A Guide to Include Gender in Investment Agreements

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for the

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LIST OF ABBREVIATIONS

BIT	Bilateral Investment Treaty
CCFTA	Canada-Chile Free Trade Agreement
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CERDS	Charter on the Economic Rights and Duties of States
CETA	EU-Canada Comprehensive Economic and Trade Agreement
CPTPP	The Comprehensive and Progressive Agreement for Trans-Pacific Partnership
DAC	Development Assistance Committee
DG EAC	Directorate-General for Education and Culture
EU	European Union
EVFTA	EU-Vietnam Free Trade Agreement
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDI	Gross Domestic Income
GDP	Gross Domestic Product
GESI	Gender Equality and Social Inclusion
GII	Gender Inequality Index
ICC	International Chamber of Commerce
ICS	Investment Court System
ICSID	International Centre for the Settlement of Investment Disputes
IFC	International Finance Corporation
IIA	International Investment Agreement
ILO	International Labour Organisation
IMF	International Monetary Fund
ISDS	Investor-State Dispute Settlement
M&A	Mergers and Acquisitions
MAI	Multilateral Agreement on Investment
MFN	Most Favoured Nation
MIC	Multilateral Investment Court
MNE	Multinational Enterprise
NAFTA	North American Free Trade Agreement
NIEO	New International Economic Order
NYC	New York Convention
ODA	Official Development Assistance
OECD	Organisation for Economic Cooperation and Development
RTA	Regional Trade Agreement
SADC	Southern African Development Community
SDG	Sustainable Development Goal
TIP	Treaty with Investment Provision
TRIM	Trade Related Investment Measure
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Commission on Trade and Development
US	United States
WEPs	Women’s Empowerment Principles
WTO	World Trade Organisation

EXECUTIVE SUMMARY

1. This Guide explains how the regulation of foreign direct investment (FDI) has evolved, why Gender Equality and Social Inclusion (GESI) needs to be addressed in international investment treaties and the ways in which this can be implemented, along with the associated challenges. It is a basic 'crossover' guide for audiences based in two very different domains of policymaking: investment law and policymakers and negotiators on the one hand and gender equality ministries and civil society stakeholders, on the other.

2. Most FDI is regulated by international investment treaties signed between the government hosting an investment and the home government of the investor. The traditional objective of an International Investment Agreement (IIA)[1] is to protect the investment in the territory of the host country, through for example: fair treatment, compensation for expropriations and the right to submit an investment dispute with the host government directly to international arbitration. Host countries are motivated to sign these agreements in order to attract FDI into their countries to further economic and human development.

3. The interconnection between gender and FDI is becoming an increasingly important area for policy makers because understanding FDI's role in enhancing gender equality and other marginalised or disadvantaged communities will bring multiple gains. Evidence now indicates that FDI is positively related to women's employment, particularly in developing countries as a result of large-scale activities in women-dominated and labour-intensive garment and food industries. FDI inflows are positively associated with women life expectancy (including reduction in maternal mortality), as well as women-to-male gross enrolment rate in secondary schools. Investment liberalisation through IIAs interacts with women's access to critical physical, financial and human resources and access to basic services, with significant implications for their empowerment, livelihoods, health, socioeconomic status and well-being.

4. Conversely, women's disempowerment causes staggeringly deep losses in productivity, economic activity, and human capital. Working women are facing a persistent gender wage gap and discrimination within the work place. At home, 75 per cent of the world's total unpaid care is undertaken by women, including the vital tasks that keep households functioning such as childcare, caring for the elderly, cooking, and cleaning. (McKinsey, 2019)

5. Such gender inequalities are the consequence of discriminatory forces that permeate all social activities. In the economic sphere, gender inequalities are evident in three main dimensions: the allocation of unpaid work, treatment in paid work, and rights to property. In relation to international investment, the main points of impact are the constraints on the level and terms of women's engagement in the labour market.

6. This Guide argues that FDI and IIAs have the potential to be important mechanisms for delivering global public goods, including improving gender equality as well as other marginalised or disadvantaged groups. This is because FDI is widely understood to introduce technical know-how, enhance work force skills, increase productivity, generate business for local firms, and create better-paying jobs, generating more government revenue. Moreover, FDI is often the largest source of external finance for many developing countries.

[1] The term International Investment Agreement (IIA) is used here as the generic term incorporating bilateral investment agreements and investment provisions or chapters in free trade agreements.

7. Harnessing the beneficial effects of FDI in a particular state requires strategic consideration of domestic conditions and the global economy. This Guide identifies the different types of FDI, the different provisions and protections included in IIAs, and how the conduct and responsibilities of these investments and investors need to be clearly set out. This will allow for the conduct of multinational enterprises (MNEs), as the main providers of investment, to be better regulated to promote gender equality.

8. As the attraction of FDI is evolving from bringing in purely financial capital to building up all forms of capital, notably human capital, foreign investors are in turn, becoming increasingly attracted to investing in countries with higher levels of human capital, in both men and women for all sections of society. So, if harnessed correctly, FDI can work to benefit both the investor and the host country, in developed and developing economies. There is much potential for governments to reform their investment policies and agreements to address gender equality more effectively, but also to attract more FDI by reducing gender inequality domestically.

9. However, while FDI in women-intensive industries may boost women's wages and employment, it has made women extremely vulnerable to the instabilities of the global economic system, along with other marginalised and disadvantaged groups. This is due to the highly competitive nature of labour-intensive export industries, the high capital mobility characterised by this type of cost sensitive FDI, and the fact that manufacturing industries, which women and informal labour are most employed in, are also the most exposed to the liberalising effects of current trade agreements.

10. Another GESI and FDI concern is that IIAs have the potential to unduly restrict policy space for host countries and create a risk that investors challenge core domestic policy decisions, for instance in the area of GESI. There is an increasing need to rebalance the rights and obligations between investors and states and ensure greater coherence between investment policies and other public policies. Investment policies do not exist in isolation, but interact with other policy areas, including gender, socially disadvantaged communities, the environment and health.

11. This Guide identifies a range of different avenues for promoting GESI in investment treaties, beginning with non-binding obligations endorsing, implementing and monitoring the enforcement of relevant international agreements such as the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). More significant provisions include non-regression clauses, with specific reference to gender equality, to prevent potential slippages in gender policies, particularly in times of crisis, such as the COVID-19 pandemic. The Guide also sets out approaches for defending policies promoting GESI in IIAs, such as broadening public policy exceptions, carve-outs or derogations, narrowing or eliminating stabilisation clauses that shield investors from changes to the law, and including performance requirements to positively discriminate in favour of women's labour employment.

12. None of these methods of promoting GESI come without challenges. Indeed, if the root causes of labour market inequalities are not addressed by domestic governments, there will always be constraints on the ability of countries to draw substantial development benefits from foreign investment in industries predominantly employing women and informal labour, and on the potential for this type of investment to contribute to women's and other socially disadvantaged and marginalised groups' well-being. This Guide sets out how countries adopting laws, international conventions and guidelines that guarantee the right to equality use investment policies and treaties to mainstream GESI into domestic and international laws.

13. If host country governments did more to give greater domestic legislative push through IIAs, foreign firms could help to enhance gender equality in host countries. By increasing the demand

for women's labour, foreign firms may put upward pressure on women's wages and contribute to reducing the gender employment and wage gaps. Foreign firms can support gender balancing in senior management through, for instance, corporate policies that help reconcile work-life balance, or activities aimed at developing leadership and managerial skills of women. Foreign firms can also develop women's entrepreneurship in host countries, by creating new business opportunities for women-owned businesses, or by helping improve their performance.

14. The study concludes by discussing how the investment policy making process within countries can be harnessed to promote gender equality, consistent with national development goals (such as the Sustainable Development Goals (SDGs)). Consultations, impact assessments and mechanisms for monitoring FDI effects are all important in this connection. A gender sensitive investment policy making process is an essential prelude for parties to negotiations to be able to push for appropriate measures in future international investment treaties.

15. GESI provisions will become the more rational approach for FDI and multinational enterprises (MNEs) to follow when more governments embed GESI within a domestic gender equality policy that is broader than GESI policy, and implement relevant international conventions and guidelines. With this objective in mind, this Guide puts forward a range of best practices and policy guidelines that have been developed to help maximize the potential benefits of FDI for gender equality, in both society and the economy.

1 THE WHAT, WHY AND HOW OF INVESTMENT TREATIES

1.1 The Role of Foreign Direct Investment

1.1.1 The What

At its most general, investment is the use of money to purchase assets in the hope that the asset will generate income over time. Investment can be private or public and it can be both domestic or foreign - when it flows into a country other than the one where the investor resides. This guide focuses on FDI, which consists of equity secured lending to, or purchase of ownership shares in a foreign enterprise, largely owned by and controlled by the investor as an MNE. It is designed for policymakers, investors and stakeholders to engage in action on promoting GESI in investment treaties, signed between the government of the country hosting the investment, and the government of the foreign investor.

An investment into a foreign firm is considered to be an FDI when it establishes a lasting interest of at least ten per cent of the voting power in a foreign firm. This represents the required element of control necessary to actively manage and influence a foreign firm's operations. Any foreign investment under ten per cent is typically classified as part of a 'stock portfolio', and too small to influence any level of control of the firm. When governments invest, on the other hand, they commonly undertake long-term investments in public infrastructures, such as transport housing, schools and hospitals, as well as investing in research and development that can contribute to balancing the economic cycles, create new jobs and enhance productivity. Public investment represents 15 per cent of total investment (public and private), and three per cent of gross domestic product (GDP) in the Organisation for Economic Cooperation and Development (OECD).[2] As such, good public investment also shapes positive choices about where people live and work, increases quality of life and can also strategically influence the nature and location of private investment – which constitutes 85 per cent of total investment flows.

Box 1: Forms of Foreign Direct Investment (FDI)

This Guide focuses on three distinct forms of FDI:

1. Equity capital: foreign investor purchase of shares in an enterprise (MNE) in a country other than its residence. Equity lending or debt financing on the other hand, does not require giving up ownership to the foreign lender.
2. Re-invested earnings in the overseas enterprise (MNE).
3. Intra-company loans, or intra company debt: short or long-term borrowing and lending of funds between direct investors, parent companies, and affiliates.

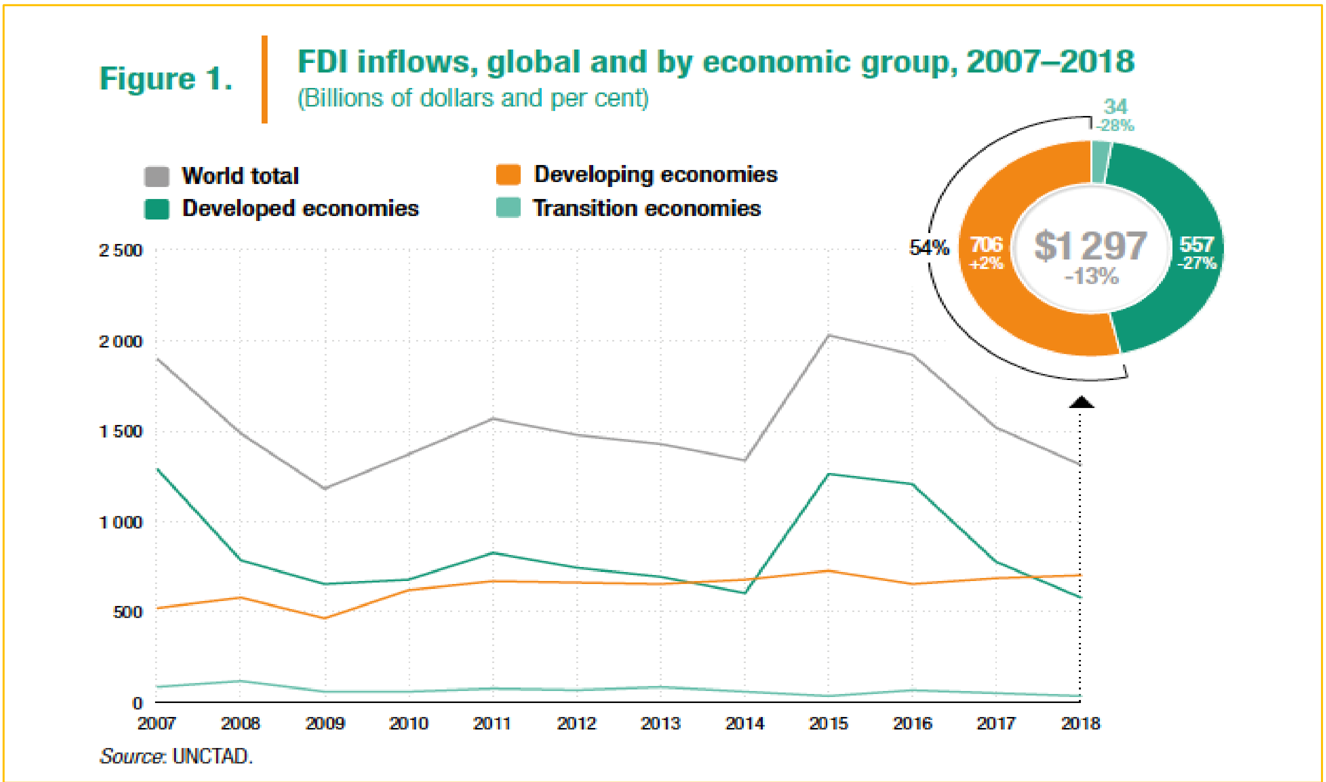
1.1.2 The Why

Foreign investment offers individuals and businesses an opportunity to expand and diversify into new areas, where growth and return on investment are significantly larger. Foreign investors can access new markets, while gaining greater efficiencies by combining assets and operations, in order to access complementary skills, labour and capacity. In some cases, foreign investors also benefit from tax incentives, lower regulatory costs, preferential tariffs and even subsidies from the host government. Nevertheless, there are some noticeable trends in FDI over the past decade or so

