



Columbia Center on Sustainable Investment

A JOINT CENTER OF COLUMBIA LAW SCHOOL
AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues

No. 134 November 10, 2014

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The road to responsible investment treaties

by

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As the OECD Guidelines for Multinational Enterprises, first adopted in 1976 and updated for the fifth time in 2011, are approaching middle age, it is appropriate to reflect on how the use of these far-reaching recommendations for responsible business conduct can be promoted in international investment agreements (IIAs). During the Guideline's almost four decades of existence, the landscape of the global economy has continuously evolved, and securing sustainable development has become a key international issue.

The OECD Guidelines is a unique tool to address this issue, as they provide voluntary principles and standards for responsible business conduct in areas such as employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation.

Economic growth is essential for achieving sustainable development, and private investment -- both domestic and foreign -- is its engine. The fundamental question then is how to ensure that such investment is environmentally sound, promotes labor standards and respects human rights.

The main aim of IIAs has been, and remains, the protection of legitimate foreign investors and their investments in the contracting parties. IIAs have so far imposed obligations on contracting parties only, and not on investors. The rationale of this approach has been that investors' obligations must come from domestic legislation, be it environment or labor-related, and that foreign investors must respect that legislation in order to be protected by the treaties.

With this in mind, governments have so far encouraged foreign investors to do more than they are obliged to under the law, based on instruments such as the OECD Guidelines and the United Nations Guiding Principles on Business and Human Rights. The question today is whether we can use IIAs to advance the same objectives as these instruments. Our answer is that we can, if we introduce some carefully drafted, smart clauses to new treaties.

An approach would be to introduce into an IIA a reference to the OECD Guidelines.¹ This can be done by preamble language where the parties to a treaty would recognize the need to promote the Guidelines. This would most likely be the easiest solution -- but at the same time would not create binding obligations on the parties. A stronger alternative would be to introduce a provision that would oblige the parties to promote the Guidelines. It could also include an obligation to set up a non-judicial grievance mechanism that would assist companies and complainants in finding a solution to issues related to implementation of the Guidelines, through mediation or conciliation.²

However, the legally non-binding nature of the Guidelines raises the question of whether the obligation can only be placed on the contracting parties and only to the extent that it would cover promotion and a non-binding grievance mechanism. The legitimate concern has been that a voluntary instrument would be made mandatory indirectly through another binding international agreement.

Nevertheless, we are in favor of exploring a solution that would stipulate that only those investors that can demonstrate compliance with the Guidelines would be eligible for protection under IIAs. This is easier said than done and involves many complex procedural and substantive issues. It is, however, conceivable to exclude protection for investments that are linked to corruption. Another option worth exploring is to include a provision that specifies that materially relevant breaches of the Guidelines are taken into account by a tribunal when deciding on the merits of a claim or on potential damages awarded.

The abovementioned approach needs to be complemented by actionable clauses in treaties that would ensure compliance from a contracting party to implement specific measures related to the environment, labor standards and human rights. A treaty could stipulate, for example, that the contracting parties would undertake to become party to and implement relevant international agreements or standards related to environment, human rights and labor standards³.

To conclude, we believe that, through the addition of clear and smart clauses or preamble language, it is possible to advance responsible business practices in IIAs while at the same time protecting the interests of responsible investors and their investments against maltreatment.

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¹ For an exploration of the various options for incorporation by reference, see OECD, "Investment treaty law, sustainable development and responsible business conduct," June 26, 2014, prepared for the Informal Ministerial Meeting on Responsible Business Conduct. Reference to the OECD Guidelines implies a reference to the United Nations Guiding Principles as the Human Rights Chapter of the OECD Guidelines is consistent with the Guiding Principles.

² The 46 governments adhering to the OECD Guidelines already have an obligation to set up National Contact Points that promote the Guidelines and provides good offices to resolve issues related to the implementation of the Guidelines.

³ A more light-handed solution would be to introduce language to the preamble of a treaty whereby the contracting parties reaffirm their commitments to international environmental and labor standards as well as human rights. Contracting parties could also recognize the importance of such standards and refrain from lowering standards to promote inward investment, as is the Finnish treaty practice.

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