
## Second round of break-out sessions: The SD dimension of IIAs Interrelationship with other bodies of law[1]

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The break-out session on the interrelationship with other bodies of law produced a fruitful and frank discussion of the questions raised by the agenda.

The break-out session began by noting the truism that international investment law does not operate in its own universe; it is not a closed system of law but is rather part of general international law. The experts observed that in the time since the international investment treaty regime began taking shape in the 1950s/1960s there has been a considerable evolution of international law more generally. Over the past fifty years the international community has come to international agreement on a wide variety of other matters including environmental concerns, trade, intellectual property, labour, health, humanitarian concerns, and human rights.

The break-out session noted the question as to whether or not States have been keeping up with these developments in their investment treaty making practice. A brief *tour d'horizon* within the group indicated that while some States have taken steps to integrate their international investment treaty commitments with their other international law obligations, the practice remains inconsistent.

In particular, the experts noted the frequent carve-out in most-favoured nation clauses for obligations which arise under free trade agreements, custom unions and double taxation treaties. The experts also noted references in treaties to compulsory licensing under the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement, references to the International Labour Organization (ILO) declaration on fundamental principles and rights at work, temporary safeguard measures and balance of payment provisions which make reference to the International Monetary Fund (IMF) articles, as well as references to international peace and security and obligations under the United Nations Charter. Among the treaties specifically noted in this part of the discussion were the 2009 Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement, the model BIT of the Southern Africa Development Community (SADC), treaty practice of Canada and the United State with a host of countries since 2004,

[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.

as well as the Central America-United States-Dominican Republic Free Trade Agreement, and the recent European Union free trade texts with Canada and Singapore.

The experts also noted that increasingly States are referring in their preambles to considerations in addition to the protection and promotion of investment, such as health, safety, labor rights, the environment, sustainable development, and other public goods. In addition, the group noted the use of textual clauses making specific reference to some or all of these matters, as well as the use of general exceptions clauses framed in more or less broad fashion, i.e., either truly general exceptions addressing broadly conceived notions of "security" or more specific exception clauses modeled on Article XX of the General Agreement on Tariffs and Trade.

The group turned to the question of whether or not the general absence of express references to other systems of law in investment treaties poses a problem that needs to be addressed in treaty making practice. The break-out session considered that the question of whether a problem exists could be framed in one of two ways. First, the question might concern whether there is a need to enhance the context within which substantive protections are to be interpreted and applied by arbitral tribunals. Second, the question might ask whether States are facing conflicts between investment treaty obligations on the one hand and obligations under other sources of international law on the other hand. Depending on how one frames the question, public international law and the Vienna Convention on the Law of Treaties suggest different responses.

Looking at the question of conflicts between State obligations under international investment treaties and other sources of international law, it was suggested that the potential for direct conflicts between investment treaties and other areas of international law was limited. The relevant provisions of the Vienna Convention on the Law of Treaties address this issue with some specificity and the occasions on which a true conflict of international obligations was likely to arise are limited.

At the same time, with respect to the interpretive role of international law outside of the investment treaty regime, it was mentioned by some experts that in arbitral tribunals' practice, other bodies of law were not always sufficiently taken into consideration during the interpretation of substantive investment treaty provisions. Thus, while there seemed to be a view that direct conflicts between investment treaty obligations and other obligations arising under international law are relatively few, there was a general concern about the interpretive approach taken in some investor-state arbitrations and whether the rules of interpretation under the Vienna Convention, especially Article 31(3)(c), were being sufficiently followed. At the same time, the group took note that the obligation to "take into account" other applicable rules of international law under Article 31(3)(c) is by its nature a rather vague obligation for the interpreter.

In addition to the use of the drafting approaches mentioned above, other suggestions which were posed during the break-out session to address the relationship between investment treaties and other sources of international law included:

1. The possibility of listing treaties in an annex which might be given priority over the investment treaty in the event of a conflict arising. In this regard, there was a general view that this is a problematic approach because closed lists by their nature risk becoming outdated as soon as they have been closed and open lists risk leaving too much leeway for States and for arbitrators and risk putting into jeopardy the entire project of protecting investment rights in the first place.

2. The establishment of institutional mechanisms which would require States to consult in the event of potential conflict between obligations under the investment treaty and under a treaty to which

they are also party. Here reference was made to the mechanisms seen in some treaties requiring consultation prior to the initiation of claims based on taxation measures or with respect to investment in the financial services industry. A further suggestion was the establishment of a mechanism of reference whereby an arbitral tribunal could be called upon to make a reference to a relevant body for an authoritative interpretation of, for example, a human rights or environmental law instrument.

3. There was also a call for improved arbitral decision making and this perhaps harked back to what some members of the break-out session felt was the insufficiency of some arbitrators taking into account other obligations under Article 31(3)(c) of the Vienna Convention. In this connection, some experts also suggested that arbitral decision-making might be improved through professionalization of the arbitral process under investment treaties by use of appellate mechanisms and arbitrator lists.

4. Finally, there was a suggestion that in light of the work of the UN Special Representative for Business and Human Rights John Ruggie and the Guiding Principles on Business and Human Rights, considerations of other obligations applicable in investment treaties and investor-state disputes might also begin to include obligations on the investors themselves, such as obligations with respect to human rights and the environment. At the same time, it was noted by some experts that international conceptions of human rights include the right to property and that in pursuit of a more holistic appreciation of international investments treaties, one needed to be careful not to lose sight of the rights of the investor.