

Hearing on ‘Implementation of Social and Environmental Provisions in bilateral trade agreements’

Committee on International Trade, European Parliament

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Contribution by Kathryn Gordon, Senior Economist, OECD Investment Division

OECD dialogue on investment treaty law combines the insights of the 54 policy jurisdictions participating in the OECD-hosted ‘Freedom of Investment’ (FOI) Roundtables with analytical and statistical support from the OECD Secretariat.

The OECD is honoured to participate in this hearing on ‘Implementation of social and environmental provisions in bilateral trade agreements’ organised by the Committee on International Trade (INTA). The hearing offers an opportunity to apply the insights and analysis undertaken for the FOI Roundtables in order to further INTA’s reflections on the important question of how international investment treaties interact with the social and environmental policies of the countries that are parties to such treaties.

My remarks will address three questions:

1. Are investment treaty commitments compatible with good public policy making, including in the social and environmental spheres?
2. How do investment treaties handle environmental concerns?
3. How do we develop a productive interface between investment treaties and effective public policy, including social and environmental policy?

Question 1. Are investment treaty commitments compatible with good public policy making, including in the social and environmental spheres?

The short answer to this question is ‘yes’. Nearly all investment treaties contain the following commitments:

- Protection against discrimination (most-favoured nation treatment and national treatment);
- Protection against expropriation without appropriate compensation
- Protection against unfair and inequitable treatment.

We can all be confident that these commitments embody basic principles of good public governance that should apply in all public sector activities, including environmental, labour and other regulation.

In support of this statement, I would cite the Universal Declaration of Human Rights, including its Article 7 (on entitlement “without discrimination to equal protection under the law” and “protection against any discrimination”); Article 8 (on the right to ‘effective remedy’ for violations of fundamental rights) and Article 17 (on the right to “own property” and to not be “arbitrarily deprived” of property). I

would also cite good public governance guidelines published by such international institutions as APEC, the OECD and the IMF, which promote non-discrimination in all government policies as well as respect due process in policy making and implementation and in the judicial proceedings.

The real challenge for investment treaty makers, and indeed for all policy makers, is to develop policy systems that make these broad principles a reality for all elements of society, including foreign investors, domestic investors and workers. In relation to investment agreements, the major policy challenge is to ensure that these treaties and their associated dispute settlement procedures are coherent with broader systems for protecting rights (both domestic and international).

Question 2. How do investment treaties handle environmental concerns?

The OECD Secretariat has done a survey of the environmental language¹ in a sample of more than 1600 investment treaties in order to document how they deal with environmental concerns are handled in these treaties. Principal results are as follows:

Language referring to environmental concerns is rare in BITs but common in non-BIT IIAs. In the treaty sample, 133, or 8.2%, of the IIAs contain a reference to environmental concerns. All 30 non-BIT IIAs contain such references, but only 6.5% of BITs do.

Country practices regarding environmental language in treaties vary. Nineteen of the 49 countries covered in the study never use such language in their treaties. In contrast, a few countries systematically began including environmental language in treaties and such language appears in all of their treaties after a given date (Canada, Mexico and the United States since the early 1990s, and Belgium/Luxembourg more recently). Several countries appear to have no autonomous policy of including such language, but tolerate its inclusion in treaties signed with countries that have a preference for such language.

Inclusion of environmental language is becoming more common. The first occurrence of such language in the IIA sample is in the 1985 China-Singapore BIT. A decade passed before environmental concerns were included in a sizeable number of BITs, and only another ten years later, in 2005, the proportion of newly concluded treaties with environmental concerns passed the threshold of 50% of new treaties concluded in a given year.

Environmental language addresses a number of distinct policy purposes. These include: 1) general language in preambles; 2) reserving policy space for environmental regulation for the entire treaty; 3) indirect expropriation stating that non-discriminatory environmental may not be a basis for claims of; 4) commitments to not lower environmental standards to attract investment; and 5) general promotion of progress in environmental protection and cooperation.

