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Investment treaty law, sustainable development and responsible business conduct: A fact-finding survey

by

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Most governments are committed to sustainable development and responsible business conduct,¹ such as the protection of the environment, labor conditions and standards, the fight against corruption, and human rights. It is safe to assume that these governments also seek to attract foreign investors with protections offered in their international investment agreements (IIAs). It is less obvious, however, how these two policy objectives interact within international investment law.

Analyzing a sample of some 2,100 IIAs concluded by over 50 developed and emerging economies, it emerges that, although 47 of the 54 countries studied included some form of sustainable development or responsible business conduct language in at least one of their IIAs, a wide variation in treaty practice across countries exists. There is also a clear trend of including such references in recent IIAs: more than three-fourths of the IIAs concluded between 2008 and 2013 contain language on sustainable development or responsible business conduct.

Nevertheless, because references to sustainable development and responsible business conduct only began to be incorporated in 1985 with the inclusion of environmental concerns (labor standards were first introduced in 1990, anti-corruption in 2000, human rights in 2002), treaties without any sustainable development and responsible business conduct language continue to be prevalent. Only 12% of the sample IIAs contained language on these matters, and the distribution of this language was unequal – environmental protection was addressed in 10% of the treaties, followed by labor standards (5.5%), anti-corruption (1.5%) and human rights (0.5%). Moreover, the depth with which sustainable development and responsible business conduct issues were covered varied from a few words to extensive text of up to several pages.

Despite the relatively small number of IIAs containing responsible business conduct language, countries have adopted different approaches on *how* to introduce sustainable

development and responsible business conduct issues in the context of treaties originally aimed at protecting investment. The survey identified nine different ways in which treaties referenced these concerns in terms of the parties' legal obligations. These were, in order of frequency: (i) preamble language; (ii) language on preserving policy space; (iii) language discouraging loosening environmental or labor regulations to attract investment; (iv) language establishing that, in general, measures taken to protect public welfare objectives do not constitute indirect expropriation; (v) commitments to cooperate on responsible business conduct matters; (vi) language establishing a relation between responsible business conduct and the investor-state dispute settlement system; (vii) language establishing commitment to maintain or implement certain internationally recognized standards; (viii) language establishing a commitment to act against corruption; and (ix) language encouraging the respect of specific responsible business conduct standards, such as those contained in the *OECD Guidelines for Multinational Enterprises*.

Arbitration panels in investor-state disputes also included references to these same sustainable development and responsible business conduct issues. A survey of 1,113 treaty-based arbitration documents quantified whether arbitrators referred to issues beyond investment protection in their decisions. More than one in four decisions mentioned or, at times, extensively discussed, at least one of the four sustainable development and responsible business conduct issues identified in the first paragraph. Arbitral tribunals also referred to international agreements relevant for sustainable development and responsible business conduct when deciding arbitration cases: a total of 28 international agreements dealing with environmental protection, labor conditions and standards, anti-corruption, and human rights were cited in the sample of the 1,113 decisions.

Thus, there is evidence of growing interaction between investment treaty law and sustainable development and responsible business conduct. Governments are much more likely to refer to sustainable development and responsible business conduct concerns in IIAs, while arbitration panels also consider such concerns fairly frequently when dealing with investor-state disputes.

However, reaping the full benefits of investment treaties for sustainable development will require that governments explore options for investment treaty language that protect their "policy space" not only in the policy areas surveyed here, but in all areas in which governments have a role in protecting the public interest. In addition, the dispute-resolution procedures that are inseparable from, and enforce, these commitments should be aligned with good practices in domestic investor-state disputes settlement. Avenues for reform include: ensuring that high standards of public sector transparency are respected in all treaty-based arbitration cases; boosting public confidence by aligning treaties' dispute-settlement procedures with those of advanced domestic law systems; and either eliminating special treaty-based privileges for foreign investors that are not available to domestic investors or providing a persuasive policy rationale for these privileges.

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¹ Responsible business conduct is a broad concept that focuses on two aspects of the business-society relationship: 1) positive contributions businesses can make to economic, environmental and social progress, with a view to achieving sustainable development, and 2) avoiding adverse impacts and addressing them when they do occur. See OECD, *Responsible Business Conduct Matters: OECD Guidelines for Multinational Enterprises* (Paris: OECD, 2013), pp. 6-7.

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