

Compliance obligations imposed on foreign investors and soft law instruments

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OUTLINE

I. Soft law instruments regulating cross-border business

1. ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy
2. UN Global Compact's governance framework
3. ISO 26000 on Guidance Social Responsibility
4. UN Guiding Principles on Business and Human Rights
5. OECD Guidelines for Multinational Enterprises
6. OECD Due Diligence Guidance for Responsible Business Conduct

OUTLINE (cont'd)

II. Soft-law instruments and actionable obligations on investors

1. What is the effect of a violation of an investor's obligations on the international protection of its investment?
 - Violation of an obligation as bar to jurisdiction or admissibility
 - Violation of an obligation as ground for counterclaims
 - Violation of an obligation taken into account in the calculation of damages

2. What is the effect of soft law instruments in setting investors' obligations?
 - Incorporation in domestic law, BITs and MITs
 - Evolution of « Principles of international law »

I. Soft law instruments aiming at regulating cross-border activity of enterprises

1. ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy

Overview

- “**ILO MNE Declaration**”: Adopted in 1977, last review in 2017
- Adopted by State parties to ILO, employers and workers
- Founded on principles contained in international labour Conventions and Recommendations
- Offers guidelines related to employment, training, industrial relations to multinationals, governments, as well as employers’ and workers’ organisations
- Invites states to incorporate the principles in domestic legislation



International
Labour
Organization

1. ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (Cont'd)

Principles

Employment

- Elimination of forced or compulsory labour
- Abolition of child labour: minimum age
- Equality of opportunity and treatment

Training

Conditions of work and life

- Wages, benefits and conditions of work
- Safety and health

Industrial relations

- Freedom of association
- Access to remedy and examination of grievances



International
Labour
Organization

2. UN Global Compact's governance framework

Overview

- UN Global Compact: Participatory forum created in 2005 within the UN framework. 13,000 participants over 170 countries. Directed by the corporations which are **members**
- Aims at mobilising a global movement of sustainable companies through regular **reports** with policy recommendations, networking events
- Business participants are required to communicate their progress to their own stakeholders annually, and to post a copy on the UN Global Compact's website.

All corporations can be members unless in the UN sanctions list / producers or sellers of landmines or cluster bombs / producers tobacco products

Decent work in Global Supply Chains
Empowerment of women

Human rights and dilemmas that business encounter when operating in conflict-affected countries

Guides on corporate sustainability



2. UN Global Compact's governance framework (cont'd)

10 Principles

1. Support and respect the protection of internationally proclaimed **human rights**.
2. Ensure non-complicity in **human right** abuses.
3. Uphold the **freedom of association** and the effective recognition of the right to **collective bargaining**.
4. Eliminate all forms of **forced and compulsory labour**.
5. Effectively abolish **child labour**.
6. Eliminate **discrimination** in respect of employment and occupation.
7. Support a precautionary approach to **environmental challenges**.
8. Undertake initiatives to promote greater **environmental responsibility**.
9. Encourage the development and diffusion of **environmentally friendly technologies**.
10. Work against **corruption** in all its forms, including extortion / bribery.



3. ISO 26000 on Guidance Social Responsibility

- Government representatives, NGOs, companies, labour organisations were involved in the development of ISO 26000 standard. Promulgated in 2010, last review in 2017
- Only guidance. No certification for Social Responsibility
- 7 core subjects: Organisational governance / human rights / labour practices / environment / fair operating practices / consumer issues / community involvement and development
- Conceived to facilitate the corporation's understanding of the topic and the implementation of aligned policies. Marketed as "helpful in applying the OECD Guidelines"



4. UN Guiding Principles on Business and Human Rights

Overview

- Guidelines for States and companies to prevent, address and remedy human rights abuses committed in business operations
- Preceded by work of United Nations' organs since 1970. Based on Ruggie Report and endorsed by the Human Rights Council in 2011
- 31 principles based on three pillars: "Protect, Respect and Remedy"

4. UN Guiding Principles on Business and Human Rights (cont'd)

States



Business



Victims



Due Action

Protect
against
abuses by
third actors

Respect
human rights in
their business
and across the
value chain

Remedy
if human rights
abuse, both by
State and non-
State actors

How

Policies,
Regulation,
Legislation and
Adjudication

Act with due
diligence and
address
adverse impact

Judicial
remedies and
non-State-
based remedies

4. UN Guiding Principles on Business and Human Rights (cont'd)

State's duty to Protect

States should protect individuals within their jurisdiction against human rights abuses committed by non-state actors, including business actors

Regulations should render clear that businesses domiciled in the State will have to respect human rights, and should encourage human rights due diligence

States should provide effective guidance to businesses on how to respect human rights

States should maintain adequate policy space to meet their human rights obligations when entering into international treaties or contracts with business entities



