.un.org/sites/developmentfinance.un.org/files/Report_IATF_2018.pdf)

6.

## PUBLIC-PRIVATE PARTNERSHIPS



SDG targets	Associated Human Rights provisions
<b>17.17</b> Encourage and promote effective public, public-private and civil society partnerships, building on the experience and resourcing strategies of partnerships	<ul style="list-style-type: none"> <li>• UN Guiding Principles on Business and Human Rights (see box in this chapter for more details)</li> </ul>

## BACKGROUND

A public - private partnership (PPP) can generally be described as a contract between a government and a private company under which the private company either finances, builds and/or operates some element of a service that is usually provided by governments.<sup>181</sup> Other definitions of PPPs exist, but they all focus on the relationship between the public sector and non-public actors to provide public services.

PPPs can be used in various sectors but are most commonly used in infrastructure projects when there is not enough public money to cover the full costs of the project. They have become increasingly popular in recent years, and in 2013, PPPs in developing countries alone (primarily, China, Russia, Brazil, India, Mexico and Turkey) amounted to roughly US\$159bn.<sup>182</sup> Most of these PPPs have been in the telecoms and energy sectors. The Addis Ababa Action Agenda<sup>183</sup> (AAAA) explicitly highlights the role of PPPs in financing the SDGs, stating, for example, that 'public-private partnerships serve to lower investment-specific risks and incentivize additional private sector finance across key development sectors led by regional, national and subnational government policies and priorities for sustainable development.'<sup>184</sup>

SDG target 17.17 can be important in mobilising the resources needed to realise the 2030 Agenda, both in terms of financial resources and the types of partnerships that are needed. The financial potential of PPPs for countries with budget constraints is huge, but attention needs to be given to the human rights implications of such partnerships, which have often given cause for concern.

## HUMAN RIGHTS ISSUES

While PPPs can provide opportunities for unlocking financing, for instance for larger scale infrastructure projects, all relevant actors need to ensure that human rights standards are respected in the process. The AAAA outlines some of the key standards of the human rights-based approach (HRBA) needed when planning a PPP, such as accountability and transparency, stating that PPPs 'should share risks and reward fairly, include clear accountability mechanisms and meet social and environmental standards [...] we also commit to holding inclusive, open and transparent discussion when developing and adopting guidelines and documentation for the use of public-private partnerships.'<sup>185</sup> The World Bank and

the Organisation for Economic Cooperation and Development's (OECD) 'Project Checklist for Public-Private Partnerships' highlights the importance for PPPs to consider compliance with e.g. existing land and labour laws when designing projects.<sup>186</sup>

### UN GUIDING PRINCIPLES ON HUMAN RIGHTS AND BUSINESS AND PPPS

When looking at respect for human rights standards in PPPs it is important to distinguish between the responsibility of the state and of business, including private sector actors. The UN Guiding Principles on Business and Human Rights (UNGPs) articulate the state duty to protect against business-related human rights abuses and the responsibility of businesses.

The UNGPs highlight that:

- "States should exercise adequate oversight in order to meet their international human rights obligations when they contract [...] business enterprises to provide services that may impact upon the enjoyment of human rights". The UNGPs further clarify that states 'do not relinquish their international human rights law obligations when they privatize the delivery of services that may impact upon the enjoyment of human rights.'<sup>187</sup> As such, entering into a PPP contract does not mean the state is no longer responsible for the protection and fulfilment of human rights. States can privatise the delivery of public services, but they cannot privatise their responsibility respect human rights. The UNGPs specify that states should promote respect for human rights by businesses they have contracts with 'including through the terms of contracts.'<sup>188</sup>
- The UNGPs constitute a minimum requirement in PPP contracts to ensure that the private sector project partner in a PPP has adequate human rights safeguards in place.
- Furthermore, the UNGPs detail that states must ensure 'policy coherence,' in other words, alignment with human rights obligations of standards and policies across all governmental departments, agencies, and other State-based institutions that shape business practices, including those in PPPs.<sup>189</sup>

Some contracts include provisions to compensate the private sector partner for changes in regulations and legislation that may affect the profitability of the project. It is, however, concerning that the public sector should compensate the private sector for costs associated with regulations that may be essential to achieving the SDGs (e.g., legislation aimed at the reduction of greenhouse gas emissions, measures to protect public health), or realising human rights.

