



Harnessing Investment for Sustainable Development: Inclusion of investor obligations and corporate accountability provisions in trade and investment agreements

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SUMMARY: SETTING THE SCENE

Two main observations form the starting point for this paper:

1. There is a need to better articulate and implement provisions and processes to ensure that investors adhere to sustainable development standards in their operations abroad.
2. There is a need to provide mechanisms for communities, individuals and sometimes even governments adversely affected by investors' corporate behaviour to seek and obtain redress for harm suffered.

The paper forms part of a process started in 2014, in which the International Institute for Sustainable Development (IISD) gathered together groups of experts from different fields to explore what investment-related dispute settlement mechanisms would ideally look like if we were to create the system from scratch today. What emerged strongly from that process was the recognition that traditional commercial arbitration rules were ill-suited for resolving disputes involving public policy issues, and that people affected or harmed by investment projects lacked effective access to justice.

The next meeting in this process—in January 2018—will consider a related question: how to include investor obligations and associated accountability mechanisms in trade and investment agreements?

Dozens of standards, guidelines, principles, norms and best practices have been adopted to address environmental, economic and social impacts of multinational enterprises.¹ However, these largely voluntary standards have had a minimal impact on ensuring that investment promotes sustainable development. This resulted in the situation that prevails today: many governments are unduly constrained in promoting the linkages between foreign investment and sustainable development, and many of those who are negatively affected by investors' activities lack effective access to justice—whether for prevention or remediation—under international and domestic law.²

This background paper focuses on the development of a different solution: the articulation of investor obligations in international economic agreements, specifically international investment agreements and international economic partnership or trade agreements with investment chapters. The issues addressed below include: substantive obligations on foreign investors (and their investments); procedures to support compliance with these obligations; and remedies for damages caused by investors in a country other than their own home state. Discussions in international processes about compliance, accountability and remedies often come back to the starting point of putting the onus on states to take steps to prevent harm or to offer remedies should harm occur. Many developing country host states already face significant challenges in seeking to regulate the activities of foreign investors. This lack of capacity can contribute to a governance gap that undermines the achievement of sustainable

¹ A survey of a broad range of such standards is found in Sauvart, K. & Mann, H. (2017), *Towards an indicative list of FDI sustainability characteristics* (E15 Task Force on Investment Policy Think Piece, October 2017). Retrieved from <http://e15initiative.org/publications/towards-an-indicative-list-of-fdi-sustainability-characteristics/>

² IISD. (2017). *Investment-related dispute settlement: Lessons from international accountability mechanisms*. Geneva: IISD. Retrieved from <http://www.iisd.org/sites/default/files/publications/investment-related-dispute-settlement-iisd-auwcl-expert-meeting-washington-dc.pdf>



development generally. The approach set out here seeks to complement domestic efforts with an international component that can operate effectively regardless of the capacity of the host state in question.

Despite the current crisis of the trade and investment regime, it is safe to assume that these agreements will continue to exist and to exercise considerable influence on states.³ Trade and investment agreements could thus play an important role in strengthening global standards and processes. They could also fill gaps in the national law and help hold investors accountable for their actions. The rationale is particularly strong in the context of investment treaties or trade agreements with investment chapters, which grant rights to one set of non-state entities (investors), but *typically* do not subject them to corresponding obligations and responsibilities. We emphasize *typically* here because a growing body of practice—which began in the early 1980s and will be described below—shows the direction and potential effectiveness for including investor obligation provisions in these agreements.

This paper begins by detailing what we want the proposed provisions to accomplish and providing background on the development of the concept of including investor obligation provisions in trade investment agreements. Section II discusses a range of investor obligations that could be included in trade and investment agreements, followed by a short Section III on the possible relationships of such obligations to traditional investor–state and state–state dispute settlement processes. Section IV proposes ways in which compliance and grievance mechanisms could be integrated in trade and investment agreements. Finally, Section V focuses the issue of civil liability and how international access to justice and enforcement could be improved through trade and investment agreements. Possible wording for relevant provisions are put forward throughout the paper as a basis for discussion at the Expert Meeting in January 2018.

I. Background

Introduction

The current international investment law regime has been the subject of much criticism. On top of the list of defects has been the asymmetry and imbalance between rights and obligations between foreign investors and host states. Many traditional investment treaties have endowed investors with broad rights and protections that are backed by strong dispute settlement mechanisms. States, on the other hand, have committed to non-reciprocal obligations that can significantly limiting their policy space. For years, countries—particularly those from the global South—have been questioning the rationale behind this practice and have attempted to design models that strike a balance between investment protection and legitimate policy space for public interest regulation. Recent developments with what the United Nations Conference on Trade and Development (UNCTAD) calls a “new generation” of investment agreements has shown that investor obligations are indeed making their ways into international investment agreements (IIAs).

³ Krajewski, M. (2017). *Ensuring the primacy of human rights in trade and investment policies: Model clauses for a UN Treaty on transnational corporations, other businesses and human rights*. Brussels: CIDSE. Retrieved from <https://www.cidse.org/publications/business-and-human-rights/business-and-human-rights-frameworks/ensuring-the-primacy-of-human-rights-in-trade-and-investment-policies.html>



Why Do We Need Investor Obligations in Investment Treaties and Chapters?

- To influence investor behaviour and improve the quality of investment
- To promote sustainable development, the respect of human rights by investors and environmental protection, and to combat corruption
- To create a better balance of rights and obligations in investment treaties
- To complement or bolster domestic law in host and home states
- To address gaps and weaknesses in domestic and international law in order to hold transnational corporations accountable for their actions
- To improve governance

Overview of Recent Developments

It is sometimes argued that there are legal impediments preventing investment treaties from providing for investor obligations. However, the absence of these obligations in traditional treaties appears more related to their origins and evolution than to questions of legality. Investment protection became the primary concern for purposes of treaty drafting, arguably based on the assumption that foreign investments are already subject to obligations stemming from national law.⁴ Also, the impediment seems to lie at a policy level where states have argued that “encumbering IIAs with the range of social and environmental issues associated with the establishment and operation of an investment would make the agreements too broad and unwieldy.”⁵

The argument that there are legal impediments to including investor obligations in international treaties is undermined by developments going back as far as the early 1980s, when two little-noticed regional treaties both included investor obligations:

Unified Agreement for the Investment of Arab Capital in Arab States (signed November 26, 1980 in Amman, Jordan during the Eleventh Arab Summit Conference, entered into force on September 7, 1981) Article 14:

1. *In the various aspects of his activity, the Arab investor must, as far as possible, liaise with the State in which the investment is made and with its various institutions and authorities. He must respect its laws and regulations in a manner consistent with this Agreement and, in establishing, administering and developing Arab investment projects, must comply with the development plans and programmes drawn up by the State for the purpose of national economic development by employing all means which reinforce its structure and promote*

⁴ Bottini, G. (2015). *Extending responsibilities in international investment law*, (E15 Task Force on Investment Policy Think Piece), p.1. Retrieved from <http://e15initiative.org/wp-content/uploads/2015/09/E15-Investment-Bottini-Final.pdf>

⁵ Mann, H. (2008). *International investment agreements, business and human rights: Key issues and opportunities*, p. 13. Winnipeg: IISD. Retrieved from https://www.iisd.org/pdf/2008/ia_business_human_rights.pdf



Arab economic integration. In so doing, he shall refrain from any action which might violate public order and morality or involve illegitimate gains.

2. *The Arab investor shall bear liability for any breach of the obligations set forth in the preceding paragraph in accordance with the law in force in the State in which the investment is made or in which the breach occurs.*

Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference (signed Baghdad, June 5, 1981, entered into force September 23, 1986) Article 9:

The investor shall be bound by the laws and regulations in force in the host state and shall refrain from all acts that may disturb public order or morals or that may be prejudicial to the public interest. He is also to refrain from exercising restrictive practices and from trying to achieve gains through unlawful means.

The 2005 Model International Agreement on Investment for Sustainable Development of the International Institute for Sustainable Development (IISD Model)⁶ was the earliest model to propose a broad base of investor obligations in IIAs. Other similar proposals can now be found in the 2012 Commonwealth Template for International Investment Agreements⁷ (Commonwealth Template) and UNCTAD's Investment Policy Framework for Sustainable Development⁸ (IPFSD). Among other things, these models challenge the traditional approach taken by traditional agreements on the issue of investor obligations.

African governments have taken a lead role in this area. The Common Market for Eastern and Southern Africa (COMESA) addressed human rights and other social issues in its 2007 Investment Agreement. This agreement was the first time that any investment agreement has expressly included human rights. Although it never came into force, the COMESA agreement is in the process of being revised by member states, and these revisions will add to the base of investor obligations. Africa has functioned as a normative incubator for advancing the next generation of investment treaties in recent years. Other regional organizations—the Economic Community of West African States (ECOWAS), the East African Community (EAC) and the Southern African Development Community (SADC)—have also prepared templates that contain innovative provisions aimed at better calibrating the legal protection of the interests of different stakeholders. The 2016 Pan-African Investment Code (PAIC) is another recent example that includes extensive provisions on investor obligations.⁹

While none of these instruments are binding in nature, they aim to provide a template to member governments for future treaty negotiations and serve as the basis for training sessions for government officials.