[2] https://www.oecd.org/gov/public-investment.htm

before the COVID-19 pandemic. Figure 1 1 indicates that after a peak in 2015, FDI inflows have been decreasing significantly, both globally and in developed economies. Explanations include declining rates of return on FDI, increasingly asset-light forms of investment and a less favourable investment policy climate. FDI inflows into developing countries, on the other hand, have been slightly increasing over this timeframe to overtake inflows to developed economies in both 2014 and 2017. FDI flows to Africa rose by 11 per cent to $46 billion, despite declines in many of the larger recipient countries and flows to developing Asia, the largest recipient region, were up 4 per cent. However, FDI in Latin America and the Caribbean was 6 per cent lower, failing to maintain momentum following a long slide. (UNCTAD, 2019).

Figure 1: FDI Inflows, Global and by Economic Group 2007 - 2018 (UNCTAD, 2019)



Economists tend to favour the free flow of capital across national borders because it allows investors to seek out the highest rate of return. Increased capital flows may also offer other benefits. International flows of capital reduce the risk faced by investors, by allowing them to diversify their lending and investment. The global integration of capital markets may also contribute to the spread of best practices in corporate governance, accounting rules, and legal traditions. As such, the global mobility of capital may limit the ability of governments to pursue local policy objectives, whether good or bad.

FDI can work to benefit both the investor and the host country, in developed and developing economies. FDI can introduce technical know-how, enhance work force skills, increase productivity, generate business for local firms, and create better-paying jobs, generating more government revenue. Moreover, FDI is often the largest source of external finance for many developing countries;[3] and an even larger source of external finance than official development assistance (ODA), remittances, or portfolio investment flows (World Bank, 2018).

However, data also indicates that not all FDI leads to sustainable development in the host states. FDI is also associated with displacing local businesses and unreasonable profit repatriation. MNE investment activities have caused environmental damage in host states and negatively impacted local communities (Schill et al, 2015:3). The potential for FDI's to cause harm is exponentially greater in countries with a vulnerable economy and environment, weak governance institutions and unstable political and social situations.

International frameworks are now highlighting the need for investment promoting several SDGs, including poverty eradication, gender equality, sustainable agriculture, sustainable energy, country equality, and global partnership. To promote the SDGs in investment in 2016, the G20 trade ministers agreed on a set of non-binding Guiding Principles for Investment and Policymaking, aiming to "promote investment for inclusive economic growth and sustainable development." (UNCTAD, 2016). For if harnessed correctly, FDI can be an important mechanism for delivering global public goods, addressing climate change, improving labour conditions, setting global industry standards, and delivering infrastructure to local communities (International Finance Corporation (IFC), 2017).

1.1.3 The How

FDI can take different forms. For example, some businesses establish a subsidiary of a domestic firm in a foreign country (MNE). FDI can often also take the form of mergers and acquisitions (M&A), which is broadly defined as the process of one company combining with another. In an acquisition, one company purchases the other outright. The acquired firm does not change its legal name or structure but is now owned by the parent company. A merger is the combination of two firms, which subsequently form a new legal entity under the banner of one corporate name.

Another common method for FDI is a joint venture. This takes place when a new business entity abroad is created by two or more entities, either foreign or domestic. It is generally characterized by shared ownership, shared returns and risk, and shared control. Through a joint venture, investors can access new markets while gaining greater efficiencies by combining assets and operations and accessing complimentary skills and capacity. At the same time, the risks are shared and minimised. (Reuer and Leiblein, 2000).

In addition to these different methods of FDI, there are different forms for creating an MNE, typically: horizontal, vertical, and conglomerate FDI. Horizontal is establishing the same type of business in another country. Vertical FDI is when the investment is made within the supply chain of the industry, but not directly in the same industry. This is known as vertical integration within the supply chain when the business invests in a foreign firm that it may supply or sell to. For example, when a food processing company also invests in the production of the food it processes – such as dairy or agricultural producers. When an investment is made in an industry that is not connected with the investors' business, it is known as conglomerate FDI.

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[3] The term "developing countries" in this report refer to low- and middle-income countries as defined by the World Bank. The list is based on income categories in fiscal year 2019 at http://databank.worldbank.org/data/ download/ site-content/OGHIST.xls.

1.1.4 Domains of gender inequality in the context of foreign investment

In all regions of the world, women tend to suffer more than males with the same background from poverty, sexual violence, marginalization and other oppressions due to transnational cycles of gender vulnerability.[4] These inequalities are particularly salient in developing countries, where gender disparities – as measured by the Gender Inequality Index (GII) for example – are generally the highest, and gender vulnerability causes women to be disproportionately affected by unfavourable conditions and a lack of resources. [5]

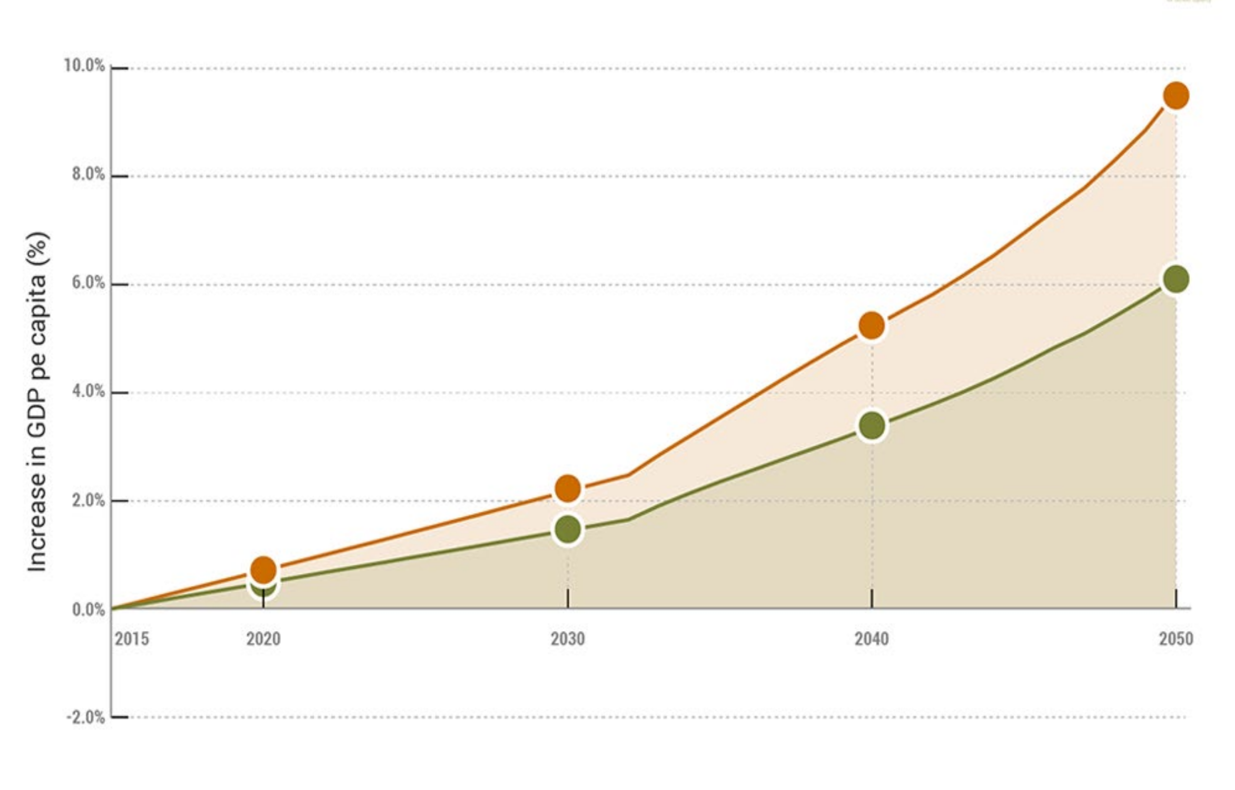
In addition to gender inequality being a moral and social issue, it is also a critical economic challenge. There are 655 million fewer women in the labour force than men. The reason for this can be sourced in all-pervasive systemic and social discrimination against women. For example, there are 195 million fewer women than men who are literate, 190 million fewer women than men have a bank account, and there are only 22 women in ministerial and parliamentary positions for every 100 men. (McKinsey, 2019). Women's ability to participate in the workplace is further obstructed because women spend three times the amount of time as men on unpaid care work in the home. (UN, 2015). This means that even prior to the Covid-19 pandemic, 75 per cent of the world's total unpaid care was undertaken by women, including the vital tasks that keep households functioning such as childcare, caring for the elderly, cooking, and cleaning. Unpaid work being undertaken by women today amounts to as much as $10 trillion of output per year, roughly equivalent to 13 percent of global GDP.

Such gender inequalities have significant negative implications for both society and the economy. In 2015, it was estimated that fully closing gender gaps in work could add as much as $28 trillion to annual GDP in 2025. Every region studied has the potential to increase its GDP by 8 to 16 percent between 2015 and 2025 (Gupta et al, 2019). For example, improving gender equality within the European Union (EU) would lead to an increase in EU (GDP) per capita by 6.1 to 9.6 per cent, which amounts to €1.95 to €3.15 trillion by 2050. See Graph 1.

[4] The World Health Organisation (WHO) refers to gender as the characteristics of women, men, girls and boys that are socially constructed. This includes norms, behaviours and roles associated with being a woman, man, girl or boy, as well as relationships with each other. Gender is hierarchical and produces inequalities that intersect with other social and economic inequalities.

[5] http://hdr.undp.org/en/content/gender-inequality-index-gii.

Graph 1: The Effect of gender equality on GDP per capita in the EU



Source: European Commission Directorate-General for Education and Culture (DG EAC), 2016.

The gender effects of FDI expansion have been studied most carefully in relation to labour market and employment. Changes in the number of jobs, wages, and the quality of jobs for women have been the main consideration. Large-scale activities have taken place in the labour-intensive garment and food industries, as they have been 'industrialised' to supply burgeoning consumer demand in foreign markets. The impact of FDI and trade expansion in each country varied by socio-economic structure. Women's constrained position in the labour market played out, in the first instance, to their advantage in countries with few natural resources, such as oil or minerals: in Asia, North and East Africa and Latin America. (Joekes et al, 2020).

These countries achieved competitive advantage in labour intensive manufacturing and horticulture. As sectors such as clothing, consumer electronics and horticultural production expanded, they recruited women workers in large numbers. This resulted in increases in women's labour force participation rates and gave many women access to income on their own account for the first time. FDI inflows in these sectors are positively associated with gender equality, as measured through women's life expectancy, education, and incomes. (Ouedraogo, Rasmané and Marlet, 2018). However, diversification into new sectors, such as automotives, did not offer women jobs in the same proportion. The early surge in the level of women's wage employment opportunities in manufacturing from early stage trade liberalisation up to about 2010 did not result in sustained increases, and the quality of women's jobs deteriorated (Seguino and Braunstein, 2019).

