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Determining Quality FDI: A Commentary on the OECD's "FDI Qualities Project"

Karl Sauvant (Columbia Law School) · Saturday, April 20th, 2019

The OECD Secretariat launched, in 2018, a "FDI qualities project". Its objective is to provide governments with a tool kit to attract investment that contributes as much as possible to sustainable development. For that purpose, the project has identified five clusters of "FDI qualities indicators": productivity-innovation, skills, job quality, gender, and carbon footprint. These indicators were selected on the basis of a detailed assessment of how FDI can contribute to specific Sustainable Development Goals, and in cooperation with an FDI Qualities Network (consisting of interested stakeholders) established to provide feedback to the project.[1] *This note is a commentary about the OECD's FDI qualities project, knowing that FDI qualities indicators are the first part of the project, and that the indicators will be complemented (beginning October 2019) by a discussion of policies on FDI qualities, in recognition of the fact that sustainable development outcomes may depend on the country context as well as domestic and international policies. This work will—and should—have implications for future arbitral proceedings, as well as the WTO's Structured Discussions on investment facilitation.*

It is no doubt laudable that the OECD is examining questions related to the quality of FDI.

It would be desirable, too, if the Secretariat, at one point, could look not only into the question of how **countries** can attract higher quality FDI and ensure that FDI has a positive impact on sustainable development, but also how **investors** can increase the contribution of their investments to the host countries in which they are established, based on the work already done in relation to the OECD Guidelines for Multinational Enterprises. Since policy questions will be addressed at a later stage of this project, maybe then it is the time to look at this question as well.

We all realize, of course, that "quality", like "beauty", is in the eyes of the beholder—and the principal beholder in this case is the host country government. It is therefore necessary to develop quality indicators that reflect the different priorities that governments have, as indicated also in their differing SDG implementation plans.

This leads to the question of how to identify quality indicators.

One approach, the approach that the OECD Secretariat has taken, is to look to the literature, firm and other databases and to experts. That is of course a reasonable approach, and the resulting five indicators are certainly very useful, very well developed and very well discussed in the excellent background paper prepared by the Secretariat.[2)]

But one could also take another—perhaps complementary—approach to identify quality indicators or quality characteristics of FDI. And that approach is to look at, on the one hand, what **governments** say they expect FDI to contribute to the sustainable economic development of their countries and, on the other hand, to look at what **investors** say they contribute to the sustainable economic development of their host countries. The underlying assumption of this approach is of course that—regardless of what academic experts say—the principal actors in the FDI relationship know best what is good for them (in the case of governments) and what they can contribute (in the case of investors).

This is the approach Howard Mann and I have taken when we sought to develop a list of "FDI sustainability characteristics" (or what the OECD Secretariat calls "qualities indicators").[3)] We looked at a wide range of instruments—ranging from international investment agreements to the corporate social responsibility statements of MNEs—to determine what governments expect that investors contribute to the development of their economies, and what investors say they contribute to the development of host countries.

What is interesting is that this research shows that there is in fact a substantial overlap between the qualities that governments seek in FDI and the qualities investors say they bring to host countries to advance sustainable economic development. These include (apart from those identified by the OECD Secretariat), labor rights, human rights, transparency, supply chain standards, and stakeholder engagement. In fact, one could even go so far as to speak about an emerging consensus between governments and investors as to various "quality" indicators. It is a consensus that includes the five indicators identified by the OECD Secretariat.

But the research undertaken by Howard Mann and myself also shows something else, namely that there are considerably more "quality indicators" (or "FDI sustainability characteristics") than the five indicators identified by the OECD Secretariat. That is important when creating a "toolkit", as it reflects the reality that different governments do indeed look for different qualities in FDI when seeking to advance their sustainable development.

This, in turn, suggests that the OECD Secretariat might want to aim for a list of "FDI qualities indicators" that is longer than the five clusters it has identified so far and that, in the end, would constitute an indicative list of FDI quality indicators that could provide guidance to governments—and, for that matter, investors—that are interested in seeking to increase the contribution of FDI to sustainable development. Such an approach would also be in line with my earlier observation, namely that "quality" is in the eye of the beholder—and the principal "beholder" in this exercise is, as noted before, the host country.

Importantly, the issue of FDI quality, in terms of the contribution that FDI can make to development, is also beginning to be considered in arbitral proceedings, by bringing various aspects of the sustainability characteristics into their deliberations. Examples include *Salini v. Morocco*, *Biwater v. Tanzania*, *Inmaris Perestroika Sailing v. Ukraine*, and *Alpha Projektholding v. Ukraine*. These decisions include references to contribution to infrastructure,[4)] technology transfer,[5)] local employee training,[6)] and the generation of government revenue[7)] as characteristics associated with the notion of an investment contribution to development. An indicative list of FDI sustainability characteristics/quality indicators could be a helpful tool for future arbitral tribunals when considering individual cases.

Finally, I should like to note that the work of the OECD Secretariat is especially important and timely at this particular moment, for an additional reason. And that reason is that the WTO Structured Discussions on a multilateral framework on Investment Facilitation for Development are moving along quite rapidly.[8)] Most of these discussions have focused so far on the "facilitation" part of the objective, while the explicit and direct "development" part of the objective has not yet received much attention.

Accordingly, the work that the OECD is undertaking in the framework of its "FDI qualities project" could make an important input into the WTO Structured Discussions. It should, therefore, be brought to the attention of the WTO process, to help inform the development part of its deliberations.

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References

?1 OECD, "FDI Qualities Toolkit: Investment for Inclusive and Sustainable Growth. Progress Report III" (Paris: OECD, March 2019). See also the earlier report "FDI Qualities Toolkit: Investment for Sustainable Growth: Progress Report II" (Paris: OECD, October 2018).

?2 OECD, 2019, op. cit.

?3 Karl P. Sauvant and Howard Mann, "Towards an indicative list of FDI sustainability characteristics" (Geneva: ICTSD and WEF, 2017).

?4 Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 57 (23 July 2001).

?5 Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, ¶ 320 (24 July 2008).

?6 Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine, ICSID Case No. ARB/08/8, Decision on Jurisdiction, ¶ 132 (8 March 2010).

?7 Alpha Projektholding GmbH v. Ukraine, ICSID Case No. ARB/07/16, Award, ¶ 330 (8 November 2010).

?8 See the "Joint Ministerial Statement on Investment Facilitation for Development". For an analysis of these Discussions, see ICTSD, "Crafting a Framework on Investment Facilitation" (Geneva: ICTSD, 2018).

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