There are many examples where PPP projects have had a negative human rights impact. For example, the European civil society network Eurodad has documented a number of cases where PPPs have given rise to financial, accountability and transparency concerns. Eurodad also highlights that standards in the provision of

basic services such as education can suffer as a result of PPPs, compromising the state's ability to fulfil in this case the right to education, as well as implementing SDG4 on education.<sup>190</sup>

The Right To Education initiative<sup>191</sup> has also specified how PPPs affect the right to education, and expressed some serious concerns. They particularly raise the risks that when private actors are tasked with delivering education, there can be discrimination in the choice of students to attend the schools<sup>192</sup>; cost-cutting measures by private actors seeking profitability can compromise the quality of education; and there can be accountability issues for fulfilling the right to education as the state is further removed from the actual delivery of education.<sup>193</sup>

To ensure that PPPs do not have a negative human rights impact, Amnesty International recommends that 'private sector financing and public-private partnerships for sustainable development should likewise be accompanied by mandatory human rights due diligence standards and processes, transparency and accountability safeguards in compliance with international human rights standards.'<sup>194</sup>

## KEY INTERNATIONAL PROCESSES AND WORKSTREAMS

There are several international processes and workstreams on PPPs.

One is the World Bank's PPP work, which includes policy advice for regulatory and institutional reforms, including a 'multibillion-dollar lending, investment and guarantee portfolio along with analytical and advisory activities and the ability to convene partners.'<sup>195</sup> The World Bank has also been contributing to the PPP Knowledge Lab<sup>196</sup> which provides sector and regionally specific information and advice on PPPs, and also runs a PPP certification scheme together with a number of development banks (see [https://ppp-certification.com/?PPP%20CID=PPP\\_TT\\_PPP\\_EN\\_EXT](https://ppp-certification.com/?PPP%20CID=PPP_TT_PPP_EN_EXT)).

The United Nations Economic Commission for Europe (UNECE) has a **Committee on Innovation, Competitiveness and Public-Private Partnerships** (CICPPP), which has as a stated objective to promote public-private partnerships for domestic and foreign investment.<sup>197</sup> The Committee meets annually in Geneva.<sup>198</sup> Its work on PPPs aims to 'increase the expertise of governments to identify, negotiate, manage and implement successful PPPs projects. This is done through exchange of knowledge and experiences of PPPs by member States, including experts from public and private sectors, particularly in the identification and testing of best practice.'<sup>199</sup> UNECE also hosts an International Centre of Excellence on PPPs (see <https://www.unece.org/cicppp/public-private-partnerships-ppp/icoeppp/abouticoe.html>)

## **FURTHER READING AND RESOURCES**

- UN Guiding Principles on Business and Human Rights: [https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)
- World Bank database 'Private Participation in Infrastructure': <http://ppi.worldbank.org/>
- World Bank PPP Guidelines: <https://ppp.worldbank.org/public-private-partnership/library/ppp-reference-guide-3-0>
- UNECE Guidelines on Promoting Good Governance in Public Private Partnerships: <https://www.unece.org/cicppp/cecipublications/ceci/2008/guidebook-on-promoting-good-governance-in-public-private-partnerships/guidebook-on-promoting-good-governance-in-public-private-partnerships.html>
- UNECE Guiding Principles on People-first Public-Private Partnerships in support of the United Nations Sustainable Development Goals: [http://www.unece.org/fileadmin/DAM/ceci/ppp/Standards/ECE\\_CECI\\_2019\\_05-en.pdf](http://www.unece.org/fileadmin/DAM/ceci/ppp/Standards/ECE_CECI_2019_05-en.pdf)
- OECD Principles for Public Governance of Public Private Partnerships: <https://www.oecd.org/gov/budgeting/oecd-principles-for-public-governance-of-public-private-partnerships.htm>
- Partnerships for the SDGs: Maximising Value Guidebook: [https://sustainabledevelopment.un.org/content/documents/2564Partnerships\\_for\\_the\\_SDGs\\_Maximising\\_Value\\_Guidebook\\_Final.pdf](https://sustainabledevelopment.un.org/content/documents/2564Partnerships_for_the_SDGs_Maximising_Value_Guidebook_Final.pdf)
- UNDESA - Public-Private Partnerships and the 2030 Agenda for Sustainable Development: Fit for purpose? <https://sustainabledevelopment.un.org/index.php?page=view&type=400&nr=2288>

