

Promoting economic and social development through an innovative investment framework: the multidimensional role of CFIA's

Promovendo desenvolvimento econômico e social através de uma inovativa estrutura regulatória de investimentos: o papel multidimensional dos ACFls

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Abstract: Within a globalized economy and its value chains, the economic performance of a country is strongly affected by foreign investments. The regulation of this cross-border capital flow through international instruments negotiated and celebrated in order to facilitate, boost and protect foreign investments demonstrates its potential to shaping the insertion of foreign investments in the host country beyond a profit perspective. In the era of digital and technological revolution, innovative businesses can also arise from a sustainable approach, which is both morally and socio-economically desirable. In Brazil, the investment agreements have been, in the recent years, negotiated through the so-called Cooperation and Facilitation Investment Agreements (CFIAs). So why not use this important mechanism to build, at once, a more responsible, efficient and innovative system? It urges that International Investment Law is brought into this debate, leading the way to incorporating socially responsible corporate conducts into the productive economic process by both States and investing

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economic agents. This study seeks, therefore, to evaluate Responsible Business Conduct in its interrelation with investment mechanisms that can both attract and facilitate investment and also promote economic and social development.

Keywords: Foreign investment. Digital and technological revolution. Innovative business. CFAs. Responsible business conduct. Economic and social development.

Resumo: Em uma economia globalizada e suas cadeias globais de valor, o desempenho econômico de um país encontra-se fortemente vinculado aos investimentos estrangeiros. A regulamentação desse fluxo transfronteiriço de capitais por meio de instrumentos internacionais negociados e celebrados para facilitar, impulsionar e proteger os investimentos estrangeiros revela o enorme potencial destes mecanismos para modular uma inserção de investimentos estrangeiros no país receptor sob uma perspectiva que vai além do lucro. Na era da revolução digital, negócios inovadores também podem surgir de uma abordagem sustentável, o que é a um só tempo moral e socioeconomicamente desejável. No Brasil, o modelo de negociação e atração de investimentos adotado foi o chamado Acordo de Cooperação e Facilitação de Investimentos (ACFIs). Então por que não se valer deste importante mecanismo para tornar o sistema, a um só tempo, mais responsável, eficiente e inovador? Para tanto, é premente que o Direito Internacional dos Investimentos seja trazido para o debate da conscientização dos Estados e agentes econômicos investidores quanto à necessidade de se incorporar, ao processo produtivo, uma conduta corporativa socialmente responsável. Por meio deste estudo procura-se, então, avaliar a Responsabilidade Social Corporativa e o potencial da inserção de cláusulas correlatas aos ACFIs, de modo a se atrair e facilitar investimentos e, ao mesmo tempo, promover desenvolvimento econômico e social.

Palavras-chave: Investimentos estrangeiros. Revolução tecnológica. Negócios inovadores. ACFIs. Responsabilidade social corporativa. Desenvolvimento econômico e social.

Summary: **1** Introduction – **2** CFAs: potential mechanism to enhance economic and social transformation – **3** Responsible Business Conduct – **4** Responsible Business Conduct applied to Foreign Investments – **5** Responsible Business Conduct measures around the globe – Conclusion – References

To be human is to be responsible; [...] to be aware, when setting one stone, that you are building a world.
(Antoine de Saint-Exupéry)

1 Introduction

The economic performance of a country, in the era of globalized economy and its value chains, is strongly linked to foreign investments, which expands an economy's productive capacity, drives job creation and boosts income growth. Investment becomes central not only to the economy, but also to a sustainable development. The effectivity of this interrelation, however, depends firmly on an adequate regulation of foreign investments acting as an engine for economic and social transformation. An adequate investment framework may mobilize capital and channel resources towards enhancing local skills and technology, contributing to the highest possible respect to human rights and the establishing of a business anticorruption ethics.

International Investment Law must, then, continuously evolve to provide instruments fostering Environmental, Social and Governance (ESG) investments, ones that will surpass the traditional economic and financial metrics and, thus, stimulate holistic economic activities. At long last, in the era of digital and technological revolution, innovative businesses can also arise from a sustainable approach, which is both morally and socio-economically desirable. Responsible Business Conduct (RBC), according to this insight, is set out as a multidisciplinary approach that has been gaining ground in investment agreements signed internationally. Widely disseminated in international forums, RBC gathers principles and standards aimed at harmonizing the economy, society and the environment, in order to integrate social and environmental issues into economic activities, establishing obligations that are ancillary to its practice, in order to frame value driven businesses.

This internationally rising tendency is fostered by guidelines established by renowned studies from international organizations, such as the United Nations (UN), the Organization for Economic Cooperation and Development (OECD) – which recommend the implementation of RBC accessory obligations into economic activity, including in the foreign investment domain. The guidance is aimed not only at interested parties, but also at public policy makers; private agents and the government; stakeholders and policymakers. Meanwhile, bilateral and multilateral instruments have already been negotiated and celebrated encompassing RBC clauses.