⁶ Mann, H., von Moltke, K., Peterson, L. E. & Cosbey, A. (2005). *IISD Model International Agreement on Investment for Sustainable Development: Negotiators' handbook* (IISD Model). 2nd ed. Winnipeg: IISD. Retrieved from https://www.iisd.org/pdf/2005/investment_model_int_handbook.pdf

⁷ VanDuzer, J. A., Simons, P. & Mayda, G. (2012). *Integrating sustainable development into international investment agreements: A guide for developing countries*. London: Commonwealth Secretariat. Retrieved from https://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf

⁸ United Nations Conference on Trade and Development (UNCTAD). (2015). *Investment Policy Framework for Sustainable Development*. Retrieved from http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf

⁹ African Union. (2017). *Draft Pan-African Investment Code (October 2017)*. Retrieved from https://au.int/sites/default/files/newsevents/workingdocuments/33090-wd-3_pan_african_investment_code_e.pdf



Such non-binding initiatives seem to have borne fruit. Morocco and Nigeria recently concluded a bilateral investment treaty some called “one of the most innovative and balanced BITs.”¹⁰ In addition to imposing a number of human and social obligations on investors, the 2016 [Morocco–Nigeria BIT](#) also incorporates an enforcement mechanism whereby the investor can be held civilly liable in its home state for damages caused in host states. This recent development sets a precedent by demonstrating that it is indeed legally and politically possible to impose a reciprocal obligation on investors.

India adopted a new Model BIT in 2015 that introduced a greater balance between rights and obligations through the design of protection standards and dispute settlement. For example, it addresses investors’ obligations on corruption and disclosure of information.

The 2016 final version of the Canada–EU Comprehensive Economic and Trade Agreement (CETA) also excludes investments made through corruption, fraud and misrepresentation from the scope of investor–state dispute settlement (ISDS). Although not expressed as obligations, the agreement punishes certain types of investor behaviour with a loss of investor–state dispute settlement rights.¹¹

Investor Obligations in Case Law

Several investment tribunals have held that investors do carry responsibilities. Some recent examples of cases include *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*,¹² and *Hesham T. M. Al Warraq v. Republic of Indonesia*.¹³ But older cases such as *Inceysa Vallisoletana S.L. v. Republic of El Salvador*¹⁴ and *Biwater Gauff v United Republic of Tanzania*,¹⁵ are also relevant. We will not examine these cases here. However, it is useful to note that the behaviour of investors and corresponding responsibilities can impact—and indeed has impacted—decisions on jurisdiction, the merits or the amounts of damages awarded. In several cases, tribunals considered investors’ behaviour based on only minimal and unclear language in the treaties. Building on the case law, clearer language on investor obligations in treaties will make outcomes more predictable for all parties involved and ensure that investor behaviour is systematically taken into account in dispute settlement, independent of the tribunal’s composition.

¹⁰ Gazzini, T. (2017). The 2016 Morocco–Nigeria BIT: An important contribution to the reform of investment treaties. *Investment Treaty News*, 8(3), 3–4. Retrieved from http://www.iisd.org/itn/2017/09/26/the-2016-morocco-nigeria-bit-an-important-contribution-to-the-reform-of-investment-treaties-tarcisio-gazzini/?utm_source=newsletter-itn&utm_medium=email&utm_campaign=itn-september-17

¹¹ *Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA)*, Oct. 30, 2016, Chapter Eight, Section 8, art. 8.18. para. 3. Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/5380>.

¹² *Urbaser S.A. v. Argentina*, ICSID Case No. ARB/07/26, Award (2016, December 8).

¹³ *Al Warraq v. Indonesia*, UNCITRAL, Final Award (2014, December 15). On *Al Warraq* and related developments see Cotula, L. (2016). Human rights and investor obligations in investor-state arbitration, *Journal of World Investment & Trade*, 17(1), 148–157.

¹⁴ *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26. Award (2 Aug 2006).

¹⁵ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22. Award (24 July 2008).



II. Model Provisions: Obligations of Investors

The model provisions and commentaries in this section are inspired by and taken from models and templates as well as BITs and trade agreements negotiated and adopted in Africa, Europe, India and Latin America.

Compliance With Domestic Law

Many investment treaties—including older ones—limit treaty protection to investments that have been made “in accordance with the laws and regulations” of the host state, thereby creating an implied obligation on investors to act in accordance with the applicable law of the host state in making an investment. This includes not only applying for and receiving the appropriate permits, but also not breaching other laws—such as anti-corruption laws—in the process. In *Salini v. Morocco* the International Centre for Settlement of Investment Disputes (ICSID) tribunal interpreted the requirement on the conformity with national laws and regulations as a provision that “refers to the validity of the investment and not to its definition.”¹⁶ More specifically, it seeks to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal.” In *Fraport v. The Republic of the Philippines*, the majority of the tribunal held that an investment intentionally structured in violation of Philippine law did not qualify as an investment and fell outside both ICSID jurisdiction and the competence of the tribunal.¹⁷ These decisions have often been based on provisions with fairly rudimentary drafting, leading to some differences in the case law. This has led to a lack of predictability and has made it difficult for states to rely on these obligations as defences against treaty claims or as the basis of counterclaim.

Clauses requiring compliance with local law typically apply only to the establishment phase: standard language requires that the investment be made in accordance with national law, but often says nothing about non-compliance during operation. The proposed provisions below do both. They address the domestic law issue in three places: in the provision defining the term “investment”; in a clarification of scope of ISDS; and in a separate provision spelling out the obligation. The provision defining investment defines investment so as to require compliance with domestic law as well as with the obligations set out in the investment agreement. If these requirements are not met at the moment of the establishment or acquisition of the investment, no investment exists. To avoid all doubt, a provision is added (based on the approach used in CETA) which states that the scope of ISDS does not extend to investments made or acquired in violation of domestic law or in violation of the obligations under the agreement.

The provision requiring compliance with national law more generally extends not only to the establishment but also the operational phase of the investment. However, the legal consequence of a violation during the investment’s operation does not necessarily lead to a

¹⁶ *Salini et al v. Morocco*, ICSID Case No. ARB/00/4. Decision on Jurisdiction (2001, July 23), p. 621.

¹⁷ *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25. Award (2007, August 16). Also see discussion at Yannaca-Small, C. (2008). Definition of investor and investment in international investment agreements. In OECD (2008). *International Investment Law: Understanding concepts and tracking innovations*. Retrieved from <https://www.oecd.org/investment/internationalinvestmentagreements/40471468.pdf>. The award was later annulled and Fraport brought a new claim at ICSID. That tribunal, too, dismissed Fraport’s claims on the grounds that the company’s violated Philippine law in the making of its investment.



loss of jurisdiction in accordance with a proposed provision set out further below in this paper which deals with the relationship between obligations and dispute settlement.

Proposed Language

Investment

“investment” means ..., provided that the investment is established or acquired in accordance with the laws of the Host State and the obligations set out in this agreement.

Scope [of ISDS]

For greater certainty, an Investor may not submit a claim under this agreement if the investment has been made or acquired in violation of domestic law or obligations set out in this agreement.

Compliance With Domestic Law

Investors and investments shall comply with all laws, regulations, administrative guidelines and policies of the host state concerning the establishment, acquisition, management, operation and disposition of investments.

Anti-Corruption

Increasingly, investment treaties explicitly include references to corruption. Examples include the SADC Model Bilateral Investment Treaty Template (SADC Template), the Morocco–Nigeria BIT, the Indian Model BIT and CETA. The proposed article builds on the UN and OECD conventions on bribery but closes a loophole that allows payments to be made to a family member or business associate instead of directly to a politician or senior official. Implementation of the article from most enforcement and penal perspectives is through domestic law. However, by including this clause, a breach is also a breach of the treaty.

Proposed Language

1. Investors and their investments shall not, prior to the establishment of an Investment or afterwards, offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a public official of the Host State, or a member of an official's family or business associate or other person in close proximity to an official, for that official or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties, in order to achieve any favour in relation to a proposed Investment or any licences, permits, contracts or other rights in relation to an Investment.
2. Investors and their investments shall not be complicit in any act described in paragraph 1, including incitement, aiding and abetting, and conspiracy to commit or authorization of such acts.

