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Promoting sustainable FDI through international investment agreements*

by

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The Washington Consensus promoted the liberalization of inward FDI regimes as a tool to advance development. Accordingly, governments have sought to attract as much FDI as possible, focusing on the quantity rather than the quality of FDI.

This strategy is becoming progressively more nuanced. While countries continue to seek to attract FDI in general, increasingly they focus on FDI that they consider particularly desirable for their economic development. While this is not new—many governments have targeted specific types of FDI in the past—a broader debate on how to define, and seek, quality investment is now underway. Indeed, even OECD members are discussing “FDI qualities”, and linking it to the concept of “sustainable FDI”: “commercially viable investment that makes a maximum contribution to the economic, social and environmental development of host countries and takes place in the framework of fair governance mechanisms.”¹

Promoting sustainable FDI is particularly important, considering that the UN’s sustainable development goals (SDGs) have become the lodestar of international economic policy, and FDI can contribute to closing the SDG financing gap.

That FDI must contribute to host countries’ development is not new in international investment relations. Apart from referring to the protection of investors—which remains the focus of international investment agreements (IIAs)—the preambles of a growing number of agreements include specific references to sustainable development,² and some IIAs now contain specific provisions in this respect.³ This is a beginning. The pressing challenge is to operationalize and firmly anchor this objective in the text of these treaties and their application, so that investment has indeed a substantial sustainable development impact. Options include:

- The *Salini* criteria, sometimes used to define “investment” for the application of IIAs, can be a starting point.⁴ While four of the *Salini* criteria are gaining acceptance (duration, substantial commitment of capital or other resources, expectation of gain or profit, assumption of risk), the fifth—contribution to the economic development of the host country—has received less attention. Moreover, accepting the *Salini* criteria is a matter for tribunals’ discretion; also, the criteria have been elaborated in relation to the ICSID Convention, and do not necessarily come into play in arbitrations conducted under other procedural rules. Still, they offer an entry point for tribunals that recognize the need for investment to contribute to sustainable development.

- Beyond application, IIAs have generally been hesitant about requiring that covered investment must contribute to the development of host countries. This could indicate a hesitation to narrow IIAs’ protections, linked perhaps to uncertainty about the interpretation of what constitutes such a contribution. However, governments have indicated in many instruments the contributions they expect from investors, and investors have identified in many instruments the contributions they seek to make to host countries’ sustainable development—and there is considerable overlap concerning such “sustainable FDI characteristics”.⁵
- IIAs could define “investment” explicitly by reference to the five *Salini* criteria—clarifying what investments would qualify as sustainable investment (or tribunals would have to do so). This, too, is tricky: the term “sustainable investment” is open to interpretation, but the sustainable FDI characteristics could help provide a way forward.
- IIAs could allow governments to deny protection to investments that fall short of the sustainable investment definition, through a denial-of-benefits clause.
- IIAs could allow governments to grant preferential treatment to investment that has certain sustainability characteristics (similar to using targeted incentives to invest in renewable energy), permit sustainability exceptions, make sustainability characteristics part of the “like circumstances” analysis for national treatment,⁶ or focus investment facilitation preferentially on such investment. The last approach is particularly relevant, given the WTO’s structured discussion on investment facilitation for development.
- Finally, incorporating binding references to corporate social responsibility (CSR) in IIAs can advance sustainable investment. References to such international CSR instruments as the [OECD Guidelines for Multinational Enterprises](#) import into treaties widely accepted provisions that encourage sustainable investment (relating to, e.g., environmental management, technology transfer, local capacity building). IIAs have begun to do so in the preambles and/or texts of treaties. For example, [CETA](#)’s Preamble encourages enterprises operating within the territory of the contracting parties or subject to their jurisdiction to respect internationally recognized CSR standards, including the OECD Guidelines. While often incorporated as soft law references to date, a growing body of work aims at expanding these references to hard law (in IIAs, domestic laws and international contracts), to enhance their impact. This CSR approach reflects a broader reorientation of IIAs, toward recognizing the responsibilities of investors in general.

Governments are intensifying efforts to attract sustainable investment. Operational IIA provisions favoring sustainable investment for sustainable development would support these efforts—to help achieve the SDGs.

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¹ [Karl P. Sauvant and Howard Mann, “Towards an indicative list of FDI sustainability characteristics” \(Geneva: ICTSD and WEF, 2017\), p. 2.](#)

² [Kathryn Gordon et al., “Investment treaty law, sustainable development and responsible business conduct”, *Columbia FDI Perspectives*, no. 157, September 28, 2015.](#)

³ For example, the [Morocco-Nigeria BIT](#).

⁴ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para. 52.

⁵ Sauvant and Mann, op. cit.

⁶ See the [Pan-African Investment Code](#) approach.

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