The effect of trade on women's formal employment is not the sole dimension to be considered. No person has the sole function, in the economy, of providing labour. Women are affected in all their multiple economic roles, as producers (workers or service providers or operators of businesses), consumers, and care givers. Any policy change or external shock to an economy, including investment policy-related changes, gives rise to changes in each channel. Changes in the availability and relative prices of goods and services affect consumption; changes in the availability of public or private provision of childcare, health services, utilities and goods (electricity, water, household appliances, processed foods) impact on the burden of unpaid care work. The net effect will vary from place to place, depending on the relative strength of the impacts, and different population sub-groups will also be affected differently. (Joekes et al, 2020).

Academic researchers and civil society organisations have long strived to understand more about the impact of FDI on gender outcomes. New investment policies are applied, with the express intention of changing entire national structures of production. Resources are channelled towards lines of businesses that are competitive in international markets and away from lines of business whose products are more expensive than imports, unless they are able to modify their production methods to become more efficient. Changes ripple through the whole economy and society. As such, a multi-stakeholder approach is necessary to negotiating international investment agreements (IIAs).

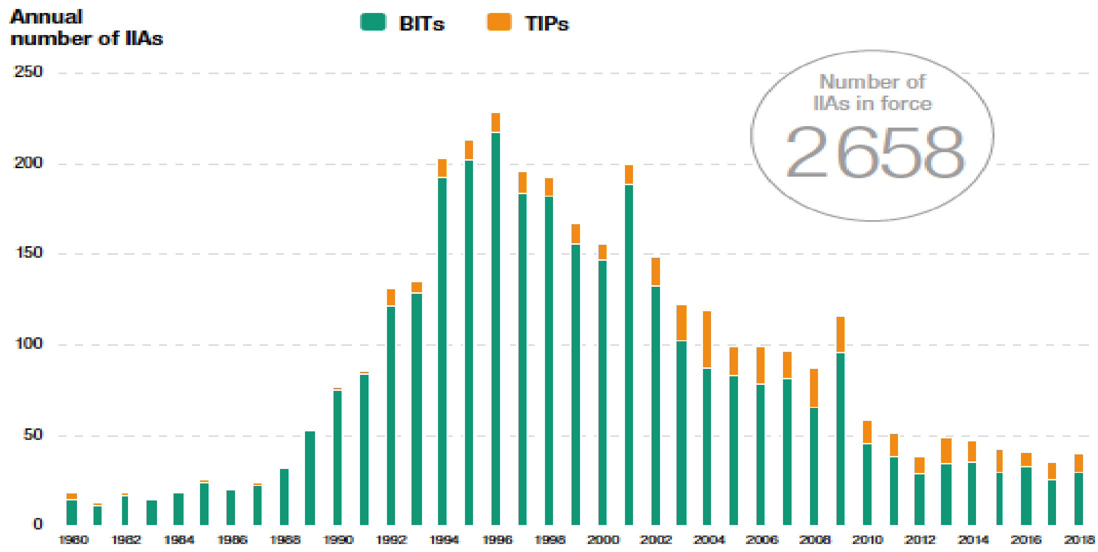
This Guide specifically advocates the objective of gender equality and social inclusion in foreign investment and IIAs negotiations based on a) the clear existing evidence of the direct impact that FDI can have on women at work and home, both positive and negative and b) the direct positive economic and social impact to be garnered from promoting gender equality and social inclusion.

1.2 The Evolution of Investment Treaties and their Limitations

1.2.1 Background

An International Investment Agreement (IIA) is an umbrella term for any type of agreement between two countries that sets up "rules of the road" for foreign investment in each other's countries. IIAs can be negotiated in the form of bilateral investment treaties (BITs) or a Treaty with investment provisions (TIP) such as a free trade agreement, or more historically, within Friendship, Commerce and Navigation agreements negotiated during the 18th century colonial period. Figure 2Figure 2 indicates that the surge in signing BITs occurred in the 1990s and while there were 2,658 IIAs signed by 2018, the number of new IIAs has been declining since 2002.

Figure 2: Number of IIAs signed 1980-2018



Source: UNCTAD, IIA Navigator.

From the beginning, IIAs have sought to establish secure trading relations between two countries and provide security and compensation for investment property in the country hosting the foreign investment. Historically, these IIAs were more favourable to the more powerful economies.

Customary international law also obligates states to treat foreign investments according to minimum international standards of protection and non-discrimination. However, these standards were vague and many developing countries have disputed their existence. In Latin America, for example, most countries adhered to the Calvo doctrine, under which foreign investors were entitled only to the same treatment that the host country provided to its own investors. (Shea, 1955: 17-20). The Hull Doctrine, held by the US and other capital exporting countries on the other hand, argued that when a foreign investment is expropriated, it is entitled to prompt, adequate and effective compensation.

As a result of this ideological conflict, a difficulty emerged. Without agreement from the host state to submit an investment dispute to arbitration, the only mechanism available under customary law for enforcement of a customary standard of protection was by espousal. Espousal is a legal device whereby, after the injured investor has exhausted local courts and remedies, the government of the injured investors assumes and presents the claim as a national claim against the state that has injured the investor. The weaknesses of this approach included the reluctance of home states to disrupt diplomatic relations with the host state after considerable resources have been expended exhausting local remedies in the host state. Ultimately espousal amounted to state-to-state diplomacy, which is inherently unpredictable and difficult during the post-colonial era. Many newly independent countries perceived FDI to be another method for developed countries to control their resources and interfere with their domestic policies protecting infant industries. (Hanink, 1987:247-48).

Developing countries successfully advocated their right to expropriate foreign assets without fair payment within the UN General Assembly. The 1974 Declaration of the New International Economic Order (NIEO) declared that states have "full permanent sovereignty" over their natural resources and other economic activities. Moreover, state sovereignty includes "the right of nationalization or transfer of ownership to its national". Crucially, the Declaration did not set out any obligation to pay compensation. (UN General Assembly 6th special session, 1974). The UN

General Assembly also adopted the 1974 Charter on the Economic Rights and Duties of States (CERDS), which declared that each state has the right to nationalise, expropriate or transfer ownership of foreign property. When specifying appropriate compensation, the Charter stated that compensation *should* rather than must be paid. Further, the amount of compensation would be based on national law, which might not provide for compensation, rather than international law. (Brower and Tepe, Jr, 1975).

The fear of expropriation without compensation led developed countries to establish a new form of IIA with other governments, the BIT. To offset the insecurity of investments in newly independent developing countries, BITs were seen as the most immediate way to apply the Hull rule and to ensure prompt, adequate and effective compensation if their assets were expropriated. Customary international law was once again seen as ill-suited to protect foreign investments from the rights of states to transfer ownership of foreign property. Beginning with the 1959 German-Pakistan BIT, the rest of Europe and Japan followed and by 1980, the US had joined them. Today there are over 2336 BITs that have been signed and are in force between the major capital exporting countries and capital importing developing countries. (UNCTAD, 2021).

1.2.2 <u>The Bilateral Investment Treaty</u>

Initially focusing on developing countries, the objective of the international investment agreement was to protect the investment of the developed country in the territory of the developing country. BITs provide a guarantee of national and most favoured nation treatment for the investments covered by the treaty, along with fair and equitable treatment, prompt and adequate compensation for expropriation of these investments and restrictions on foreign exchange controls. Nevertheless, developing countries were also motivated to sign these agreements in order to attract FDI into their countries, to further economic development.

To support these legal developments, in 1965 the International Centre for the Settlement of Investment Disputes (ICSID), an affiliate of the World Bank, was established. ICSID aims to provide a forum for dispute arbitration between investors and host states. For the first time, this offered investors an effective remedy for unlawful actions by host states against their investments, which did not involve either espousal or military action. IIAs could now include a provision to allow the arbitration of certain disputes with investors involving the provisions of the agreement without having recourse to customary international law, placing the protections made in inter-state treaties under the law. This served to depoliticize investment disputes and placed these protections under the law, further increasing their attraction.

In an effort to harmonise investment protections under an international agreement, the OECD members put forward a proposal for a Multilateral Agreement on Investment (MAI) in 1998. This was rejected strongly by developing countries. Since then, no other significant consideration of a comprehensive and multilateral investment agreement has emerged either in or outside the World Trade Organisation (WTO). Instead, there are now over two thousand BITs in force and a further 323 Treaties with Investment Provisions (TIPs). Some of these TIPs are between developed countries, such as the EU-Canada Comprehensive Economic and Trade Agreement (CETA), or between developed and developing countries such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). These agreements include an investment chapter with provisions that encourage FDI by offering certain guarantees and protections to the nationals of one contracting state, who make investments in another contracting state. They typically enforce these rights in the event of a dispute between investors and host states through arbitration, including under ICSID.

International Investment treaties, whether in the form of a BIT or TIP, typically provide foreign investors with the following benefits:

1.2.2.1 Substantive Protections:

- IIAs establish clear *limits on the expropriation* of investments and entitle foreign investors to seek compensation. Expropriation can occur only in accordance with international law standards, to attain a public purpose. This must be in a non-discriminatory manner, under due process of law, and accompanied by payment of prompt, adequate, and effective compensation. Further, "expropriation" is not limited to physical takings, and can include a wide range of measures that deprive the investor of the economic value of its investment.
- IIAs include additional broad guarantees of treatment for investors in accordance with international law. Host countries typically promise "*fair and equitable treatment*" and "*full protection and security*" for investments, and promise not to engage in "arbitrary" or "discriminatory" decision making.
- IIAs seek to ensure that foreign companies are not discriminated against, and are entitled to be treated as favourably as their local competitors and other foreign companies. IIAs therefore provide that foreign investors are entitled to non-discrimination in the form of *national treatment* or *most favoured nation (MFN) treatment*, subject only to certain limited and specifically described exceptions listed in annexes or protocols to the treaties. In some IIAs, such as in the US BITs, the guarantee of non-discrimination applies both to making the initial investment, or establishment, as well as throughout the lifetime of the investment. Other IIAs only guarantee national and MFN treatment after an investment is made, or post-establishment.
- IIAs give foreign investors the *right to transfer funds* into and out of the host country without delay, using a market rate of exchange. This covers all transfers related to an investment, including interest, proceeds from liquidation, repatriated profits and infusions of additional financial resources after the initial investment has been made. Ensuring the right to transfer funds creates a predictable environment, guided by market forces.
- IIAs limit the ability of host governments to require foreign investors to adopt inefficient and trade distorting practices. For example, *performance requirements,* such as local content or export quotas, are often prohibited. Investors protected by such BITs can purchase competitive foreign-produced components without undue restriction on inputs in their production of various products, and can also import other foreign-produced products for distribution and sale in the local market. They cannot be forced, as a condition of establishment or operation, to export locally produced goods.
- IIAs can also give foreign investors the right to engage the top *managerial personnel* of their choice, regardless of nationality.

1.2.2.2 Non-regression Clauses

- Non regression clauses in IIAs establish the principle that host states should not lower existing environmental, labour or other social protections in their domestic legal systems with the aim of promoting foreign investment. The non-regression clause in international investment law states that the parties recognise that it is inappropriate to encourage investment by relaxing domestic environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor.

1.2.2.3 Dispute Settlement

- IIAs give investors a private right of action, which is the right to submit an investment dispute with the host government directly to international arbitration, such as ICSID.
- Disputes under an IIA will be governed by the terms of the relevant treaty and international law, and not necessarily by the law specified in contracts related to the investment.
- The track record of government compliance with BIT awards is good. If necessary, awards issued by investor-state arbitration tribunals can be enforced in any of the countries that are signatories to the New York Convention (NYC) on the recognition and enforcement of foreign arbitral awards.

1.3 Limitations

When countries enter into an IIA, they agree to provide protections for another country's foreign investments that they would not otherwise have. Stabilisation clauses are widely used across industries and regions to offer investors – and their lenders – some assurance, that the investment will not be subject to unpredictable and costly changes in law, for example, in relation to the level of taxation applicable to a project. Investors want to calculate the risk of their FDI against a stable and predictable economic and regulatory environment. As a result, investors commonly request for a *Stabilisation Clause* to be included in the contract between an investor and a host state that addresses changes in law in the host state during the life of the project. (IFC and UN, 2009).

