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Policy pointers

The types of investments and their operating standards, not just their volume, matter a great deal to the contribution they can make to sustainable development; yet most international investment treaties say little or nothing about standards of responsible business conduct.

Some recent treaties mandate or encourage states to set and enforce standards, or directly encourage or require businesses to act, in areas such as human rights, labour rights and the environment. For any such provisions to have bite, treaty drafters need to define the consequences of non-compliance in the context of dispute settlement.

To further develop treaty policy in this area, analysts and practitioners should monitor the effectiveness of existing approaches and their articulation within national and international law, and support informed debate to identify ways forward.

In relatively unchartered policy terrain, there is an important role for imaginative policymaking and the international sharing of lessons to document what works and inform new policies.

Raising the bar on responsible investment: what role for investment treaties?

The system of international investment treaties is at a crossroads. Many states are reviewing their investment treaty policies to recalibrate investment protections and reform dispute settlement arrangements. In doing so, mitigating risks to businesses while enabling states to act in the public interest have been the central concerns. Less attention has been paid to the role that treaty reform could play in addressing the risks that business activities can create for workers, landholders and the people most affected by investments. Can investment treaties promote responsible business conduct in areas such as human rights, labour relations, land rights and the environment? This briefing reviews recent treaty practice and charts possible ways forward.

Time and time again we see an apparent paradox: low- and middle-income countries strive to attract foreign investment for national development, yet when investments materialise, they often create conflict — over land acquisition, environmental impacts or labour relations. Making sense of this apparent paradox means recognising that, from a sustainable development perspective, promoting foreign investment is not an end in itself but a means to an end. It also means recognising that the types of investments and their operating standards, not just their volume, matter a great deal to the contribution that they can make to sustainable development.

Promoting responsible business conduct: can investment treaties add value?

Most investment treaties focus on protecting investments (Box 1) but say little or nothing about the quality of those investments or standards of responsible business conduct. Investment treaties are not the primary, nor necessarily the best, vehicle for tackling all the social, environmental and economic issues at stake in investment processes. National law has a key role to play, governing issues such as local consultation and free, prior and informed consent, environmental protection, land rights, taxation and labour relations.

In addition, many international instruments set key parameters for any responsible investment — from human rights treaties and labour conventions to international soft-law instruments on respecting land rights.[1] The UN Guiding Principles on Business and Human Rights affirm businesses' responsibility to respect human rights;[2] and if the ongoing negotiation of a proposed binding treaty on business and human rights is successful, it could mean significant shifts in this area of law.[3] When multiple instruments apply, international law tools can help to coordinate them, for instance by requiring any tribunals that are interpreting investment treaties to 'take into account' other relevant, applicable international rules.[4] Some

arbitral tribunals settling investor-state disputes have already referred to the human rights responsibilities of businesses.[5]

At present, there is little evidence to point to the most effective ways for international regulation to establish standards of responsible business conduct. While this situation calls for more research, two arguments indicate the value of addressing responsible business conduct within investment treaties — an approach that can complement the use of national and international instruments either in place or in development.

From a sustainable development perspective, promoting foreign investment is not an end in itself but a means to an end

First, coordinating the application of different national and international norms can leave significant room for a tribunal's discretion and often gives rise to difficult questions. So it is perhaps not surprising that arbitrators — including members of the same tribunal — can reach different conclusions.[6] Arguably, more explicit treaty provisions on responsible investment and/or on the interface with other relevant instruments could increase clarity and certainty.

Second, the narrow focus on investment protection taken by many investment treaties creates imbalances in the rights and obligations of the key actors involved: the treaties establish standards of treatment that investors are entitled to, but they do not define those investors' obligations towards the state and the people affected by their investments. If the treaties aim to promote investment flows in order to advance sustainable development, there is a case for binding the treaties' protections to compliance with parameters of investment quality. Entrenching responsible business standards in treaties that have legal bite could rebalance rights and obligations and help arbitral tribunals to more easily consider those standards when they settle investor-state disputes.

