

Sauvant, Karl P.; Ortino, Federico

**Research Report**

## The WTO Investment Facilitation for Development Agreement needs a strong provision on responsible business conduct

Columbia FDI Perspectives, No. 335

**Provided in Cooperation with:**

Columbia Center on Sustainable Investment (CCSI) - A joint center of Columbia Law School and the Earth Institute, Columbia University

*Suggested Citation:* Sauvant, Karl P.; Ortino, Federico (2022) : The WTO Investment Facilitation for Development Agreement needs a strong provision on responsible business conduct, Columbia FDI Perspectives, No. 335, Columbia University, Columbia Center on Sustainable Investment (CCSI), New York, NY

This Version is available at:

<https://hdl.handle.net/10419/263362>

**Standard-Nutzungsbedingungen:**

Die Dokumente auf EconStor dürfen zu eigenen wissenschaftlichen Zwecken und zum Privatgebrauch gespeichert und kopiert werden.

Sie dürfen die Dokumente nicht für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, öffentlich zugänglich machen, vertreiben oder anderweitig nutzen.

Sofern die Verfasser die Dokumente unter Open-Content-Lizenzen (insbesondere CC-Lizenzen) zur Verfügung gestellt haben sollten, gelten abweichend von diesen Nutzungsbedingungen die in der dort genannten Lizenz gewährten Nutzungsrechte.

**Terms of use:**

*Documents in EconStor may be saved and copied for your personal and scholarly purposes.*

*You are not to copy documents for public or commercial purposes, to exhibit the documents publicly, to make them publicly available on the internet, or to distribute or otherwise use the documents in public.*

*If the documents have been made available under an Open Content Licence (especially Creative Commons Licences), you may exercise further usage rights as specified in the indicated licence.*



## **Columbia FDI Perspectives**

Perspectives on topical foreign direct investment issues

Editor-in-Chief: Karl P. Sauvant ([Karl.Sauvant@law.columbia.edu](mailto:Karl.Sauvant@law.columbia.edu))

Managing Editor: Riccardo Loschi ([rl3083@columbia.edu](mailto:rl3083@columbia.edu))

*The Columbia FDI Perspectives are a forum for public debate. The views expressed by the authors do not reflect the opinions of CCSI or our partners and supporters.*

No. 335 July 11, 2022

### **The WTO Investment Facilitation for Development Agreement needs a strong provision on responsible business conduct**

by

Karl P. Sauvant and Federico Ortino\*

The negotiations on a WTO Investment Facilitation for Development Agreement are scheduled to conclude by the end of 2022. Negotiations are far advanced, and they have given considerable attention to advancing sustainable development.<sup>1</sup>

More could be done, of course. In particular, it is essential that an Agreement that is *for development*—as its title specifies—includes a clear and strong provision on responsible business conduct (RBC). This is key to help WTO members achieve their sustainable development, as RBC helps to minimize negative effects of FDI and increase its positive ones.

As all indications are that the WTO Agreement will have a provision on RBC, the challenge is to arrive at a clear and strong provision. This would be entirely consistent with a clear trend of corporate social responsibility (CSR) or RBC clauses becoming increasingly common in international investment agreements (IIAs).

Specifically, until ten years ago, express references to RBC or CSR in IIAs were rare. Today, they are commonplace: while only 3% of bilateral investment treaties (BITs) concluded in 2013 included an express reference to RBC or CSR, 70% of all BITs concluded between January 2020 and June 2022 (for which the text of the agreement is available) include such an express reference.<sup>2</sup> Similarly, while only 22% of all regional trade agreements (RTAs) concluded in 2008 contained an explicit CSR provision, 75% of those concluded in 2020 did.<sup>3</sup>

Importantly, CSR/RBC provisions are contained in IIAs between developed and developing countries and between developing countries, reflecting a consensus among states about their importance.

An example of the former is the provision in the 2020 [China-EU Comprehensive Agreement on Investment](#): “Each Party agrees to promote responsible business practices [...] taking into account relevant internationally recognised guidelines and principles, such as the UN Global Compact, the UN Guiding Principles on Business and Human Rights, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, and the OECD Guidelines for Multinational Enterprises” (Chapter IV.1-2).

In fact, some of the strongest provisions are contained in IIAs between developing countries. Thus, the 2021 [Congo-Rwanda BIT](#) provides: “Investors and their Investments must [...] maintain a system of environmental management that complies with recognized international standards for environmental management and good business practices” (Art. 16(1)) and the 2020 [Brazil-India BIT](#) stipulates: “Investors and their investments shall strive to achieve the highest possible level of contribution to the sustainable development of the Host State...” (Art. 12.1). The draft African Investment Protocol uses virtually the same strong (“shall”) language.

While the scope and enforceability of RBC provisions vary, an increasing number of IIAs refer to internationally recognized guidelines and principles, especially those mentioned in the China-EU Investment Agreement. Referencing such instruments is important: they reflect an international consensus as to what RBC is, hence enjoy legitimacy and, therefore, constitute a solid basis for the WTO negotiations. Moreover, although these instruments are voluntary in nature, their inclusion in binding IIAs strengthens their normative value. Furthermore, these instruments identify specific requirements for investors, including due diligence requirements for their supply chains.<sup>4</sup>

Recent IIAs contain similarly detailed—and additional—requirements in their RBC/CSR provisions. With regard to investors’ obligations vis-à-vis their supply chains, for example, Article 8.15.2(j) of the 2018 [Brazil-Chile FTA](#) states that “Investors and their investments should develop their best efforts to [...] encourage, as far as possible, that its business partners, including suppliers and contractors, apply the principles of business conduct compatible with the principles set forth in this Article” (see also [Brazil-India BIT](#), Article 12.2(j)).

