
Business Responsibilities and Investment Treaties

OECD Public Consultation – Jan-Feb. 2020

Compilation of Comments Received

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Investment Division, Directorate for Financial and Enterprise Affairs
Organisation for Economic Co-operation and Development
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Context

This document is a compilation of responses received to date in response to a public consultation in January-February 2020 on an OECD Secretariat [paper](#) on Business responsibilities and investment treaties. [<https://oe.cd/BR-consult>] The consultation paper and comments received to date have been made available on the OECD website in order to foster informed debate. They will form part of the material for discussion at the [OECD Investment Treaty Conference](#) on Business responsibilities and investment treaties. [<https://oe.cd/BR-conf>] They will also be considered by governments and others at the OECD in further work on Business responsibilities and investment treaties.

The OECD Investment Committee has hosted an intergovernmental Roundtable since 2006 that brings together over 60 OECD, G20 and other governments from around the world to exchange information and experiences on investment policies.¹ Government participants in the Roundtable, which is known as the Freedom of Investment (FOI) Roundtable, have been considering [investment treaty policy](#) at [regular meetings](#) since 2011.

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¹ Economies invited to the Roundtable include: Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, People's Republic of China, Colombia, Costa Rica, Croatia, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Korea, Latvia, Lithuania, Luxembourg, Malaysia, Mexico, Morocco, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, Ukraine, United Kingdom, United States, Uruguay, and the European Union.

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1.24. Martins Paparinskis (Reader in Public International Law, UCL Faculty of Laws, University College London)

Many thanks for inviting me to comment on your consultation paper of 15 January 2020 on ‘Business Responsibilities and Investment Treaties’.

The challenge of squaring a mechanism of implementing State responsibility through formalised investor-State arbitration, with its focus on binding rules, and the generally not binding instruments directed at business is both important and not straightforward. Indeed, the one decision in investor-State arbitration that goes furthest in that direction by accepting, in principle, human rights counterclaims against investors, *Urbaser SA and Or v Argentina*, achieves that result by essentially sidestepping most hard questions about the legal source and personal scope of binding international obligations, ICSID Case no ARB/07/26, Award, 8 December 2016 [1194]-[1199]. Overall, at least in my reading of the consultation paper, the efforts of addressing business responsibilities in investment treaty law tend to be somewhat on the unimpressive side: binding human rights obligations do not easily map on to rules addressed at actors engaged in investor-State arbitration, non-binding norms will not always be an appealing basis of decision-making for arbitrators subject to review for failure to apply proper law, and binding treaty rules directly addressed at investors are either modest in effect or lacking in overwhelming political support.

The key point I want to make in my response is that general international law provides more solutions to this challenge than immediately catches the eye. Such rules, particularly when related to treaty interpretation and content of State responsibility, provide considerable scope for giving appropriate effect to business responsibilities, even without taking excessively creative steps regarding sources and personal scope of international law. Four examples in particular may be relevant:

- First, States have international human rights obligations in the context of business activities, e.g. UN Committee on Economic, Social and Cultural Rights General Comment no 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural rights in the context of business activities, UN Doc E/C.12/GC/24. An investor-State tribunal engaged in the exercise of interpretation and application of an investment protection law must take into account, in line with the custom-reflecting Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT), other relevant rules applicable between the parties, which may include human rights obligations. That may sound like a trivial point but when such obligations are ‘taken into account, together with the context’, as prescribed by the custom-reflecting chapeau of VCLT Article 31(3), they may end up having considerable interpretative weight, particularly regarding those rules that are in the technical sense vague. Such an impact is particularly likely when human rights obligations are reflective of or contiguous to jus cogens. The challenge of Black Economic Empowerment in the *Foresti and Ors v South Africa* case is a pertinent example: while the tribunal never reached the merits stage of the investor’s challenge, it is hard to see how interpretation and application of the relevant treaties could have been carried out without taking into account the International Convention on the Elimination of All Forms of Racial Discrimination, ICSID Case no AB(AF)/07/01. I do not want to overstate my point: VCLT Article 31(3)(c) provides a tool for interpretation and not a mandate to replace applicable law. Nevertheless, when competently argued and applied, it can be a powerful argument in disputes raising business responsibilities -- particularly since human rights obligations’ focus on States,

rather than investors, does not preclude taking them into account in interpreting other obligations of States.

- Secondly, the consultation paper's valuable discussion of the effects of hortatory clauses (Section 8.3.2) may be understating the effect that such clauses play for the purposes of interpretation as context within the meaning of VCLT Article 31(2) as well as a means for identifying the relevant considerations in the application of the treaty. A good example of how such clauses operate, from the (in relevant respects) comparable field of environmental protection, is provided by the award in *Al Tamimi v Oman* dispute. In that case, various treaty rules were drawn upon to identify 'the importance attached by the US and Oman to the enforcement of their respective environmental laws', which in turn informed identification and application of the international minimum standard, even though none of the rules explicitly referred to it, ICSID Case no ARB/11/33, Award, 3 November 2015 [387]-[390]. There is no obvious reason why treaty language addressed at human rights in a similar manner could not be given similar legal effect.
- Thirdly, the consultation paper does not directly engage with the topic of counterclaims against investors (except noting as part of its discussion of the Dutch Model Treaty that it does not provide for them, fn 261). If the omission signifies the paper's uncertainty about following the approach of the *Urbaser* tribunal, I have some sympathy: certain elements in that award's legal reasoning will not persuade everybody, whatever one's views regarding the normative desirability of its conclusion. But more persuasive authority can be found, again, in recent decisions on environmental matters, which show how public policy issues can be properly articulated in the technical terms of counterclaims, *Burlington Resources Inc. v Ecuador*, ICSID Case no ARB/08/5, Decision on Counterclaims, 7 February 2017; *Perenco Ecuador Limited v Ecuador*, ICSID Case no ARB/08/6, Award, 27 September 2019 Section IV.
- Fourthly, it may be helpful to also engage with the customary law of State responsibility, particularly regarding content of responsibility. Two principles are of particular relevance here: contribution to injury and mitigation of loss. In his dissenting opinion in the *Bear Creek Mining Corporation v Peru* case, Arbitrator Sands relied on the standards of the ILO Convention 169 (Indigenous and Tribal Peoples Convention) to apply the customary rule on contribution to injury so as to diminish the damages by one half, ICSID Case no ARB/14/21, Partial Dissenting Opinion of Professor Philippe Sands QC, 12 September 2017. The important difference between this argument and the route taken in *Urbaser* is that the former does not hinge upon legal creativity, and proceeds in the most orthodox blackletter terms of applicable customary law (2001 International Law Commission's Articles on responsibility of States for internationally wrongful acts, Article 39). Mitigation of loss has not, to my knowledge, been applied in cases raising business responsibilities, but is also an orthodox blackletter principle of international law, *Clayton and Ors v Canada*, PCA Case no 2009-04, Award on Damages, 10 January 2019 [195]-[205], and as such could be applied in appropriate circumstances.

My overall conclusion, perhaps a somewhat unexciting one, is that there is quite a lot in the broader system of international law and international investment law that permits the articulation of concerns about business responsibilities, even without exercising excessive

legal or political creativity. Treaty interpretation by reference to context and to other relevant rules, counterclaims for important public policy issues related to investment projects and expressed in domestic law, and calculation of compensation by reference to principles that are given content by human rights obligations can be very effective tools. They also have the not inconsiderable advantage of fitting easily within the four corners of law applicable by tribunals, and therefore not raising concerns for parties and tribunals that excessive creativity otherwise might.