Box 1. International investment treaties: an outline

Investment treaties are international, legally binding agreements that aim to promote cross-border investment. Traditionally involving bilateral investment treaties (BITs) between two states, these agreements have increasingly taken the form of 'investment chapters' embedded in wider trade and investment treaties and/or of regional treaties among multiple states.

Under many investment treaties, states will provide each other's investors with specified standards of treatment in the expectation that this will encourage investment, though empirical evidence of whether investment treaties do promote foreign investment is mixed.[7] In many treaties, the standards of treatment primarily relate to investment protection against adverse conduct by the state, but a growing minority of treaties also involve steps to liberalise investments. Most investment treaties allow investors to bring disputes to international investor-state arbitration if they consider the state has breached its treaty obligations.

Picturing responsible investment provisions: state obligations

If responsible investment provisions are to play a role in investment treaties, what might that look like? Existing treaties provide an obvious starting point. While evolving treaty practice shows fewer developments in the area of responsible investment than investment protection, new features are emerging. Relevant treaty provisions can be clustered in two main groups: those dealing with what states should do to promote responsible business conduct, and those encouraging or mandating businesses to uphold responsible investment standards.[8]

Treaty clauses that establish obligations for states to promote responsible business conduct are relatively rare but are slowly making their way into treaty practice. For example, several treaties contain 'non-lowering of standards' clauses to discourage states from deviating from national labour or environmental laws in order to attract investment. Other treaties go beyond national law standards, for instance reaffirming the obligations of the parties under International Labour Organization (ILO) conventions. Examples of this latter approach include the US Model BIT 2012 and the Morocco-Nigeria BIT 2016.

In addition, the 2008 CARIFORUM-EU Economic Partnership Agreement requires the parties to take any necessary measures, including legislation, to ensure that investors act in accordance with relevant international labour and environmental standards; while the Morocco-Nigeria BIT 2016 commits states to ensure that their laws, policies and actions are consistent with applicable human rights treaties. Some investment treaties commit states to take measures to combat corruption — examples include the Japan-Mozambique BIT 2013, the Morocco-Nigeria BIT 2016, and the Intra-MERCOSUR Investment Facilitation and Cooperation Protocol 2017.

These provisions establish important parameters which states are required to implement. But questions remain about the real difference such provisions can make. Take the case of 'non-lowering of standards' clauses — the effectiveness of these provisions in pursuing social or environmental goals partly depends on the content of applicable national law standards: if national law sets the bar low, investments that adhere to it could still cause social or environmental harm.

And creating effective enforcement mechanisms to promote state compliance with 'non-lowering of standards' or anti-corruption clauses is also

problematic. Because these provisions are not designed to benefit foreign investors,[9] they are unlikely to be enforced through the investor-state arbitration system. Some treaties even exclude 'non-lowering of standards' clauses from state-state arbitration; though some of the more comprehensive trade and investment agreements have enabled state-state dispute settlement in relation to labour standards.[10]

And investor obligations

A few recent treaties clarify certain responsibilities of investors.[11] One approach is for the preamble of the treaty to refer to pre-existing international instruments on responsible investment. For example, the preamble of the 2016 EU-Canada Comprehensive Economic and Trade Agreement (CETA) encourages businesses to respect the OECD Guidelines for Multinational Enterprises. This approach sends an important signal to businesses and the preamble can influence the interpretation of treaty clauses, but it does not itself create legal obligations.

A few treaties (or treaty templates) require investors to comply with applicable laws; examples include the India Model BIT 2015 and the Intra-MERCOSUR Investment Facilitation and Cooperation Protocol 2017. In some countries, however, weak legal frameworks mean that compliance with national law may not be enough to ensure responsible business conduct. One possible option would be for treaties to require states to bring national law into line with specified international standards,[12] but this approach has yet to be tried in an actual treaty.

On the other hand, some recent investment treaties encourage investors to apply international standards of corporate social responsibility (CSR). While these standards can go beyond national law requirements and while such 'best efforts' clauses can convey the states' expectations to the investors, the limitation is that the clauses are not typically formulated in mandatory language nor backed by effective enforcement mechanisms. An exception is the Morocco-Nigeria BIT 2016, which uses mandatory language when requiring investors to uphold certain standards, including to:

- Respect human rights
- Act in accordance with ILO Declaration on Fundamental Principles and Rights at Work
- Comply with environmental impact assessment requirements applicable under the law of the home state or the host state, whichever is more rigorous, and maintain appropriate environmental management systems.