Given that, in Brazil, instruments used to promote and protect foreign investments are currently negotiated under the model of Cooperation and Investment Facilitation Agreements (CFIAs), this study aims at evaluating Responsible Business Conduct in relation with CFIAs, evidencing that the alignment of investment agreements negotiated under RBC clauses can guide business towards a more sustainable perspective. The unrestrained search for profit adds a markedly individualistic bias to the economic process. However, the private interest saga must be marked out in the light of society, environment, human and labor rights, which is what this study tries to demonstrate and stimulate.

2 CFIAs: potential mechanism to enhance economic and social transformation

The economic performance of a country, as said, is strongly influenced by foreign investments: they expand and diversify the market of the host country as, simultaneously, foster greater economic development. In order to regulate this cross-border capital flow, international instruments have been negotiated and signed to facilitate, boost and protect foreign investments, giving the coordinates on which the economic activities will occur. In Brazil, the investment negotiation and

attraction model has been adopted through the so-called Investment Cooperation and Facilitation Agreements (CFIAs).

Despite the fact that the Brazilian State has not followed the trend of the Latin American community that, in the 1990s, broadly celebrated bilateral investment agreements, usually under the so-called Bilateral Investment Agreements (BITs), the Brazilian strategy has been revisited in view of the increase of national investments abroad, which demand legal certainty, clarity and predictability of the treatment to be received in the host country, as well as the non-commercial risks involved in the transactions – aspects directly related to the legal scenario of the place where the investment will take place.¹ A thorough review of the old treaties was carried out by Brazilian agents, having been evaluated the unfavorable aspects and the main criticisms related in order to adapt the instruments to the limits of domestic regulation in the countries involved and decrease the negative side effects, which gave rise to the CFIAs as known today.

The three central pillars of CFIAs can be pointed as: (i) achieving institutional governance; (ii) instituting mechanisms for mitigation of risks and prevention and resolution of disputes and (iii) promoting the facilitation of investments through thematic agendas.² Therefore, the result of this elaboration was an agreement for the facilitation of investments abroad, which encourages cooperation between the Parties, mitigates existing risks and preservation of the Parties' policy space, and also contemplates an agenda for sustainable development, containing rules on social responsibility, environment and corruption, even if their nature is merely exhortatory.

Through CFIAs, investment facilitation is based on a dynamic and continuous interaction between the parties, with the creation of an institutional governance structure (Joint Committee and Ombudsman) responsible for promoting cooperation between governments between each other, as well towards investors. Therewith, CFIAs encompass a preventive mechanism chosen to settle disputes, focused on the Ombudsman as a first step to settling disputes, followed by the submission of the matter to a Joint Commission, remaining necessary diplomatic protection to bring a dispute to international level.

As for the thematic agenda, they include guidelines towards sustainability. According to the United Nations Conference on Trade and Development (UNCTAD), this forecast follows a worldwide trend of the latest trade agreements promotion

¹ DIAS, Bernadete de Figueiredo. *Investimentos Estrangeiros no Brasil e o Direito Internacional*. Curitiba: Juruá, 2010, p. 193.

² BRASIL. Ministério da Economia. *Acordos de Cooperação e Facilitação de Investimentos – ACFIs*. Sítio oficial da Secretaria Executiva da Câmara de Comércio Exterior – CAMEX – Ministério da Economia, [2020?]. Disponível em: <http://www.camex.gov.br/negociacoes-comerciais-internacionais/acordos-de-cooperacao-e-facilitacao-de-investimentos-acfi>. Acesso em: 13 dez. 2020.

and protection³ of investments signed since 2014, when emphasized the purpose of generating economic growth combined with reducing poverty, creating jobs, expanding productive capacity and promoting human development, all in addition to promoting technology transfer. CFAs follow this trend, by establishing “cooperation agendas in areas that improve the investment environment, such as business visas, foreign exchange remittances, technical and environmental regulation, logistics and transport”, according to Carlos Cozende, ⁴ member of the Brazilian Foreign Affairs Ministry.

Therefore, the improvement of the investment environment through CFAs reveals its potential to, as an instrument adjusted towards a Responsible Business Conduct, attract economic growth linked to social development. The comprehension of this important interrelation presupposes the understanding of Responsible Business Conduct such as conceived in the international arena.

3 Responsible Business Conduct

According to the OECD, “Responsible business conduct (RBC) entails above all compliance with laws, such as those on respecting human rights, environmental protection, labor relations and financial accountability, even where these are poorly enforced”.⁵ The concept involves a multidisciplinary approach applied to the economic process, while aims at harmonizing economy, society and the environment by introducing social and environmental responsibilities into economic activities and finally creating value driven businesses.

