# Deconstructing treaty parallelism and overlap: The infamous “Achilles Heel”

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It has been remarked as early as 1991 that texts of international investment agreements (***IIAs***) differ in many important respects … however, they are also remarkably similar in structure and content – which means that tribunals may work to create a common law of investment protection, with a *substantially shared understanding* of its general tents. [Asian Agricultural Products Ltd v. the Republic of Sri Lanka, ICSID Case No. ARB/87/3] This substantially shared understanding may of course be jointly distributed among different states who in turn act through multiple ad-hoc tribunals. The multiplicity of tribunals naturally multiplies the number of decision-makers and creates more fragmentation.

However, on the flip side, this naturally means that inconsistencies in the precedents followed under investment law by such tribunals will find an eventual echo in the corpus of public international law as well, which is rather alarming. Fragmentation also creates a veritable loss of legal certainty which is, in turn, an element of the (global) rule of law. The vast number of responsible institutions (especially courts and tribunals) creates conflicts over potentially overlapping jurisdictions of those courts.

The diverging and possibly conflicting legal norms in substance that are available to those bodies reduce the predictability and reliability of the application of the law, resulting in procedural and substantive insecurities. To appreciate the nuances of fragmentation, the paper attempts to analyze (a) overlap in investment treaty law through treaty parallelism and (b) divergent interpretations of the same standard of treatment.

### (a) Overlap in investment treaty law and treaty parallelism

Only a few states use regionalism to *de jure* or *de facto* consolidate their investment treaty network. Most countries opt for parallel bilateral and regional treaty layers. Such overlap raises coordination challenges as parallel treaties may duplicate or contradict each other increasing the risk of parallel proceedings, double jeopardy, and normative conflict. As UNCTAD stated in its 2011 World Investment Report: ‘*[w]ith thousands of treaties, many on-going negotiations and multiple dispute-settlement mechanisms, today’s IIA regime has come close to a point where it is too big and complex to handle for governments and investors alike*.’ Most countries leave BITs and regional agreements to co-exist, resulting in parallel agreements, instead of using regionalism to consolidate treaty overlap. The existence of overlapping global, regional, and bilateral agreements poses problems due to forum shopping by complainants and inconsistencies in awards by dispute settlement bodies in different agreements that undermine the emergence of acceptable rules for the conduct of international trade and other economic transactions.

A bigger and more intrinsic issue with the proliferation of BITs is that possible inconsistency between two treaties are not always addressed within the framework and realm of BITs. Some IIAs include specific "conflict rules" as Article 32.3, COMESA Agreement, or certain soft law approaches that state which treaty prevails in the case of inconsistency. Other treaties (in a rather overwhelming approach) do not address these conflicts at all and adopt silence over preexisting, overlapping treaties.

In the absence of such a conflict rule, the general rules of international law (the *lex posterior* rule) enshrined in the Vienna Convention on the Law of Treaties apply. It has been argued that precise compartmentalization of treaties respecting their facial or ostensible subject matters is not a legally satisfying criterion because treaties of seemingly different subject matters may overlap either in effect or in their regulatory scope. While NAFTA, and the approximately 1500 BITs that were concluded in the 1990s made considerable progress in advancing protections for foreign direct investment, they nonetheless represented a second-best option, falling short of providing a comprehensive, standardized, predictable regime for investment with high protective thresholds. The proliferation of investment protections embedded in varying types of agreements meant that rules were "overlapping and sometimes confusing."

Alschner makes a rather interesting argument that while investment law is quite accustomed to horizontal overlap of parallel BITs, regionalism has added a novel dimension to investment law: vertical overlap of BITs with regional investment agreements. Owing to the prolific number of preferential trade agreements signed in the last decade or so, there is a visible turn towards regionalism and investment chapters of these very agreements end up creating overlaps with pre-existing BITs.