Four categories of stabilisation clauses:

- **Freezing clauses** — that specify that the law that is in effect on the day that a contract is signed, will apply to the project for the life of the project, notwithstanding any subsequent changes in law.

- **Economic equilibrium clauses** that require an investor to comply with new laws, but to be compensated by the host state for doing so. Compensation can be in the form of rebates, adjusted tariffs, an extension of the term of the project, or tax reductions, for example.

- **Hybrid clauses** which are a combination of freezing clauses and economic equilibrium clauses.

- **Consistency clauses**, whereby the domestic legislation of the host state only applies to the project, if consistent with the investment contract.[6]

Early stabilisation clauses committed the host state not to nationalize and/or required the consent of both contracting parties for specific investment contract modifications. More recent stabilisation clauses tend to be broader in managing non-commercial risk associated with the investment project, including changes in the regulatory framework, falling short of expropriation or contract modification. (IFC and UN, 2009).

However, they may also have negative impacts on the host country. They can reduce a government's ability to maintain flexibility to changing economic, social and political

[6] Both freezing and consistency clauses feature for instance in the contractual arrangements for the Chad–Cameroon oil development and pipeline project.

circumstances. For example, these clauses can be designed to insulate investors from labour and gender equality legislation.

The concern is that the protection of investor rights in contracts and international agreements is not appropriately limited by 1) the state's own duty to regulate investors to protect labour, environmental and human rights, and 2) the investors' responsibility to respect these rights. (IFC and UN, 2009).

1.4 Treatment of public policy objectives in investment treaties

Public policy exceptions in investment treaties permit a government to lawfully take action directed at a particular regulatory objective, industry, or sector of the economy that would otherwise be inconsistent with its substantive treaty obligations, including non-discrimination, fair and equitable treatment and stabilisation clauses. Exceptions have become an increasingly popular mechanism in investment treaties, appearing in 43 per cent of investment agreements concluded between 2011 and 2016, compared to 7 per cent of agreements signed between 1959 (when the first investment treaty was signed) and 2010. (Henkels, 2018).

IIAs' exceptions typically use language such as "nothing in this Agreement shall be construed to prevent the adoption of . . . ," yet impose some restrictions on the design of the measure. Firstly, there is a requirement for a 'nexus' or connection between the policy measure and the specific and permitted public policy objective. It is often argued that the measure is 'necessary' to achieve the specific public policy objective, such as environmental protection or GESI. Increasingly, investment agreements contain exceptions that incorporate by reference, or are modelled on the general exceptions in Article XX of the General Agreement on Tariffs and Trade (GATT) and Article XIV of the General Agreement on Trade in Services (GATS). These two rules also contain the added requirement that these necessary measures must not be applied in an arbitrary or discriminatory way.

The significant rise in the prevalence of exceptions in IIAs suggests that governments negotiating new treaties are seeking greater assurance that public welfare measures will be shielded from liability. However, there is uncertainty as to how an exception will be interpreted and whether an exception should be seen as a permission or a defence. For, if an exception is defined as a 'permission' the treaty obligations do not apply and the exception serves as a limitation on the scope of the investment protections in the treaty. However, if the exception is interpreted as an affirmative defence, the government would formally accept it had not complied with its treaty obligations, but would seek to justify that conduct as lawful and necessary. This has implications for the investment agreement and for litigation. Unless an investment tribunal sets out its interpretation and characterization of an exception, legal uncertainty over the nature of the exceptions remain.

1.4.1 Carve-outs

Carve-outs in an IIA exempt an entire policy area or sector from the scope of a treaty. For example, public health advocates advocate a carve-out that specifically excludes tobacco control measures from the scope of IIAs. Article 22 of the investment chapter of the Australia-Singapore FTA provides that "No claim may be brought . . . in respect of a tobacco control measure of a Party." Similarly, Article 29.5 of the CPTPP allows governments to "elect" to "deny the benefits" of investor-state dispute settlement (ISDS) to their "tobacco control measures". Such carve outs have been increasingly sought after cases brought by Philip Morris against Australia's measures relating to the plain packaging of tobacco products and various Uruguayan tobacco regulation measures.[7]

1.4.2 Reservations

Reservations are similar to carve-outs, except that they permit parties to unilaterally nominate a sector or sectors where they reserve the right to adopt or maintain otherwise non-conforming measures. This can be in relation to some obligations or the agreement as a whole. Reservations differ from exceptions because an exception applies to all signatories to a treaty and is contained in the treaty's text. Reservations, on the other hand, apply only to the state making them and are generally only found with the "instruments of ratification" of a particular treaty or in an annex to the treaty. An example of a reservation can be found under Articles 8.2(3) and 9.2(2)(b) and (c) of the CETA. This reservation provides that for the EU, obligations regarding establishment and non-discriminatory treatment of investments, do not apply to a measure with respect to audio-visual services; and for Canada, they do not apply to a measure affecting cultural industries.

1.5 Investor-state dispute settlement: experiences and models

1.5.1 The Traditional Approach

It is important to have procedural protection of the right to have disputes resolved in a neutral forum, before impartial adjudicators and in accordance with transparent rules. IIAs give investors the right to submit an investment dispute with the host government directly to international arbitration through ISDS. This is a mechanism that enables foreign investors to resolve disputes with the host state of the country where their investment was made in a neutral forum through binding international arbitration.

ISDS agreements are most commonly found in IIAs, but may also be found in domestic legislation and contracts. ISDS provisions typically set out the substantive protections or obligations that foreign investors are entitled to, the breach of which gives rise to a right to bring a claim directly against the host state. Common substantive protections that when breached may lead to an ISDS claim include: fair and equitable treatment, full protection and security, national treatment, MFN treatment, no expropriation without full and prompt compensation and free transfer of capital. Monetary compensation is the most common remedy. Interim relief whilst proceedings are ongoing may also be available, including temporary measures to compel or restrain a party from certain conduct.

In some contexts, ISDS protections and remedies can be more favourable than local law protections available to domestic investors. For example, the local law of the host state might

[7] Philip Morris Asia Limited (H.K. v. Austrl.), Case 2012-12 (UNCITRAL), (Perm. Ct. Arb. 2012); Philip Morris Brands Sàrl, Philip Morris Products S.A. & Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, (July 8, 2016).

permit the government to expropriate property without providing any compensation, or for less than full compensation. In this situation, a domestic investor would have no recourse against state expropriation. However, a foreign investor may have additional rights where an applicable IIA provides for full (and prompt) compensation. The foreign investor can therefore pursue compensation under the treaty regime, through international arbitration.

In an IIA, the ISDS provisions will typically stipulate the rules that will apply to the proceedings, or it will permit the claimant to choose between certain rules that the host state has consented to in advance. The most common of these rules include the ICSID Arbitration Rules, ICSID Additional Facility Rules, United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules and International Chamber of Commerce (ICC) Rules of Arbitration. Generally, the tribunal will be constituted of three arbitrators, as opposed to a sole arbitrator. Typically, each party may nominate an arbitrator to the panel and a president is chosen by the two party-nominated arbitrators, in consultation with the parties. The arbitration may take a number of years, from commencement through to final award.

In the event that an arbitral award is not voluntarily complied with, there are two main enforcement approaches. If the award is an ICSID award, it may be enforced under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). This Convention provides that ICSID awards are to be treated as final court judgments of Contracting States. There are 153 Contracting States to the ICSID Convention.

In the case of non-ICSID arbitrations, the award may be enforced under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). There are 157 Contracting States to the New York Convention. The New York Convention facilitates award compliance by constraining the grounds on which a court may refuse to recognise, or enforce a foreign award. Sovereign immunity may be an obstacle to execution against a state's assets. Some ISDS agreements contain waivers of sovereign immunity, including from execution against assets.

There is no standard rule as to who bears the cost of ISDS. An ISDS agreement may stipulate how costs will be allocated, such as "loser pays". Often the allocation of costs is left to the discretion of the arbitral tribunal, which may take into account factors such as the relative success of the parties and their conduct during the proceedings. Arbitration costs, including the cost of the tribunal's fees, institutional fees, rental costs etc. are often treated separately from the costs of prosecuting or defending a claim, such as legal fees, expert fees and travel costs.

Most treaties containing ISDS agreements provide that the treaty protections will continue to apply for a certain period, generally 10-15 years, after a country withdraws from the treaty. These "sunset" clauses protect only those investors and investments that qualify for protection at the time the withdrawal becomes effective.

1.5.2 Reforming ISDS

The most common criticisms levelled at ISDS in recent years include:

- the risk of foreign investors challenging legitimate domestic regulation;
- a lack of transparency in ISDS proceedings;
- a lack of consistency in arbitral decision making;

- a lack of appellate authority to correct substantive errors and ensure consistency of outcomes;
- perceptions of arbitrator bias and/or lack of independence resulting in decisions that allegedly tend to favour investors. Conflicts of interest and corruption increase as tribunals are often formed of individuals whose professional background, critics allege, make their opinions predictable and may make them sympathetic to certain arguments
- the cost and time associated with ISDS.

There is increasing policy concern that IIAs have the potential to unduly restrict policy space for host countries and create a risk that investors challenge core domestic policy decisions, for instance in the area of GESI. This has led to a growing desire to rebalance the rights and obligations between investors and states and ensure greater coherence between investment policies and other public policies. Investment policies do not exist in isolation but interact with other policy areas, including gender, the environment and health. If the IIA does not make an explicit link to supporting these other policy areas it risks creating inconsistencies and undermining the effectiveness of national policies.

The procedural shortcomings of dispute settlement mechanisms in IIAs are criticized by both developed and developing countries. The current regime is seen providing various legal rights for investors, without requiring corresponding responsibilities for them. In many instances, developing countries can ill afford the exorbitant cost and procedure of arbitration, particularly when arbitral tribunals have made ad hoc and conflicting interpretations and inconsistent awards. This has led to governments become unwilling to make some policy and regulatory changes to promote public and environmental welfare. This is known as regulatory chill. It has occurred in investment areas such as taxation, tobacco and hazardous waste disposal because of previous failed disputes with investors.

Other stakeholders choose to blame the ICSID Convention. Back in 2013 the UNCTAD World Investment Report set out the following criticisms of ICSID that are now widely recognised:

> *Legitimacy*: the fact that three individuals, appointed on an ad hoc basis, are entrusted with assessing the validity of states' acts, particularly when they involve public policy issues. Pressures on public finances and potential disincentives for public-interest regulation may pose obstacles to countries' sustainable development paths.
>
> *Transparency*: Even though the transparency of the system has improved since the early 2000s, Investors may gain access to ISDS procedures using corporate structuring. An investment can be channelled through a company established in an intermediary country, with the sole purpose of benefitting from an IIA concluded by that country with the host state.
>
> *Consistency of arbitral decisions*: Recurring episodes of inconsistent findings by arbitral tribunals have resulted in divergent legal interpretations of identical or similar treaty provisions, as well as differences in the assessment of the merits of cases involving the same facts. Inconsistent interpretations have led to uncertainty about the meaning of key treaty obligations and lack of predictability as to how they will be read in future cases.
>
> *Absence of an appeals mechanism*: Substantive mistakes of arbitral tribunals, should they arise, cannot be effectively corrected through existing review mechanisms.

Arbitrators' independence and impartiality: An increasing number of challenges to arbitrators may indicate that disputing parties perceive them as biased or pre-disposed. Particular concerns have arisen from the perceived tendency of each disputing party to appoint individuals sympathetic to their case. Arbitrators' interest in being re-appointed in future cases, and their frequent 'changing of hats' (serving as arbitrators in some cases and counsel in others) amplify these concerns.

Financial stakes: The high cost of arbitrations can be a concern for both states and investors (especially small- and medium-sized enterprises). From the state perspective, even if a government ends up winning the case, the tribunal may refrain from ordering claimant investors to pay the respondent's costs, leaving the average US$8 million spent on lawyers and arbitrators as a significant burden on public finances and preventing the use of those funds for other goals.

1.5.3 The EU ISDS Proposal for Reform

Against the rising criticism against ISDS and ICSDI, in 2015, the EU began advocating reforms to investment dispute settlement both in bilateral and multilateral investment agreements. The EU has two parallel proposals to reform investor-state dispute settlement. First, in its bilateral investment negotiations the EU aims to establish investment courts to replace the existing international arbitration tribunals. These investment courts operate in current bilateral EU investment agreements such as the CETA and the EU-Vietnam Free Trade Agreement (EVFTA).