This implies the active participation not only of private stakeholders, but also from States, since governments are able to provide and stimulate business to navigate responsibly, while providing tools, incentives, and adequate framework. A legal environment for responsible businesses will induce companies towards it, bringing lasting benefits to societies in which they operate.

In this regard, international initiatives, and guidelines such as the ones from the United Nations (UN) and the Organization for Economic Co-operation and Development (OECD), have been developed linking Corporate Social Responsibility to the economic process.

³ UN Conference on Trade and Development. World Investment Report 2015: reforming international investment governance. Geneva: UNCTAD, 2015.

⁴ COZENDEY, Carlos Marcio Bicalho. Um balanço até aqui dos acordos de investimentos. Available in: <http://antigo.itamaraty.gov.br/pt-BR/discursos-artigos-e-entrevistas-categoria/outras-autoridades-artigos/16357-um-balanco-ate-aqui-dos-acordos-de-investimentos-embaixador-carlos-marcio-cozende-valor-economico-29-05-2017>. Accessed in: 13 out. 2020.

⁵ OCDE. Policy Framework for Investment. Available in: <https://www.oecd.org/investment/toolkit/policyareas/responsiblebusinessconduct/> Accessed at: 05 January 2020.

3.1 United Nations Global Compact Guide to Corporate Social Responsibility

In order to understand Corporate Social Responsibility as an ancillary element to be added to economic activities, then also to foreign investments, it is useful to revisit the main initiatives and guidelines already signed on the subject at the international level.

The United Nations (UN) Global Compact initiative was created in 2000. Striving for a profound change in world business management from a corporate responsibility perspective, it pursued at disseminating good corporate measure around the globe. Today, it is considered the world's largest global corporate sustainability initiative.

The urgency of adopting corporate social responsibility policies has led the UN Global Compact to elaborate, in 2014, a Guide to Corporate Sustainability⁶ in which provides clear directives to the corporate sector and also to governments in the aforementioned areas. It is aimed, fundamentally, at exhortation companies to align their strategies and actions with universal principles in the areas of Human Rights, labor, environment and anti-corruption, by facing underlying challenges and mitigating the damages that their activities might cause or contribute to cause.

The Guide stresses 5 (five) main guidelines for companies to conduct their activities sustainably. One of them consists of *Strengthening society*. To this end, companies should enhance proactivity in the social context in which they operate, providing support for the societies around them, by facing important issues such as poverty, disqualified workforce and scarcity of resources. The alignment of core business activities, philanthropy and advocacy campaigns sustainable goals are strongly recommended.

Leadership commitment is another pillar established by the UN Global Compact. The change in business conduct begins with the leadership of the company according to the UN which gives leaders a central position on committing to sustainability. If this is the case, sustainability measures requires long-term commitment from leaders in order to enable adjustments to sustainable policies and practices throughout the organization, as well as alignment with government practices, training and motivating employees, encouraging sustainability for the supply chain.

Reporting progress is also stated as a corporate sustainability guideline, by which transparency in the conduct of corporate activities is encouraged. As an accountability measure, to elaborate periodical reports contributes to providing the company's stakeholders with an account of their efforts, helping to direct corporate

⁶ UN Global Compact. Guide to Corporate Sustainability. UN Publishing, 2014.

strategies, inform community and stakeholder dialogues and also better orienting the investor decision-making.

As a fourth guideline, the UN Guide encourages the company's engagement through *Local actions*, given that social proactivity and effectivity depends on collaborating with local community. In order to do so, the specific local features must be taken into account. Although the principles of the Global Compact are universal, companies exist and act within communities with highly variable characteristics, which conditions the types of problems faced and the way to combat them.

Finally, *Principled business* is the ultimate guideline set by the United Nations in favor of socially responsible conduct. To this end, the UN Guide asserts integrity as a key bastion, which includes respecting fundamental responsibilities in the areas of human rights, labour, environment and anticorruption. Regardless of size, complexity or location, the Global Compact indicates 10 (ten) principles that should govern any and all businesses intended to be socially sustainable, namely:

1. Business should support and respect the protection of International Human Rights and
2. Make sure that they are not complicit in human rights abuse
3. Businesses should uphold the freedom of association and the effective recognition of the right to collect bargaining
4. The elimination of all forms of forced or compulsory labor
5. The effective abolition of child labor;
6. The elimination of discrimination in respect of employment and occupation;
7. Bussinesses should support a precautionary approach to environmental challenges;
8. Undertake initiatives to promote greater environmental responsibility;
9. Encourage the development of environmental friendly technologies.
10. Businesses should work against corruption in all its forms, including extortion and bribery.

