

INCREASING THE RELEVANCE AND GLOBAL REACH OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

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INVESTMENT TRENDS AND OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (THE GUIDELINES) AND THE UNITED NATIONS GUIDING PRINCIPLES (UNGPs)

Investment treaties increasingly include articles pertaining to sustainable development and Responsible Business Conduct (RBC). According to an OECD survey,¹ conducted by Gordon, Pohl and Bouchard (2014), more than three-fourths of the recently concluded International Investment Treaties (IIAs) between 2008 and 2013 and virtually all of the IIAs concluded in 2012-2013 included language pertaining to sustainable development and RBC.²

The authors state in their Executive Summary:³

“Generally, governments do not use these IIAs to communicate directly to companies on SD/RBC. No treaty specific language on investor responsibility (aside from legality requirements for covered investments) was found in the sample and only 4 of the treaties surveyed specifically mention the OECD Guidelines for Multinational Enterprises”.

The authors concluded that inclusion of sustainable development and RBC has become a dominant trend but that the practice shows large variations among countries and that the substantive treaty commitments used in IIAs are often broadly framed and references to ISDS (Investor State Dispute Settlement) are generally “lightly regulated”. The authors suggest in their summary that governments should be mindful of the need to craft treaties in language that succeeds in providing incentives for improved public sector governance to attract high quality investment.

¹ The survey covered 2107 investment treaties and 1113 treaty-based arbitration cases.

² Kathryn Gordon, Joachim Pohl, and Marie Bouchard, “Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey”, 2014/01, OECD Publishing. <http://dx.doi.org/10.1787/5jz0xvqx1zlt-en>.

³ Kathryn Gordon, Joachim Pohl, and Marie Bouchard, “Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey”, 2014/01, page 6.

DIFFERENCES AND COMMONALITIES BETWEEN THE OECD GUIDELINES AND THE UNGPs

The UNGPs and the OECD Guidelines are the two most authoritative guidance documents for implementation of RBC. While the UNGPs focus on business and human rights, the OECD Guidelines go further and have a broader scope. In addition to human rights, the OECD Guidelines also cover employment and industrial relations, the environment, fighting corruption, consumer interests, science and technology, competition and taxation.

The Guidelines are the most important non-judicial mechanism available that contributes to guiding business based on ethical and social standards for the benefit of society but also in the interest of the companies' own sustainability. The Guidelines are non-binding but nevertheless the adherent governments to the OECD Declaration on International Investment and Multinational Enterprises (OECD Investment Declaration) recommend to multinational enterprises (MNEs) operating in or from their territories to observe the Guidelines. Should they be found in violation of the Guidelines, the National Contact Points (NCP) of the country where the company is officially registered is required to invite the company and the respective claimant to open a process of conciliation and mediation also called remediation.

NEED TO RE-POSITION THE OECD GUIDELINES

The Guidelines go back to 1976 and have evolved over the last 40 years. The fourth revision was negotiated and concluded in 2011 and sectoral application are being added strengthening the substantive part of the Guidelines. The UNGPs are of more recent origin. They were approved by the UN General Assembly in 2011 with a narrower scope than the OECD Guidelines.

While the OECD Guidelines are more comprehensive, their wider adherence has not progressed significantly. There are 35 OECD and 11 non-OECD member countries amounting to 46 countries who are adherents to the Guidelines. Even though the Guidelines are very comprehensive and their implementation by some of the adherent countries is impressive, the majority of the UN Member States have not adhered to them, jeopardising the attempt to make the Guidelines universally valid.

The intense acceleration of globalisation has created new developments and alliances between governments, business, civil society organisations (CSOs) and International Organisations. NGOs are increasingly included in international forums and play a major role in international relations.⁴ A good example of the increasing participation of CSOs in international affairs was the negotiations that

⁴ Yiu, Lichia; Saner, Raymond; "Sustainable Development Goals and Millennium Development Goals: an analysis of the shaping and negotiation process", *Asia Pacific Journal of Public Administration*, Vol. 36, No. 2, 89–107, 2014.

led to the agreement on the 2030 Agenda for Sustainable Development and its Sustainable Development Goals (SDGs).

