Public consultation on business responsibilities and investment treaties

Business at OECD (BIAC) comments

February 2020

Business at OECD (BIAC) appreciates the opportunity to submit initial comments on the OECD paper on Business Responsibilities and Investment Treaties, which was developed further to discussions at the OECD March 2019 Roundtable. The paper provides a comprehensive overview of the basic framework as well as the many developments in the field of responsible business conduct (RBC) that have taken place at national, regional and international levels.

Business is actively engaged in the OECD work on responsible business conduct and supports effective implementation and further outreach regarding the OECD Guidelines for Multinational Enterprises (MNE Guidelines). The international business community is fully committed to and underlines the importance of RBC in the framework of their investments.

At the same time, we would like to underline again the importance of the OECD’s work on investment. The OECD Freedom of Investment dialogue, which brings together governments from OECD and non-OECD countries to exchange information on investment policies and develop guidance for open, transparent and non-discriminatory investment policies, is particularly important in this respect. We reiterate our long-standing suggestion that FOI roundtable sessions and other substantive discussions of the OECD’s Investment Committee, which affect business directly, be opened to the recognized stakeholders, including Business at OECD. We believe business could both contribute to and benefit from participating in these important discussions.

OECD work on investment matters to business

The paper provides a comprehensive overview of the overall framework for business responsibilities and developments in the area of RBC, including human rights. We recommend, however, that the paper further underlines up-front that the OECD has a fundamental and unique role in supporting a pro-investment policy framework and improving the policy environment for both foreign and domestic investment through evidence-based analysis and international cooperation. Taking into account current international developments, work on ensuring that companies are able to operate on a level playing field in the global market is extremely important.

In addition to a number of dedicated instruments on responsible business conduct, we recommend further highlighting the OECD’s unique legal instruments in the field of investment, the OECD’s analysis on the importance of an open investment environment, as well as the role the OECD plays by providing a platform to promote openness, transparency and non-discrimination in investment.
We underline the importance of responsible conduct by both governments and investors, which needs to be approached in a balanced manner. A more direct linkage to the OECD's Policy Framework for Investment, where we played a major role in the development, would also be appropriate. A clear delineation of the responsibilities of governments (both recipient and home country), business and other stakeholders, building on the UN Guiding Principles and the OECD Guidelines for MNEs, would further strengthen the paper.

The fundamental role of international investment treaties

Investment treaties and protection play a fundamental role in fostering a pro-investment policy environment. We recommend that the section starts with an overview of the role investment treaties have played for many years in contributing to a pro-investment policy environment. From a state point of view, they have contributed to promote and attract investments, which are important ingredients for sustained economic growth. For enterprises, they have helped ensure that their investments are protected from arbitrary government action, such as discrimination, expropriation, denial of justice, etc.

In the context of a deteriorating international investment climate and decreasing trade and investment flows, it is more important than ever to recall and highlight to policy makers, and the public at large, why international investment agreements matter, and how they contribute to economic development worldwide. Our paper on ‘why international investment agreements matter’, which provides further details, is available on our website.

The importance of well-designed investment protection mechanisms

The protection part of investment treaty policy has been subject to multiple discussions on reform. We have consistently underlined the importance of investment protection mechanisms to ensure that foreign investments do not experience loss derived from discriminatory or unfair measures without compensation. Companies must therefore be able to address these matters through a well-designed investment protection mechanism, which is free from government interference and appropriately compensates them for their loss.

While not commenting on specific proposals that are being discussed, we developed a paper on ‘the importance of well-designed investment protection mechanisms’, which includes key principles that should be in place for any investment resolution system. These principles should also be duly highlighted in the paper.

Investment treaties and responsible business conduct

As mentioned above, investment treaties (as well as free trade agreements which include investment chapters) are a key component of a pro-growth policy environment, protecting
investment against political risk, providing investors with an additional layer of security and constituting an important mechanism to address investor uncertainty. This makes them an important factor for host countries to incentivize foreign direct investment (FDI), which, in turn, is contributing to higher levels of economic development. Moreover, investment treaties can help to promote fair competition between foreign and domestic business.

The incorporation of RBC issues in investment treaties discussed in the paper, should be approached with care in order to avoid duplication with other standards and keep a clear scope. We caution not to overload investment treaties with too many detailed provisions and underline the need to ensure the right balance with the treaties’ aim of guaranteeing a level-playing field between domestic and foreign companies.

