



Foreign Direct Investment and Policy Space for Sustainable Development
European Commission - DG Trade -

Foreign Direct Investment and Policy Space for Sustainable Development

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Introduction

- growing number of preferential regional agreements, that go beyond cross-border measures,
- To cover “new issues” such as services, investments, intellectual property rights, government procurement, competition, etc...



Introduction (2)

- Economic benefits of FDI for development
- In order to attract FDI, investment provisions in regional trade agreements can be more effective than bilateral treaties.
- RTAs entail costs as well as benefits (both to developed and to developing economies).
- In negotiating RTAs, the aim should thus be to **minimise the costs** and to **maximise the benefits**.



Foreign Direct Investment, the right to regulate and the policy space for development

- Assumptions that bilateral investment treaties would provide more flexibility (and implicitly more benefits) to their signatories,
- as opposed to the believed inflexibility (and implied damages) that regional and plurilateral investment rules would impose on their policy space.



Foreign Direct Investment, the right to regulate and the policy space for development (2)

- Is the *policy space* of Contracting States to regulate impeded mainly by pre-establishment rules?
- No. Possibility exists to conciliate investment provisions substantive enough to attract FDI, with full respect of the regulatory sovereignty of host States



Foreign Direct Investment, the right to regulate and the policy space for development (3)

- The “positive approach” of investment commitments (GATS-type approach): a country freely decides, for each sector of its economy, whether to open it to foreign investors or not.
- Even where commitments exist, exceptions and limitations to NT and MFN are possible
- This « positive approach » enable a **creative** design of rules



Some concrete examples

- *Policies designed to generate and Transfer Technology*

ex: **partnerships** with local companies through joint-ventures as a condition for foreign investors' access to the market

ex: market-friendly measures to **promote technology transfer**, such as providing incentives for specific high technology industries



Some concrete examples (2)

- *Policies aimed at protecting the environment*

Investment provisions can offer a framework to **encourage transfer** of clean technology and environmentally sound management practices to host countries

- 1st ex: *exclusions* or **exceptions**, to carve out environmental and social issues from the agreement' disciplines
- 2d: “**non-lowering-standards clause**” : undertaking **not to relax environmental and social standards and legislation** in order to attract FDI



Some concrete examples (3)

- **Non-binding or declaratory provisions related to the environment**

Although non-binding, possible for these “soft” commitments, to create, over time, **customary norms**, and thus **enforceable as customary rules of international law**



Investment rules and the debate on deregulation

- Too often, confusion is made between investment commitments on non-discrimination, and risk of deregulation
- Investment rules embodied in RTAs aim at providing a stable and transparent regulatory climate, not at weakening the regulatory regime
- investment provision in RTAs should lead to **better regulation**, not de-regulation.



II- Foreign investors' behaviour and home and host states policies

- equal attention should be paid to foreign investors' rights **and obligations**
- Corporate Social Responsibility (CSR) is one of the possible ways to address investors' duties
- **BUT: CSR is not a substitute, but a complement to hard law. It must not be seen as a substitute to **public authorities' duty to establish binding rules, at domestic and international level, for the respect of social and environmental standards****



Foreign investors' behaviour and home and host states policies (2)

- International instruments: *The OECD Guidelines for MNEs*
- the only multilaterally agreed benchmark for good corporate behaviour
- recommendations by the Governments of all OECD Members and nine non-Member countries (Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania, Romania and Slovenia) to their companies to adopt responsible operations 'wherever these enterprises operate'



Foreign investors' behaviour and home and host states policies (2)

- Monitoring: specificity of the GL lies in their **effective implementation** through **National Contact Points**. Each government has to set up such a NCP: He should raise awareness on the GL, investigate and act as a mediator. Local community representatives, NGOs or trade unions from home/host countries can raise issues related to the implementation of the GL through the NCPs.
- Ex of use of GL in trade agreements: the **Joint Declaration** in the framework of the **EU-Chile Association Agreement**, which indicates that *the trading partners “jointly remind their companies to observe the OECD Guidelines for Multinational Enterprises” wherever they operate.*



III- Supporting measures and incentives to sustainable investments

- Too often, SD is seen as entailing a high cost, thus jeopardizing competitiveness, or reserved to rich countries
- Challenge: to demonstrate the **positive links** between economic efficiency, **profit and sustainable development**



III- incentives to sustainable investments

- ex: The Kyoto Protocol and the Clean Development mechanism (CDM):
- the CDM allows industrialised countries and their companies to achieve part of their emission reduction commitments by investing in emission-reducing projects abroad.
- The EU-Emission Trading Scheme provides an economic incentive for companies to invest in sustainable projects abroad.
- This mechanism also provides opportunities to transfer energy-efficient and climate-friendly technologies to developing countries



III- Supporting measures to sustainable investments

- **ex: Sustainable impact assessments**
- The EU undertakes **Sustainable Impact Assessments** in parallel to its RTAs negotiations, to identify the necessary supporting measures.
- **One of the objectives:** to create **synergies between private and public initiatives**, *inter alia* between SIAs and CSR. Such synergies contribute to improve SIAs outcomes, by better integrating in the consultation process the experience of the private sector and develop partnership activities in the regions covered by SIAs.
- Conversely, the **design and implementation** of CSR projects will **benefit** from SIA-led capacity building activities.



IV- Conclusion

- Investment provisions in regional trade agreements do not *per se* limit the right to regulate of host States,
- nor do they harm sustainable development objectives



IV- Conclusion (2)

- There is no “one-size-fits-all” solution
- two main directions are worth being further explored:
- First, the strengthening of the regulatory provisions of the agreements (ex: a very minimum can consist in including a comprehensive “non-lowering-standards clause”)
- Second, the development of economic incentives to sustainable investments.



IV- Conclusion (3)

- **A further challenge:**

To develop and widely spread between all stakeholders, the sharing of information on experiences and best practices reg. the design of investment agreements.



Further information

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