On stakeholder consultations, for example, Article 19.1(b) of the 2016 [Morocco-Nigeria BIT](#) states that “Investments shall establish and maintain, where appropriate, local community liaison processes, in accordance with internationally accepted standards when available.”

On the exchange of information among treaty parties, for example, Article 8.7 of the 2018 [Ecuador-EFTA FTA](#) provides that “[t]he Parties shall encourage corporate social responsibility practices [...]. To this end, the Parties agree to exchange views and may consider, jointly or bilaterally, cooperation in this area.”

These internationally-agreed requirements have also inspired national actions, such as the [German Supply Chain Act](#) and the recently proposed [Due Diligence Directive of the EU Commission](#). More of such regulatory actions are likely to follow.

In sum, including RBC provisions in IIAs is clearly entirely within the trend of international investment rulemaking. They are a requirement for any up-to-date, modern investment agreement.

Hence, *not* to include clear and strong language on responsible business conduct in a WTO Investment Facilitation *for Development* Agreement would sadly fall behind best practice in international investment rulemaking.

---

\* Karl P. Sauvant ([karlsauvant@gmail.com](mailto:karlsauvant@gmail.com)) is Resident Senior Fellow, Columbia Center on Sustainable Investment, a joint center of Columbia Law School and the Earth Institute, Columbia University; Federico Ortino ([federico.ortino@kcl.ac.uk](mailto:federico.ortino@kcl.ac.uk)) is Professor of International Economic Law, King's College London. The authors wish to thank Manjiao Chi, Peter Muchlinski, Catherine Titi, and Katia Yannaca-Small for their helpful peer reviews.

<sup>1</sup> Karl P. Sauvant, "[How would a future WTO Agreement on Investment Facilitation for Development encourage sustainable FDI flows, and how could it be further strengthened?](#)," in Kabir Duggal et al., eds., *What Does It Mean to be "Pro Arbitration"?: Reflections on George Bermann's Legacy by Columbia Law School Community* (forthcoming 2022).

<sup>2</sup> [UNCTAD's website and mapping](#).

<sup>3</sup> José-Antonio Monteiro, "[Buena vista: Social corporate responsibility provisions in regional trade agreements](#)," *WTO Staff Working Paper* (2021), p. 5.

<sup>4</sup> [Guiding Principle 13\(b\)](#) and commentary; [OECD Guidelines](#), Chapter II, paragraphs A12, A13 and B2; [Global Compact](#), Principles 1 and 2 and commentary.

*The material in this Perspective may be reprinted if accompanied by the following acknowledgment: "Karl P. Sauvant and Federico Ortino, 'The WTO Investment Facilitation for Development Agreement needs a strong provision on responsible business conduct,' Columbia FDI Perspectives No. 335, July 11, 2022. Reprinted with permission from the Columbia Center on Sustainable Investment (<http://ccsi.columbia.edu>)."* A copy should kindly be sent to the Columbia Center on Sustainable Investment at [ccsi@law.columbia.edu](mailto:ccsi@law.columbia.edu).

For further information, including information regarding submission to the *Perspectives*, please contact: Columbia Center on Sustainable Investment, Abigail Greene, [avg2129@columbia.edu](mailto:avg2129@columbia.edu).

The Columbia Center on Sustainable Investment (CCSI), a joint center of Columbia Law School and the Earth Institute at Columbia University, is a leading applied research center and forum dedicated to the study, practice and discussion of sustainable international investment. Our mission is to develop and disseminate practical approaches and solutions, as well as to analyze topical policy-oriented issues, in order to maximize the impact of international investment for sustainable development. The Center undertakes its mission through interdisciplinary research, advisory projects, multi-stakeholder dialogue, educational programs, and the development of resources and tools. For more information, visit us at <http://ccsi.columbia.edu>.

#### **Most recent Columbia FDI Perspectives**

- No. 334, Emmanuel Kolawole Oke and Olufunmilola Olabode, "International investment law, intellectual property and development," *Columbia FDI Perspectives*, June 27, 2022
- No. 333, Luca Jobbágy, "BEPS reform: The end of fiscal incentives to attract FDI?," *Columbia FDI Perspectives*, June 13, 2022
- No. 332, Katia Yannaca-Small, "Shaping responsible business conduct through a Multilateral Treaty on Due Diligence," *Columbia FDI Perspectives*, May 30, 2022
- No. 331, Crina Baltag, "Denying the benefits of the Energy Charter Treaty: Shifting the policy or just the burden of proof?," *Columbia FDI Perspectives*, May 16, 2022
- No 330, Karl P. Sauvant and Rebecca Chacon Naranjo, "WTO processes would benefit from the input of civil society", *Columbia FDI Perspectives*, May 8, 2022

All previous FDI Perspectives are available at <https://ccsi.columbia.edu/content/columbia-fdi-perspectives>.