Assembling elements from the Universal Declaration of Human Rights, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption, the The UN Global Compact, its Guide and the aforementioned vector principles elucidates, orientates and stimulates the urge for Responsible Business Conduct.

3.2 OECD Guidelines for Corporate Social Responsibility in Multinational Enterprises

On the basis of previous corporate social responsibility guidelines, notably the ones stressed under the aegis of the UN Global Compact Guide to Corporate Sustainability, several other international initiatives have deepened and expanded the subject. The OECD, in turn, has stood out by promoting extensive research to strengthen social responsibility amongst the corporate environment. In 2011, the Organization launched the *OECD Guidelines for Multinational Enterprises* (OECD Guidelines).⁷

This study aim at promoting economic, environmental and social progress around the world, especially in the following areas: transparency; humanity; employment and industrial relations; environment; combating corruption and related illicit acts; consumer rights; science and technology; competition; and taxation. The diversity of issues involved under the OECD Guidelines denotes the transversality approach embedded in the RBC rationale. In fact, it is considered the only comprehensive code on RBC adopted, at the multilateral level, by the most numerous adherent governments, namely: all OECD members, as well as Brazil, Argentina, Egypt, Latvia, Lithuania, Morocco, Peru and Romania. Together, these governments are host to a large part of foreign direct investment.

This study was followed by the *OECD Due Diligence for Responsible Business Conduct*, in 2018.⁸ Providing plain language explanations towards the implementation of the OECD Guidelines, its recommendations and associated provisions and highlighting the benefits of this: to avoid and address adverse impacts related to workers, human rights, the environment, bribery, consumers and corporate governance that may be associated with their operations, supply chains and other business relationships. Due diligence, according to the OECD, involves embed responsible business conduct into policies and management systems; identifying and assessing actual and potential adverse impacts associated with the enterprise's operations, products or services; ceasing, preventing and mitigating adverse impacts; tracking implementation and results; communicating how impacts are addressed; and providing for or cooperating in remediation when appropriate.

Altogether, the OECD studies seek to harmonize business operations and government policies; reinforce mutual trust between companies and societies in which they operate; increase the private sector's contribution to sustainable development, as well as improve the investment environment. As *recommendations*, they provide principles and standards; but, on the other hand, encompass a binding

⁷ OCDE. *OECD Guidelines for Multinational Enterprises*. Paris: OECD Publishing, 2011.

⁸ OCDE. *OECD Due Diligence for Responsible Business Conduct*. Paris: OECD Publishing, 2018.

compromise for adherents concerning their implementation, so that its internalization is recommended through national laws, as well as international commitments.⁹

In fact, the engagement towards the effective adoption of RBC clauses in the field of foreign investments, rises from the annex of the OECD Guidelines: “Declaration on Foreign Investment and Multinational Companies”. This Declaration recognizes foreign investment as being of great importance to the world economy, with the potential to significantly contribute to the development of countries. On the other hand, it also recognizes multinational companies as having an important role in this investment and subsequent development process. Therefore, the Declaration encourages the adoption of a socially responsible approach by multinational companies in conducting their foreign investments, given its notable potential to promote economic, social and environmental progress.

In addition to the abovementioned international initiatives, several others set out important guidelines for corporate social responsibility, mention should be made, notably: *Responsible business conduct and human rights, from the OECD*; *OECD Due Diligence Guidance for Responsible Business Conduct*; *OECD Policy Framework for Investment*; *7 OECD Policies towards RSC*; *UN Guiding Principles Business, UN*; *UN Principles for Responsible Investment, UN*; *ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*; and *ILO Declaration on Fundamental Principles and Rights at Work (1998)*, by the ILO; the *ISO 26000 - Guidance on Social Responsibility*, from the International Organization for Standardization (ISSO); and *IFC Performance Standards*, International Finance Corporation.

4 Responsible Business Conduct applied to Foreign Investments

As seen, socially responsible business conduct implies compliance with human rights, environmental protection, labor relations as well as the adoption of measures against corruption. Although companies have the ultimate decision whether to act responsibly or not in the given areas, States are granted the duty to protect and safeguard the public interest, playing an important role in shaping a structure that

⁹ OCDE. v. According to the Preface of OECD Guidelines for Multinational Enterprises: “The Guidelines provide voluntary principles and standards for responsible business conduct consistent with applicable laws and internationally recognized standards. However, the countries adhering to the Guidelines make a binding commitment to implement them in accordance with the Decision of the OECD Council on the OECD Guidelines for Multinational Enterprises. Furthermore, matters covered by the Guidelines may also be the subject of national law and international commitments” (OCDE. *OECD Guidelines for Multinational Enterprises*. Paris: OECD Publishing, 2011, page 15).

allows and encourages socially responsible businesses, a steady economic growth and sustainable development.