4. UN Guiding Principles on Business and Human Rights (cont'd)

Corporate responsibility to respect

- Avoid action that may affect human rights
- If a violation is identified, take action to repair the effect
- Duty to prevent and address harm which may or has been caused by corporate partners
- Focus on ongoing due diligence on actual or potential human rights impacts, and on the effectiveness of the response



4. UN Guiding Principles on Business and Human Rights (cont'd)

Access to remedy

- States must ensure effective remedies to human rights abuses in their territory, following a fair and impartial process, protected from corruption and influence
- Remedies: apologies, restitution, compensation, rehabilitation, punitive sanctions, prevention of harm...
- States need to take action to remove legal barriers that prevent access to remedy:
 - corporate structures which facilitate avoidance of accountability
 - cost of bringing claims
 - difficulty in securing legal representation



5. OECD Guidelines for Multinational Enterprises

Overview

- Adopted in 1976 as an Annex to the 1970 OECD Declaration on International Investment and Multinational Enterprises. Regular revisions, most recent in 2011, to reflect the UN Guiding Principles on Business and Human Rights
- Shared values of the countries from which a large share of international direct investment originates, and which are home to many of the largest multinational enterprises
- Framework to further develop the Guidelines and their implementation, including:
 1. Annual report on the Guidelines
 2. Supporting documents (such as frequently asked questions),
 3. Global Forum, that brings together stakeholders from business, trade unions, civil society and academia to debate key challenges related to responsible business conduct
 4. OECD Due Diligence Guidance for Responsible Business Conduct



5. OECD Guidelines for Multinational Enterprises (cont'd)

1. General Policies
2. Disclosure
3. Human Rights
4. Employment and Industrial Relations
5. Environment
6. Combating Bribery, Bribe Solicitation and Extortion
7. Consumer Interests
8. Science and Technology
9. Competition
10. Taxation



5. OECD Guidelines for Multinational Enterprises (cont'd)

They might not bite, but they bark...

- Unique implementation mechanism through National Contact Points ("**NCPs**") for Responsible Business Conduct : Mediation and conciliation platforms to hear grievances relating to the non-observance of the Guidelines
- 48 NCPs, not all of them effective
- Trade unions, NGOs, individual companies and government officials have submitted cases. Not individuals (yet)
- Non-binding dispute resolution, but often successful –perhaps because cases are published: 48% of admitted cases resulted in agreement between the parties, 37% in policy changes by the company
- Since 2000, NCP have received more than 425 cases (OECD 2019)



6. OECD Due Diligence Guidance for Responsible Business Conduct

Map the enterprise's operations, suppliers and other business relationships

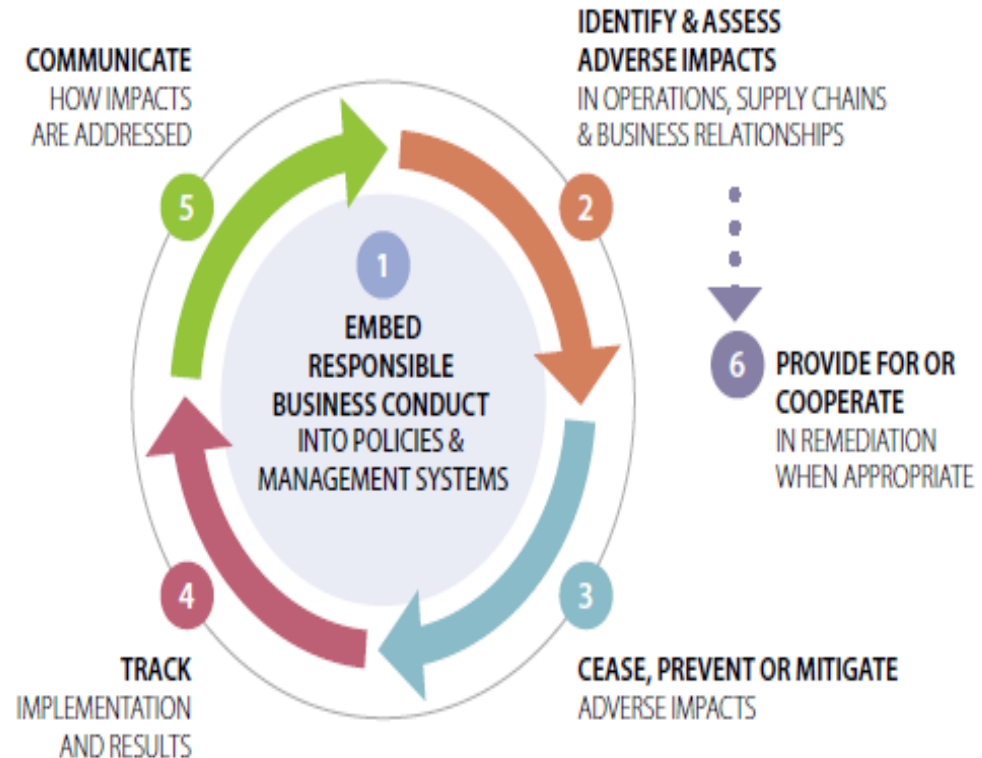
Gather information to understand risks related to the **sector, geography, enterprise** and identify adverse impacts

Identify which potential or actual impacts may be addressed immediately (e.g. update contract terms with suppliers, amend audit protocols to focus on risks that may have been previously missed during audits)

Take measures to prevent, cease or mitigate impacts

Monitor and track implementation and effectiveness of the enterprise's own internal commitments

Communicate on how impacts are addressed



In a nutshell...