Provision of Information

The obligation to disclose necessary information carries forward the anti-corruption idea to issues of fraud and misrepresentation in the making of an investment. It is consistent with recent arbitral decisions that have found material fraud and misrepresentation by investors in the information provided to a state in the making of an investment. In essence, it sets out clearly an obligation for honesty and plain dealing in making investments. The same penalty could be provided for fraud and misrepresentation as for corruption, but with a standard of “material” to avoid severe penalties for *de minimus* errors or inconsequential



misrepresentations in the course of “selling” the investment to the government. Material is a legal standard that requires a finding that the information was relied on as part of, but not solely, in the making of relevant decision by government.¹⁸

The proposed clause below builds on the Morocco–Nigeria BIT and SADC Template. The India Model BIT also contains a similar requirement.

Proposed Language

1. An Investor shall provide such information to a potential Host State Party as that Party may require concerning the investment in question and the corporate history and practices of the Investor, for purposes of decision making in relation to that investment or solely for statistical purposes. The Investor shall provide all other information relevant to the proposed investment decision, whether specifically requested or not, to the potential Host State making a decision in relation to admitting the investment. The Party shall protect any confidential business information from any disclosure that would prejudice the competitive position of the Investor or the Investment.
2. Host States may make the information provided available to the public, including in the community where the investment may be located, subject to the protection of confidential business information and to other applicable domestic laws.
3. An Investor shall not commit fraud or provide false or misleading information provided in accordance with this Article.
4. Nothing in this Article shall be construed to prevent a State Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its domestic law or in connection with disputes between the Investor and the State regarding the Investment.

Minimum Standards on Human Rights, Environment and Labour

It is well demonstrated by the OECD Multinational Enterprises (MNE) Guidelines, the Global Compact, and the UN Principles on Business and Human Rights that corporations should behave in a way that is consistent with basic human rights and should not act in a manner that assists others in breaching such norms. Such obligations are also reflected in the ongoing development of the Open-ended Intergovernmental Working Group for the Elaboration of an International Legally Binding Instrument on Transnational Corporations under its elements document for a future binding instrument.¹⁹ This obligation should be specially highlighted in situations involving armed conflict or civil strife as well as for investors in the extractive industries, whose decisions regarding where to operate are more constrained by the location of resources.²⁰

Reference to International Labour Organization (ILO) standards should be less controversial, given the acceptance of the ILO core labour principles by almost all countries of the world in

¹⁸ Southern African Development Community. (2012). *SADC Model Bilateral Investment Treaty Template with Commentary (SADC Template)*. Commentary to Art. 12. Retrieved from <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf>

¹⁹ Chairmanship of the OEIGWG (2017). *Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights*. Retrieved from http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf

²⁰ Commonwealth Template, *supra* note 7, 290-317.



the tri-partite ILO structure (labour, business, governments). The Commonwealth Template spells out the core standards set out in the ILO Declaration rather than simply referencing the Declaration. It is argued that this approach addresses one of the criticisms of the regime created by the ILO Declaration that it obscures the precise relationship between the principles of the Declaration and the legal rights set out in the underlying ILO Conventions. The Commonwealth Template provision also adds to the core labour rights listed in the ILO Declaration the obligation to provide a healthy and safe work environment.²¹

By imposing a duty on investors and investments to respect international environmental, labour and human rights standards adopted by the host state, the suggested provision sets a floor for conduct, even if not fully incorporated into domestic law. These are not open-ended obligations but derive expressly from the act or ratification of an agreement by the host state, or home state in certain circumstances.²²

Sentence 3 of paragraph 1 below comes back to the UN Guiding Principles on Business and Human Rights that investors should not be complicit in breaches of human rights by others. Complicity is a legal standard that requires some form of direct affiliation or deliberate failure to act in the face of human rights abuses. Complicity does not generally include simply paying taxes or other compliance with law, absent specific factors that might inform the investor or investment of human rights abuses related to such acts.

For labour standards, the ILO Convention on Core Labour Standards and Declaration on Multinational Enterprises and Social Policy set out what are considered as the minimum global standards, or core labour standards. Almost all states have subscribed to these minimum standards. There is no evident rationale for any investor to operate in a manner than denies these standards, given the tripartite nature of the process by which ILO standards are adopted.

Paragraph 3 broadens paragraph 2 by imposing a duty on investors and investments to respect international environmental, labour and human rights, standards adopted by the host state through participation in international agreements. These are easily identifiable. It sets such international agreements as a floor for conduct, even if not fully incorporated into domestic law. These are not open-ended obligations but derive expressly from the act or ratification of an agreement by the host state, or home state in certain circumstances.

Proposed Language

1. Investors and their investments have a duty to respect human rights in the workplace and in the community and State in which they are located. Investors and their investments shall not undertake or cause to be undertaken acts that breach such human rights. Investors and their investments shall not assist in, or be complicit in, the violation of the human rights by others in the Host State, including by public authorities or during civil strife.
2. Investors and their investments shall act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998, as well as by the law in the Host State on labour standards.

²¹ Commonwealth Template, *supra* note 7, 317-333.

²² SADC Template, *supra* note 14. Commentary to Art. 15.



3. Investors and their investments shall not establish, manage or operate investments in a manner inconsistent with international environmental, labour, and human rights obligations binding on the Host State or the Home State, whichever obligations are higher.

Transparency of Contracts and Payments

Developing countries widely use contracts to define the relationship between governments and private companies, particularly in the extractive industries sector. Unlike laws and regulations, these contracts are typically unavailable to citizens, and they often contain confidentiality clauses. Several countries are recognizing the need for (and benefits of) making contracts public, and international consensus is growing on this issue. Contract transparency is crucial for ensuring that all stakeholders benefit from large-scale investments. It also allows citizens to monitor compliance with contracts, especially with respect to environmental and social commitments. Contract transparency improves the contract itself since government officials as well as the investor will be held accountable to the public. It is thus an important tool to fight corruption.

This article sets out the principle of transparency and an expectation that both investors and governments will act on this expectation.

Payments by investors to the government—which may be in the form of taxes, rents, royalties, etc.—are similarly subject to increased demands for transparency. Several international transparency initiatives have developed over the past years, including: the Extractive Industries Transparency Initiative (EITI); the Kimberly Process for the Certification of Diamonds; the International Financial Corporation (IFC) Performance Standards and Equator Principles; the OECD Due Diligence Guidelines; and the International Monetary Fund (IMF) Resource Revenue Transparency Guidelines. In large part, these initiatives focus on improved disclosure of payments made by extractive companies to national governments.

The 2012 final rules of the U.S. Securities and Exchange Commission (SEC) for the implementation of Dodd-Frank 1504, require “resource extraction issuers” to provide information in their annual reports on payments made to the U.S. or foreign governments for the commercial development of oil, natural gas and minerals. “Commercial development” of extractives covers exploration, processing, export and the granting of licences. Payments to be reported include: taxes; royalties; fees; production entitlements; bonuses; and other material revenues arising from commercial development of extractive sectors. The minimum threshold for reporting payments is USD 100,000 per fiscal year.

Proposed Language

1. Unless explicitly prohibited by the laws of the Host State] Investors or their investments shall make public in a timely manner all contracts related to the establishment or right to operate an Investment made by the Investor or the Investment with a government in the Host State, subject to redaction of confidential business information.
2. Investors or their investments shall make public in a timely manner all payments made to a government related to the establishment or right to operate of an Investment, including taxes, royalties and similar payments.
3. Where feasible, such contracts and payments shall be made available on an Internet website freely accessible by the public.



Tax Base Erosion and Profit Shifting

Every year between USD 100 to 200 billion dollars of potential government revenue are lost due to tax base erosion and profit shifting (BEPS) by foreign investors. Unlike tax evasion, which is illegal, BEPS practices are generally legal and efficient ways of allocating profits, which makes the matter complicated. Establishing a clear obligation on investors not to undertake such practices will assist developing country governments in improving their revenue base. For many, the overriding rationale is simple: the first obligation of any corporate social responsibility (CSR) hierarchy ought to be for corporate citizens to pay their taxes.

Proposed Language

1. Investments shall meet or exceed national and internationally accepted standards of corporate financial governance for the sector involved, in particular for transparency and in the application of internationally accepted accounting standards.
2. Investors and their investments shall ensure that all transactions with related or affiliated companies shall be arms-length transactions at fair market price. Investors and their investments shall not undertake any transfer pricing practices between themselves or any other related or affiliated companies.
3. Investors and their investments shall conduct their operations in a manner that fully complies with all applicable tax laws and international standards relating to ensuring tax benefits are not reduced through base erosion and profit shifting practices. Investors shall avoid undertaking aggressive tax or other financial practices which have such effects. Investors and their investments shall provide the financial information required by the host state to ensure compliance with the applicable laws.
4. Investors and their investments shall comply with all reasonable government requests for information on their supply chain and sales chain transactions.
5. States Parties shall cooperate in the detection and prevention of illicit financial flows and BEPS practices, including through the provision of information necessary to identify and prevent such acts.

Corporate Governance

These general principles reflect important issues in relation to which good practice has often been lacking. The result of this absence is that one often finds governments are unable to clearly track corporate practices on such important issues as environmental liabilities, who the corporate owners actually are (and their capacities in relation to the investment in question), and other key issues. These general principles seek to set a floor of expected conduct for investors to ensure governments are aware of the status of the investments in their countries.