In its role as regulators, States might then establish a regulatory framework adequate to RBC guidelines, integrating them into the investment policy framework and creating a favorable environment for sustainable businesses deriving from foreign investments. OECD has, in this regard, formulated a *Policy Framework for Investment*,¹⁰ in which international good practices are suggested through guidelines aimed at improving the capacity of a country to enable a qualified environment for investment.

The study was formulated upon the urge to strengthen the international and national environments in which economic activity is conducted. Key policy issues must be set out, notably the ones that drive investment according to social awareness, building shared values of democratic society and respect for human rights. In order to improve the development benefits of investments to society, appropriate roles and responsibilities for governments should be firmly fixed, along with the ones assigned to business, civil society and others focusing on promoting development and poverty reduction.

Governments are then urged to elaborate an effective set of policies, providing a framework conducive to responsible corporate action that will enable companies to more easily protect the public interest by aligning economic activities with environmental and social consciousness. To that effect, OECD proposes measures to States based on *regulating, facilitating, cooperating, promoting and exemplifying*.

Regulating implies States establishing and implementing an adequate legal framework that protects the public interest and supports RBC. This set of rules might also provide for monitoring business performance and compliance from well-defined milestones, ensuring sufficient resources to for that end in order to sufficiently curb violations. In this sense, the OECD understands that it is the duty of governments to provide a legal and regulatory framework in the areas of human rights, employment and labor, the environment, anti-corruption, consumer interests - sectors that can be severely impacted through activities conducted irresponsibly. *Facilitating* demands communicating clearly and efficiently the notions and expectations about RBC, by providing guidance and support to companies regarding their respective regulatory regimes. This contributes to the identification and removal of barriers that hinder the acceptance of RBC by the corporate sector.

In turn, *Co-operating* requires States to act both domestically and internationally. Internally, within the public organizational structure; as well as towards foreign governments. The process of defining and implementing RBC, given its far-reaching

¹⁰ OECD, *Policy Framework for Investment 2015 Edition*, Paris: OECD Publishing, 2015.

impacts, requires consultation and cooperation between all relevant stakeholders – including government, companies, workers, civil society and local community organizations. From that perspective co-operation will ensure internal and external coherence, allowing for building harmonic policies according to widely recognized instruments (for example, OECD Guidelines for Multinational Enterprises, the UN Guiding Principles for Business and Human Rights).

The act of *Promoting*, in turn, requires State supporting for best RBC practices. In addition to enacting and enforcing regulations that protect the public interest underlying RBC, governments may encourage correlated non-governmental initiatives. The OECD suggests, then, that governments encourage the achievement of specific public interest goals by granting tax benefits to companies that add a positive contribution to economic, environmental and social progress. Another form of incentive would be for governments establishing RBC-related procurement criteria, rather than simply establishing legal contract obligations. In addition, governments can also recognize RBC best practices through annual awards.

Finally, *Exemplifying* requires States to act responsibly when performing as an economic actor. By exemplifying RBC through States' own operations, the government increases its legitimacy when setting recommendations to private economic actors and businesses. The OECD, with this Policy Framework, engages States to pay special attention to protecting human rights of those involved in the investor activities; to encouraging local capacity, through cooperation with the local community; to facilitating the development of human capital, by stimulating job creation as much as possible; to instituting principles of good corporate governance; and, furthermore, to implementing self-regulatory systems to foster the relationship of mutual trust between the companies and the societies in which they operate.

5 Responsible Business Conduct measures around the globe

Although the aforementioned international guidelines on RBC have a prevalently *soft law* nature, not generating by itself international legal obligations, they have inspired and guided administrative measures, court decisions and national legislation adopted in the national level. First of all, countries are increasingly incorporating RBC in the form of *hard law* instruments and, thus, attributing companies the *duty of diligence* regarding the consequences of their activities in social, human, environmental and labor domain. This *diligence* aims at preventing adverse impacts from economic activities and, when occurred, enables companies to, timely and effectively, provide remedy, if caused or somehow facilitated by them.

The OECD Trade Union Advisory Committee (TUAC),¹¹ for example, states that it is government's responsibility to make it mandatory for companies to implement due diligence audits, which would lend itself to assess the observance or not of the corporate responsibility contained in the OECD Guidelines, establishing binding obligations for the engagement of stakeholders in its implementation. Furthermore, TUAC calls governments to introduce binding due diligence clauses in trade and investment agreements, export credits, development finance and public procurement. In fact, to strengthen policy coherence, a whole of measures must be aligned and coherent with the same purpose, which extrapolates the scope of national legislation, since binding investment agreements, as seen, play a decisive role on conduction the underlying economic activities.

