

Foreword

The Commonwealth Secretariat has produced this practical handbook, entitled *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators*, to help enable developing countries to design international investment agreements (IIAs) that support their development needs. The Guide marks the culmination of an intense and successful consultative and expert-group process held in the Commonwealth Caribbean, Pacific, South Asian and African regions. It has also been subjected to a rigorous peer review process comprising renowned experts in the field to ensure that it meets international standards.

The Guide identifies an area of crucial need among its poorest, smallest and most vulnerable members; and is providing a cost-effective, instructive and already deeply appreciated tool across the Commonwealth's developing country membership. It is designed to be a useful reference for policy-makers, legal experts, legal researchers and civil society groups with a stake in the effects of IIAs on development. It explains how IIAs can be more effective tools to attract investment and to ensure that investment leads to sustainable development.

It is expected that the Guide will be of use to developing countries in negotiating bilateral investment treaties, while various provisions may also be suitable for inclusion in economic partnership agreements, investment provisions in preferential trading agreements and other international economic agreements relating to investment.

The Guide analyses the costs and benefits of existing approaches from a sustainable development point of view. It provides a menu of options for states negotiating IIAs, including new ideas for treaty provisions that can enhance the prospects for ensuring that investors' activities contribute to sustainable development.

The challenges of negotiating and living with IIAs

Most IIAs are bilateral investment treaties (BITs) between capital-exporting countries and capital-importing countries. These treaties offer protection for foreign investors operating in host countries. Countries hope that by offering protection, an IIA will increase inflows of foreign investment from existing and future investors. But the evidence of the link between IIAs and foreign investment inflows is weak, and not all foreign investment contributes to sustainable development. At the same time, the forms of IIA typically sought by countries can constrain the ability of host countries to regulate foreign investors operating within their borders. IIAs may make it difficult for countries to achieve essential public policy objectives, including their development goals and the maintenance of environmental, human rights and labour rights standards.

The constraints that IIAs impose on host states, combined with costly and often inconsistent decisions by investor–state arbitration tribunals regarding the meaning of broadly worded IIA obligations, have led many countries to rethink what obligations an IIA should include.

How can the Guide help address challenges related to IIAs?

The Guide is designed to explain how IIAs can do a better job of promoting sustainable development in host states. It explains how IIAs, if combined with a mix of other policies, can increase foreign investment inflows and support the efforts of host countries to regulate foreign investment inflows in order to ensure that they contribute to sustainable development.

The Guide achieves these goals by:

1. Identifying emerging best practices in existing agreements;
2. Suggesting new and innovative provisions; and
3. Discussing how states can achieve better coherence between their IIAs, their other international commitments and their domestic policy.

Essential features of the Guide

The Guide contains the following features, which are designed to explain how IIAs can do a better job of promoting sustainable development in a manner that serves the needs of its different intended users most effectively. It:

- Discusses the basic purposes of IIAs;
- Describes the links between IIAs and inward investment flows and those between investment inflows and sustainable development;
- Presents the various current approaches to IIA provisions;
- Identifies new ways to modify traditional IIA provisions;
- Describes new types of sustainable development provisions that can be included in future agreements relating to sustainability assessments, human rights, labour rights, environmental protection and corruption;
- Explains the policy implications of all provisions discussed and evaluates their costs and benefits; and
- Provides sample provisions.

Who is the Guide intended for?

The Guide is intended to serve the needs of a variety of users, including serving as:

- A resource to help policy-makers to make more informed policy choices;
- A negotiators' handbook;
- A technical reference for legal experts and researchers; and
- A source of information on IIAs for civil society groups and advocates.

Key policy issues discussed in the Guide

The Guide discusses many of the potential social, cultural and environmental effects of IIAs. It also explains the current debates regarding the legal interpretations of various IIA provisions. Issues discussed include:

- Do IIAs contribute to economic growth?
- How can IIAs contribute to sustainable development?
- How can IIAs encourage investment more effectively?
- What is the impact of IIAs on regulatory sovereignty?
- How can investors' home states be engaged to support sustainable development in host states?
- Can IIAs be used to implement international human rights obligations and promote corporate social responsibility?
- How do IIAs interact with WTO obligations, other investment agreements and domestic policy?
- Should IIAs include investor–state dispute settlement?
- What kinds of changes can be made to investor–state arbitration procedures to make them less onerous for states and more predictable?

The Guide is not intended to be prescriptive and is not without limitations. It does not compare IIAs with investment contract commitments or insurance, which may be used as substitutes for, or complements to, IIAs as ways to encourage investment. Nor does the Guide's focus on IIAs suggest that IIAs constitute the best or only approach to attracting and retaining foreign investment. Other policies may be preferable, or have greater impact.

Rather than surveying all possible approaches to attracting investment, the Guide aims to help developing countries with existing IIAs and the negotiations of new ones. Its main purpose is therefore to provide a source of useful information and analysis for countries that have negotiated, or are considering negotiating, IIAs.

The Commonwealth Secretariat is indebted to Professors Anthony VanDuzer, Graham Mayeda and Penelope Simons at the University of Ottawa in Canada who have worked tirelessly over the past five years to write this Guide, along with the support of the technical manager overseeing this project. Special thanks as well to the Secretariat's Publications team for their editorial contributions.

I welcome this important publication, and hope that it will be widely read and actively utilised.

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