Several instruments, including the Morocco-Nigeria BIT 2016 and the Intra-MERCOSUR Protocol 2017, seek to prohibit investors from engaging in corruption. While strictly speaking not an investment treaty, the investment-related Supplementary Act of the Economic Community of West African States (ECOWAS) also illustrates the ways in which investor obligations clauses could be drafted (Box 2).

Depending on exact formulations and circumstances, effectively drafted investor obligations clauses could help the state to have an investor-state dispute thrown out due to inadmissibility or lack of jurisdiction; influence the tribunal's decision on the merits of the case; or reduce the amount of compensation due to the investor. They could also allow states to make counterclaims — that is, to respond to an investor's arbitration claim by seeking damages for harm caused by the investor.

The challenges ahead

Consolidating treaty practice. These recent departures in formulating treaties provide food for thought on possible ways to integrate responsible investment standards into investment treaties. But we are still far from a consolidated set of effective solutions. Treaty practice is yet to settle: responsible investment provisions remain rare and are sometimes underdeveloped in comparison to other treaty clauses. There is little evidence as yet on the real difference these provisions can make — not least because arbitral jurisprudence on these points is still very limited. In fact, some model treaty provisions are yet to be translated into actual treaties and some treaties signed (the Morocco-Nigeria BIT and the Intra-MERCOSUR Protocol, for example) are not yet in force.[13] Conceptually, important questions remain. Many of the international instruments that investment treaties could refer to are directed at states rather than investors. Coupled with limited treaty practice, this can create challenges to the design of effective

Box 2. An example of investor obligations: the ECOWAS Supplementary Act

The ECOWAS Supplementary Act of 2008 Adopting Community Rules on Investment and the Modalities for their Implementation is an instrument adopted by the ECOWAS heads of state and government, under the Revised ECOWAS Treaty. It contains provisions found in many investment treaties — from definition clauses that determine the scope of application, to commonly used standards of treatment such as conditions for the legality of expropriations, non-discrimination, and 'fair and equitable treatment'.

Unlike many investment treaties, the Supplementary Act also contains extensive provisions on investor obligations (not dissimilar to some of the clauses contained in the Morocco-Nigeria BIT 2016). These include obligations for businesses to comply with national law, uphold human rights, conduct environmental and social impact assessments, comply with international standards of corporate governance and refrain from engaging in corruption.

investor obligations clauses based on international best practice.

There are also questions about the articulation between investment treaty provisions and other national and international instruments. Entrenching responsible investment standards in reciprocal investment treaties is no replacement for systemic, national regulation of all relevant investments in a given country. And while responsible investment provisions could make it easier for investor-state tribunals to consider business conduct in the context of investment disputes, they are no replacement for devoted international systems such as those associated with labour conventions or human rights treaties.

Ensuring provisions have legal bite. Simply affirming responsibilities or even obligations is unlikely to have much effect. Ensuring that any responsible investment provisions are effective would require clarifying the specific consequences of non-compliance in the context of dispute settlement. For example: should investor non-compliance be a jurisdictional issue in investor-state arbitration, so investments that breach responsible investment standards are excluded from the legal protection provided by the treaty? Or if not, how should tribunals consider responsible investment standards when deciding the merits of the dispute, or when assessing any damages the state may owe to the investor? Is it appropriate for fundamental issues such as human rights to only be considered at damages stage?

Should states be able to bring counterclaims against investors over alleged violations of responsible investment standards? Such counterclaims could enable a government to address social or environmental issues through investor-state arbitration. But how to ensure that any payments are used to provide redress to those most directly affected, and that counterclaims are not 'sacrificed' in a global settlement that also deals with an investor's claims on possibly unrelated issues?[14]

Also, what scope should there be for third parties to invoke responsible investment provisions? Many contemporary investor-state disputes are rooted, at least in part, in conflicts that involve third parties — which could be the people affected by the investment. Previous IIED research found that third-party perspectives are often overlooked in investor-state arbitration.[15] Addressing this issue may involve rethinking procedural aspects of dispute settlement, but it also raises questions about the substantive rights and obligations established in the treaties.

