



Trade Union
Advisory Committee
to the OECD
*Commission
syndicale consultative
auprès de l'OCDE*

TUAC contribution to OECD public consultation on business responsibilities and investment treaties

Paris, 17 February 2020

Key messages

- The positive impact of liberalised trade and investment flows on sustainable development does not materialise automatically. A strong social framework is required, ensuring that workers' fundamental rights to join a trade union and to bargain collectively can be exercised.
- Avenues for more coherent and effective responsible business conduct should be explored. The OECD is in a unique position to produce models that can be used by policy-makers to interpret RBC clauses in existing treaties and to negotiate new ones.
- TUAC emphasises three priorities for future work. 1. Countries should actively be reminded of their duties to regulate. 2. Foreign investors should observe RBC standards in their supply chains in order to benefit from treaty coverage. 3. Every international agreement should contain enforceable provisions guaranteeing the respect of fundamental social rights. Whilst the inclusion of human rights and labour clauses in trade and investment agreements is more accepted, their enforceability remains indeed a major concern.

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Introduction

On 15 January 2020, the OECD launched a public consultation on “[business responsibilities and investment treaties](#)”. The consultation paper describes developments at national and international level in the area of business responsibilities that may influence trade and investment policies. The OECD seeks public input both on the background information provided in the paper, and how to take this work forward.

The following includes the comments by the TUAC following an internal consultation of its members. A first section summarises TUAC policy objectives on investment agreements. The second section provides specific remarks on the consultation paper. The final section lays down TUAC priorities for future work in this area.

TUAC agrees to the publication of this response.

General remarks

TUAC welcomes this public consultation and the opportunity to provide input to future OECD activities. TUAC’s policy objective is to ensure that domestic and international investment policies support sustainable development, inclusive growth and enhanced protection for workers’ rights.

The trade union movement has long been expressing strong concerns about the excessive focus of international investment agreements (‘IIAs’) on the protection of private interests of investors, leaving aside the wider public interest and workers’ rights in particular. The positive impact of liberalised trade and investment flows on sustainable development does not materialise automatically.

As an illustration, the OECD has revealed in a recent report that the increased productivity enjoyed by foreign firms do not fully translate into better wages for workers. FDI also tend to be associated with lower job security and greater gender inequalities¹.

In an earlier analysis of the societal benefits and costs of IIAsⁱⁱ, the OECD found little evidence of positive impact of investors' protection. The paper noted that even if treaties contain language on responsible business conduct, such references are weak and not directed to individual investments themselves. Furthermore, the number of investors' claims increased over the past decades in particular against countries with a reputation for good governance.

A real challenge is therefore to ensure that benefits for firms go hand-in-hand with decent working conditions and wage growth. For this, a strong social framework is required and it is in particular essential to ensure that workers' fundamental rights to join a trade union and to bargain collectively can be exercised. As underlined by the OECD in a 2019 report, collective bargaining and workers' voice are key labour rights which improve labour market performanceⁱⁱⁱ.

The consultation paper takes a broad approach to the notion of responsible business conduct ('RBC'), having regard to *the positive contribution businesses can make to sustainable development and inclusive growth, and avoiding adverse impacts on others and addressing them when they occur*.

Among the applicable standards, TUAC wishes to underline the importance of workers' rights enshrined in the ILO Core Conventions, in particular Conventions C98 and C87. Fundamental social rights must be applied by investors and governments alike.

The observance of these fundamental rights is reflected in Chapter V of the OECD Guidelines for Multinational Enterprises. For future work, TUAC encourages the OECD to explore how trade and investment treaties can leverage the implementation of these standards.

Specific remarks on the consultation paper

The consultation paper emphasises in several places the potential role of businesses in making a vital contribution to sustainable development and inclusive growth. The paper could usefully add that trade unions should also play a vital role, as they are instrumental in guaranteeing decent work. This is important as for future work TUAC recommends that particular attention is paid to workers' rights.

The consultation paper assumes that the number of NCP proceedings is increasing (paragraph 24). This only tells part of the story. More than half of the cases in 2018 were rejected and did not proceed. This warrants a reflection on how to link investment treaties and effective RBC procedures.

