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Achieving sustainable development objectives in international investment: Could future IIAs impose sustainable development-related obligations on investors?

by

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A number of influential international organizations recently have issued publications that discuss the promotion of sustainable development in international investment. These organizations include the United Nations;¹ UNCTAD;² FAO, IFAD, the UNCTAD Secretariat, and the World Bank Group;³ the Commonwealth Secretariat;⁴ the Organisation for Economic Co-operation and Development (OECD);⁵ the International Chamber of Commerce (ICC);⁶ and the South African Development Community (SADC).⁷

These publications⁸ evince two theoretically distinct, but complementary, approaches to the promotion of sustainable development in international investment:

1. (A) Declaration of key principles: the Principles on Responsible Agricultural Investment, for example, propose a number of principles concerning consultation and participation and social and environmental sustainability;⁹ and (B) the presentation of guidelines to relevant stakeholders, including investors and states: the ICC Guidelines, for example, recommend that the investor “should support sustainable economic growth by considering the financial, environmental, and social impacts of its investment in the host country at the outset of the planning and during operation.”¹⁰
2. Guidance to states on how best to integrate sustainable development objectives into international investment agreements (IIAs): the Commonwealth Secretariat Guide,¹¹ for example, suggests that, in future IIAs, investors would be required to conduct a sustainability assessment of investments that takes into account their environmental, social and human rights impacts.¹²

While the two variants of the first approach purport “to set forth the responsibilities” of the relevant stakeholders in the international investment process,¹³ their observance, in and of themselves, by investors is “voluntary and not legally enforceable.”¹⁴ The effectiveness of such principles and guidelines thus depend on, among other things, their incorporation by investors into

corporate policies and “project identification and implementation.”¹⁵ The second approach goes further by seeking to “operationalize” sustainable development objectives into IIAs by enumerating “a comprehensive compilation of policy options available to IIA negotiators.”¹⁶ A number of proposed IIA design options merit particular attention:

- Investors would be required **to comply with the laws and regulations of the host country** when making and operating an investment, even at the post-operations stage (e.g., environmental clean-up).¹⁷
- Introduction of a **two-way umbrella clause** that would require *both* the host country and the investor to observe their specific obligations in relation to their investments, including any sustainable development-related commitments, under any investment contract concluded between the investor and the host country.¹⁸
- Introduction of a **best endeavors clause**, requiring investors to comply with principles and guidelines that seek to promote sustainable development objectives or standards.¹⁹

Such IIA design options could be complemented by further designing IIAs to limit investor access to investor-state dispute settlement where the investor fails to comply with such obligations (e.g., an IIA provision requiring compliance with domestic law), and/or provide a counterclaim mechanism for the host country against an investor that has made an international investment treaty claim.²⁰ The former could serve to exclude claims in respect of investments that fail to respect sustainable development-related obligations, while the latter would enable the home country to obtain relief for injuries suffered as a result of an investor’s non-compliance with such obligations.

The practical implementation of these IIA design options would, of course, involve a significant shift in the design of future IIAs, since they require balancing traditional state commitments against new investor commitments introduced in connection with the achievement of sustainable development objectives.²¹

It remains to be seen if IIAs can be utilized in a way that imposes sustainable development-related obligations on investors. Nonetheless, these IIA design options represent significant “game changers” in the area of international investment, including in relation to investor-state dispute settlement, and merit serious consideration by stakeholders.

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¹ UN, *Guiding Principles on Business and Human Rights* (2011), available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

² UNCTAD, *Investment policy framework for sustainable development* (2012) (IPFSD), available at http://unctad.org/fr/PublicationsLibrary/webdiaepcb2012d6_en.pdf.

³ FAO, IFAD, UNCTAD, and the World Bank Group, *Principles on Responsible Agricultural Investment* (January 2010) (PRAI), available at http://siteresources.worldbank.org/INTARD/214574-1111138388661/22453321/Principles_Extended.pdf.

⁴ J Anthony VanDuzer, Penelope Simons and Graham Mayeda, *Integrating Sustainable Development into International Investments Agreements: A Guide for Developing Countries* (2012) (Commonwealth Secretariat Guide), available at http://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf.

⁵ OECD, *OECD Guidelines for Multinational Enterprises* (2011) (OECD Guidelines), available at <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

⁶ ICC, *ICC Guidelines for International Investment* (2012) (ICC Guidelines), available at <http://www.iccindiaonline.org/pdf.pdf>.

⁷ SADC, *SADC Model Bilateral Investment Treaty Template with Commentary* (2012) (SADC Model BIT), available at: <http://www.iisd.org/itm/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf>.

⁸ It should be noted that these publications have benefited from the conceptual policy work and content of the IISD Model International Agreement on Investment for Sustainable Development (2005).
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⁹ See, PRAI, pp. 5-7.

¹⁰ See, e.g., ICC Guidelines, p. 18.

¹¹ See, e.g., Commonwealth Secretariat Guide; SADC Model BIT.

¹² See, Commonwealth Secretariat Guide, p. 33.

¹³ See, e.g., ICC Guidelines, Preamble.

¹⁴ See, OECD Guidelines, p. 17.

¹⁵ See, FAO, IFAD, the UNCTAD Secretariat, and the World Bank Group, *PRAI Discussion Note: Synoptic Version* (March 2010), available at http://unctad.org/en/Docs/ciicrp3_en.pdf, p. 8. Such principles might have a longer term effect if over time they coalesce into customary international law obligations or emerge as elements of international public policy.

¹⁶ See, IPFSD, p. iii.

¹⁷ See, IPFSD, p. 39.

¹⁸ *Ibid.*, p. 54.

¹⁹ *Ibid.*, p. 58.

²⁰ *Ibid.*, p. 39.

²¹ Most IIAs currently only provide for State obligations but do not usually specify investor obligations or responsibilities. See, IPFSD, p. 39.

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