

6<sup>th</sup> Annual Conference on Investment Treaties

# Business responsibilities and investment treaties

Draft Agenda

**16 March 2020**

OECD Conference Centre, CC12  
Paris, France

## ■ About the Annual Investment Treaty Conference

This annual conference brings together senior policy makers and investment treaty negotiators from around the world for exchanges with leading representatives of business, civil society, academia and international organisations. <http://oe.cd/BR-conf>

## ■ About the Freedom of Investment (FOI) Roundtable

The FOI Roundtable, an intergovernmental forum hosted since 2006 by the OECD, brings together over 55 governments from around the world to exchange information and experiences on investment policies. Since 2011, governments have been evaluating key aspects of investment treaties at the Roundtable. The following economies are invited to participate: Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, People's Republic of China, Colombia, Costa Rica, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Korea, Latvia, Lithuania, Luxembourg, Malaysia, Mexico, Morocco, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Tunisia, Turkey, Ukraine, United Kingdom, United States and the European Union. Participation may vary depending on the issues being discussed. [www.oecd.org/investment/foi.htm](http://www.oecd.org/investment/foi.htm)

## ■ Contacts

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**This is a draft agenda. Additional governments and other organisations are finalising possible arrangements for speakers and may be added to the agenda. Other changes may also be made. Speakers are listed but the order of speakers has not been determined.**



- Responsible business conduct (RBC) and Business and human rights (BHR) are fast-developing fields with converging approaches to business responsibilities. The convergence is demonstrated in the alignment of the OECD Guidelines for Multinational Enterprises, the United Nations Guiding Principles on Business and Human Rights (UNGPs) and core International Labour Organisation standards. Governments, business, trade unions and civil society are all engaged in efforts in this area.

The 2020 OECD Investment Treaty Conference will explore how governments have integrated and are integrating policies relating to business responsibilities into their trade and investment treaties, and potential policy options. The Conference is being held early in the process of inter-governmental work on these issues and offers an occasion for dialogue in an important policy area.

The Conference will first examine the general framework for business responsibilities and latest developments in the field, in order to provide background for the consideration of policy issues relating to trade and investment treaties. Recognition in the UNGPs and OECD Guidelines of governance gaps and the need for governments and business to address them have given rise to a growing range of measures to address BHR/RBC. The initial focus at this stage of work is primarily on government action, but other initiatives will also be addressed.

The Conference will then address the varying ways in which investment treaties may interact with policies on business responsibilities including through

- their impact on policy space for governments and in particular non-discriminatory regulation of business;
- provisions that buttress domestic law or its enforcement, including in key areas such as labour, the environment, anti-corruption or human rights; or
- provisions that speak directly to business by, for example, encouraging observance of RBC standards or establishing conditions for access to investment treaty benefits.

A more detailed consultation paper by the OECD Secretariat was discussed by governments at the FOI Roundtable in October 2019 and has been made available for a public consultation in January-February 2020 (<http://oe.cd/BR-consult>). The paper together with comments received in the consultation provide additional background for Conference participants and context for the individual sessions.

The Conference languages are English and French with interpretation available.

■ Schedule

<b>09:00 – 09:15</b>	<b>Welcoming remarks</b>
	<p><b>Mathilde Mesnard</b>, Deputy Director, Directorate for Financial and Enterprise Affairs, OECD</p>

<b>09:15 – 10:45</b>	<b>Overview and recent developments to address Responsible Business Conduct (RBC) and Business and Human Rights (BHR)</b>
	<p>The Conference will first examine the general framework for business responsibilities and latest developments in the field. Recognition in the UNGPs and OECD Guidelines of governance gaps and the need for governments and business to address them have given rise to a growing range of measures to address BHR/RBC. The need for RBC due diligence by companies has been emphasised in extensive work at the OECD on sectoral and general due diligence guidance. Recent government measures and policy proposals include imposing obligations to engage in or disclose action on human rights or RBC due diligence, conditioning access to government contracts or benefits on appropriate business conduct, or adopting broad National Action Plans to set out future areas for policy development.</p> <p>Business is increasingly engaged in efforts to address BHR and RBC, with major business organisations and companies affirming business responsibilities towards workers and communities. Strong public demand is notably reflected in the extraordinary growth of “environmental, social and governance” (ESG) investment, estimated at over USD 25 trillion. This mix of mandatory, incentive-based, or voluntary measures by governments and business, at national, regional and global levels, together with outside monitoring, is sometimes referred to as a flexible “smart mix” that seeks to improve business conduct.</p> <p>In this context, it is timely for investment treaty policy makers to collectively consider whether and how investment treaties could contribute more actively to address business responsibilities.</p>