Globalisation also means renegotiation of spheres of influence. For instance in trade and international development, CSOs create their own labels and standards and the same holds for MNEs. In other words, public and private standards compete with each other. Government-led standards for economic and social development are being partially hollowed out by private sector and social sector standards such as Fair Trade, Fair Labour, Safe Work etc.

One way of measuring the impact of a standards originating from a government or from a CSO is to conduct surveys to assess how stakeholders view the importance and relevance of those standards. A survey questionnaire designed and administrated by Menno Kamminga (2016) in 2014 was completed by 1317 companies.⁵ One question put to the companies was which international legal instruments were mentioned in your company's responses. Few mentioned international instruments. The most often mentioned were Global Compact (2.8%), the least often was the OECD Guidelines (0.3%).

Another study by Marion Jansen et al. (2017) had as its objective to find out to what extent voluntary sustainability standards referenced intergovernmental regulatory frameworks. The ILO core conventions were referenced in 105 such standards, norms set by the World Health Organisation in 44, the United Nations Universal Declaration of Human Rights, in 42, while the OECD Guidelines were only referenced in 14 and the UNGPs in 11.⁶

This raises the question as to how the OECD Guidelines could be better positioned in the international community. What kind of re-organisation and re-positioning could be envisaged? The main propositions are the following:

Strengthening the regulatory reach

Besides differences in scope between the OECD Guidelines and the UNGPs, there is also overlap of common language. Both instruments focus on business and human rights and both are non-binding, hence non-litigation-based international guiding instruments. The two guidelines provide means for parties to engage companies in talks through intermediaries such as the NCPs in the case of the Guidelines or governments in general in the case of the UNGPs, with the aim of finding solutions that are acceptable to the company accused of violating the respective instruments on the one hand and satisfactory to the claimant parties on the other.

⁵ Menno Kamminga, "Company Response to Human Rights Reports: An Empirical Analysis", *Business and Human Rights Journal*, 1(1), 2016.

⁶ Marion Jansen, Valentina Rollo, and Olga Solleder, "Meeting the standard for trade", *SME Competitiveness Outlook*, International Trade Centre, Geneva, 2016. <http://www.intracen.org/uploadedFiles/SMECO2016.pdf>.

The UNGPs have been endorsed by the United Nations Human Rights Council (HRC) in its resolution of 16 July 2011.⁷ The HRC is comprised of 47 states, which are elected by the majority of members of the General Assembly of the United Nations (193 states) through direct and secret ballot. Even though non-binding, the UNGPs thus have a broader claim to representativeness and legitimacy than the OECD Guidelines.

The lack of judicial due process under both instruments is seen by many as an acceptance of the power asymmetry between business and civil society whereby investors and MNEs appear to be better protected than the human rights of civil society and, in the case of the OECD Guidelines, also additional rights and interests (e.g. consumer protection, environment, anti-corruption).⁸

In light of the non-binding nature of the UNGPs, an initiative has been launched by the HRC to strengthen the UNGPs “Access to Remedy” pillar. The HRC subsequently requested the Office of the United Nations High Commissioner for Human Rights (OHCHR) to initiate a process to help states strengthen their implementation of the third pillar. Pursuant to this mandate from the HRC, OHCHR launched the Accountability and Remedy Project.⁹ The resulting report provides guidance to improve accountability and access to remedy for victims of business-related human rights abuses.¹⁰

In some countries, NGO coalitions are requesting a strengthening of the OECD Guidelines. The Dutch NGO Centre for Research on Multinational Corporations (SOMO), for instance, is pointing out that the NCPs focus only on their role as mediators instead of expanding this to become more of an investigator of possible breaches of the Guidelines.¹¹ In Switzerland, a coalition of over 70 Swiss NGOs calling themselves the Swiss Coalition for Corporate Justice launched a popular initiative called Responsible Business Initiative with the goal of getting the Swiss public to vote and accept a legally binding law which would ensure that corporations respect human rights and the environment, including their subsidiaries abroad.¹² The coalition collected sufficient signatures from Swiss citizens to make it mandatory for the Swiss government to put the initiative to a popular vote, most likely in 2018. While the initiative will most likely not be supported by a majority of Swiss citizens, the pressure is increasing in different countries aiming at further strengthening the remedial function of the OECD Guidelines and UNGPs.

⁷ Human rights and transnational corporations and other business enterprises, A/HRC/RES/17/4.