- Origin:
 - Institutional (UN Guiding Principles, OECD Guidelines, OECD Due Diligence Guidance)
 - Private (ISO 26000)
 - Mixed (ILO Tripartite Declaration, Global Compact's governance framework)
- Focus on human rights, labour standards, environment, fight against corruption. Focus on due diligence
- Non-binding character (soft law). No dispute resolution framework (except NCP of OECD Guidelines for Multinational Enterprises)
- Important role in self regulation of the business / standard setting

II. Soft law instruments and actionable obligations on investors

1. Effect of the violation of investor's obligations on the international protection of the investment

OUTLINE

- Violation of the investor's obligations as bar to the jurisdiction of the tribunal or the admissibility of the claim
- Violation of the investor's obligations as ground for a counterclaim
- Violation of the investor's obligations as ground for reduction of compensation

Violation of the investor's obligation as bar to jurisdiction or to admissibility

Procurement of the investment by corruption or fraud

Breach of «*In accordance with host State law*» clauses = lack of jurisdiction

"The term investment means every kind of asset established or acquired by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter Contracting Party, including in particular, though not exclusively [...]"

(Finland-Nigeria BIT, Article 1(1))

See *Salini v Morocco*, *Inceysa v El Salvador*, *Tokios Tokelés v Ukraine* etc

Sometimes, even in the absence of such clause in the BIT = lack of jurisdiction or non-admissibility

Cortec Mining v Kenya: "States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws. ... [T]his condition – the conformity of the establishment of the investment with the national laws – is implicit even when not expressly stated in the relevant BIT".

Plama v Bulgaria: *Misrepresentation is contrary to applicable rules and principles of international law*

Violation of the investor's obligation as bar to jurisdiction or to admissibility (Cont'd)

Not any non-compliance is sanctioned

- A fundamental breach: *Tokios Tokeles v. Ukraine*
- A good faith mistake is tolerated: *Desert Line v. Yemen*
- Proportionality determination: *Kim v. Uzbekistan* (2017)
- Timing of the breach is relevant (at the procurement of the investment or during its lifetime): *Hamester v. Ghana*

Violation of the obligation as ground for a State counterclaim

Requirements

- Investor's consent
 - In the investment agreement or the procedural rules
- Link between the claim and the counterclaim
 - Legal basis in the relevant BIT
 - Factual nexus with the main claim

Violation of the investor's obligations as ground for reduction of compensation

Yukos v Russian Federation

The claimants' tax avoidance arrangements amounted to misconduct that contributed to the prejudice the Claimants have suffered.

The tribunal reduced the damages granted to the claimants by 25% in account of that misconduct.

2. What is the effect of soft law instruments in setting investors' obligations?

OUTLINE

- Incorporation of relevant standards in domestic law
- Incorporation of relevant standards in IIAs
- Application of relevant standards as “principles of international law”

Incorporation of relevant standards in IIAs

Several IIAs refer to relevant standards, but not as actionable obligations:

Argentina-UAE BIT (2018), Article 17:

“The Parties, being mindful of internationally-recognized corporate social responsibility standards, guidelines and principles, including the [OECD] Guidelines for Multinational Enterprises, shall endeavour to encourage enterprises doing business in its territory or subject to its jurisdiction to voluntarily include said standards, guidelines and principles.”

See also Brazil-Ethopia Agreement on Investment Cooperation and Facilitation, referring to the OECD Guidelines

Incorporation of relevant standards in IIAs (Cont'd)

Morocco-Nigeria BIT

ARTICLE 18

POST-ESTABLISHMENT OBLIGATIONS

1) Investments shall, in keeping with good practice requirements relating to the size and nature of the investment, maintain an environmental management system. Companies in areas of resource exploitation and high-risk industrial enterprises shall maintain a current certification to ISO 14001 or an equivalent environmental management standard.

ARTICLE 19

CORPORATE GOVERNANCE AND PRACTICES

- 1) In accordance with the size and nature of an investment,
 - a) Investments shall meet or exceed national and internationally accepted standards of corporate governance for the sector involved, in particular for transparency and accounting practices.

Application of relevant standards as “principles of international law”

The Example of corruption

“An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption” (Hamester v. Ghana, 18 June 2010)

See also Marlicorp v. Egypt, Metal-Tech v. Uzbekistan, Spentex v. Uzbekistan...

Questions?



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