



Open-ended intergovernmental working group on transnational corporations and other business enterprises

c/o Secretariat, Office of the High Commissioner for Human Rights

via email: igwg-tncs@ohchr.org

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Your Excellencies,

It is our privilege to present for your consideration the attached memorandum, which sets out concerns over how the proposed treaty on transnational corporations and other business enterprises with respect to human rights might address conflicting standards that arise in investment law and trade law agreements.

This memorandum builds on the long-standing work of the Essex Business and Human Rights Project and the Human Rights Centre at the University of Essex (located in the United Kingdom) in the area of business and human rights. For the past two decades, the Human Rights Centre has been a leading voice on the issue of business and human rights, producing significant publications and training hundreds of students through our LL.M. and M.A. offerings. A decade ago, the creation of the Essex Business and Human Rights Project (EBHR) allowed the University to expand our work in this area. EBHR has advised states, intergovernmental organizations and non-governmental organizations on the legal and practical obstacles posed to human rights by businesses, business law, and international investment and trade law. This memorandum draws on that experience and the work of our Director, Professor Sheldon Leader, and two of our academic members, Dr Tara Van Ho and Dr Anil Yilmaz-Vastardis, as well as our own research in the hopes of furthering the development of the treaty.

We hope this work is of benefit to the open-ended working group on transnational corporations and other business enterprises with respect to human rights. We are at the disposal of the open-ended working group should further insights or support be needed.

Sincerest regards,

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Conflicts between a Treaty on Business and Human Rights and Investment and Trade Agreements

The Problem:

When investment law or trade law obligations conflict with human rights, the current system for dispute settlement generally gives priority to the investment and trade obligations over the human rights obligations.

Brief Solution:

As the Elements proposed for the draft treaty indicate, the instrument should include provisions that human rights should take precedence over conflicting investment and trade obligations, marking the treaty as the 'superior law' (*lex superior*). With further explanation below, we suggest the following language:

"The Parties agree that any future trade and investment agreements they negotiate, whether amongst themselves or with third parties, shall not contain any provisions that conflict with the primacy for human rights.

When negotiating trade and investment agreements, whether amongst themselves or with third parties, each State Party shall ensure the inclusion of clauses that protect human rights. These clauses must require investors to uphold human rights in the host state and must protect the right of states to continuously adopt new regulations for the protection of human rights.

The Parties agree that all existing and future trade and investment agreements shall be interpreted in a way that is least restrictive on their ability to respect and ensure their national and international human rights obligations, including the obligation to progressively realize economic, social and cultural rights using maximum available resources. As such, the Parties agree that tribunals hearing relevant cases must provide a detailed analysis of the relevant human rights obligations taking into account, *inter alia*, the General Comments and jurisprudence issued by the relevant United Nations human rights bodies. This rule of conflict resolution shall take priority over other existing rules of conflict resolution arising from customary international law or from existing trade and investment agreements."¹

¹ The final paragraph adopts an argument advanced by Sheldon Leader in his recent chapter 'Coherence, Mutual Assurance and the Rationale for a Treaty', in Surya Deva and David Bilchitz (ed), *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge University Press 2017) at p. 88, 89, 100.

1. The Problem: Conflicts with Investment and Trade Treaties

According to the ‘Elements for the draft legally binding instrument on transnational corporations and other business and enterprises with respect to human rights’, the prospective Treaty on Business and Human Rights (‘the Treaty’) should recognize the primacy of human rights obligations over trade and investment agreements and establish specific state obligations in this regard. However, the legal effect of such a provision is contentious as it can potentially cause conflicts with existing obligations of States originating from trade and investment law.² This briefing aims to explain the problem and explore sample provisions that would provide the Treaty with a strong legal effect in terms of human rights protection. It must be noted at the outset that for this to have effect on investment law disputes, both the home and host states would need to be party to the Business and Human Rights Treaty. For trade law disputes, as we discuss below, it is possible that both parties to the dispute would not need to be parties to the Business and Human Rights Treaty.