Likewise, France introduced a legislation imposing a "surveillance plan" (plan de vigilance) on companies, which implies the duty to promote internal audits regarding the observance or not of human and environmental rights. This was stated in art. L. 225-102-4,¹² of the French Commerce Code, through a modification introduced by Ordonnance n° 2017-1162 du 12 Juillet 2017 – art. 11. By means of this provision, a legal obligation is imposed on companies to adopt reasonable due diligence measures capable of identifying risks and preventing serious violations of human rights and fundamental freedoms, including human health and safety and the environment which may arise either directly from the main company's activities, as well as from companies controlled, subcontractors or suppliers.

In Switzerland, a popular initiative project promoted by a coalition of over 130 civil society organizations was entitled "Responsible companies – protection of human beings and the environment". Arising back in 2016, the proposal claimed companies responsibilities concerning environment and human rights. The so-called Responsible Business Initiative, if approved, would require the compliance of companies' subsidiaries and supply chains with U.N. human rights guidelines and a range of international environmental standards. A public report on potential risks, such as inabilities to verify the safety of factory buildings or the use of child labor, and the measures taken to address them, were foreseen.

¹¹ Trade Union Advisory Committee (TUAC) to the OECD is an interface for trade unions with the OECD. It is an international trade union organization which has consultative status with the OECD and its various committees. Trade Union Advisory Committee. About TUAC. Available in: <https://tuac.org/about/>. Accessed in: 18 November 2020.

TUAC. Launch of the OECD Due Diligence Guidance on Responsible Business Conduct – TUAC Contribution. Available in: <https://mneguidelines.oecd.org/TUAC-Due-Diligence-Guidance-Contribution-2018.pdf>. Accessed in: 18 November 2020.

¹² FRANCE. Code de Commerce – L. 225-102-4. Available in: <https://www.legifrance.gouv.fr/affichCode.do?idSecti onTA=LEGISCTA000006161273&cidTexte=LEGITEXT000005634379&dateTexte=20200406>. Accessed in: 02 January 2020.

The initiative would, therefore, render companies based in Switzerland liable for violations even when concerning entities and subsidiaries they control abroad, enabling victims to bring their cases before Swiss courts.¹³ Unfortunately, after a referendum occurred in November 2020, thus contemporary to the coronavirus pandemic, the Initiative opposed both by businesses and the government, was rejected by a narrow percentage, having the struggle faced by Swiss companies with the pandemic. Either way, a milder counter-proposal got into force,¹⁴ obliging companies to report on human rights and environmental standards and conduct due diligence, but not including liability clauses as it was foreseen by the.

In Germany, in turn, has also been struggling to remedy the lack of a legal framework for human rights due diligence, when the German government approved its National Action Plan on Business and Human Rights (“NAP”) in line with the UN Guiding Principles for Business and Human Rights. Based on the requirements of this document together with the OECD Guidelines for Multinational Enterprises, a Supply Chain Law (“Lieferkettengesetz” or “Sorgfaltspflichtengesetz”)¹⁵ was drafted in February 2009 imposing mandatory legal obligations on companies based in Germany with more than 500 employees, both for German companies and their supply chains (“Lieferkettengesetz” or “Sorgfaltspflichtengesetz”).¹⁶

The draft law dwells on human rights responsibilities of German companies with regard to subsidiaries and contractors abroad. In that matter, it aims at obliging large German companies to take appropriate measures to prevent human rights violations in their business activities and supply chains. The draft law also proposes amendments to the Commercial Code. Civil liability for damages and risk sanctions would incur in case of non-compliance, including fines of up to five million euros, imprisonment and impediment to public procurement in Germany. In order to refrain adverse effects from economic activities, German government has been adopting several other actions to aligning companies towards a socially responsible conduct.¹⁷

¹³ NEW YORK TIMES. Swiss to Vote on Tougher Responsibility Proposal for Companies. Available in: <https://www.nytimes.com/2020/11/27/world/europe/switzerland-referendum-corporate-responsibility.html>. Accessed in: 05 January 2020.

¹⁴ Business And Human Rights Resource Centre. Switzerland: Responsible Business Initiative rejected at ballot box despite gaining 50.7% of popular vote. Available in: <https://www.business-humanrights.org/en/latest-news/switzerland-responsible-business-initiative-rejected-at-ballot-box/>. Accessed in: 06 January 2021.

¹⁵ GERMANY. (Federal Ministry For Economic Cooperation And Development Of Federal Republic) Federal Ministers Heil and Müller: “Now the Coalition Agreement will come into play for a supply chain law. The aim is finalisation before the end of this legislative term.” Available in: https://www.bmz.de/en/press/aktuelleMeldungen/2020/juli/200714_pm_21_Federal-Ministers-Heil-and-Mueller-Now-the-Coalition-Agreement-will-come-into-play-for-a-supply-chain-law-The-aim-is-finalisation-before-the-end-of-this-legislative-term/index.html. Accessed in: 03 January 2021.