Under these EU agreements, disputes will be referred to permanent tribunals with fixed numbers of members appointed from the EU and Canada/Vietnam, together with members from neutral countries. Members of the tribunal will be paid monthly retainers to ensure availability and will be required to conform to specific standards of independence. Both agreements also contain an appellate mechanism, with an appellate tribunal formed in a similar manner to the lower tribunal. They also explicitly envisage the formation of a permanent multilateral forum for investor-state dispute resolution. CETA, for example, provides that Canada and the EU "shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes" and provides for this new system, once implemented, to have jurisdiction over disputes arising from CETA.

Second, the EU has proposed a Multilateral Investment Court (MIC) that would be established through intergovernmental discussions at the United Nations Commission on International Trade Law. This Court would replace both arbitral tribunals established under BITs and the EU's current ICS and would be open to all countries. The key elements include removing party autonomy, as regards who will decide upon the dispute in favour of the permanent appointment of publicly appointed qualified judges, who will be unable to act as counsel on other investor-state disputes. Proceedings would be transparent, with open hearings and a right of intervention for third parties with an interest in the case. The EU's proposed MIC system will tightly define and limit the ability of investors to bring cases to instances such as discrimination on the basis of gender, race or religion, or nationality, expropriation without compensation, or denial of justice.

1.6 Bringing forward the social agenda

While many countries conclude IIAs in order to attract foreign investment, at the same time, they limit their own scope to exercise national policy. It is a challenge, especially for developing countries, to strike a balance between attracting FDI and retaining policy autonomy. Governmental regulations can easily impact upon private property and investors' business operations, and for this reason regulatory changes are particularly sensitive.

To develop IIAs with GESI, investment agreements need to channel FDI towards positive impacts on human rights, the labour, and health and safety conditions connected with their activities in host countries. FDI can make a significant social, political and environmental impact. If FDI can play both a negative and a positive role in the host country, governments need to craft rules that can help to avoid any negative consequences for social welfare. As MNEs are subject to international law, including international human rights obligations, this will help to regulate them.

Multilateral initiatives have been developed to encourage MNEs to respect human rights, minimum environmental standards or core labour standards. These are soft law guidelines or codes that do not compel MNEs. However, they still have significant legal effects in the development, interpretation and clarification of international law. Established norms include the OECD Guidelines for MNEs and the ILO Tripartite Declaration of Principles concerning MNEs and Social Policy and the United Nations SDGs promoting gender equality and women's empowerment. They can be explicitly integrated further into IIAs to diffuse norms into the operation of FDI and MNEs (see Chapter 3).

2 THE JUSTIFICATION FOR BRINGING GENDER CONCERNS INTO INVESTMENT TREATIES

When FDI increases household income and tax revenue increases, not only does this allow for improved government social services, but families also invest more in girls' education as access to schools becomes less restricted. Families allocate more income to medication and medical visits; and have access to closer medical centres. Moreover, FDI inflows are bringing women into the formal sector and more fully integrating them into the labour market.

The impact of FDI on development and gender inequality differs across geographic regions, sectors and income groups (Ouedraogo and Elodie Marlet, 2017). Sectors with relatively higher women in employment tend to be lower-skilled and lower-wage, while sectors with high-skilled and better paid jobs tend to be male-dominated. (OECD, 2019). This means that these industries have been an important avenue for women to enter the labour force, it could exacerbate the gender gap if it perpetuates gender-specific labour roles, with women participating primarily in low-skill low-wage jobs. However, in the food and garment industries there is greater women's participation in top managerial roles and larger shares of businesses owned by women. This warrants governments taking initiatives to upgrade women's skills and facilitate their access to higher-paid activities to reduce gender disparities. To some extent FDI in low-skilled, labour-intensive activities dominated by women can also support women's empowerment and entrepreneurship if it is supported with training and skills upgrading opportunities targeting women. (OECD, 2019).

Through their activities, foreign firms can help to enhance gender equality in host countries. By increasing the demand for women's labour, foreign firms may put upward pressure on women's wages and contribute to reducing the gender employment and wage gaps. Foreign firms can support gender balancing in senior management through, for instance, corporate policies that help reconcile work-life balance, or activities aimed at developing leadership and managerial skills of women. Foreign firms can also develop women's entrepreneurship in host countries by creating new business opportunities for women-owned businesses, or by helping improve their performance.

2.1 Forms of economic discrimination and disadvantage

Despite the fact that FDI in women-intensive industries may boost women's wages and employment, it has made women extremely vulnerable to the instabilities of the global economic system. (Braunstein, 2006:63). This is due to the highly competitive nature of labour-intensive export industries, the high capital mobility characterized by this type of cost sensitive FDI, and the fact that manufacturing industries which women are most employed in are also the most exposed to the liberalising effects of current trade agreements.

Women are confined to the most flexible and poorly paid jobs because of persistent gender inequalities in education and labour markets, and because of gendered responsibilities in the home. Even after women get paid jobs, they maintain their non-market work in the home, leading to what has been termed the double day. This is a root cause of gender inequality, as women's non-market responsibilities constrain their abilities to compete for more lucrative jobs, and lowers their bargaining power with respect to their male partners in the household and with firms in the labour market. Lack of bargaining power makes women cheaper workers, and hence may make them more attractive to foreign investors. It detracts from the ability of FDI to improve women's well-being, and to deliver longer-term development benefits.

Gender Dimensions to FDI

Gender concerns therefore arise in the discussion of foreign investment treaties in many dimensions, both indirectly through spill-over effects on health and education, as well as direct economic effects including:

1. FDI's impact on the quantity and quality of women's employment.
2. FDI's overall impact on the nature, size and growth potential of women owned and operated small and medium sized firms in host countries (though FDI's impact on production, sectoral and governmental and outsourcing, resource allocation and competition).
3. FDI's contribution to the regulation of the labour market and the consequent implications for women's health and morbidity.
4. Corporate Social Responsibility in terms of promoting better gender working conditions and increasing the gender transfer of skills and technology.
5. Gender performance requirements on FDI regarding technology transfer, the strengthening of domestic capabilities/linkages to domestic enterprises (especially women's small and medium sized enterprises), gendered outsourcing for local content and regional development promotion.

2.2 Impact of investment expansion under investment treaties

The interconnection between gender and FDI is becoming an increasingly important area for policy makers. There is strong evidence that improving women's rights is a driving force of economic growth and helps attain stability and prosperity. (Thi Mai Hoai Bui, Xuan Vinh Vo, Duy Tung Bui, 2018) Equally, women's disempowerment causes staggering and deeply permeating losses in productivity, economic activity, and human capital. (Coleman, 2010).

Nevertheless, empirical findings on the relationship between gender inequality and FDI are highly specific to the context. Some evidence suggests that gender inequality can attract FDI, as some foreign investors may want to exploit the gender disparity in host countries to maximize their profit on a pool of low-skilled and compliant labour force, and there is little improvement in gender equality with FDI flows. Yet research suggests that the reduction of gender connected educational gaps is related to increased investment in low-skilled manufacturing industries. (Blanton and Blanton, 2015) Women's empowerment in a high skilled labour pool can be more attractive to foreign investors. While women's wages may undergo an absolute boost from foreign investment, it is not possible to generalise whether this will necessarily result in a closing of the gender wage gap.

In sum, it is possible to harness the potential benefits to gender equality from FDI, through IIA provisions; and furthermore, identify new approaches to mitigate potential harms to women's welfare. Investment liberalisation through IIAs interacts with women's access to critical physical, financial and human resources and access to basic services, with significant implications for their empowerment, livelihoods, health, socioeconomic status and well-being. In many cases, the impact process is so complex that the gendered nature of it is apparent only after a deeper analysis.

However, harnessing the beneficial effects of FDI in a particular state requires strategic consideration of domestic conditions and the global economy. There are different types of FDI and the conduct and responsibilities of these investments and investors needs to be clearly set out. This allows for the conduct of MNEs as the main providers of investment to be better regulated to promote gender equality.

2.3 Domestic policies to address gender inequalities

When a country has significant inequalities by gender in the areas of education, access to resources and inclusion in the business environment, and the labour market, there is evidence to suggest that FDI inflows can make women worse off. (Thi Mai Hoai Bui, Xuan Vinh Vo, Duy Tung Bui, 2018). If the root causes of women's labour market inequality are not addressed, there will always be constraints on the ability of countries to draw substantial development benefits from foreign investment in industries which predominantly employ women, and on the potential for this type of investment to contribute to women's well-being.

From this perspective, providing social welfare support for women is perhaps the most important thing that governments can do to strengthen the link between foreign investment in women's industries and gender equity. Working for a wage has been widely documented as having empowerment benefits, but as long as women are constrained by their non-market sector responsibilities, there are limits to how far earning an income can improve their well-being and redress gender inequities.

Despite countries adopting laws, international conventions and guidelines that guarantee the right to equality, they need to be effectively implemented and enforced through domestic laws. Some governments incorporate the fundamental labour rights included in the 1998 ILO Declaration, but without establishing minimum standards for their domestic laws. However, individual governments may fear the resulting disinvestment in a world where countries competing for scarce FDI have not taken similar actions. Gender inequality remains a critical issue across the world. Thus, women and girls, particularly in developing countries, still face great limitations and obstacles.

Investors have and can assume responsibilities to promote gender equality. Some of them may be government led, such as the 1976 OECD Declaration and Decisions on International Investment and Multinational Enterprises, which has been subscribed to by 50 governments, both developed and developing. This Declaration is their policy commitment to provide an open and transparent environment for international investment and to encourage the positive contribution MNEs can make to economic and social progress. The 1976 OECD Guidelines for MNEs has been subscribed to by 44 governments representing all regions of the world and accounting for 85 per cent of foreign direct investment. These guidelines are updated, strong recommendations outlining responsible business conduct for MNEs to observe wherever they operate.

While governments can encourage their MNEs to behave responsibly in their foreign investment activities, it is the host government that provides the enabling environment, including flanking policies, legal frameworks and financial investment, that can harness and incentivise the private sector, including FDI, to play a full role in ensuring successful outcomes. The evidence indicates that increasing women's income can lead to a more efficient allocation of resources within households and increase the share of expenditures allocated to health, education, and nutrition. (Björkman Nyqvist, and Jayachandran, 2017). There are different policy measures that can serve to reduce gender inequality, however all of them require bold domestic leadership and political will to succeed.

2.4 Linking domestic and investment policies to foster GESI

Bold domestic leadership can ensure that FDI and investment contracts promote and buttress domestic policies to meet clearly defined gender equality targets. Governments negotiate IIAs that can incorporate ILO fundamental rights and introduce domestic regulation and standards that ensure that the parties extend the promotion of labour standards pertaining to minimum working conditions and the prevention of, and compensation for, cases of occupational injuries or illnesses.

Governments are the linchpin to fostering GESI in investment policies. Using a clear rule of thumb, governments can ensure that GESI is mainstreamed into investment decisions through appropriately designed initiatives. These can be divided into:

- **Gender Specific:** Policy or programme specifically focused on one group, such as women's health.

- **Gender-sensitive:** Programmes where gender norms, roles and inequalities have been considered and awareness of these issues has been raised and reflects understanding of the issues, such as women's ability to organise in the workplace.

- **Gender-responsive:** Programmes where gender norms, roles and inequalities are considered and measures have been taken to actively address them through actions, such as women's education and business training initiatives.

- **Gender-transformative:** policy of programme seeking to changing the conditions or practices that unfairly treat men or women, such as introducing and enforcing equal pay for equal work acts and providing equal paid paternity and maternity leave.

Mainstreaming gender considerations through the strategic sequencing of these different gender policy initiatives into investment policy, requires investing in human capital. Investing in policies that reduce gender gaps will help develop economic capital by ensuring equal access to economic resources and opportunities. This also creates investment in human capital by increasing women's participation in decision-making processes and reducing inequalities and eliminating discrimination through the advancement of the rights of women and girls at home, in education and at the workplace.

2.5 GESI as performance requirements:

Performance requirements are conditions applied to FDI MNE operations. These requirements can be a condition of gaining access to invest in a country, or to receive some kind of subsidy, or a tax break from the host government.