⁸ For reference on the tension between investor protection versus human rights protection, see Rainer Geiger, “Historical Perspectives” in this publication.

⁹ See www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx.

¹⁰ Improving accountability and access to remedy for victims of business-related human rights abuse, report by UNHCHR, Human Rights Council, A/HRC/32/19, 10 May 2016.

¹¹ Van Os, Roos, McGauran, Katrin, Römgens, Indra ; « Private Gain-Public Loss : Mailbox companies, tax avoidance and human rights », The Centre for Research on Multinational Corporations (SOMO), Amsterdam, June 2013, p.109.

¹² <https://www.publiceye.ch/en/topics-background/corporate-regulation/>

In order to strengthen the OECD Guidelines, the following actions could be envisaged:

First, adhering to Guidelines by non-OECD countries should no longer be an automatic side-benefit from signing the OECD Investment Declaration. New adherents should be asked to show evidence of being ready to implement the Guidelines, for instance, demonstrating that laws are in place covering the full domain of the Guidelines and that the legal practice is de-linked from direct political interference and rent-seeking arrangements. The OECD secretariat could do a preliminary assessment following the example of the WTO in regard to the accession process but applied to OECD Guidelines. Following the OECD secretariat's report, a group of OECD Members could be invited to form a committee which would discuss the applicant country's interest and readiness to comply with the OECD Guidelines. Once the committee or working group has seen satisfactory readiness of the applicant country, the committee could present its accession report to the whole membership for approval during the annual meetings at the OECD. This procedure should also be applied to countries that have become inactive members like Egypt and might want to rejoin the OECD Guidelines community of like-minded countries as could be for instance the case with Egypt who has been inactive since the start of its revolution in 2011.

Second, the track record of NCPs varies greatly. Reported breaches of the Guidelines by companies in adherent countries vary considerably. Some NCPs report few cases of mediation. This could be attributed to the fact that the NCP does not want to engage the respective MNEs in mediation.¹³ It is understandably difficult for NCPs and their respective governments to find a good enough balance between protecting their country's investment attractiveness versus attempting to reinforce compliance with the OECD Guidelines. Still, some NCPs give the impression that their governments are more lenient towards investors and MNEs and less protective of the rights of citizens in the home as well as in the host country. The existing peer review system is a good step towards professionalising the NCPs but peer reviews alone will not entice laggards to improve their compliance with their assigned tasks and responsibilities. Hence, it would be useful to make performance, transparency and access to NCPs more aligned to a minimum standard of practice and to schedule regular reviews every three years of all adherents to the Guidelines. The example to follow could be the Trade Policy Review of the WTO or the Universal Periodic Review (UPR) of the HRC.

Third, policy coherence should be improved between the OECD Guidelines community and the other international organisations and treaties. The text of the 2030 Agenda for Sustainable Development with its 17 SDGs is devoid of

¹³ Saner, Raymond, Viciglione, Girolamo, Yiu, Lichia; "Recent Development of the National Contact Points of signatory countries to the OECD RBC Guidelines, CSEND Policy Brief, Nr. 16, April 2015, pp 18-19 and by same authors "Analysis of NCP's responses to Alleged Breaches of OECD Guidelines by MNEs http://www.csend.org/images/articles/files/20160909-Violation_of_OECD_guidelines_for_MNE_2015.pdf

references to the OECD Guidelines. This omission should be remedied, especially in light of SDG 17 which focuses on partnerships aiming at financing the SDGs over the 15 years of implementation. SDG 17 calls for private-public-civil society partnerships. The private sector is expected to do its best to contribute to the achievement of the SDGs in advanced and developing economies. In view of the remaining 16 SDGs, it would be of paramount importance to better embed international public-private partnerships in the OECD Guidelines.¹⁴

Another form of policy coherence pertains to inter-agency and inter-treaty coherence. For example, labour rights – key human rights – are covered by ILO labour conventions and are part of an increasing number of Free Trade Agreements (FTAs). MNEs doing business within the context of an FTA should be aware that their business conduct is still covered by the OECD Guidelines if they are domiciled in an OECD Guidelines adherent country.¹⁵

Another important potential policy conflict could emerge between a country's interpretation of the OECD Guidelines and its trade and procurement rules e.g. involving the UN procurement rules or the Government Procurement Agreement of the WTO. A sovereign country is free to issue laws and policies regarding preservation of the environment or social policies like minimum wage requirements and transforming the OECD Guidelines into national laws are possible as long as such laws and policies do not discriminate against a specific foreign enterprise or foreign country (market access and national treatment rules).