Proposed Language

1. Investors and their investments shall, [in accordance with domestic laws and regulations,] *inter alia*:
 - a. Ensure the equitable treatment of all shareholders, in accordance with national laws;
 - b. Encourage active cooperation between corporations and stakeholders in creating wealth, jobs and the sustainability of financially sound enterprises;



- c. Ensure that timely and accurate disclosure is made on all material matters regarding a corporation, including the financial situation, performance, beneficial ownership, and governance of the company, risks related to environmental liabilities, and any other matters in accordance with the relevant regulations and requirements;
- d. Provide information relating to human resource policies, such as programs for human resource development.

Pre-establishment Social and Environmental Impact Assessment

The UNGP, the OECD MNE Guidelines, the International Finance Corporation (IFC) Performance Standards on Environmental and Social Sustainability and other instruments see impact assessment as part of the due diligence process. As is the case with due diligence more generally, prior assessment of risks is an important part of giving effect to states' and investors' duty to protect those affected by an investment; it also makes sound business sense.²³ One of the many arguments in favour of ex ante social, sustainability or human rights impact assessments is that it is less costly for investors to identify in advance possible risks that their investment might have and to adopt strategies to avoid or mitigate possible risks rather than to deal with these impacts after they materialize. The assessment process also builds a beneficial relationship between the investor, the government of the host state and the local community.²⁴

Both state-based and private sector instruments call for the assessment of potential and actual impacts of economic activities, including in the area of investment.

Impact Assessment (IA) is a structured process for considering the implications—for people and their environment—of proposed actions while there is still an opportunity to modify (or even abandon) the proposals.²⁵ Impact assessments can simplify the complexity of managing social, economic, human rights, environmental risks by providing companies with a consistent, efficient, and systematic way to identify, prioritize, and address risks and opportunities at a corporate, country, site, or product level, while also ensuring that the perspectives of the affected communities are properly taken into account.²⁶

The level of IA required might differ depending on the risk categorization of the activity in question. This is the approach taken by the IFC Performance Standards on Environmental and Social Sustainability,²⁷ the Equator Principles, and in most national IA processes. The suggested texts below reflect this need for scalability.

²³ Commonwealth Template, supra note 7, 266.

²⁴ Id.

²⁵ As defined by the International Association for Impact Assessment. See <http://www.iaia.org>.

²⁶ Natour, F. & Davis Pluess, J. (2013) *Business for Social Responsibility (BSR) Conducting an effective human rights impact assessment: Guidelines, steps and examples*. Retrieved from www.bsr.org/reports/BSR_Human_Rights_Impact_Assessments.pdf

²⁷ IFC. (2012). *Performance Standard 1: Assessment and Management of Environmental and Social Risks and Impacts*, paragraph 7.s



A number of recent instruments contain provisions on impact assessments, including the 2016 Morocco–Nigeria bilateral investment treaty (BIT)²⁸, the draft PAIC²⁹ and the SADC Template.

*Proposed Language*³⁰

1. Investors or their investments shall carry out an impact assessment of their proposed investments prior to their establishment, as required by the laws of the Host State for such an investment [[or the laws of the Home State for such an investment] [or other performance standards], whichever is more rigorous in relation to the scale and nature of the investment in question].
2. Investors or their investments shall include in the impact assessment required under paragraph 1 assessment of the impacts on the human rights of the persons in the areas potentially impacted by the investment, including the progressive realization of human rights in those areas, or carry out a separate assessment on the same.
3. The impact assessment or assessments shall be carried out by an entity that is wholly independent of the investor or its investment and any State with a stake in the investment.
4. The impact assessment or assessments shall include input from independent experts, such as international and domestic human rights lawyers, trade unions and environmental specialists.
5. The impact assessment or assessments must be carried out in a way that is transparent and accessible to the public, to investors and any other affected person.³¹ It shall in particular actively seek participation of the communities most likely to be affected by the investment and ensure that their input is reflected in the impact assessment.
6. Investors or their investments shall make the impact assessment or assessments:
 - a. public [including via the Internet] and
 - b. accessible to the local communities, or other persons with potentially affected interests, in an effective and sufficiently timely manner so as to allow comments to be made to the Investor, Investment and/or government prior to the completion of the Host State processes for establishing an Investment.

Questions for Consideration

- Is this provision sufficiently comprehensive to integrate requirements on due diligence which are widely accepted? The OECD Guidelines for Multinational Enterprises state that enterprises should carry out risk-based due diligence, “to identify, prevent and mitigate actual and potential adverse impacts, and to account for how these impacts are addressed.”³² The Equator Principles emphasize due diligence in relation to environmental and social impacts, with a higher level of due diligence required to prevent, mitigate and manage adverse human rights impacts.³³ The UN Guiding Principles on Business and Human Rights (UNGP)

²⁸ Not yet in force.

²⁹ Draft Pan-African Investment Code. Supra note 9. Article 37. A draft Agreement on Investment of the African Continental Free Trade Area (currently under negotiation) contains a similar provision.

³⁰ Loosely based on SADC Template (2012), supra note 18, on Krajewski, M. (2017), supra note 3 and on Commonwealth Template, supra note 7.

³¹ Adapted from Commonwealth Template, supra note 7, 284–5.

³² OECD. (2011). *OECD guidelines for multinational enterprises*. Part. I. General Policies, A. 10. Paris: OECD.

³³ Equator Principles Association. (2013). *Equator Principles III*. Exhibit II: Illustrative list of potential environmental and social issues to be addressed in the environmental and social assessment documentation



specify that the corporate responsibility to respect human rights means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved.³⁴

- Should this provision include a requirement to obtain liability insurance as a condition of making an investment? This might be quite far-reaching for a treaty requirement.
- Given that the due diligence obligation includes supply chains, should this issue be addressed here, and if so, how?

Environmental Management and Improvement

Environmental management systems (EMSs) provide an important framework of processes that can assist businesses achieve their environmental goals through systematic review, evaluation and improvement of their environmental performance. Although they do not prescribe a level of environmental performance, they can improve regulatory compliance and fill gaps in non-regulated areas. The most commonly used framework for Environmental Management Systems is the ISO 14001 standard, developed by the International Organization for Standardization (ISO).

Based on the SADC Template, the provision below requires investors to “maintain an environmental management system consistent with recognized international environmental management standards and good business practice standards.” It allows for flexibility in terms of environmental management and planning, adapted to the nature and size of the investment.

In addition to helping ensure compliance with domestic environmental laws, environmental management systems also require ongoing environmental due diligence and improvement. Referring to environmental management standards is also important because it forces investors to evolve and progress in accordance with international standards. This can counteract efforts of some investors seeking clauses in investment contracts that require stabilization of environmental laws and regulations.³⁵

Proposed Language

1. Investments shall, in keeping with good practice requirements relating to the size and nature of the investment, maintain an environmental management system consistent with recognized international environmental management standards and good business practice standards.
2. Emergency response and decommissioning plans, where necessary, shall be included and regularly reviewed and updated in the environmental management system process, and made accessible to the Host State and the public.
3. A closure fund to ensure that resources are available to implement the decommissioning plan shall be established and maintained by the Investor or its investment in accordance with applicable law and good industry practice for such funds.
4. Environmental management plans shall include provision for the continued improvement of environmental management technologies and practices over the life of the investment.

³⁴ United Nations (2011). Guiding principles on business and human rights: Implementing the United Nations “Protect, Respect and Remedy” Framework. Retrieved from http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

³⁵ SADC Template, supra note 18.



Such improvements shall be consistent with applicable laws but shall strive to exceed legally applicable standards and always maintain high levels of environmental performance consistent with best industry practice.

Development Goals

For foreign investment to play a role in supporting local economic development, there is a need for investors to play a positive role through constructive engagement with local economic actors—including entrepreneurs, labour and local communities. The suggested text below is based on PAIC and the SADC Template.

Proposed Language

Investors and their investments shall support the integration of the investment into local economic development policies and strategies, through, *inter alia*, and consistent with the size and nature of the investment:

- (a) supporting the development of local businesses through programs to train and purchase goods and services from local suppliers;
- (b) seeking to enhance productive capacity, where feasible, of local businesses through capacity building and technology development;
- (c) increasing employment and human resource capacity and training through direct training of employees for higher level work and training of prospective employees;
- (d) research and development activities located in the host state and community, including of new technologies and technology transfer;
- (e) gender specific training for women in the local community to contribute to the above goals;
- (f) investment specific opportunities developed with the local community; and
- (g) recognition of the right of a State Party, in accordance with applicable law, to take measures necessary to address historically based economic disparities suffered by identifiable ethnic or cultural groups due to discriminatory or oppressive measures against such groups prior to the signing of this Agreement.