There are two major examples: first are local content rules, whereby investors/MNEs are required to source a certain proportion of inputs and labour locally, for instance. Second, domestic equity rules, whereby foreigner investors are not permitted to wholly own a firm operating in a particular country.

Performance requirements in the form of local content rules, promoting gender equality, can be made a condition of market access for an FDI. There can be a requirement for MNE to employ a certain number of women for predetermined periods of time; or to employ more women in skill-intensive and non-production jobs. MNEs could be required to provide the types of training that women could transfer to other sectors of the labour market, especially in more skill-intensive and highly paid sectors.

In other words, the types of performance requirements designed to improve the labour impact of MNE presence, could be redesigned to become more gender aware.

<u>Challenges</u>

There are direct prohibitions in the legally binding obligations of current trade agreements; the WTO's agreement on Trade Related Investment Measures (TRIMs), for example, prohibits performance requirements that are considered trade-distorting, such as local content requirements and export controls. The TRIMs agreement is designed to ensure that imports and domestic goods are treated the same. IIAs and investment chapters can also prohibit, make conditional or discourage other performance requirements that are not dealt with by the TRIMs agreement.

However, the TRIMs agreement permits performance requirements that are not "trade distorting", such as local hiring rules. Therefore, governments would be permitted to require that FDI does not discriminate between men and women in the workplace, and promote positive discrimination towards women in hiring, retention and promotion, wherever possible. In this way, aspects such as employment and training requirements could also be structured in such a way as to contribute to growth and gender equity.

A more practical challenge is to monitor and evaluate GESI performance requirements, using pilot projects where possible, to ensure that these measures are effective and targeted. The impacts need to be measurable in terms of GESI and cost-benefit analyses to build upon positive results.

2.6 Gender Requirements as Incentives

Some countries have sought to use incentives as a way to influence the behaviour of foreign investors. Countries such as Hungary, Malaysia, the Republic of Korea, Singapore and South Africa have made successful use of incentives designed to encourage technology transfers or specific activities such as increasing training and assistance to local women suppliers, or fiscal incentives like tax holidays. (UNCTAD, 2003).

Challenges

This is a radical departure from lowering regulatory standards for labour as an incentive to attract FDI. As such it requires political will and a whole of government GESI strategy that actively encourages FDI because of the comparative advantages attached to a high gross domestic income (GDI) and low GII rate for education, health and labour market.

2.7 Binding Non-Regression Clauses

For FDI in industries dominated by women, it is extremely important for governments to consider investment provisions that limit the use of, and scope for, incentive competition through lowering regulatory standards. Non-regression clauses commit governments not to reduce existing environmental, labour or other social protections in their domestic legal systems with the aim of promoting foreign investment.

A principle of non-regression from domestic protections to encourage investment was first included in the 1992 North American Free Trade Agreement (NAFTA). Today over 130 countries have now concluded IIAs that include such a provision. However, in response to the concern that governments might continue to encourage FDI through lower labour standards, the soft law contained in the 1992 NAFTA has evolved from a "should" - based obligations to a harder "shall" - based subject to dispute settlement. (Mitchell and Munro, 2019).

In Canada's Regional Trade Agreements (RTAs) with Colombia 2011 and Peru 2009, Canada introduced a binding non-regression clause prohibiting the parties from waiving or derogating from domestic labour law "in a manner that weakens or reduces adherence to the internationally recognised labour principles and rights" in order to encourage trade or investment. The parties commit to the fundamental labour principles and rights at work, as well as to additional standards as described in the ILO's Decent Work Agenda. The protection of migrant workers is also included. Later agreements with Honduras 2014, Jordan 2012 and Panama 2013, include more specific provisions pertaining to prevention of and compensation for occupational injuries and illnesses.

Non-regression clauses in IIAs can also be explicitly linked to international conventions, principles and rights.

2.8 Global Labour Standards

To promote strong standards in labour conditions and to help to combat the use of labour regulatory concessions to attract FDI, IIAs can adopt global labour standards. For example, the 1998 ILO Declaration on Fundamental Principles and Rights at Work commits its Member States to respect and promote certain categories of principles and rights at work, whether or not they have ratified the relevant labour conventions (see Box 2). These concern rights which are directly related to gender equality in the workplace, including: freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation.

The standard rights covered under non-regression clauses could be explicitly extended to include gender equality and the prohibition on discrimination on the grounds of gender, through incorporation of the CEDAW. This adoption can help to fight against a race to the bottom in regulatory standards to attract FDI and negative incentive competition. Governments are then less able to compete for FDI on the basis of cheap production costs, and more likely to do so on the basis of labour-force or product quality.

Box 2: The Eight Fundamental Labour Conventions

1. Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)
2. Right to Organise and Collective Bargaining Convention, 1949 (No. 98)
3. Forced Labour Convention, 1930 (No. 29) (and its 2014 Protocol)
4. Abolition of Forced Labour Convention, 1957 (No. 105)
5. Minimum Age Convention, 1973 (No. 138)
6. Worst Forms of Child Labour Convention, 1999 (No. 182)
7. Equal Remuneration Convention, 1951 (No. 100)
8. Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

MNEs can adhere to international standards on gender equality in their normal activities to fulfil their responsibilities towards women in developing host countries. When MNEs are the vehicle for FDI, MNEs can promote gender development through their traditional activities of strategy, employment, marketing, and supply chain management. The international guidelines for MNEs to follow as best practice are the UN Women's Empowerment Principles. See Box 3.

Box 3: The UN Women's Empowerment Principles (WEPs)[8]

Principle 1: Establish high-level corporate leadership for gender equality

Principle 2: Treat all women and men fairly at work – respect and support human rights and non-discrimination

Principle 3: Ensure the health, safety and well-being of all women and men workers

Principle 4: Promote education, training and professional development for women

Principle 5: Implement enterprise development, supply chain and marketing practices that empower women

Principle 6: Promote equality through community initiatives and advocacy

Principle 7: Measure and publicly report on progress to achieve gender equality

Applying the UN WEP to MNEs and FDI would require that MNEs implement effective mechanisms to:

- Evaluate a country's gender situation when considering a potential investment opportunity and have a clear plan to address gender vulnerabilities.
- Invest in additional training programs for current employees and promising candidates to help bridge the gendered skills gap.
- Implement and enforce a clear policy of equal treatment in all hiring practices, promotions, etc. Establish an expectation of equal treatment among business partners and organisations along the supply chain.
- Give equal pay for equal work and equally valued work, understanding that men and women of similar skill may be segregated into different roles.
- Encourage and facilitate women's participation in unions and other bodies of collective bargaining.
- Offer family benefits and childcare facilities to both women and men who are employed to reduce the overburdening of women in the private sphere.
- Report on gender participation at all levels of the organisation and in all countries, and disclose how gender issues are integrated into their overall strategy.
- Seek out local women-owned businesses to include in their supply chain and help with capacity-building.
- Assess the gender impacts of divestment or the reduction of foreign investments to develop a gender friendly FDI exit strategy.

[8] "Endorse the Women's Empowerment Principles | UN Global Compact." Global Corporate Sustainability Report 2013 UN Global Compact. https://www.unglobalcompact.org/take-action/action/womens-principles.

Challenges

Current global labour surpluses and extreme competition mean that foreign investors face a wide choice of low-cost production platforms and subcontractors. With the option of moving to a cheaper production platform, firms have more incentive to respond to local wage increases by moving rather than by raising productivity. This means that these types of standards need to be coordinated at a multilateral level, because unilateral efforts to raise wages or improve working conditions could merely result in capital flight. In addition to providing for minimum standards, ensuring labour rights at a global level will enable workers to counter the bargaining power of FDI with less fear of capital flight.

The question of how and where to enforce such standards is a contentious one. The global labour standards movement is sometimes identified as a thinly veiled attempt at trade protectionism by the more developed economies. It is further argued that mandatory labour standards will ultimately hurt labour in developing countries, as the consequent increase in export costs will lower employment and economic growth, and/or result in more production shifting to the informal sector, presumably beyond the reach of such standards. (Singh, 2002). More gender-aware research into impact on growth and human development indicators from improvements in gender wage equity, or women's working conditions in export sectors are required in order to improve GESI outcomes.

While there have been various initiatives to establish soft law guidelines and norms in the OECD, ILO and the UN Declarations, these tend to be rights based, addressing issues such as the right to organise and work in a safe environment, but they do not include any income standards such as a global minimum wage. Moreover, soft law is not enforceable, which means that their practical impact is based on political will and corporate social responsibility, rather than a reliable, rights-based national employment injury insurance system in the producer country. As a result, after a workplace disaster involving death and injury, there may be no or little statutory provision for workers' compensation for death and injury at work.

In such events, some MNE and industry stakeholders have established innovative worker compensation schemes to award compensation to injured workers and the families of those killed, consistent with international standards for compensating occupational death or injury, such as the Rana Plaza Arrangement, the Tazreen Claims Administration Trust, and the Ali Enterprises compensation arrangement. While this has led to the emergence of guiding principles and best practices for workers' compensation for death or injury in global supply chains, emergency compensation schemes should not be seen as an alternative to enforcing effective health and safety regulations and establishing national employment injury insurance systems.

Promoting labour and GESI standards through binding agreements under WTO is also problematic. It would be a challenge to achieve consensus among the diverse membership of 165+ countries. Moreover, penalizing countries via sanctions could ultimately have an immiserating effect. (Cagatay, 2001). Nevertheless, even promoting dialogue between diverse countries on how to ensure workers' rights, including gender equality, is particularly important for women working in FDI industries.

2.9 Stabilisation Clauses

As discussed in Chapter 1, stabilisation clauses are included in investment contracts to freeze or limit the laws that are applicable to certain projects. The host State under the clauses essentially undertakes not to take any legislative or administrative actions that will adversely affect the investor's interests. Given that such clauses freeze the law for as long as the contract subsists, there has been debate on the negative impact stabilisation clauses have on the progressive development of gender and human rights in the host State. There has been some debate on the impact that these clauses essentially freezing the law will have on the development of robust gender equality and equal pay laws.

Challenges

Stabilisation clauses can insulate the investor from the obligation of implementing new laws as the host State is prohibited from passing new laws that have an adverse effect on the investor. New obligations that develop from GESI laws and policies passed after the signing of concession agreements, may be deemed incompatible with the stabilisation clauses contained in the agreement. In essence, therefore, stabilisation clauses could act as a regulatory chill or potential veto on the development of GESI laws in host countries.

Without appropriate limits, stabilisation clauses can also make foreign investments exempt from necessary social and environmental laws that come into force after the effective date of the agreement, or can require the host state to compensate the investor for compliance. Investor protections can deny the state its proper role as legislator, with powers different and greater than those of companies, and creates a financial disincentive for the host state, thus chilling or hindering the application of dynamic social and environmental standards over the life of a long-term project. The negative effects of stabilisation clauses are exacerbated in developing countries where the need is for rapid legislative development and implementation, rather than more obstacles to the application of new laws. (IFC and UN, 2009).

To address the disincentives to FDI caused by the uncertainty of regulatory risks and the need for governments to introduce new public policies and laws, stabilisation clauses should be narrowly drafted and limited in scope and time, particularly in relation to major revenue streams such as royalties, taxes, duties, and major fees. Stabilisation clauses should also not freeze labour or other similar rules.

Another option is for the investors' home states to commit to subsidizing regulatory risk insurance for investments covered by the treaty, and use that insurance to supplement the compensatory regime of the treaty in situations where an investor suffered losses due to general regulatory activity by the host state. On this basis, the regulatory risks inherent in all business decision-making in the face of changing social, economic, and environmental conditions would be shared between host and home states.

2.10 Regulating Physical Capital Mobility

One way to enhance the bargaining power of labour (and governments) relative to foreign investors would be to regulate international capital flows. Types of capital control include exchange controls that prevent or limit the buying and selling of a national currency at the market rate, transaction taxes such as the proposed Tobin tax on currency exchanges, minimum stay requirements and limits on the amount of money a private citizen is allowed to remove from the country.

These measures can be economy-wide, sector, or industry specific. They can differentiate by type of flow, such as FDI. Regulating outward flows of capital can enable governments to control the timing and amount of FDI, avoiding the financial fragility that can come with unregulated foreign exchange inflows and outflows. It also raises the cost of capital flight and reduces the conflict between the needs of communities and the incentives for MNEs.