Moving forward

This analysis indicates a need for further research to assess the effectiveness of existing approaches and inform the development of treaty policy. In relatively unchartered policy terrain, there is also a need for imaginative policymaking and the international sharing of lessons learned. Ongoing processes to explore the reform of investor-state dispute settlement, including at the United Nations Commission on International Trade Law (UNCITRAL), can provide arenas to debate the procedural dimensions of responsible investment (for example counterclaims). Responsible investment raises difficult questions, both technically and politically, and there is value in different actors — states, international organisations, investment-affected groups, civil society, the private sector and researchers — coming together to debate issues and explore ways forward.

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Notes

[1] For example, Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security. / [2] See also: Committee on Economic, Social and Cultural Rights, General Comment No. 24 (10 August 2017). / [3] See: www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/Session3.aspx / [4] Vienna Convention on the Law of Treaties (Vienna 23 May 1969), Article 31(3)(c). / [5] Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergo v. The Argentine Republic, ICSID ARB/07/26, Award (8 December 2016), eg paras. 1193, 1195, 1199, 1200. See also E. Guntrip, "Urbaser v Argentina: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration?", EJIL:Talk! (10 February 2017). www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration/; and D. Desierto, "The ICESCR as a Legal Constraint on State Regulation of Business, Trade and Investment", EJIL:Talk! (13 September 2017). www.ejiltalk.org/the-icescr-as-a-legal-constraint-on-state-regulation-of-business-trade-and-investment-notes-from-cescr-general-comment-no-24-august-2017/ / [6] For example, Bear Creek Mining Corporation v. Republic of Peru, ICSID ARB/14/2, Award (30 November 2017), paras. 663–668, and Partial Dissenting Opinion of Professor Philippe Sands QC (12 September 2017). / [7] Pohl, J (2018) Societal Benefits and Costs of International Investment Agreements: A Critical Review of Aspects and Available Empirical Evidence. OECD. www.oecd-ilibrary.org/finance-and-investment/societal-benefits-and-costs-of-international-investment-agreements_e5f85c3d-en / [8] On trends in responsible investment provisions, see: UNCTAD, World Investment Report 2017: Investment and the Digital Economy, Chapter III. http://unctad.org/en/PublicationChapters/wir2017ch3_en.pdf / [9] However, a situation could arise where selective non-enforcement of labour or environmental regulations might place some investors at a disadvantage. / [10] ICTSD, "Trade Dispute Panel Issues Ruling in US-Guatemala Labour Law Case", Bridges Weekly 41(24):9–10 (6 July 2017). www.ictsd.org/sites/default/files/bridgesweekly21-24a.pdf; discussing a state-state dispute over labour standards under the Central America Free Trade Agreement. / [11] Coleman, J, Johnson, L, Sachs, L and Gupta, K (2017) "International Investment Agreements, 2015-2016: A Review of Trends and New Approaches", Yearbook on International Investment Law and Policy 2015-2016. OUP. http://ccsi.columbia.edu/files/2014/03/YB-2015-16-Chapter-2-Sachs-et-al.pdf, paras. 2.81–2.88. / [12] UNCTAD (2015) Investment Policy Framework for Sustainable Development (2015). http://investmentpolicyhub.unctad.org/Upload/Documents/INVESTMENT%20POLICY%20FRAMEWORK%202015%20WEB_VERSION.pdf, Policy Option 7.1.2. / [13] According to http://investmentpolicyhub.unctad.org/IIA (last accessed 23 February 2018). / [14] Johnson, L and Skartvedt Guven, B (13 March 2017) The Settlement of Investment Disputes: A Discussion of Democratic Accountability and the Public Interest. *Investment Treaty News*. https://tinyurl.com/m9s87pc / [15] Cotula, L and Schröder, M (2017) Community perspectives in investor-state arbitration. IIED, London. http://pubs.iied.org/12603IIED

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