Shifting patterns of global FDI in which South-South flows account for a larger share of global FDI will challenge developing countries' typically cautious approach to international investment policy approach. As capital importers, they may still have a deep rooted interest in preserving safeguards in their BITs to support domestic development processes. A rather intriguing point is that consequently, the harm caused to the public policy agendas of developed country's host governments by actions brought by both developed and developing country investors, has made even developed country hosts reconsider the rights of foreign investors to bypass local courts under international trade and investment agreements.

For instance, while NAFTA was originally designed to impose investment protection obligations on Mexico, a developing country, it has turned out that the number of investor-state disputes between the US and Canada far exceeds those against Mexico. The extent of the litigation brought under the investment provisions of NAFTA has subjected the two developed countries to the same experience of having to defend their regulatory policies before foreign tribunals that developing countries had earlier been subjected to. As newly evolving capital

exporters, however, these countries will have to (re)negotiate liberal BITs with developed and other developing countries to protect the foreign investments of their own national enterprises.

**(b) Divergent interpretation of same standards of treatment**

Non-discrimination is a well-established standard of protection in international law. In the investment context, discrimination exists where investors or investments in like circumstances are treated in a different manner without legitimate reason. Inconsistencies in arbitral jurisprudence also developed with regard to the interpretation of identical or essentially comparable clauses in different BITs or of the same rule of customary international law by different tribunals. [SGS Société Générale de Surveillance SA v. Republic of the Philippines, ICSID Case No. ARB/02/6]

These inconsistencies are understandable because the relevant provisions are enshrined under BITs however interpretations are made intermittently over the same provisions by varied arbitral tribunals, often culminating into inconsistent judgments. Inconsistencies in investment arbitration become more blaring and evident since commercial arbitration is private and confidential. However, unlike commercial arbitration which is heavily entrenched in domestic legal framework (owing to enforcement and challenge being dealt with domestic courts), the international law governing investment treaties is fairly uniform and it is difficult to justify such radically opposite outcomes in ISDS cases.

Another key aspect of international investment law is that some investment treaty commitments involve standards of government treatment of foreign investors (e.g. "fair and equitable treatment", "national treatment") that are almost unavoidably difficult to describe in precise terms. Lack of precise wording for many investment treaty provisions amplifies the need for interpretation that allows these broadly worded provisions to be applied to specific fact situations. Even though tribunals are not traditionally associated with creating jurisprudence in investment arbitration but merely resolving disputes, they do contribute to the body of thought and in a way shape *stare decisis* and precedents. The diverging judgments can be appreciated in terms of (i) MFN clauses (ii) fair and equitable treatment and (iii) umbrella clauses.

**Policy perspective – Need for convergence**

Several developing states may have similar policy concerns however there is also divergence created in the way treaties are designed as States will ideally opt for different alternatives while remedying similar concerns. The framework for the global economy relies on the idea of relative liberalization of economies and relative deregulation with an in-built North-South imbalance due to different bargaining powers. From a legal perspective, irrespective of formal equality between Northern and Southern governments, the material substance of the rules of the game for global trade, investment, and financial and capital movements between

the North and South are neither uniform nor harmonized, and are inherently discriminatory in light of the South's disadvantages. To illustrate, the inclusion of most-favored nation clauses in most BITs drives convergence in treaty drafting, as each State strives to ensure that the benefits that it is extending to the nationals of one State are consistent with obligations already undertaken in prior treaties.

As the distinction between capital-exporting and capital-importing countries continues to fade – many countries are now "a bit of both" countries. The perceived self-interests in relation to investment treaties of most nations may have evolved. Structural changes, such as the creation of Multilateral Investment Courts, standalone Multilateral Investment Appellate Mechanism or even the recently instituted Investment court system under the Comprehensive and Economic Trade Agreement and the European Union-Viet Nam Investment Protection Agreement are all welcome suggestions, potentially leading to a re-evaluation of treaty practice and promotion of a greater commonality of interests among treaty partners.

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