Public Order, Consumer Rights and Non-interference

The text below reflects developing countries' concerns around interference of foreign investors in domestic affairs, and cultural and socio-economic preferences. The language is based on PAIC Article 20 on socio-political obligations. It avoids the use of 'socio-political obligations' due to a certain lack of clarity.³⁶ If further clarified, it could possibly be maintained. The proposed provision also integrates PAIC Article 40 on Consumer protection³⁷ and adds a reference to public order.

³⁶ Supra note 9. Article 20 reads: *Socio-political obligations*

1. Investors shall adhere to socio-political obligations including, but not exclusively, the following: (a) respect for national sovereignty and observance of domestic laws, regulations and administrative practices; (b) Respect for socio-cultural values; (c) Non-interference in internal political affairs; (d) Non-interference in intergovernmental relations; and (e) Respect for labor rights.
2. Investors shall not influence the appointment of persons to public office or finance political parties.
3. Investors shall refrain from exercising restrictive practices and from trying to achieve gains through unlawful means.

³⁷ Id. Article 40 reads: *Consumer protection*

1. Member States and investors shall take measures to protect the health, safety and economic interests of consumers and their right to information, education and to organize themselves in order to safeguard their interests.



Proposed Language

1. Investors and their investments shall refrain from all acts that may be prejudicial to the public order, morals or to the public interest.
2. Investors and their investments should act in accordance with fair business, marketing and advertising practices when dealing with consumers and should ensure the safety and quality of goods and services they provide.
3. Investors and their investments shall respect sociocultural values, and refrain from interfering with internal political affairs and intergovernmental relations.
4. Investors and their investments shall refrain from influencing the appointment of persons to public office or financing political parties.

Intellectual Property Rights and Traditional Knowledge

The provision below is based on PAIC Article 25 on Intellectual Property Rights and Traditional Knowledge. It reflects the concerns of many developing countries regarding intellectual property rights and traditional knowledge.

Proposed Language

1. Each State Party shall, in its effort promote investment and as applicable, ensure the enforcement of intellectual property rights within its territory and in accordance with the rights and obligations under the TRIPS agreement and other relevant international instruments.
2. Notwithstanding paragraph 1, States Party may provide exceptions, in accordance with generally accepted international legal standards and best practices, to the exclusive rights conferred by an intellectual property right, and allow for its use without the authorization of the right holder, including use by the government or third parties authorized by the government. Investors shall respect such exceptions when adopted.
3. States Party, as well as investors and their investments, shall, in accordance with generally accepted international legal standards and best practices, protect traditional knowledge systems and expressions of culture as well as related genetic resources, including those that are sought, used or exploited by investors, or are otherwise relevant to their contracts, practices and other operations in such States Party. Where traditional resources are used by an investor or its investment, the investor or investment shall have the free, prior and informed consent of the traditional knowledge holder and shall pay appropriate compensation as agreed with them.
4. States Party shall provide for, within their national laws, the patenting or equivalent protection of biological materials associated with traditional knowledge systems and expressions of culture for the protection of local communities in such States Party.

Monitoring and Reporting

Monitoring and reporting are common approaches to aid the implementation of, and enhance compliance with, sustainable development standards. Monitoring a situation with regard to specific sectors, vulnerable groups or environmental factors provides data and information that form the essential basis for designing and amending policies and approaches in order to avoid harm and to take corrective action if necessary. Beyond the disclosure element, reporting helps companies embed human rights, sustainability and CSR awareness and management

2. Investors should act in accordance with fair business, marketing and advertising practices when dealing with consumers and should ensure the safety and quality of the goods or services they provide.



within the firm.³⁸ Although the procedures are sometimes considered a drain on resources, there appears to be strong recognition within business about the value of non-financial reporting. In 2014, a study showed that three in four CEOs agreed that it contributed to their long-term success. Identifying risks to a business—whether financial, social or environmental—has long been recognized as crucial for investors, and more progressive companies recognize that their relationship with other stakeholders is also important.³⁹ Various instruments—both private and public—set out reporting obligations for business.

Proposed Language

1. The investor and its investments shall publish an annual report on how it has implemented the obligations under this Agreement and its obligations under the applicable law of the Host state [and Home State where relevant].
2. The annual report shall be available in the language of the national government and of the local community in which the investment takes place.
3. The report shall be made available for comment and input by all impacted stakeholders, and shall be subject to a review process with them following its completion.
4. Whenever necessary, special measures will be taken to ensure that they are brought to the attention of key stakeholders such as affected communities who may not have access to the Internet.

Questions for Consideration

- Should the provision refer to existing reporting frameworks (such as the UN Guiding Principles Reporting Framework⁴⁰) or set out the reporting requirements in an Annex (as is the case with the Equator Principles), or leave it open?
- Should the provision define more stringent reporting requirements for high-risk or large-scale investments, or exclude some investments from reporting obligations altogether?

Further Obligations for Consideration

Community Liaison Process

A number of instruments call for the establishment of mechanisms for dialogue and consensus building. A forum for dialogue between investors and communities is a valuable way to build constructive relationships and to air problems before they turn into conflicts. It can also help protect the investor's social licence to operate and save companies millions of dollars.⁴¹ Non-binding instruments, such as the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (ILO MNE Declaration)⁴² or the UN Guiding

³⁸ See Langlois, M. (2017). *Human rights reporting: Are companies telling investors what they need to know?* New York: Shift. Retrieved from https://www.shiftproject.org/media/resources/docs/Shift_MaturityofHumanRightsReporting_May2017.pdf

³⁹ Chaplier, J. (2014, February 28). EU to force large companies to report on environmental and social impacts. *The Guardian*. Retrieved from <https://www.theguardian.com/sustainable-business/eu-reform-listed-companies-report-environmental-social-impact>

⁴⁰ UNGP Reporting Framework. (2017). UN Guiding Principles Reporting Framework. Retrieved from <https://www.ungpreporting.org/framework-guidance>

⁴¹ Commonwealth Template. Supra, note 7, p. 376.

⁴² ILO. (2017). Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, Annex II – Operational Tools. Annex II provides details about what the “focal points” could do.



Principles refer to the need for such mechanisms. The recent Morocco–Nigeria BIT explicitly calls investments to set up community liaison processes.⁴³ Article 19 reads:

Investments shall establish and maintain, where appropriate, local community liaison processes, in accordance with internationally accepted standards when available.

Community Capacity Building

Some investment agreements contain capacity-building and technical assistance provisions. These require assistance and cooperation for capacity building between state parties.⁴⁴ The draft PAIC, for instance, encourages investors to provide adequate financial resources—including for the transfer of technology—needed for implementing measures to assist particularly vulnerable member states meet the costs of climate change adaptation and mitigation.⁴⁵

Others call on investors to foster community capacity building. This is the case with Brazil’s investment treaties, which stipulate that investors and their investment shall strive to achieve the highest possible level of contribution to the sustainable development of the Host Party and the local community, and invite them to encourage local capacity building through close cooperation with the local community.⁴⁶ Similarly, the OECD MNE Guidelines say that enterprises “should encourage local capacity building through close cooperation with the local community.”⁴⁷

III. Relation to Investment Dispute Settlement

Background

Investor obligations in trade and investment treaties can be made effective and implemented in different ways. Besides compliance mechanisms and other enforcement channels, an important channel for implementation is through traditional ISDS channels or, where these are not used, through state–state dispute settlement. Where investors or home states initiate a dispute, the host state can invoke violations of obligations by the investors as a defence or bring a counterclaim.

If the violation has taken place in the making of the investment, the investor will be barred from access to ISDS, as discussed above:

Investment

“Investment” means, provided that the investment is established or acquired in accordance with the laws of the host State and the obligations set out in this agreement.

Scope [of ISDS]

For greater certainty, an investor may not submit a claim under this agreement if the investment has been made or acquired in violation of domestic law or obligations set out in this agreement.

⁴³ Morocco–Nigeria BIT (2016). Article 19. Investments shall establish and maintain, where appropriate, local community liaison processes, in accordance with internationally accepted standards when available.

⁴⁴ See, for instance, ASEAN Comprehensive Investment Agreement. (2009). Article 23: Special and Differential Treatment for the Newer ASEAN Member States, or Japan–Mongolia EPA. (2015). Article 5.6, and EU–Ukraine Association Agreement (2014).

⁴⁵ *Supra*, note 9, Article 30.

⁴⁶ Brazil–Malawi CIFA (2015).

⁴⁷ OECD. (2011). *Supra* note 32. Part. I. General Policies, A. 3.



If the violation has taken place at a later stage, a tribunal or court will have to take the violation into account when assessing the merits or damages. There may be instances where the behaviour, even during operation, is so grave that the tribunal will also have to deny jurisdiction. This instance is addressed in paragraph 2.