¹⁶ GERMANY. Sorgfalt Gesetzentwurf. Available in: <https://media.business-humanrights.org/media/documents/files/documents/SorgfaltGesetzentwurf.pdf>. Accessed in: 03 January 2021.

¹⁷ GERMANY. (Federal Ministry For Economic Cooperation And Development Of Federal Republic) Faire globale Liefer – und Wertschöpfungsketten. Available in: <https://www.bmz.de/de/themen/lieferketten/index.html>. Access in: 03 January 2021.

These measures, adopted both at national and international level, impact on the regulation of foreign investments, whose agreements signed at the international level are, in general, linked to the compliance to domestic legislation of the contracting States and also to the international commitments undertaken by each State Party to the agreement.

In this light, several investment agreements around the globe have included RBC clauses, expressly regulating the correlation between investments and social aspects – such as human rights, work, health, poverty reduction – as well as environmental aspects – such as biodiversity and change climate change.

This is the case of the Bilateral Investment Agreement signed between Morocco and Nigeria,¹⁸ in 2016. In the same vein, the Bilateral Investment Agreement – also in the year 2016 – between Argentina and Qatar¹⁹ and, still, the agreement signed between Canada and Cameroon,²⁰ in 2014. South Africa, for its part, developed a model for bilateral investment agreement (SADC Model Bilateral Investment Treaty Template – 2012)²¹ in which a whole chapter is dedicated to the rights and duties of investors, among which it expressly cites measures of corporate social responsibility, such as: obligations against corruption; [consideration of] environmental and social impacts; environmental management and improvement; minimum standards for human rights, environment and work; corporate governance standards; right to development.

Brazil, in turn, has already signed a bilateral agreement with Chile (2015)²² in which an explicit reference was made to the OECD Guidelines on Multinational Enterprises; and with Colombia,²³ in which an exclusive article was addressed to tackle “Corporate Social Responsibility”. In the field of investment arbitration jurisdiction, the correlation between investments and human and social rights has already been analyzed by the arbitration courts, although the direct confrontation of

¹⁸ MORROCO; NIGERIA. Morocco – Nigeria Bilateral investment treaty (2016). Available in: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3711/morocco-nigeria-bit-2016>. Accessed in: 17 December 2020.

¹⁹ ARGENTINA; QATAR. Argentina - Qatar Bilateral investment treaty (2016). Available in: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3706/argentina-qatar-bit-2016>. Accessed at: 17 December 2020.

²⁰ CAMEROON; CANADA. Cameroon – Canada Bilateral Investment Agreement (2014). Available in: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3537/cameroon-canada-bit-2014>. Accessed at: 17 December 2020.

²¹ SOUTH AFRICA. SADC Model Bilateral Investment Treaty Template (2012). Available in: <http://www.iisd.org/itn/wpcontent/uploads/2012/10/sadc-model-bit-template-final.pdf>. Accessed at: 17 December 2020. Trade Union Advisory Committee. About TUAC. Available in: <https://tuac.org/about/>. Accessed in: 18 Nov. 2020.

²² BRASIL. Acordo e Cooperação e Facilitação de Investimentos entre a República Federativa do Brasil e a República do Chile. Brasília, 27.04.2018. Disponível em: www.itamaraty.gov.br/images/ed_atosinter/20151009-ACF-port2.pdf. Acesso em: 30 jan. 2021.

²³ BRASIL. Acordo e Cooperação e Facilitação de Investimentos entre a República Federativa do Brasil e o Governo da República da Colômbia. Bogotá. 09.10.2015. *Op. cit.*

RBC measures is not yet consensual – notably due to the nature of predominantly inalienable rights involved. In Brazil, for example, the arbitrability or not of the matter is restricted to available rights (article 1, Law 9.307 / 1996).²⁴

Subject to that proviso, the matter of social adverse impacts of foreign investments is faced, albeit mostly tangentially, by arbitral courts. In the CMS GAS case,²⁵ Argentina claimed that, given its state of social and economic crisis, compliance with the objected investment treaty would imply a violation of constitutionally guaranteed rights. The International Center for Settlement of Investments Disputes (ICSID), arbitral tribunal to the case, concluded otherwise, stating that there was no collision between the instruments in question (investment treaty and Argentinian Constitution), whose compatibility is scrutinized when a new agreement is concluded, notably considering that the question at issue did not directly affect fundamental human rights.