In the section describing US developments on procurement (section 4.1.5), it would be useful to add references to the practice of local public authorities to incorporate labour peace requirements into public procurement processes at airports and hotels. Such provisions require contractors to mitigate risks of labour disputes and deliver continuous services and revenue to the government authority. The involvement of trade unions is essential in this regard.

TUAC recommendations for future work

The consultation paper lists the numerous RBC initiatives that exist or are about to emerge at national and regional levels. No less than nine OECD countries have introduced in their laws various forms of due diligence requirements. The EU, representing 27 jurisdictions, is currently exploring the possibility of enacting a standard of its own.

This variety of regulations is challenging. Some approaches are horizontal, others issue-specific. The affected business organisations are not the same because thresholds and scopes are so diverse. Various reporting standards are also widespread throughout the OECD.

There is an obvious case for a level playing field: upward convergence between all the applicable standards would guarantee legal certainty and fair competition conditions for all. Above all, TUAC wishes to emphasise the cost of non action. As long as workers do not perceive the economic and social benefits of trade and investment flows, distrust, economic resentment and entrenched policies will continue to grow.

Furthermore, whilst social and sustainability chapters are increasingly included in trade and investment agreements, their enforcement is largely insufficient. Unsurprisingly, the consultation paper notes that whilst most national action plans on business and human rights address trade and investment treaties, they do so in very general terms, without detailed commitments nor ideas for practical solutions.

In this context, TUAC welcomes the work on business responsibilities in trade and investment treaties, and encourages the OECD to explore further avenues for more coherent and effective responsible business conduct. TUAC recommends that the OECD aims at producing models that can be used by policy-makers to interpret RBC clauses in existing treaties and to negotiate new ones.

TUAC strongly encourages the OECD to reflect in particular on the following three trade unions priorities.

Domestic policy space

IAs with fair and equitable treatment clauses and other investor protections undermine governments' competence to regulate in the public interest. IAs should no longer expose countries to liabilities for regulating workers' rights, and quality and sustainable public services.

Furthermore, a pitfall to avoid is to consider that corporate social responsibility clauses in IAs can satisfactorily replace governments' regulatory obligations and competence. While corporate self-regulation is welcome, countries should actively regulate and enforce labour protections without limitations from IAs. Such obligations apply equally to home and host countries. Home countries should in particular ensure that the MNEs headquartered in their territory abide by high standards when doing business abroad by requiring due diligence and remedy responsibilities.

Pre-conditions for access trade & investment benefits

International agreements should ensure that foreign investors do observe RBC standards in their supply chains in order to benefit from treaty coverage. The OECD is in a unique position to offer an effective framework in this regard.

The OECD guidelines for multinational enterprises foresee that enterprises carry out due diligence to “identify, prevent and mitigate actual and potential adverse impacts” on matters covered by the guidelines. Enterprises should also account for how these impacts are addressed.

Trade union engagement in that process is indispensable to guarantee that effective due diligence process is taking place. For companies, trade unions’ involvement at the pre-investment stage can also serve to guarantee of social peace and lessened reputational risks.

Enforceable labour rights

Every international agreement should contain social provisions guaranteeing the respect of fundamental social rights. Employment and Industrial Relations Chapter V of the OECD Guidelines for MNEs, and the references to ILO Conventions, offer good model for doing this.

Whilst the inclusion of human rights and labour clauses in trade and investment agreements is more accepted, their enforceability remains a major concern. As the consultation document rightly underlines, labour provisions are usually not subject to dispute settlement and there are no provision applicable to companies. It should therefore be explored how state-to-state dispute settlements could offer appropriate mechanisms for enforcement.

Sanctions should also be explored as an integral part of complete, dissuasive enforcement mechanisms. As a matter of principle, the sustained violation of fundamental social rights should be considered unfair competition, akin to unlawful state aid.

It is important to simultaneously devise dispute resolution and prevention mechanisms. Pre-conditions for access to treaty benefits, in partnership with trade unions, should be fundamental work.

ⁱ OECD (2019), *FDI Qualities Indicators : measuring the sustainable development impacts of investment*

ⁱⁱ OECD (2018) “Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence” See also [TUAC evaluation](#)

ⁱⁱⁱ OECD (2019), *Negotiating Our Way Up: Collective Bargaining in a Changing World of Work*