Proposed Language

1. Subject to any other specific directions under this Agreement as to the consequences of a breach of an obligation, where an Investor or its investment is alleged by a State Party in a dispute settlement proceeding under this Agreement to have failed to comply with its obligations under this Agreement, the tribunal hearing such a dispute shall consider whether this breach, if proven, is materially relevant to the issues before it, and if so, what mitigating or off-setting effects this may have on the merits of a claim or on any damages awarded in the event of such award.
2. Where the tribunal is of the view that the breach of obligation by the investor is fundamental to the nature of the claim, it may rule the claim inadmissible, or proceed only with the counterclaim by the State.
3. A Host State may initiate a counterclaim against the Investor before any tribunal established pursuant to this Agreement for damages or other relief resulting from an alleged breach of the Agreement.

IV. Accountability and Mediation Mechanisms

Introduction

The sections above have focused on investor obligations and how they can be implemented and addressed in the traditional ISDS or state–state dispute settlement context. This is, however, insufficient since it does not provide any opportunities for individuals or affected communities to have their voices heard. One way to address this gap while working within the ISDS or state–state context would be to go beyond proposals to allow third parties to submit an amicus curia brief and in addition allow for joinders. For example, a U.S./Germany-type of joinder model specifically defines grounds for joinder and provides for both compulsory and permissive joinder. Such a provision would be very valuable. This paper does not propose a specific clause but strongly supports its inclusion in future trade and investment agreements.

Another—and potentially more effective—way to address the remedies gap is to provide individuals and communities with an option to initiate mediation processes as well as compliance proceedings outside the traditional arbitration process. Access to mediation should be wide and open to any individuals and communities negatively affected—or potentially negatively affected—by an investment of an investor of the home state. Access to a compliance mechanism should be similarly broad. Any individual, community or organization should be able to initiate a process on non-compliance of a project with the obligations under the treaty.⁴⁸

⁴⁸ See for example Bartels, L. (2014). *A model human rights clause for the EU's international trade agreements*, p. 38. Retrieved from http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Studie_A_Model_Human_Rights_Clause.pdf



The experience under the OECD NCP system, the IFI accountability mechanisms and others can help inform the design of a mediation mechanism. Ideally, a specialized mechanism would be set up at the multilateral level and could be part of the broader efforts taking place in UNCITRAL and/or in the Binding Treaty context. However, since a multilateral solution will take a long time to come to fruition, it will be useful for mediation and compliance mechanisms that are open to individuals and communities to be included—at least on an interim basis—in trade and investment agreements. This is the approach that the European Union (EU) has been taking in the context of ISDS—albeit only for receiving investor complaints. The EU has integrated an “investment court system (ICS)” in recent trade agreements such as CETA and EU–Vietnam, while also pushing for a multilateral solution. While that ICS is narrowly tailored and is open only to investor complaints, it shows the willingness of governments to set up third-party dispute resolution through a roster system as an interim solution. Other EU trade and investment agreements also include mechanisms and panels that have the mandate to deal with issues and obligations relating to the environment, labour, human rights and other issues.⁴⁹ However, they typically apply only to disputes between the treaty parties and do not provide space to address concerns by individuals, organizations or affected communities.

Agreements negotiated by the United States and Canada, by comparison, have gone a step further in allowing individuals to initiate procedures in some instances. The labour chapter of the Central American–Dominican Republic Free Trade Agreement (CAFTA–DR)—which is similar to the older, now inoperative North American Agreement on Labor Cooperation (NAALC)—allows any person to file a submission to one of the State parties’ national administrative office regarding labour law matters arising in the territory of another Party.

The provisions aim to resolve issues in a cooperative manner and provide numerous opportunities for formal and informal consultations. But if the various consultative processes fail to yield a solution, an arbitral panel may be established. The ultimate outcome of the dispute settlement process may be a monetary assessment backed by a suspension of trade benefits. In contrast to the NCP mechanism, this process is aimed at the actions of a State Party, not a transnational company. It shows, nevertheless, the willingness of states to set up mechanisms under trade and investment agreements that go beyond pure economic issues.

Similarly, Articles 14 and 15 of the North American Agreement on Environmental Cooperation—and subsequent environmental chapters in free trade agreements (FTAs) negotiated with the United States or Canada—provide for a process that any non-governmental organization or person residing or established in one of the state parties may initiate to bring the facts to light concerning alleged under-enforcement of environmental law. While these submissions formally focus—like those in the NAALC—on actions of state parties, they both relate to how foreign and domestic investments are managed.

OECD Guidelines National Contact Points

One of the most developed governmental mechanisms is the National Contact Point (NCP) system, an implementation mechanism that countries that have adhered to the OECD Guidelines for MNEs are bound to establish in order to promote and implement the

⁴⁹EU–Republic of Korea FTA. (2010). Retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2602>



Guidelines.⁵⁰ As of January 2018, 48 countries have adhered to the NCP system. Experience under the NCP system can serve as an excellent basis for designing a mechanism under trade and investment agreements. Since there may be some overlap between investor obligations under the agreement and the principles outlined in the OECD Guidelines and the NCP system on the other, the two systems will have to be coordinated.

The role of National Contact Points (NCPs) is to further the effectiveness of the Guidelines. The NCPs operate in accordance with core criteria of visibility, accessibility, transparency and accountability. NCPs are also called upon to contribute to the resolution of issues that arise relating to the implementation of the Guidelines. Three steps generally follow the submission of a case:⁵¹

- **Initial assessment:** The NCP evaluates whether the issues raised merit further examination and either accepts the case or publishes a statement explaining why it has not accepted it.
- **Support:** The NCP offers its "good offices" (dialogue, mediation, conciliation services) to both parties to help resolve the issues.
- **Conclusion:** At the end of the process, the NCP publishes a statement regarding the issues raised in the case, the support offered by the NCP and the outcome. NCPs' mandates are broad and include handling enquiries from people affected by companies' actions overseas and acting as a forum for discussion.

Overall, however, the Guidelines provide little specific direction on the structure and functioning of NCPs. As a result, their functioning and effectiveness has varied widely. Some assume the role of mediators or good offices to promote dialogue and the finding of solutions. Some NCPs issue a statement on the alleged violation of the Guidelines when mediation fails, but others do not. NCPs also vary widely in their resources. Observers generally agree that only a few NCPs are effective.⁵² According to a recent study, the overwhelming majority of complaints to NCPs "have failed to bring an end to corporate misconduct or provide remedy for past or on-going abuses, leaving complainants in the same or worse position as they were in before they filed their complaint."⁵³

Shortcomings of NCPs include: practical and procedural barriers that prevent potential complainants from filing a complaint; a perceived lack of independence and impartiality of some NCPs; the priority of confidentiality over transparency; and frequent nonconformity with procedural timelines.⁵⁴ These findings are backed by joint peer reviews conducted for seven NCPs.⁵⁵

⁵⁰ OECD. (2011). *Supra* note 32. See also <http://mneguidelines.oecd.org/ncps/>

⁵¹ OECD. (2017). *Frequently asked questions: National Contact Points for the OECD Guidelines for Multinational Enterprises*. Retrieved from <https://mneguidelines.oecd.org/OECD-Guidelines-for-MNEs-NCP-FAQ.pdf>

⁵² A recent study finds that the Australian National Contact Points ranks among the poorest performing NCPs internationally. Newton, A. (2011). *Australian National Contact Point under the OECD Guidelines for Multinational Enterprises*. Retrieved from <http://www.oecd.org/daf/inv/mne/48754688.pdf>

⁵³ Daniel, C., Wilde-Ramsing, J., Genovese, K. & Sandjojo, V. (2015). *Remedy Remains Rare*, p. 5. Amsterdam: OECD Watch.

⁵⁴ *Ibid.*

⁵⁵ OECD. (2017). *National Contact Point peer reviews*. <http://mneguidelines.oecd.org/ncppeerreviews.htm>



These lessons learned should be taken into account when designing mediation and accountability processes in trade and investment agreements.

Accountability Mechanisms of International Financial Institutions (IFIs)

Accountability and grievance mechanisms under some of the multilateral and regional development banks can also serve as a basis for designing a mechanism under trade and investment agreements.⁵⁶ The experience under mechanisms such as the World Bank's Inspection Panel or the International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA)'s Compliance Advisor/Ombudsman (CAO) is quite extensive. The mechanisms vary significantly in terms of function, structure, mandate and procedure. One of the most used—and with some success—is Compliance Advisor/Ombudsman (CAO). As an independent recourse and accountability mechanism, it aims to improve the environmental and social performance of IFC and MIGA.⁵⁷ The CAO can receive and handle complaints from individuals and communities adversely affected or potentially affected by a project that has received financing from one of the two institutions.

The CAO has three complementary roles: dispute resolution, compliance and advisory. In practice, it has most frequently acted as a convener of “dispute-resolution meetings.”⁵⁸ This includes: facilitation and information sharing; joint fact-finding; dialogue and negotiation; mediation and conciliation. Mediation and conciliation involves the intervention by a neutral third party in a dispute or negotiation with the purpose of assisting the parties in voluntarily reaching their own mutually satisfying agreement. In conciliation, the neutral third party may make recommendations to the participants in the conciliation process.