## NOTES

- 1 Transforming our world: the 2030 Agenda for Sustainable Development, UN Doc. A/RES/70/1, 21 October 2015.
- 2 Transforming our world: the 2030 Agenda for Sustainable Development, UN Doc. A/RES/70/1, 21 October 2015, Preamble.
- 3 See Danish Institute for Human Rights, The Human Rights Guide to the SDGs, <http://sdg.humanrights.dk/>
- 4 See <https://www.un.org/sustainabledevelopment/financing-2030/> (Retrieved February 2019)
- 5 See <https://worldinvestmentforum.unctad.org/financing-for-the-sdgs/> (retrieved December 2019)
- 6 See <https://www.un.org/sustainabledevelopment/financing-2030/> (Retrieved February 2019)
- 7 Political Declaration of the High-Level Political Forum on sustainable development convened under the auspices of the General Assembly, UN Doc. No. A/Res/74/4, October 2019, para. 27.
- 8 Ibid., para. 27(b)
- 9 See <https://www.un.org/ecosoc/en/home>
- 10 See <https://sustainabledevelopment.un.org/hlpf>
- 11 Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda), UN Doc. No. A/RES/69/313, 27 July 2015. Available at: <https://sustainabledevelopment.un.org/frameworks/addisababaactionagenda>
- 12 Regarding the interpretation of this article, see also ICESCR General Comment No.3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant),(1990)
- 13 See <http://www.un.org/documents/ga/res/41/a41r128.htm>
- 14 See <http://sdg.humanrights.dk/en>
- 15 See e.g. <https://unstats.un.org/sdgs/metadata/>
- 16 Para 22, AAAA.
- 17 Para 22, AAAA.
- 18 Para 23, AAAA
- 19 Para 23, AAAA
- 20 Para 26, AAAA
- 21 Para 27, AAAA
- 22 Para 27, AAAA
- 23 This measures a government's total revenues from e.g. tax as a percentage of the total Gross Domestic Product (GDP) of the country.

- 24 See e.g. <https://www.oecd.org/tax/tax-global/work-on-statebuilding-accountability-effective-capacity-development.htm>
- 25 See e.g. <http://www.oecd.org/tax/countries-must-strengthen-tax-systems-to-meet-sustainable-development-goals.htm>
- 26 See World Economic Outlook data, <https://www.imf.org/external/pubs/ft/weo/2018/01/weodata/index.aspx>
- 27 See p. 21, (Crivelli, De Mooij and Michael Keen, 2015) <https://www.imf.org/external/pubs/ft/wp/2015/wp15118.pdf>
- 28 World Investment Report, UNCTAD, 2015, p. 200, [http://unctad.org/en/PublicationsLibrary/wir2015\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf)
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- 30 The SDG investment gap in developing countries alone is estimated at US\$2.5tn annually. See e.g. <https://www.undp.org/content/undp/en/home/blog/2017/7/13/What-kind-of-blender-do-we-need-to-finance-the-SDGs-.html>
- 31 Article 2, ICESCR, <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>
- 32 Article 11, ICESCR, <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>
- 33 Article 26, ACHR, <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>
- 34 Article 1, ACHPR, <http://www.achpr.org/instruments/achpr/>
- 35 ICESCR, General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, UN. Doc. No. E/C.12/GC/24, para. 23, <http://undocs.org/%20E/C.12/GC/24>
- 36 Ibid., para. 29, <http://undocs.org/%20E/C.12/GC/24>
- 37 Ibid., para. 37. <http://undocs.org/%20E/C.12/GC/24>
- 38 See p. 1, Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, UN Doc. No. A/HRC/26/28, 22 May 2014. Available at: <https://undocs.org/A/HRC/26/28>
- 39 Ibid. para. 44
- 40 Ibid. para. 47
- 41 Ibid. para. 79
- 42 Ibid. para 79
- 43 Ibid. para. 80
- 44 Ibid. para. 82
- 45 See <https://au.int/>
- 46 See <https://www.uneca.org/>
- 47 The Mbeki Panel defined Illicit Financial Flows as 'money that is illegally earned, transferred or utilised. These funds typically originate from three sources: commercial tax evasion, trade misinvoicing and abusive transfer pricing; criminal activities, including the drug trade, human trafficking, illegal arms dealing, and smuggling of contraband; and bribery and theft by corrupt