An overview of the research into the impact of capital mobility on growth and gender equity suggests that by raising the bargaining power of foreign investors, capital mobility limits government capabilities to manage FDI for the good of development, as well as the capacity of women to bargain for better wages relative to their male counterparts working in less mobile industries. (Braunstein, 2006:63). Continuing liberalisation of capital flows only worsens these inequities, as it enables firms to more credibly threaten to leave. The mobile nature of foreign investment not only pits governments against each other in offering competing incentives, but it can also be an obstacle to achieving equity in the capital/community relationship.

Managing this mobility from a gender-aware perspective is a key policy goal. As it is cheap for labour intensive producers to relocate or subcontract, women working in foreign-invested industries are highly exposed to the negative effects of capital mobility. In addition to domestic regulation, FDI must be governed in ways that can support gender equity and growth. The regulation of international capital flows can underpin a levelling up, rather than a race to the bottom.

Important components of such an agreement could include: international tax floors, regulation floors and wage floors, to ensure the levelling up process; rules to make FDI, MNE and government operations more transparent, so as to assist the public in grappling with tax, regulatory and subsidy abuses; policies and institutions to maintain adequate aggregate demand, ensuring lower unemployment (and maintaining labour's bargaining power); a system of insurance to protect foreign investors against expropriation; and finally, to administer the system, internationally governing bodies that are democratically organised. (Braunstein, 2006).

Challenges

There have been several shifts of opinion on whether capital controls are beneficial and in what circumstances they should be used. IMF research indicated that capital controls can reduce the quality of FDI, both in terms of volatility and volume. Therefore, countries considering the application of these should be aware of the potentially counterproductive effect of their policy on foreign direct investments. The stability of capital flows is of particular concern for economies that are perceived to be high risk, as the probability of sudden capital outflows will be the highest in these. (Elo, 2007).

It is a non-trivial challenge for governments, in both developed and developing countries, to obtain sufficient data to understand how the impact of these regulations on the quality of foreign direct investments alters when country risk changes.

2.11 Capacity building and cooperation

Gender capacity building for key stakeholders has long been identified as a key constraint for making progress toward gender equality in development cooperation efforts. (OECD Development Assistance Committee (DAC), 2007; 2009; 2011). Capacity building and cooperation is required to strengthen the ability and available resources for policymakers, investors and the public to design, implement, and evaluate policies and initiatives, to ensure that both men and women participate and benefit equally from FDI. Without this expertise and capacity, it is difficult to identify appropriate strategies to implement gender equality targets. IIAs can incorporate provisions obliging the parties to ensure sufficient technical assistance and building up of expertise in gender in the form of gender help desks and designated gender focal persons who bring gender expertise and perspectives. This should improve the level of leadership and personal commitment of staff to this new way of working, including through incentive and sanction schemes.

Well-designed initiatives can strengthen the capacity of MNEs, government agencies, and national women's and civil society organisations. Supporting women's organisations to articulate women's experiences and priorities, advocate for gender equality at various levels, and hold governments to account can be a powerful strategy for achieving sustainable changes in gender relations. Strengthened capacity to provide quality education can address the barriers to educational access and achievement by women and men in human resource management and curriculum development and review. Cooperation is also important between public–private partnerships and private sector education. These cooperative initiatives can be managed and monitored to ensure gender equity.

One useful capacity building initiative undertaken by the OECD is to create a Toolkit for Mainstreaming and Implementing Gender Equality. This aims to aid the implementation of the 2015 OECD Recommendation on Gender Equality in Public Life. The toolkit provides a clear path for making public bodies more aware of and responsive to the perspectives, interests and needs of both women and men. The toolkit helps policy makers to design gender-sensitive public policies and services and enable women's equal access to public decision making. It can provide a common framework for both governments and FDI/MNEs to systematically reduce gender inequalities in the workplace and community.

There is consensus that for it to be effective, capacity building plans need to reflect the needs of different groups in society. It also requires political will and a network of leaders, across the government and investors to help effectively communicate and mainstream the strategic plan across different policy areas. The OECD capacity building tool for gender equality involves a dual approach: 1) mainstreaming gender in the design, development, implementation and evaluation, and 2) adopting targeted actions to eliminate gender discrimination and enable progress in specific areas.[9]

Further preconditions of well-designed and effective capacity building and cooperation initiatives are gender and social analysis and planning skills. This includes the ability to identify realistic targets, results, and indicators, and to develop, implement, and monitor gender action plans and strategies. Requiring gender analysis or gender-based impact assessments for planning and strategic documents can help ensure that gender equality issues are not marginalized. This can reduce resistance and red tape in the long run.

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[9] See: https://www.oecd.org/gov/toolkit-for-mainstreaming-and-implementing-gender-equality.pdf

3 CONCLUSIONS AND RECOMMENDATIONS

3.1 Making investment policy gender responsive

Vigorous scrutiny of investment agreement negotiation and management by parliament, civil society and the media is key to promoting GESI. These stakeholders have the potential to play a vital role by holding governments and investors to account.

Provisions can be made to require Gender Impact Assessments of prospective FDI, which will be taken into account in policy decisions. Strengthening capacity for independent scrutiny of investment agreements and contracts is therefore an essential part of strategies to be taken to maximise the benefits and minimise the risks of FDI in promoting gender equality in sustainable investment. During the early stage of large investment projects there are high costs, high levels of risk and large capital injection. At the project design stage, the host government may be under pressure to attract investment and may agree to incentives and stabilisation clauses. This is when it is particularly important to ensure that not only is there sufficient independent oversight of these negotiations, but that IIAs have clearly crafted provisions, setting out both the responsibilities and rights of both investors and states.

FDI can provide opportunities for strengthening the host government's capacity to promote GESI. For example, individual investment contracts can require the investor to pay specified sums to the government in order to finance capacity building, support mechanisms to women in working the relevant economic sector or "Future Generations Funds". While financial contributions may also be provided to specialised gender equality agencies through taxes, there are also risks in making regulatory agencies financially dependent on investment projects, as it may create in-built biases towards continuation of such projects.

Implementing and embedding GESI policies will become the rational approach for FDI and MNEs to follow when a broader spectrum of governments embed GESI within a domestic gender equality policy and implement relevant international conventions and guidelines.

3.2 Best practice and road map to drafting model IIA provisions

3.2.1 GESI as performance requirements

The types of performance requirements designed to improve the GESI impact of MNEs' presence could be redesigned to become more gender aware.

The TRIMs agreement permits performance requirements that are not "trade distorting", such as local hiring rules based on GESI policy.

All performance requirements need to be monitored for implementation and impacts. The impacts need to be measurable in terms of GESI targets and cost-benefit analyses, to be able to build upon positive results.

3.2.2 Incentives for GESI

Fiscal incentives such as tax holidays can be used to influence the behaviour of MNEs and foreign investors to promote GESI, for example through increasing training and assistance to local women suppliers.

This requires political will and strong leadership over a whole of government GESI strategy. A political and economic vision should be developed that actively encourages FDI because of the comparative advantages attached to a high GDI and low GII rate for education, health and the labour market.

3.2.3 Binding non-regression clause

Non-regression clauses commit governments not to reduce existing environmental, labour or other social protections in their domestic legal systems with the aim of promoting foreign investment. This clause should be binding, prohibiting the parties from waiving or derogating from domestic labour law in a manner that weakens or reduces adherence to the internationally recognised labour principles and rights in order to encourage investment.

Non-regression clauses in IIAs should also be explicitly linked to international conventions, principles and rights.

3.2.4 Adopting Global Labour standards

IIAs can adopt global labour standards to diffuse these norms and fight against a race to the bottom in regulatory standards, to attract FDI and negative incentive competition:

- The Eight Fundamental Labour Conventions
- The 1998 ILO Declaration on Fundamental Principles and Rights at Work is directly related to gender equality in the workplace
- The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).

In addition to adhering to the OECD Guidelines for MNEs, government can also advocate that MNEs adhere to international standards on gender equality in FDI in their normal activities, by applying the UN WEPs. This would require that MNEs:

- Evaluate a country's gender situation when considering a potential investment opportunity and have a clear plan to address gender vulnerabilities.
- Invest in additional training programs for current employees and promising candidates to help bridge the gendered skills gap.
- Implement and enforce a clear policy of equal treatment in all hiring practices, promotions, etc. Establish an expectation of equal treatment among business partners and organisations along the supply chain.
- Give equal pay for equal work and equally valued work, understanding that men and women of similar skill may be segregated into different roles.

- Encourage and facilitate women's participation in unions and other bodies of collective bargaining.
- Offer family benefits and childcare facilities to all employees - both women and men - to reduce the overburdening of women in the private sphere.
- Report on gender participation at all levels of the organisation and in all countries, and disclose how gender issues are integrated into their overall strategy.
- Seek out local women-owned businesses to include in their supply chain and help with capacity-building.
- Assess the gender impacts of divestment and develop a gender friendly exit strategy.

3.2.5 Stabilisation clauses

Stabilisation clauses in investment contracts could insulate the investor from the obligation of implementing new GESI laws, as the host State is prohibited from passing new laws that have an adverse effect on the investor. Stabilisation clauses can therefore act as a regulatory chill or potential veto on the development of GESI law in host countries.

To balance the disincentives to FDI caused by the uncertainty of regulatory risks, with the need for governments to introduce new GESI laws and policies, stabilisation clauses should be narrowly drafted and clearly limited in scope and time, particularly in relation to major revenue streams such as royalties, taxes, duties, and major fees. Stabilisation clauses should also not freeze labour or other similar GESI rules.

More radically, investors' home states could agree to commit to subsidizing regulatory risk insurance for investments covered by the treaty and use that insurance to supplement the compensatory regime of the treaty in situations where an investor suffered losses due to general regulatory activity by the host state. The regulatory risks inherent in all business decision-making in the face of changing social, economic, and environmental conditions would be shared between host and home states.

3.2.6 Gender capacity building for key stakeholders

Lack of capacity and resources have long been identified as a key constraint for making progress toward gender equality in development cooperation efforts (DAC) 2007, 2009, 2011). The OECD Toolkit for Mainstreaming and Implementing Gender Equality provides a strategy raising awareness and responsiveness to gendered perspectives and interests.[10] It offers a common framework for both governments and FDI/MNEs to systematically reduce gender inequalities in the workplace and community. This tool for gender equality involves a dual approach: 1) mainstreaming gender in design; development, implementation and evaluation and 2) adopting targeted actions to eliminate gender discrimination and enable progress in specific areas.

[10] See: https://www.oecd.org/gov/toolkit-for-mainstreaming-and-implementing-gender-equality.pdf

A further precondition of well-designed and effective capacity building is the skills and methodologies to undertake gender analysis or gender-based impact assessments for planning and strategic documents, which can help ensure that gender equality issues are not marginalized. This can reduce resistance and red tape in the long run.

Here are six basic questions GESI stakeholders need to consider when seeking to mainstream gender considerations into IIA and FDI:[11]

1. In which economic sectors do women and men work? What is the difference between women's employment patterns and men's patterns? What is the proportion of women and men working in sectors with potential for export expansion? What is the proportion of women and men working in sectors which will be exposed to import competition?

FDI leads to some sectors expanding and some other sectors contracting. It is important to know if the expanding/contracting sectors are predominantly employing women and hence whether gains/losses in employment from FDI are likely to be disproportionately felt by women/men.

2. Do working conditions vary by gender? For example, is the enforcement of labour rights weaker for women in the workforce? How easily can workers/producers move from one sector to another? Are opportunities for upward mobility equally available to both men and women as workers/producers? Is access to training gender-differentiated?

It is important to know not just how many jobs are likely to be created/destroyed by FDI, but also whether such jobs respect labour standards. Some developing countries have focused their export strategy on labour intensive goods produced by cheap labour, taking advantage of gender and other wage inequalities. Such strategies may stimulate profits in the short run but are counter-productive in the longer run. Greater gender equality in access to skills, capital and infrastructure promotes higher returns on investments and sustainable growth.

3. How much time do women and men spend on activities such as cooking, cleaning, child care, fetching water and fuel? Does this vary depending on location, age, family circumstances or ethnicity?