Although studies give the CAO credit for some success, critics find that it has not resulted in better respect for environmental or social principles by the financial institutions concerned. Studies on the CAO find that power imbalances between affected communities and the institutions in question play against the effectiveness of the mechanism, as does the fact that the principles on which it is based are not binding.⁵⁹ The CAO team is continuously working on identifying highly qualified region- and country-specific mediators, keeping an up-to-date list.⁶⁰ If a mediation process were to be set up under a trade and investment agreement, the CAO could possibly assist with identifying suitable third-party mediators.

National Human Rights Institutions

In the human rights arena, National Human Rights Institutions (NHRIs, which can include national Human Rights Commissions or Human Rights Ombudsmen) can play a powerful

⁵⁶ These International Accountability Mechanisms (IAMs) share a common mission to independently assess people's complaints and seek a response to their concerns. A list of international financial institutions IAMs is available at <http://ewebapps.worldbank.org/apps/ip/Pages/Related%20Organizations.aspx>

⁵⁷ Office of the Compliance Advisor Ombudsman. (2013). *Operational Guidelines 2013*. Retrieved from http://www.cao-ombudsman.org/documents/CAOOperationalGuidelines_2013.pdf

⁵⁸ Altholz, R. & Sullivan, C. (2017). *Accountability & international financial institutions: Community perspectives on the World Bank's Office of the Compliance Advisor Ombudsman*. Berkeley: Berkeley Law <https://www.law.berkeley.edu/wp-content/uploads/2015/04/Accountability-International-Financial-Institutions.pdf>

⁵⁹ See e.g., Acheta, E.O. (2017). *Project finance contribution to environmental and social sustainability: An inquiry into the implementation of the Equator Principles*. See also Altholz, R. & Sullivan, S. (2017), *supra* note 58.

⁶⁰ Discussions with Gina Barbieri, Principal Ombudsman, CAO.



non-judicial dispute-resolution role. Over 120 countries have an NHRI.⁶¹ While there are differences in the way each approaches its responsibilities, some typical roles include: investigations; alternative dispute resolution; and seeking redress or remedies on behalf of victims through the courts or specialized tribunals. This can consist in addressing courts as *amicus curiae* where legally warranted, receiving and hearing individual complaints, conducting public inquiries into systemic human rights violations, and monitoring and reporting on the situation of human rights in the country. Most NHRIs focus on core protection issues (such as the prevention of torture and degrading treatment, summary executions, arbitrary detention and disappearances, and the protection of human rights defenders) along with advancing all aspects of the rule of law (including with regard to the judiciary, law enforcement agencies and the correctional system.) However, some (like Ghana's) are explicitly mandated to investigate complaints alleging behaviour by private enterprises that violates human rights.⁶² In some countries (such as Morocco) the NHRI actively collaborates with the NCP. Collaboration and coordination with NHRIs could be considered when establishing procedures under a trade and investment agreement. As noted with the NCP system, there may be some overlap between investor obligations under the agreement and the NHRI mandate. This will require effort and careful attention to ensure the processes are complementary and coordinated.

Proposal for a Joint Accountability and Mediation Process (JAMP)

This language regarding the establishment and functioning of a process that deals with both solution-oriented mediation and compliance builds on the CAO Operational Guidelines, various trade and investment agreements, and select national NCP procedures guides.

Proposed Language

The parties shall establish a joint accountability and mediation process (JAMP).

The JAMP will have two complementary functions:

1. **Multistakeholder Mediation:** The JAMP will help to resolve the issues raised by individuals and/or communities affected or potentially affected by an Investment of an Investor of the Home State using a flexible, collaborative problem-solving approach. The JAMP's mediation function focuses on responding to concerns raised and should include the individuals and/or communities bringing the complaint and the Investment, as well as the Host State, and other relevant stakeholders.
2. **Compliance:** The JAMP will also contribute to ensuring compliance with obligations under this agreement. Individuals and/or communities affected or potentially affected by an Investment of an Investor of the Home State, as well as civil society organizations may file a complaint alleging non-compliance with the obligations under the treaty. This process includes fact-finding through an impartial and careful investigation when there is factual disagreement between the stakeholders, as well as a final report.

⁶¹ Global Alliance of National Human Rights Institutions. (2017). *Chart of the status of national institutions*. Retrieved from http://www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf

⁶² Network of African National Human Rights Institutions. (2016). *A mapping survey of the complaint handling systems of African National Human Rights Institutions*, p. 13. Retrieved from <https://nhri.ohchr.org/EN/ExternalPublications/English%20Mapping%20Survey%20on%20Complaints%20Handling%20Systems%20Final.pdf>



Roster

1. The Parties shall establish two rosters by the date of entry into force of this Agreement, and maintain the rosters thereafter. One roster will contain up to XX individuals who can be called on to serve as mediators, the other will contain up to XX individuals who can be called on to serve as compliance specialists. Individuals may serve on both rosters. The roster members shall be appointed by consensus for terms of XX years, and may be reappointed [once]. Parties shall consult with relevant civil society and industry for the choice of roster members.
2. In case no agreement can be reached on the composition of the rosters, XX shall appoint the remaining members to be appointed.
3. Members of both rosters shall:
 - a. be of high moral standing
 - b. be independent of, and not be affiliated with or take instructions from, any of the stakeholders
 - c. be recognized to have competence in the field of sustainable development and human rights, and business
 - d. be knowledgeable about cultural realities relevant under this Agreement
 - e. be chosen strictly on the basis of objectivity, reliability and sound judgment
 - f. serve in their personal capacity
 - g. comply with a code of conduct to be established by the Parties.
4. In addition to the criteria above, members of the roster of compliance experts should also have a legal background.
5. End of a roster member's term does not bar him or her from continuing to see ongoing disputes through to final consideration.

Process

1. Any individual or group of individuals that believes that:
 - a. They are negatively affected, or potentially negatively affected, by an investment of an investor of the Home State, or
 - b. one of the obligations under this treaty has not been complied with by the Investment,
 may lodge a complaint with one of the national Focal Points⁶³ designated by each Party to initiate a Joint Accountability and Mediation Process (JAMP).
2. The national Focal Point will immediately inform the Joint Committee⁶⁴ of the complaint. The complainant or complainants and the Investor may freely appoint a sole mediator, or a sole mediator will be appointed by lot from the roster of mediators by the Joint Committee.

⁶³ This could coincide with the NCP, depending on the State Party.

⁶⁴ The Joint Committee will be provided for in another article of the Agreement. It could be modeled on the Brazil model investment treaty provision, as follows:

1. For the purpose of this Agreement, the Parties hereby establish a Joint Committee for the administration of this Agreement (hereinafter referred as "Joint Committee").
2. This Joint Committee shall be composed of government representatives of [both][all] Parties designated by their respective Governments.
3. The Joint Committee shall meet at such times, in such places and through such means as the Parties may agree. Meetings shall be held at least once every two years, with alternating chairmanships between the Parties.
4. The Joint Committee shall have the following functions and responsibilities [to be defined].



3. The chosen mediator shall establish such rules of procedure as are necessary to conduct the mediation. He or she will endeavour to involve all other stakeholders to participate.
4. When there is no agreement amongst the stakeholders to continue with mediation, the complaint may proceed to the JAMP's compliance process, in accordance with a recommendation by the mediator on whether a compliance process is warranted.
5. The mediator's recommendation will be based on input of all stakeholders. He or she will take into account:
 - a. Evidence of potentially significant adverse effect now or in the future
 - b. Indications that one of the specific obligations under this Agreement may not have been adhered to by the Investment
 - c. Evidence that indicates that the Investment has committed a breach under this Agreement.
6. The Joint Committee will publish a summary of the mediator's written assessment.
7. Where the mediator's recommendation concludes that a compliance process is warranted, the complainant or complainants and the Investor may freely appoint a Compliance Panel composed of three compliance specialists. If no agreement is reached, the Joint Committee will appoint three compliance specialists by lot from the roster.
8. To conduct the compliance process, the chosen Compliance Panel shall function according to the rules of procedure in Annex XXX. It will endeavour to invite all other stakeholders to participate.
9. Where the Investor refuses to engage fully in the compliance process the Home State shall exclude the Investor from privileges, such as export credit guarantees or private sector development aid.
10. The compliance process involves a systematic, documented verification process of objectively obtaining and evaluating evidence to determine whether investments have complied or are complying with obligations under this Agreement whose violation might lead to adverse impacts.
11. The compliance investigation will typically be based on a review of documents, interviews, observation of activities and conditions, or other appropriate means.
12. The Compliance Panel will make public before it begins the investigation the Terms of Reference for compliance investigations. The Terms of Reference will specify the objectives and scope of the investigation, as well as a brief description of the project to be investigated. It will also include the approach to the investigation, methods, and a schedule for the investigation tasks, identifying the timeframe and reporting requirements.
13. The Investigation Report will include:
 - a. A brief description of the project
 - b. A description of the underlying issues that gave rise to the investigation
 - c. The objectives and scope of the investigation
 - d. The criteria against which the investigation was conducted
 - e. The findings of the investigation with respect to non-compliance and any adverse effects.