	<p>Governments at the FOI Roundtable began joint consideration of the issues in October 2019. A consultation paper on Business responsibilities and investment treaties has been released for public comments (<a href="http://oe.cd/BR-consult">http://oe.cd/BR-consult</a>) in order to provide additional information for consideration by governments and others. In addition to addressing the general framework for BHR/RBC, the Conference will provide an opportunity for dialogue on key aspects of investment treaty policy.</p>
<b>Chair</b>	<b>tbc</b>
<b>Speakers</b>	<ul style="list-style-type: none"> <li>• <b>Representative from the government of France (tbc)</b></li> <li>• <b>Tihana Bule</b>, Economist and Policy Expert, OECD RBC Centre</li> <li>• <b>Andrea Shemberg</b>, Chair, Global Business Initiative on Human Rights</li> <li>• <b>Richard Meeran</b>, Leigh Day (law firm), London</li> </ul>

**Coffee break 10:45-11:15**

<b>11:15 – 13:00</b>	<b>The impact and potential impact of trade and investment agreements on domestic law and the duty to protect</b>
	<p>During work on the UNGPs, “states, the business community, and the advocacy community supported the emphasis on state duties as the bedrock of protection against corporate human rights abuse.”<sup>1</sup> The OECD Guidelines similarly recognise the primacy of state action. This broad recognition of the primary role of governments in addressing the adverse impacts of business activities makes attention to the interface between investment treaties and domestic regulation of key interest. Treaties can limit governments’ policy space to regulate business and include constraints on changes to regulatory policies. Governments can also commit in treaties to regulate business activities and to enforce regulation.</p> <p>With regard to policy space, leading representatives of the BHR community, such as John Ruggie, have expressed concerns about investment treaty overreach, in particular in permitting claims against non-discriminatory regulatory policies. Governments have taken</p>

<sup>1</sup> Ruggie, John Gerard, *Just Business: Multinational Corporations and Human Rights*, 2013 (Kindle ed.) at location 1788.

numerous actions to protect policy space in recent years. This is exemplified most recently by the USMCA, which limits investor-state dispute settlement (ISDS) to direct expropriation and discrimination between Mexico and the US except for specified claims, and substitutes State-to-State dispute settlement (SSDS) for ISDS between Canada and the US for all investment protection issues. Claims based on non-discriminatory regulation are no longer subject to ISDS. EU treaties have incorporated an express clause addressing the right to regulate. Other recent treaty policy, such as the new Dutch Model bilateral investment treaty, expressly refers to state duties under the UNGP framework. At the same time, many older investment treaties continue to be used for claims against governments, and theories generating liability for non-discriminatory regulation under vague treaty provisions continue to be applied frequently in ISDS.

Treaty provisions that buttress domestic law or its enforcement in key areas in host states remain rare but they are increasing in importance. Trade agreements and integrated trade and investment agreements have included commitments to adhere to or incorporate international labour, anti-corruption or environmental norms into domestic law or regulation, and to enforce relevant law. But the many stand-alone investment treaties have rarely sought to strengthen regulation. Interest and debate are growing both in light of expanded use of such provisions in recent integrated agreements, the first examples of government attempts to enforce, and the gap in this area between trade and investment treaties. Issues include scope, whether access to binding resolution is available and under what conditions, standards of liability, remedies for breach, impact on the ground, and risks of protectionism.

A third area of potential interaction between investment treaties and domestic law relates to the possible exercise of jurisdiction over companies by home states. Recent domestic law cases in some jurisdictions, such as the UK Supreme Court decision in *Lungowe & Others v Vedanta Resources Plc & Konkola Copper Mines* [2019] UKSC 20, have set out a domestic legal framework applicable to potential liability relating to corporate group-wide policies established by parent companies on issues such as environmental impacts. Some recent trade and investment agreements have included chapters with agreements to incorporate and enforce anti-corruption norms including against foreign bribery. Some commentators have suggested that investment treaties could be used to facilitate the agreed exercise of such domestic jurisdiction in a range of areas.

<b>Chair</b>	<b>Joost Pauwelyn</b> , Professor, International Law, Co-Director of the Centre for Trade and Economic Integration, The Graduate Institute, Geneva, Switzerland <b>(tbc)</b>
<b>Speakers</b>	<ul style="list-style-type: none"> <li>• <b>Rodrigo Monardes</b>, Counsellor, Permanent Mission of Chile to the OECD</li> <li>• <b>Carlo Pettinato</b>, Head of Investment Policy Unit, DG Trade, EU Commission</li> <li>• <b>Brooke S. Guven</b>, Researcher, Investment Law and Policy, Columbia Center on Sustainable Investment (CCSI)</li> <li>• <b>Lorand Bartels</b>, Reader in International Law, Faculty of Law, University of Cambridge; Senior Counsel, Linklaters, London</li> <li>• <b>Eric Gottwald</b>, Policy Specialist for Trade and International Economics, American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)</li> </ul>