The conflict between human rights law and trade and investment law can be conceptualized in a broad or narrow sense. Broad conflict refers to situations where compliance with an obligation leads not to a breach, but to a limitation of another obligation.³ In the narrow sense, there are situations where compliance with one obligation unavoidably leads to breach of another obligation. Broad conflicts can often be resolved through harmonious interpretation, whereas narrow conflicts call for the prioritization of one norm over the other.⁴ Under general international law, this prioritization is established by three rules: (1) the norm of a higher status is prioritized over the norm of a lower status (*lex superior*), (2) the more recent norm is prioritized over the older norm (*lex posterior*), or (3) the more specific norm is prioritized over the more general norm (*lex specialis*).⁵

In the current practice of trade and investment tribunals, human rights law is commonly left out of analysis and consideration in dispute resolutions. If human rights law is taken into account at all, it is often done through harmonious interpretation, with investment and trade law bodies striking a compromise between the bodies of law by limiting both obligations instead of giving formal primacy to one or the other. This appears to be the standard required by the Vienna Convention on the Law of Treaties, Article 31(3)(c).⁶ In practice, this can lead to a bias towards

² Humberto Cantú Rivera, ‘Negotiating a Treaty on Business and Human Rights: the Early Stages’, (2017) 40 *UNSW Law Journal* 1200, at p. 1215. See, also, generally, Markus Krajewski, ‘Ensuring the Primacy of Human Rights in Trade and Investment Policies: Model Clauses for a UN Treaty on Transnational Corporations, Other Businesses and Human Rights’, for CIDSE (2017), available at www.cidse.org/resources.

³ Erika de Wet and Jure Vidmar, ‘Conflict between International Paradigms: Hierarchy versus Systemic Integration’, (2013) 2 *Global Constitutionalism* 196, at p. 198.

⁴ *Ibid.*

⁵ Cf. International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682 (2006).

⁶ *Vienna Convention on the Law of Treaties* (1969), 1155 U.N.T.S., 331, entered into force 1980.

investment or trade law, either explicitly in the judgments or implicitly through the strength of the investment and trade bodies and the legal standards those bodies employ when evaluating cases that involve conflicting human rights obligations.⁷

To understand the problem, it is necessary to briefly distinguish between the reasoning within trade and investment dispute agreements.

1.1. Investment Tribunals and Human Rights

For investment law, when and if human rights are discussed, tribunals have at times been reluctant to diagnose a real conflict between investment or trade law and human rights.⁸ For example, in *Biwater Gauff v Tanzania*, the tribunal noted the relevance of submissions on human rights, but did not directly address the conflict in the state's obligation when assessing the merits of the case.⁹ More explicitly, the tribunal in *Suez and Vivendi v Argentina* decided that the refusal of Argentina to renegotiate the tariff a private water provider could charge in the face of the economic crisis constituted a violation of the standard of fair and equitable treatment, despite Argentina's claim that the measure was necessary to preserve the human right to water.¹⁰ Without greater clarity on how the tribunal understood the relationship between human rights and investment law, the tribunal concluded, that,

"Argentina is subject to both international obligations, i.e. human rights and treaty obligation, and must respect both of them equally. Under the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive. Thus, ... Argentina could have respected both types of obligations."¹¹

To address the relationship between investment law and human rights, the draft treaty should be phrased in a way that firstly, requires tribunals to take human rights into account, and secondly, clarifies that trade and investment law must be interpreted in a way that is least restrictive on the ability of a state to respect, protect, ensure, and fulfill its human rights obligations. This second requirement is necessary to ensure that states maintain their ability to adapt regulations to changing circumstances without having to pay compensation that can deplete state resources that should be used for the realization of human rights.

1.2. Trade Law Bodies and Human Rights

⁷ See, e.g., M. Sornarajah, *The International Law on Foreign Investment*, 3rd ed. (Cambridge University Press, 2010) p. 472; Tara Van Ho, 'Is it Already Too Late for Colombia's Land Restitution Process?' (2016) 5 *International Human Rights Law Review* 60, at p. 72.