Such treaty language can make useful contribution to international investment policy by clarifying the parties' intent and by providing guidance to arbitrators on how environmental concerns are to be integrated into interpretation of investment treaties. However, integrating environmental language into treaties is actually the easy part of ensuring that environmental policy objectives are advanced and not undermined by investment treaties. The really difficult challenge – one that must be solved if investment treaty law is to help societies advance their environmental agendas -- is to ensure that investor state dispute settlement works in a disciplined manner that reflects the intent of states and appropriately integrates applicable domestic and international law (including environmental law).

¹ See Kathryn Gordon and Joachim Pohl "[Environmental Concerns in International Investment Agreements](#)" OECD Working Papers on International Investment No. 2011/1.

Question 3. How do we develop a productive interface between investment treaties and effective public policy, including social and environmental policy?

The enforcement/compliance mechanism that underpins investment treaty law is based on private enforcement of states' investment treaty commitments. That is, investment treaty law allows covered foreign investors to bring claims for governments' alleged breach of their investment treaty commitments – commitments that are (necessarily) broad and vaguely worded. These investor claims are brought for monetary redress to an international arbitration process and may be brought without exhaustion of local remedies.

There is nothing else like this system of enforcement of investment treaty law, either in other bodies of international law² or in domestic systems of law designed to discipline the power of the state. For example, advanced systems of domestic law do not offer monetary remedies for non-respect of most of the commitments contained in investment treaties (expropriation is an exception) – instead decisions may be annulled and the government instructed to go back and do things over again. In addition, advanced systems of domestic law tightly regulate procedures that are only lightly regulated in the dispute resolution provisions of treaties³ (e.g. conduct of arbitrators, time limits, shareholder claims and transparency/disclosure).

One problem with this system is that it provides a very elaborate system of redress for certain entities (covered foreign investors) while, more generally, international systems of redress are not as advanced (and domestic systems may not work well). Indeed, many parties to investment treaties (and, indeed, the European Commission) state that they wish to create a “level playing field”, but the current enforcement system in investment treaty law seems to create several dimensions of “un-levelness”. These dimensions include:

- domestic investors versus covered foreign investors;
- foreign investors covered by different investment treaties (or not covered by any investment treaty at all);
- covered foreign investors versus other entities or individuals that may be victims of abuse of state power but have no or only limited access to redress in domestic or international systems.

In addition to the apparent competitive non-neutralities that might be introduced by investor state dispute settlement, problems such as low standards of transparency, light regulation of the arbitration process and of arbitrators suggest that a thorough evaluation of the dispute settlement process would be useful. A great deal of work remains to be done in this area.

The material produced by the institutions of the European Union, including INTA, suggests that the European Union, through its development of an EU-wide treaty practice and policy, is currently contributing to this re-evaluation. Noteworthy developments include its efforts to clarify treaty commitments (e.g. by developing new language on fair and equitable treatment). INTA's ‘Motion for a resolution’ on the EU-China negotiations for a bilateral investment agreement also mentions interest in a

² For more analysis of how treaty based investor dispute settlement compares with dispute settlement in other bodies of international law, see Part 1 of “[Investor-state dispute settlement: A scoping paper for the investment policy community](#)”.

³ For a survey of investor state dispute settlement procedures see “[Dispute settlement provisions in international investment agreements: A large sample survey](#)”. OECD Working Papers on International Investment 2012/2.

code of conduct for investor state arbitrators. The OECD Secretariat has reviewed available codes of conduct and stands ready to assist the European Union with this project, perhaps by helping with the application of available codes for commercial arbitrators to investor-state arbitration.

More generally, these initiatives by EU institutions are part of a much broader effort to ensure that investment treaty law lives up to its full potential and brings tangible benefits to home and host societies and to investors and that it also builds confidence in the workings of the global economic institutions. The OECD also stands ready to assist the European Union with analytical and statistical support as it develops its new treaty practice and policies.