**Lunch break (13:00-14:30)**

<b>14:30 – 16:30</b>	<b>Addressing business in trade and investment agreements</b>
	<p>The traditional approach to investment protection treaties did not address business conduct. It reflects the view that host governments have the primary duty to protect their citizens and residents from injuries from business. Investment treaties accordingly did not need to address business conduct or adverse impacts caused by business because they could be addressed under domestic law.</p> <p>Given the broad recognition of the existence of serious governance gaps, investment policy makers may need to re-examine the degree to which the traditional primary reliance on national law suffices to address business conduct, and to consider a possibly stronger contribution of investment treaty policy in this area. Silence in many investment treaties on issues like climate change, human rights, gender, the rights of indigenous peoples or public health is increasingly visible and contested.</p> <p>There is growing criticism in particular of the perceived one-sided nature of investment treaties. They are seen as asymmetric, protecting covered investors and restraining host states while lacking accountability mechanisms for covered investors operating in those states. The 2012 OECD ISDS scoping paper and the 2012 progress</p>

report on Roundtable work on ISDS took note of marked contrasts between the access to remedies of ISDS investor claimants and tort victims (including victims of human rights abuses) in many jurisdictions.<sup>2</sup>

Governments have begun to address business in their new trade and investment treaties in recent years. Recent approaches to business responsibilities include hortatory clauses encouraging RBC or corporate social responsibility, or legality requirements for access to investment treaty benefits. There are increasing calls to do more, which can create challenges including in light of the competitive interests that are part of investment treaty policy.

Several types of provisions could be potentially at issue and the examples of domestic actions and debates can be instructive. Potential approaches could include providing expressly for reductions in damages for businesses that fail to meet BHR/RBC standards, as in the new Dutch Model bilateral investment treaty (BIT); modifying legality requirements for coverage to extend to the operation of the business as well as the making of the investment; expanding the scope for counterclaims by governments; addressing demands for increased access by third parties whose rights may be at issue; or providing businesses that conduct effective HR/RBC due diligence with a "safe harbour" from certain potential liabilities. Business concerns about liability in connection with due diligence obligations could suggest consideration of making due diligence a condition for investment treaty coverage for large enterprises, without imposing any obligations.

Differentiated approaches are also possible. For example, business access to ISDS for core protections, such as those against direct expropriation or discriminatory measures, could remain unconditional while coverage in ISDS under broader protections that can generate liability for non-discriminatory measures, where included, could be made conditional on business conformity with BHR/RBC due diligence responsibilities.

In all events, ideas in this area need to be considered taking into account the policy goals advanced for investment treaties, their success in achieving them, and the possible impact of new approaches on them. Competitive interests are also at issue and joint government work can help to address them. The vast number of investment treaties, however, coupled with strong and growing

<sup>2</sup> See David Gaukrodger & Kathryn Gordon, Investor-State Dispute Settlement: A scoping paper for the investment policy community, OECD Working Paper on International Investment 2012/03, pp. 11-13, 24-29, 79-87; OECD, Government perspectives on investor-state dispute settlement: a progress report (14 December 2012), pp. 8-11.

	interest in reform, could provide an environment conducive to innovation.
<b>Chair</b>	<b>David Gaukrodger</b> , Senior Legal Adviser, Investment Division, OECD <b>(tbc)</b>
<b>Speakers</b>	<ul style="list-style-type: none"> <li>• <b>Caroline Kollau</b>, Director, Trade Policy and Economic Governance, Ministry of Foreign Affairs, Netherlands <b>(tbc)</b></li> <li>• <b>Felix Imhof</b>, Deputy Head, International Investment and Multinational Enterprises Division, State Secretariat for Economic Affairs, Switzerland</li> <li>• <b>Nathalie Bernasconi-Osterwalder</b>, Senior Director, Economic Law and Policy, International Institute for Sustainable Development (IISD)</li> <li>• <b>Shaun Donnelly</b>, United States Council for International Business (USCIB)</li> <li>• <b>Jean Ho</b>, Associate Professor, Faculty of Law, National University of Singapore (NUS)</li> <li>• <b>Julianne Hughes-Jennett</b>, Partner, Quinn Emanuel, London</li> </ul>

**Coffee break (16:30-17:00)**

<b>17:00 – 18:00</b>	<b>Conclusions and next steps</b>
	A final session will draw preliminary conclusions from the discussion and consider potential ways forward.
<b>Chair</b>	<b>Ana Novik</b> , Head of Investment Division, OECD
<b>Speakers</b>	<ul style="list-style-type: none"> <li>• <b>Manfred Schekulin</b>, Chair, OECD Investment Committee</li> <li>• <b>Representative from the OECD Working Party on Responsible Business Conduct (tbc)</b></li> <li>• <b>Carlo Pettinato</b>, Head of Investment Policy Unit, DG Trade, EU Commission</li> <li>• <b>Pierre Hubbard</b>, General Secretary, Trade Union Advisory Committee to the OECD (TUAC)</li> <li>• <b>Winand Quaadvlieg</b>, Chair, Investment Committee, Business and Industry Advisory Committee to the OECD (BIAC)</li> </ul>

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