Unpaid domestic work is mostly carried out by women and is particularly heavy in remote rural areas. It is a barrier to women seizing new opportunities related to FDI: for example, by preventing women farmers from participating in extension services or by limiting women wage workers' access to new paid employment conflicting with family responsibilities

4. Do women and men have equal access and control over resources such as land, credit and inputs? Gender intensified constraints on the use of productive resources limit women's ability to respond to economic opportunities created by FDI and weakens supply response.

5. Who is in charge of food expenditure in the household? How is family consumption distributed among girls and boys, women and men? FDI and increased income leads to

[11] Adapted from Women's Rights & Gender Equality. PE 571 388. EC Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs. 2016. p43.

new choices and spending priorities. Changes in household income may especially affect women in their role as home managers.

6. What is the proportion of social sector spending that supports gender equality? Is this likely to be protected in the event of a decline in public revenue? How is the promotion of gender equality objectives affected by changes in the regulation of public services?

3.3 Implementation and Monitoring

Desired outcomes may not be realised from embedding GESI into a whole of government approach covering FDI. For if these GESI laws and policies are not properly implemented, they contribute little. Well designed and implemented IIA contracts can maximise the contribution of FDI to GESI goals. Conversely, badly drafted or executed agreements may impose unfavourable terms on the host country often for long periods of time, lead to costly disputes and undermine the pursuit of GESI policy goals.

For example, while the 2019 version of the Dutch Model BIT now "*[r]ecogniz[es] the importance of equality between men and women when formulating, implementing and reviewing measures within the field of international trade and investment*" it does not impose any concrete obligations on the Contracting Parties. Therefore, its potential impact on achieving gender equality, without political will or further legislative push, is still unclear. Nevertheless, its inclusion represents a positive recognition of the nexus between trade, investment, gender equality and development. Indeed, Article 6(3) states that:

> *"The Contracting Parties emphasize the important contribution by women to economic growth through their participation in economic activity, including in international investment.* ***This includes removing barriers to women's participation in the economy*** *and the key role that gender-responsive policies play in achieving sustainable development. The Contracting Parties* ***commit to promote equal opportunities and participation for women and men in the economy****. Where beneficial, the Contracting Parties* ***shall carry out cooperation activities to improve the participation of women in the economy, including in international investment"****.* [emphasis added]

Furthermore, gender-based discrimination is expressly qualified as a "*wrongful ground*" that constitutes a breach of fair and equitable treatment under Article 9(2) 2019 Dutch Model BIT. Such discrimination could regard both natural as legal persons, and if implemented effectively should prevent unequal treatment based on gender.

As such, the 2019 Dutch Model BIT is unprecedented and offers a new era of GESI in investment agreements. For it has only been since 2010 that investment treaties began to include gender provisions. Of the over 2,899 BITs signed to date, only six mention gender in the text of the agreement. One analysis highlighted that there is little correlation between the countries that addressed gender in their model BITs and the countries that signed BITs that addressed gender. For example, Brazil's recent model investment agreement did not address gender, while the government addresses the issue in most of its recently signed investment cooperation and facilitation treaties. Conversely, whereas Morocco's 2019 model BIT addressed gender, its most recent BIT – signed with Japan in August 2020 – does not (Amaral and Jaller, 2020).

Canada's 2014 model BIT does not address gender, although policies promoting gender inclusion and other disadvantaged and marginalized groups could be potentially addressed under Article 16 Corporate Social Responsibility:

> "Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. **These principles address issues such as labour, the environment, human rights, community relations and anti-corruption**." [emphasis added]

On the other hand, Canada's trade agreements have been noteworthy in their inclusion of gender equality provisions and this may soon be transferred to its BITs. For example, the 2019 amendment to the Canada-Chile Free Trade Agreement (CCFTA) includes a stand-alone chapter on trade and gender with numerous commitments to promote gender equality, the inclusion of women on economic growth and cooperation activities, although these commitments are not enforceable under the dispute resolution mechanism of the CCFTA pursuant to Article N *bis*-06. The Canada-Israel FTA further notes that the treaty's objectives include to: *"promote gender equality and encourage women's economic empowerment and the use of voluntary corporate social responsibility standards and principles…."*.

The Southern African Development Community (SADC) Model BIT does not mention gender or the economic inclusion of women either. Rather, the agreement sets minimum standards for human rights, environment and labour under Article 15, stipulating that investors have a duty to respect human rights in the host's workplace, community and State. It references the core labour standards required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998 and states that investors and their investments shall not establish, manage or operate investments in a manner inconsistent with international environmental, labour, and human rights obligations binding on the Host State or the Home State, whichever obligations are higher.

Yet even when an investment agreement with GESI provisions has been signed, opportunities can be missed if the host government is unable to adequately monitor implementation and sanction non-compliance. Strengthening the capacity of host governments, not only to negotiate new agreements, but also to manage existing ones is significant in enabling governments to get the best possible GESI results.

Investment agreements need to clearly identify and clarify roles, along with responsibilities and powers. Legal provisions that require the parties to regularly review how the agreement is working and to share information through periodic reporting requirements is one way to help effective implementation. The agreement can also set up institutions, such as coordination committees, to keep track of GESI implementation, monitor the costs and progress of GESI implementation and develop future work plans. In practice, these committees and the host government's participation in them have not been sufficiently active. In these situations, dispute settlement clauses are also important to clarify what happens in case of inaction or disagreement.

For the host government, GESI implementation requires well thought-out investment contract management processes. Dedicated resources are needed along with the technical ability to understand complex legal provisions. In this regard, dedicated host government units with strong expertise and high-level political backing are key to monitoring implementation and sanctioning non-compliance. In a whole of government GESI strategy, there is also a role for a wider range of regulatory agencies, such as education and health or the Ministry for Women, where this has been established. These bodies can also monitor compliance and impacts from GESI laws and policies if they are provided with effective tools and adequate resources to access information and sanction violations. Proper coordination among the various government agencies involved is important to the smooth implementation of GESI.

A range of best practices and policy guidelines have been developed to help governments maximize the potential benefits of gender equality to both society and the economy. (See Box 4)

Box 4: Good Practices and Lessons Learned in Designing and Implementing Gender Policies and Action Plans [12]

- Clear policy guidance and sustained management commitment to gender needs to be articulated well and consistently for sustained gender-equality results.
- Both women and men need to be included as key stakeholders and in target groups.
- Clear baselines and measurable gender-related targets should be established from the outset.
- In terms of monitoring and reporting on gender-sensitive policy implementation, results and processes, and clear accountability mechanisms must be articulated in order to take corrective measures when needed.
- Gender-sensitive and anonymous complaint mechanisms should be available, so that women and men feel confident when filing their complaints relating to climate change interventions.
- Sex-disaggregated data and relevant gender indicators must be created in the results and portfolio monitoring frameworks and in reporting.
- Periodic auditing of gender-sensitive results allows policies and accountability and implementation mechanisms to be adjusted. This should be considered in the initial design.
- The institutionalising of gender and the building of interest and competencies among core staff on gender issues strengthens results and impacts and should be included whenever possible.
- Dedicated budgets for gender-related activities will support greater success.

3.4 Enforcement and dispute settlement

Chapter 1 discussed how wide-ranging reforms are proposed in order to restore the perceived legitimacy of the FDI dispute settlement process for public stakeholders. While states are drafting increasingly clear and detailed IIAs to better express their rights and responsibilities, purpose and object, different propositions have emerged from within ICSID and elsewhere to create an international appellate facility to hear appeals from investment tribunals. These proposals generally suggest a body to review appeals on the grounds of error of law, fact and procedure.

At present, the annulment of awards under ICSID is designed to be a limited remedy for serious error, usually of a procedural nature. A further reform proposal is for a standing appellate tribunal composed of nationals from the Contracting States plus a national of a third State. Currently the ICSID annulment committees are selected by the Chairman of the ICSID Administrative Counsel from the Panel of Arbitrators and cannot be a national of either disputing party or of the state of any of the tribunal members whose decision is at issue.

The EU's proposed system is more ambitious than this. It would remove party autonomy by appointing a permanent body of publicly appointed judges. To avoid conflicts of interest, these judges would be unable to act as counsel on other investor-state disputes. To ensure expertise, these judges would be required to have comparable qualification requirements to those of other permanent international courts such as the International Court of Justice and the WTO Appellate Body. All proceedings under the MIC would be transparent, with open hearings and a right of intervention for third parties with an interest in the case. The system would preclude the ability to

[12] Source: Tool Kit on Gender Equality Results and Indicators. Asian Development Bank (ADB) and Australian Aid, 2013.

forum-shop and will tightly define and limit the ability of investors to bring cases to instances such as "discrimination on the basis of gender, race or religion, or nationality, expropriation without compensation, or denial of justice". This investor-state dispute settlement system seeks to enshrine gender equality, good governance and guarantee states' right to regulate. It could therefore be argued that the EU proposals, if enacted, would shift the balance of ISDS in favour of states that wanted to pursue GESI.

In the meantime, the gender diversity approach that has emerged in the dispute settlement provisions of the revised 2019 Dutch BIT, requires the appointing authority appointing the tribunal, to "*strive for gender and geographic diversity"*. This provision seeks to redress the gender imbalanced identified in ICSID arbitral appointments, where the total number of women appointees is estimated to be about three per cent.

Unfortunately, even where such GESI provisions have been incorporated into IIAs, a number of studies find its enforcement mechanisms to be weak. Lack of an independent oversight body is a key weakness. White et al (2003) find that gender-specific labour laws on matters such as non-discrimination and equal-pay standards were given secondary status. A panel could not be convened or a withdrawal of benefits if women workers' rights are violated, for instance. This is a serious concern given the well-documented cases of sexual harassment and forced pregnancy-testing in the export-processing zones, where the women working have had no avenue to redress their grievances when the owner of the factory was foreign. Examples such as this indicate that much more needs to be done urgently to promote GESI in IIAs and through FDI.

3.5 Next steps for GESI policy making in IIAs and the impact of COVID-19

"Change is coming at a pace that is too slow for the women and girls whose lives depend on it, and for the effectiveness of our efforts to maintain international peace and security".

(António Guterres, 2019)[13]

While gender equality is now championed globally, on the ground during emergencies such as COVID-19 it is often deprioritised in practice. Yet COVID-19 is threatening efforts to address broader structural gender inequalities. Lockdown measures to address COVID-19 are having a major impact on women's livelihoods and income. Because women and girls carry out three-quarters of unpaid care work, lockdown only adds to their responsibilities for looking after children and sick relatives. COVID-19 has made people working in the informal sector the most vulnerable to food insecurity. This will disproportionately effect women and children, in both nutritional and personal security terms.

All of these consequences indicate a need for both short- and longer-term measures to avoid exacerbating gender inequalities. First and foremost, gender equality must be made an integral part of the overall response. This means understanding how gender identity interacts with other factors to impact an individual's experiences of the crisis and their vulnerabilities. To effectively undertake and apply such analysis, it is important that response teams are gender balanced, including at leadership level. This includes increasing resources and support to local women's activists, networks and organisations, as the linchpin for the advancement of the broader gender equality movement.

Gender inequalities persist and are exacerbated by COVID-19. Persisting inequalities come at a significant cost for women, men, employers and society as a whole, leaving a large share of talent under-utilised. Encouraging more active participation of women in the labour market and increasing their educational attainment in science, technology, engineering and mathematics would have a largely positive effect on both the domestic and global economy. Higher gender equality would lead to a large increase in the number of jobs, to the benefit of both women and men. Improving gender equality has strong, positive impacts on GDP per capita that grow over time.

Governments are the vital linchpin in ensuring GESI is promoted and embedded by FDI and MNE as well as by domestic society policy. For only governments can establish national laws, policies and mandatory regulations to mandate equal pay and provide equally paid maternity and paternity leave. Only governments have the public policy mandate and resources to finance initiatives to promote women enterprises, education and training. Governments can lead by example in promoting equal pay and strong support systems for women working within and for the government and public sector. It is governments that make intellectual property rights agreements with investment implications that can have negative impacts on women in their multiple roles as farmers, healers, developers and conveyors of traditional knowledge and technology.

Putting gender equality at the heart of a whole of government approach would make the investment and trading system inclusive, enabling women to fulfil their full potential, and hence benefit women and society as a whole. This would help governments everywhere to achieve smart, sustainable and inclusive growth from FDI activity.

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[13] https://news.un.org/en/story/2019/10/1050151

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