First round of break-out sessions: Substantive content of IIAs Scope and definitions[1]

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On the issue of scope and definitions, the experts devoted particular attention to the definitions of "investment" and "investor". The experts suggested that the definitions should be carefully circumscribed in IIAs, with different views being expressed on the best ways of doing so and on the assets and activities that should be covered or excluded. Some experts were of the opinion that the exclusion of portfolio investment from the definition of investment would be useful; others considered it important to cover a broad range of investments, including portfolio investment, including to ensure adequate protection for investments and to foster the investment attraction function of IIAs. Some experts suggested that it should be clarified what was covered by the term "portfolio investment"; another suggestion was to assess whether an exclusion of portfolio investment might have a negative impact on achieving the overall development objectives of the host State. It was added that there might be cases where portfolio investments were beneficial to development.

A related question discussed by the experts was how to distinguish between "good" and "bad" investments. The view was expressed that, rather than limiting the overall scope of the treaty, an exclusion of "unworthy" investment from investor-State dispute settlement (ISDS) provisions could be considered. Several delegates expressed the need for further deliberations on these issues.
One expert stressed the need for host States to determine which type of investment the State might want to attract. The experts also considered whether contractual rights should be excluded from the definition of investment, and investments which did not comply with human rights or did not contribute to the sustainable development of the host State.

The experts also discussed whether requiring investments to be made in accordance with hosts State laws and regulations would increase or rather reduce clarity for States and investors. Some experts found the specific procedures a host State might use in this regard cumbersome, particularly from an investors' perspective but also from the point of view of the authorities of the host country. The experts discussed whether the clause would be applicable not only at the time of establishment but also throughout the operation of the investment. Under this scenario, the experts considered how the investor's access to ISDS could be limited if this investor had violated certain domestic laws during its operation.

[1] The opinions expressed in this paper are those of the author and do not necessarily reflect the views of the UNCTAD Secretariat or its Member States.

With respect to the definition of “investor”, concerns were expressed about so-called “treaty shopping” and “round tripping” behaviour by investors. The experts emphasized that treaty shopping undermined legal certainty in that host States did not know which investors and investments were protected under the treaty and the host States might thus be subject to unexpected or unforeseen claims. One expert considered that round tripping appeared more problematic than treaty shopping since the former went against the very purpose of IIAs. There was a general consensus among the experts participating in the break-out session with respect to the desirability of preventing “treaty shopping” and “round tripping”. After identifying this as a key challenge, the group focused on how these practices could be prevented. The experts pointed to recent treaty practice and suggested the inclusion of additional criteria for covered investors (e.g. including the requirement to undertake “substantive business operations” in the home State and regulating the dual nationality of physical investors). Another suggestion was to exclude from treaty coverage investors that abused rights or to include a denial of benefits clause for cases of treaty shopping. Finally, possibilities of treaty shopping could be limited by including the criterion of direct ownership or control in the definition of “investor”.

Moreover, the experts observed that some IIAs contained a denial of benefits clause that excluded investors with double nationality, while some others allowed the denial of treaty protection to investors from third States with which the host country of investment controlled by these investors did not maintain diplomatic relations or maintained economic/trade restrictions.

In light of past arbitral awards, the experts noted that it would be helpful to clarify at what time States should be able to notify the application of the denial of benefits clause. Arbitral awards were not coherent in this regard.

The experts noted that the issue of defining the scope and definitions of IIAs in a clearer manner was important while there were many complications in doing so. The most-favoured nation clause would raise concerns in this regard, as it could potentially be used to circumvent and undermine specific scope and definition provisions by making recourse to more favourable clauses in other agreements. The implications of extending the scope and definitions of a treaty to the pre-establishment phase were also discussed.