Still concerning Argentina, in the Sempra case²⁶ the State maintained that, in the light of the prevailing economic and social conditions, the recognition of the Argentinian right to property would, once again, meet the fundamental rights incorporated in its Constitution, with the Argentine government argued that adherence to the Washington Convention could not support sovereign decisions necessary to safeguard public interests, such as those needed for restructuring the national monetary system. However, the arbitrators decided on the need to respect the investor's legitimate expectations.

In the TECMED case,²⁷ Mexico's compliance with environmental and public health rights was questioned before the ICSID. Based on the denial of renewal of environmental and public health licenses to the company Cytar, a subsidiary of the Spanish company TECMED - which, years before, had obtained a license to operate in a landfill, but in the following years got suspended after Mexican legislation prohibited the installation of sanitary landfills with toxic waste in the vicinity of urban centers. After local pressure on denying this environmental license renewal to Cytar upon protection of environmental and public health rights, the decision did not please investors, which lead to arbitration. The arbitral tribunal, assessing the issue, decided, on the other hand, that the expropriation had violated the bilateral investment agreement signed between Mexico and Spain.

The aforementioned international arbitration cases reveal the increase of corporate social responsibility matters being brought upon Arbitral Tribunals and leading, consequently, to unfavorable arbitral awards towards States. These cases

²⁴ BRASIL. Lei 9.307, 23 set. 1996 – Dispõe sobre a arbitragem. Disponível em: http://www.planalto.gov.br/ccivil_03/leis/l9307. Acesso em: 04 jan. 2020.

²⁵ ICSID. CMS Gas Transmission Co v. Argentina. ICSID Case n. ARB/01/8, Award 12/05/2005.

²⁶ ICSID. Sempra Energy International v. Argentina. ICSID Case n. ARB 02/16, Award, 28.09.2007.

²⁷ ICSID. Técnicas Medioambientales Tecmed, S.A. vs. Mexico. ICSID Case n. ARB (AF)/00/2, Award 29/05/2003.

usually derive from investment operations not preceded by investment agreements in force or, if so, without RBC clause foreseen. In other words, in case of a lack of instruments guiding corporate activities towards socially responsible standards, the arising controversies tend, in practice, to entail unfavourable judgements to States.

Recognition of indirect expropriation or breach of expectations legitimate interests of the investor, for example, could be avoided by mere provisions of specific clauses tackling RBC clauses – suggesting, for example, that the increase in corporate social responsibility standards, resulting from rules of domestic or international law applicable to all economic actors, will not generate the right to any compensation to the investor for fact of having to fulfill them. The examples above reveal the undeniable linkage between foreign investments and social and environmental matters. While coexisting in the context of economic activities arising from foreign investments, these issues must be tackled with no delay. It is up to governments to seek to mitigate adverse effects, foreseeing, as much as possible in their investment agreements, RBC clauses that allow harmonization between these different sectors.

6 Conclusion

In order to prevent economic process from derailing to the detriment of human rights and labour laws, environment and human well-being, an adequate regulation towards Responsible Business Conduct urges. Foreign investment regulation forms part of a broader attempt to transform the World Economic Order into a more equitable, sustainable and fairer one. As a relevant feature of Economy in the globalized era, foreign investments shouldn't be and end in itself. Given its potential to improve the economic reality of the host country, foreign investment should also aim at providing social and environmental changes.

The adjustment of foreign investments towards value driven business is capable of combatting some of the most adverse effects deriving from economic activities, such as social inequalities, environmental destruction and corruption. The State is called upon to regulate and thus repair faults in the free market system, mitigating the negative effects of economic activity, in a rapprochement of law with morals and justice. Adequate instruments such as investment agreements negotiated and celebrated between governments are key instruments that may function as engines for economic and social transformation.

That is why the international guidelines for RBC, regardless of their *soft law* nature, should inspire and integrate clauses in investment agreements. Despite not creating new international legal obligations, they can serve as a useful route for conducting the economic processes towards a socially sustainable globalization. Improving the investment climate, often used to encouraging foreign investment,

should be interpreted broadly. A good investment climate helps mobilise capital, skills, technology to allow firms to expand. But it also helps channeling resources to building a better society.

The Cooperation and Investment Facilitation Agreements (CFIAs), as the Brazilian model of investment agreement, follows this trend, standing out as a mechanism that promotes additional advantages beyond attracting investments itself, serving as a conduit for the local diffusion of technology and expertise, and also providing RBC guidelines to the investors. It promotes business towards a socially, economically and environmentally responsible manner, revealing the attempt to raise social awareness within economic stakeholders and, thus, sustainability. Even though sustainable development measures implies a shared duty between States, economic agents and civil Society, States, given its role to safeguard the public interest, should consider, as much as possible, the promotion of investment clauses setting ancillary obligations to economic practices, in order to build value driven businesses. This is for the benefit of the sustainable development. Of the environment. Of human and labor rights. Of humankind.

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