14. The Joint Committee will share the Investigation Report with the complainant or complainants. It will make the report public and alert relevant stakeholders of the disclosure.
15. In cases of non-compliance, the Joint Committee will monitor the situation. Where the Investor does not come into compliance within a reasonable period of time, the Home State shall exclude the Investor from privileges, such as export credit guarantees or private sector development aid.

V. Judicial Mechanisms – The Civil Liability Approach

Background

Many developing country host states face significant challenges in seeking to regulate the activities of foreign investors. This often includes a lack of judicial capacity to provide avenues of redress when communities and individuals suffer harm caused by an investor or its investment. Even when host state courts do rule on companies' liability, the remedies awarded can be worthless if the investor has no local assets in the host state or becomes insolvent (both of which can happen if the investor transfers assets to a sister or parent company). As a result, investors may remain unaccountable for acts that violate human and labour rights or for damage to the environment.⁶⁵

One approach to overcome this situation is to allow affected communities and individuals to bring tort or civil liability claims⁶⁶ in the courts of the investor's home state. The purpose of tort law is to determine whether or not an individual should be held legally accountable for the injury of another person or their property. Tort litigation has been increasingly successful in holding multinational corporations (MNCs) accountable for harm caused in developing countries.

The notion of the MNC parent company's "duty of care" has gained increasing recognition, notwithstanding the "corporate veil" obstacle. "There is no reason in principle why, like any other legal entity or person, a parent company which is responsible for, or in control of, specific functions at overseas subsidiary operations should not be liable for damage arising from those functions or deficiencies in them."⁶⁷

There are various practical challenges for individuals and communities wishing to bring a case against a company in another country. These have much in common with the challenges they face when seeking to have their interests represented in dispute avoidance and non-judicial fora. Although these hurdles are of central importance, they are not discussed here. Rather, this section considers legal and procedural challenges that access to justice provisions in trade and investment agreements would need to address.

⁶⁵ Commonwealth Template, supra note 7, p. 364.

⁶⁶ Other important avenues to consider include bringing criminal claims, or through human rights or sustainable development-orientated arbitration; these will not be discussed in this paper.

⁶⁷ See Meeran, R. (2011). Tort litigation against multinational corporations for violation of human rights: An overview of the position outside the United States. *City University of Hong Kong Law Review* 3(1), 1–41.

Retrieved from <http://www.biforbusinessintegrity.com/pdf/publications/Tort-litigation-against-multinational-corporations-by-Richard-Meeran.pdf>



The *forum non conveniens* principle is one such challenge. This principle allows a court to dismiss a case when it believes another court is better suited to hear the case. Recent years have seen changes in the way *forum non conveniens* is applied—so much so that scholars in the United States have called for the principle to be retired.⁶⁸ Canadian and British courts have recently held that they could exercise jurisdiction to hear claims resulting from alleged human rights violations, civil torts and environmental harm caused in African countries by subsidiaries of a Canadian and British company, respectively.⁶⁹ The doctrine of *forum non conveniens* has also been largely displaced in Europe due to an EU-wide directive.

Another challenge consists in the piercing of the corporate veil. Under corporate law in most jurisdictions, courts may “pierce the corporate veil” (look behind the separate legal existence) of a corporation in certain limited circumstances to impose liability on shareholders, including parent corporations. Enterprise law goes beyond the piercing of the corporate veil, in that it allows a court not only to find a parent liable for the acts of a subsidiary, but also to find a sister subsidiary (a corporation that is under the common control of the parent) liable, because the entire corporate group is regarded as a single juridical entity.⁷⁰

A different avenue—separate from traditional corporate veil piercing—consists of abandoning the idea of linking the behaviour of the subsidiary to the parent altogether, and to focus instead on the direct liability of the parent company arising from the failure to exercise due diligence in controlling the acts of its subsidiaries, over which it may exercise control. The OECD MNE Guidelines appear to follow this approach, when stating that they “extend to enterprise groups, although boards of subsidiary enterprises might have obligations under the law of their jurisdiction of incorporation. Compliance and control systems should extend where possible to these subsidiaries.”⁷¹

Indeed, allegations in MNC cases in the United Kingdom (UK) have sought to circumvent the corporate veil by centering on the “direct negligence” of the parent company for harm caused by its own wrongdoing (in relation to the functions for which it was responsible or over which it had control) instead of, or in addition to, its responsibility for the negligence of its subsidiaries.⁷²

The language proposed here focuses on ensuring that home state courts will hear tort claims for harm caused in the host state. It does not address the issue of applicable law for cases with a cross-border character when disparities exist between home and host state laws. A question for consideration is whether this would be possible or even desirable. The proposed clause below also refers to the relationship between “parent corporation” and “sister subsidiary.” Another question for consideration is whether these should be further defined. For example,

⁶⁸ Gardner, M. (2017). Retiring *forum non conveniens*. 92 *New York University School of Law Review*, 4, p. 390.

⁶⁹ See *Araya v. Nevsun Resources Ltd*, 2016 BCSC 1856; and *Lungowe & Ors v. Vedanta Resources Plc & Anor* [2017] EWCA Civ 1528 (13 October 2017).

⁷⁰ Commonwealth Template, *supra* note 7. See also Zerk, J. (2013) *Corporate liability for gross human rights abuses – Towards a fairer and more effective system of domestic law remedies*. Retrieved from <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>

⁷¹ Skinner, G., McCorquodale, R., De Schutter, O. & Lambe A. (2013). *The third pillar - Access to judicial remedies for human rights violations by transnational business*, 58. Retrieved from http://corporatejustice.org/documents/publications/eccj/the_third_pillar_-_access_to_judicial_remedies_for_human_rights_violation.-1-2.pdf

⁷² Meeran, R. (2011), *supra* note 67, p. 5.



the proposed Swiss Responsible Business law uses the term “companies under their control” or “controlled companies.”⁷³

Proposed Language⁷⁴

Investor Liability

1. Investors and their investments shall be subject to civil actions for liability in the judicial process of their home state for the acts, decisions or omissions made in relation to the investment where such acts, decisions or omissions led to damage, personal injuries or loss of life in the host state.⁷⁵
2. Parties shall ensure that their legal systems and rules allow for, or do not prevent or unduly restrict, the bringing of court actions on their merits before domestic courts relating to the civil liability of the Investor for damages resulting from alleged acts, decisions or omissions of the Investor and/or its investment in the territory of other Parties.
3. In particular,
 - i. each Party shall ensure that its domestic courts shall not decline to hear such actions based on *forum non conveniens* or any similar judicial rule in the Party.
 - ii. each Party shall allow its courts to look at the structure of the Investor and its investments to impose liability on the parent corporation and/or a sister subsidiary if the acts, decisions or omissions of the Investor or its investment led to damage, personal injuries or loss of life in the host state.

Additional Considerations on International Liability

Not discussed in this paper is the option of allowing communities and individuals to sue for damages when harmed by an investment in an international mechanism. Such a mechanism could be set up under trade and investment agreements. This could take the form of international arbitration or a more judicialized form of dispute settlement like the EU-proposed multilateral investment court. In case of arbitration, a way would have to be found to ensure consent between the parties. For example, an investor may have to register for accessing ISDS and at the same time give its consent to arbitration in potential future case brought against itself. The advantage of resorting to arbitration would be that enforcement obstacles will be more easily overcome than with another system.

Besides setting up a dispute settlement mechanism under a specific trade and investment agreement, treaty obligations could also be implemented through a multilateral mechanism. Discussions in UNCITRAL and in the Binding Treaty context should extend to a discussion on the implementation of obligations of investors under treaties.⁷⁶

⁷³ Adapted from SCCJ Initiative Text with Explanations. Retrieved from <http://konzern-initiative.ch/wp-content/uploads/2017/11/The-initiative-text-with-explanations.pdf>

⁷⁴ Adapted from Commonwealth Template, *supra* note 7, p. 391; IISD Model, *supra* note 6; SADC Template, *supra* note 18.

⁷⁵ This article does not define standards of liability—due diligence, strict or absolute. This could be left for the civil liability rules in the state or states in question as suggested by IISD’s 2005 Model Investment Treaty. Alternatively, a list could be developed associating different investment activities with different risks, and those in the high risk category would be subject to strict liability.

⁷⁶ For more discussions, see IISD. (2016). *Investment-related dispute settlement: Moving towards comprehensive accountability and inclusive access to remedies*. Retrieved from <https://www.iisd.org/event/investment-related-dispute-settlement-moving-towards-comprehensive-accountability>