- government officials.' African Union Commission/United Nations Economic Commission for Africa (AUC/ECA) Conference of African Ministers of Finance, Planning and Economic Development. p. 9, [https://www.uneca.org/sites/default/files/PublicationFiles/iff\\_main\\_report\\_26feb\\_en.pdf](https://www.uneca.org/sites/default/files/PublicationFiles/iff_main_report_26feb_en.pdf)
- 48 Ibid., p.34
- 49 Trade mis-invoicing is a method for moving money illicitly across borders which involves the deliberate falsification of the value, volume, and/or type of commodity in an international commercial transaction of goods or services by at least one party to the transaction.
- 50 Mbeki report, p. 79.
- 51 Ibid., p.4.
- 52 Ibid.
- 53 Ibid.
- 54 See <http://www.mofa.go.jp/files/000059869.pdf>
- 55 See <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L0849&from=EN>
- 56 See <https://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/MCAA-Signatories.pdf>
- 57 See <http://www.oecd.org/tax/beps/>
- 58 See <https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp062714>
- 59 See <https://www.addistaxinitiative.net/about>
- 60 See <https://www.un.org/esa/ffd/ffd3/index.html>
- 61 See <https://www.addistaxinitiative.net/ati-members-0>
- 62 See <http://sdg.humanrights.dk/en>
- 63 AAAA, Para 36
- 64 AAAA, Para 45
- 65 AAAA, Para. 41
- 66 See e.g. <https://www.iisd.org/sites/default/files/publications/assessing-impacts-investment-treaties.pdf>
- 67 Sauvant, K P. and Mann, H (2017). Towards an Indicative List of FDI Sustainability Characteristics, <http://ccsi.columbia.edu/files/2017/10/KPS-HM-Towards-an-Indicative-List-of-FDI-Sustainability-Characteristics-17-Oct.-17-FINAL.pdf>
- 68 See [https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)
- 69 See <https://www.ohchr.org/en/issues/business/pages/wghrandtransnationalcorporationsandotherbusiness.aspx> 70 UNGPs, [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)
- 71 Principle 8, UN Guiding Principles
- 72 [http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc\\_153591.pdf](http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf)
- 73 Thomas Reuters Practical Law, Glossary: Host Government Agreement, [https://uk.practicallaw.thomsonreuters.com/5-501-4985?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/5-501-4985?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1) (last accessed 21 July 2017).
- 74 Kienzler et al. (2015), p. 16; [https://www.bmz.de/g7/includes/Downloadarchiv/Natural\\_Resource\\_Contracts.pdf](https://www.bmz.de/g7/includes/Downloadarchiv/Natural_Resource_Contracts.pdf)

- 75 International Institute for Sustainable Development, Assessing the Impacts of Investment Treaties: Overview of the evidence, 2017, <https://www.iisd.org/sites/default/files/publications/assessing-impacts-investment-treaties.pdf>, p. 1.
- 76 Inter-state contract, host state 'commitments' and the myth of stability in international law, L Johnson and O. Volkov. [http://ccsi.columbia.edu/files/2013/10/Investor-state\\_contracts\\_host-state\\_commitments\\_-\\_ARIA\\_V24\\_No3\\_L\\_Johnson\\_O\\_Volkov.pdf](http://ccsi.columbia.edu/files/2013/10/Investor-state_contracts_host-state_commitments_-_ARIA_V24_No3_L_Johnson_O_Volkov.pdf).
- 77 SADC Model Bilateral Investment Treaty Template with Commentary: <http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf>
- 78 See 'Transforming Our World – the 2030 Agenda for Sustainable Development' <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf>
- 79 UNCTAD Investment Framework for Sustainable Development, [http://unctad.org/en/PublicationsLibrary/diaepcb2015d5\\_en.pdf](http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf) 2015, p. 101. Whilst the Framework primarily addresses international investment treaties, rather than state-investor contracts, it includes a broad investment policy focus, the principles of which, by implication, can also be read as relevant to state-investor contracts.
- 80 World Bank, NRGi and CCSI, Resource Contracts, <http://www.resourcecontracts.org/> (last accessed 2 September 2017). – supported by the World Bank, the Natural Resource Governance Institute and the Columbia Center on Sustainable Investment.
- 81 For example, Indonesia in 2014, see e.g., <https://www.ft.com/content/3755c1b2-b4e2-11e3-af92-00144feabdc0>; South Africa in 2012, see e.g., <http://www.nortonrosefulbright.com/knowledge/publications/118456/bilateral-investment-treaties-in-south-africa>; India in 2016, see e.g. <http://www.bothends.org/en/newsitem/469/India-terminates-bilateral-investment-treaties-BITs->; Ecuador in 2017, see e.g. <http://www.ids.ac.uk/opinion/bilateral-investment-treaties-on-the-eve-of-a-major-reform>.
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105 Ibid, p. 12.

106 Agenda 21: programme of action for sustainable development. Adopted at United Nations Conference on Environment and Development (UNCED). See in particular Chapter 2: <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>

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115 [http://www.who.int/medicines/areas/policy/wto\\_trips/en/](http://www.who.int/medicines/areas/policy/wto_trips/en/) Ibid. and UNCTAD (2008), Training Module on the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), UN Doc. No. UNCTAD/DITC/TNCD/2008/3, p. 30. Available at: [http://unctad.org/en/Docs/ditctnkd20083\\_en.pdf](http://unctad.org/en/Docs/ditctnkd20083_en.pdf). LDCs were granted an extension of time until 2016, pursuant to the Doha Declaration on the TRIPS Agreement and Public Health, i.e. meaning that LDCs need to provide for, nor enforce patents and data protection with respect to pharmaceutical products until 1 January 2016. [https://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_trips\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm)

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