Fourth, supporting enterprises in their understanding of the OECD Guidelines is needed as is helping them see that the value in applying the Guidelines lies not only in the benefits to the societies and countries they operate in, but also for in the benefits they will receive as compliance with the Guidelines increases their reputational capital and increases their sustainability. Enterprises can be helped through information and orientation. The Swiss government, for instance, has published a user-friendly guideline¹⁶ and other governments contribute through publications and seminars. Socially relevant business decisions such as conformity with the Guidelines often remain confined to the sphere of the corporate social responsibility (CSR) office of enterprises and line managers responsible for the companies' operations and performance are often not involved in applying neither CSR standards nor the Guidelines.¹⁷ The gap between the CSR office and line management could be closed by a

¹⁴ Saner, Raymond; « Financing SDGs through PPPs: need for standards, institutions and capacity building », conference on Financing the SDGs, UNDP, Jamaica, April 2017.

¹⁵ Saner, Raymond, Keith, Angad, Yiu, Lichia; "Labour Rights as Human Rights: Evaluating the policy coherence of USA, EU and Australia through trade agreements and their participation in the Universal Periodic Review ", Journal of Trade, Law and Development, Winter, 2015, Vol. VII No.2

¹⁶ OECD Guidelines for Multinational Enterprises in practice: guidance for application in business operations, Federal Department of Economic Affairs, SECO, Berne, 2016.

¹⁷ For comparisons between CSR and the Guidelines see: Nieuwenkamp, Roel; "CSR is dead! What's next?" OECD Insights, 22 January 2016, <http://oecdinsights.org/2016/01/22/2016-csr-is-dead-whats-next/>

PART 3 - DISPUTE RESOLUTION

certification scheme similar to an ISO standard like the ISO 26000 but should have more OECE Guidelines-specific content than is the case with ISO 26000 (social responsibility). Certification houses, be they private sector or social sector-based, could be accredited by the OECD's Working Party on Responsible Business Conduct.

Fifth, making the OECD Guidelines sector specific. The Guidelines are meant to cover all forms and sizes of business (not only MNEs). However, the specifics of each business require translation of the Guidelines to the specifics of the sector within which the enterprise operates. The OECD, through its Working Party on Responsible Business Conduct under the chairmanship of Professor Roel Nieuwenkamp,¹⁸ has created sector specific guidances of great use and relevance for companies working in the extractives sector, mineral supply chains, agricultural supply chains, garment supply chains, the financial sector, with further guidances in the pipeline. Through such sector-specific application of the OECD Guidelines, enterprises are better oriented and guided, as are NCPs and wider stakeholders such as labour unions, business associations, NGOs and academics whose research focuses on Responsible Business Conduct.

CONCLUSIONS

The goal of this chapter was to explore ways of increasing the relevance and global reach of the OECD Guidelines and to discuss what could be done to deepen commitment to the Guidelines by the current signatory countries and their NCPs and what could be done to help other countries see value in adhering to the Guidelines. At the same time, the question of how companies could be encouraged and supported in implementing the Guidelines was discussed, together with what it takes for a company to prepare itself for compliance with the Guidelines.¹⁹

Additional research could help identify the views of MNEs in the BRICS and emerging economies with regard to the OECD Guidelines. What benefits and what costs do they see to their governments signing or not the OECD Guidelines in the short and long term, especially for countries where MNEs are active in difficult industries, such as mining, and where the countries suffer from instability due to armed conflict and general lack of security.

¹⁸ Prior to his current position, Prof Roel Nieuwenkamp was Chair of the OECD Working Party on International Investment responsible for the negotiations on the 2011 update of the OECD Guidelines for Multinational Enterprises.

¹⁹ This article discusses some of the necessary steps that companies have to prepare for when ready for RBC implementation. Saner, R; Yiu, L, "Business Diplomacy Competence: A Requirement for Implementing the OECD's Guidelines for Multinational Enterprises", the Hague journal of Diplomacy 9, 2014, Brill Nijhoff; Leiden, 311-333