At the same time, RBC chapters in investment treaties can be useful to encourage states and investors to observe not only domestic law, but also internationally recognized standards, such as the UN Guiding Principles, the ILO MNE Declaration and the OECD MNE Guidelines thus encouraging their further uptake. However, duplication with existing initiatives and addition of too much complexity should generally be avoided. Most importantly, RBC clauses that would establish extended corporate liabilities concerning RBC should not be added to investment treaties.

As noted in the paper, the interaction between business responsibilities and investment treaties has to date been subject to limited consideration. Additional discussion is needed before drawing conclusions in this important field. Business remains committed to engage constructively in discussions on how to ensure that an open investment environment and RBC remain mutually supportive and asks to be included in future discussions in this area.

Highlighting the different roles of business and governments

When discussing the interface between human rights, responsible business conduct and investment treaties, the different roles of governments and business must be duly highlighted up front, recognizing that business cannot take over the role of governments. The respective roles of governments and business have been clarified by the “protect, respect, remedy” framework in the UN Guiding Principles, which also inspired the OECD MNE Guidelines. While businesses have the responsibility to respect human rights, governments have a duty to protect their citizens from human rights abuses by establishing appropriate policies and regulation.

Respecting human rights is also a priority for the business community, which actively supports the implementation of the UN Guiding Principles. It is important to note that private sector best practices often go “beyond the law” involving complex and comprehensive processes going far beyond the verification of financial reliability and involving supply chains, third parties and authorization processes. Business also carries out numerous activities to make a positive contribution to the Sustainable Development Goals (SDGs) at the international, regional,
and local level. Companies have made significant efforts in conducting due diligence related to their investments and in many cases have acted as ‘agents of change’ in the countries in which they invest.

Nonetheless, business efforts can only be effective if governments ensure the rule of law and establish and enforce a stable and predictable policy environment as well as consistent regulatory and legal frameworks. To advance progress, all states must address economic, environmental and social (including human rights) challenges in their own jurisdictions, by implementing and enforcing national and international standards both at the national and local levels.

Effective implementation of OECD instruments

The OECD has been at the forefront of developing internationally recognized RBC standards, most notably, the MNE Guidelines, which business actively supports and promotes. It should be underlined, however, that the MNE Guidelines should not be considered in isolation. They are part of the broader OECD Investment Declaration, which constitutes a policy commitment by adhering governments to provide an open and transparent environment for international investment while encouraging the positive contribution multinational enterprises can make to economic and social progress.

We also recommend to further highlight the importance of effective implementation by investment host countries of the OECD Policy Framework for Investment, which provides a comprehensive checklist of key policy issues to be considered for creating an enabling environment for investment, thereby also advancing the implementation of the SDGs and helping to mobilize financing for development.

The need for international policy coherence on business responsibilities

We have consistently underlined our strong support for key government-backed frameworks, such as the UN Guiding Principles on Business and Human Rights (UNGPs), the OECD MNE Guidelines and the ILO MNE Declaration. Our members and their member companies have demonstrated this support through concrete actions. The international coherence provided by these instruments is of crucial importance to business and must be preserved. Moreover, they were established through extensive, global dialogue and multi-stakeholder engagement and have articulated a clear sense of roles and responsibilities. They have been integrated into a wide array of voluntary and regulatory measures, standards, principles, and rules and have prompted significant investment in policies and procedures to drive action.

Yet, business today is also confronted with an increasing number of new national and international standards, legislation, guidelines, and other measures on RBC that compete with these long-established and widely used instruments. Sometimes, these initiatives contain ‘hardening’ soft law commitments through the establishment of legal obligations in domestic
jurisdictions. A proliferation of measures creates challenges for business operating globally, in particular if these initiatives are not aligned with or diverge from the UNGPs, the OECD MNE Guidelines, and the ILO MNE Declaration (see our 2019 comments on the Future OECD work on Responsible Business Conduct). When designing policies, it is further crucial to avoid extensive bureaucratic burdens for companies, especially SMEs, and to prevent unintended consequences for investment in certain countries. In the absence of a comprehensive compliance structure, "compliance check-lists" tailored to the needs of SMEs could be a helpful tool.

Binding Instrument on Business and Human Rights

As the paper includes a section on current discussions regarding a binding instrument on business and human rights, we would like to highlight the comments we submitted jointly with the IOE and BusinessEurope in October 2019. Among others, we underlined that the draft treaty contains many vague, far-reaching and legally imprecise provisions. The unclear scope and punitive approach risks jeopardising the crucial consensus achieved by the UNGPs. Furthermore, the proposed approach does not offer solutions to encourage States to meet their existing human rights obligations and address human rights challenges in their own jurisdictions. The concerns expressed by the business community should be reflected in the paper. To read the full joint business response, click here.