⁸ See, e.g. *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v Argentina*, ICSID Case No. ARB/03/19, Decision on Liability (30 July 2010), para 262.

⁹ *Biwater Gauff (Tanzania) Ltd., v Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008), paras 379-380, 387-388, 392.

¹⁰ *Suez* (n 8), at paras 247, 252, 276.

¹¹ *Ibid* para 262.

With regard to trade law, Article XX GATT¹² and the parallel exceptions in other treaties of the World Trade Organization ('WTO')¹³ recognize certain enumerated non-trade values that are meant to prevail in case of a conflict with trade rules.¹⁴ Human rights themselves are not among these values. There are, however, protections for public morals as well as the protection of human, animal or plant life or health, which are often discussed in a human rights context.¹⁵

Measures relating to these Article XX exceptions must be 'necessary'. In recent cases, tribunals have approached the issue of necessity by weighing and balancing the trade impact of the measure, the importance of the interests protected by the measure, the contribution of the measure to the realization of the end pursued, and any reasonably available alternatives achieving the same level of protection. It is still likely that in practice, trade law will prevail over human rights law due to (1) the limited opportunities to read human rights into the enumerated Article XX grounds, and (2) the stronger enforcement system for trade law compared to human rights law.¹⁶

Unlike with investment treaties, trade law allows the possibility for the proposed treaty to take effect even when all parties to a dispute are not party to the new treaty. The decision of the Appellate Body in *United States – Shrimp (Art. 21.5)* deserves special attention when considering what unilateral actions States Parties to the new treaty may take in regard to trade restrictions. The case involved unilateral restrictions by the US regarding the import ban of certain shrimps with the purpose of protecting endangered species of sea turtles.¹⁷ The Appellate Body found that such a restriction could be permitted under the condition that all parties concerned must engage in continuous efforts to negotiate a multilateral solution in good faith. The benchmark for such a negotiation could, said the Appellate Body, be properly located in an international convention that had been negotiated among all states with an interest in the issue. A legitimate refusal to trade by any particular state could be grounded on such a convention.¹⁸ However, the Appellate Body stopped short of requiring all of the parties affected by a restriction to agree to support the convention. Instead, where a broad consensus can be reached, the party that refuses to be part of that consensus might nevertheless find that is subjected to a restriction on its trade. There is a precedent here for the way in which a treaty on business and human rights might be based on a broad, but not complete consensus – and nevertheless have a decisive impact on a recalcitrant party. In this context it is instructive to recall the conditions placed by the Appellate Body. The restriction on trade must

¹² *General Agreement on Tariffs and Trade* (1947), 61 Stat. A-11, 55 U.N.T.S. 194.

¹³ E.g. Article XIV *General Agreement on Trade in Services* (1994), 1869 U.N.T.S. 183, 33 I.L.M. 1167; Article 2.2 *Agreement on Technical Barriers to Trade* (1994), 1868 U.N.T.S. 120; Article 3 *Agreement on Trade-Related Investment Measures* (1994), 1868 U.N.T.S. 186.

¹⁴ Robert Howse and Makau Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization* (International Centre for Human Rights and Democratic Development, 2000) at p. 10.

¹⁵ Sarah Joseph, *Blame It on the WTO? A Human Rights Critique* (Oxford University Press 2011) p. 104 ff.

¹⁶ *Ibid* at p. 50.

¹⁷ *United States – Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Art. 21.5 by Malaysia*, WT/DS58/AB/RW, Appellate Body Report (21 November 2001) at para. 3 ("Shrimp II").

¹⁸ *Ibid* Para 133 - 134

(1) be aimed at a legitimate interest and must not be designed to disguise an intentional restriction on international trade for the benefit of national producers;

(2) not unjustifiably or arbitrarily discriminate against states that are in similar conditions, meaning that all similarly situated states have had a similar opportunity to negotiate an appropriate solution; and

(3) there must have been good faith, sustained efforts to reach a multilateral solution with affected states.¹⁹

Therefore, potentially the Treaty on Business and Human Rights could be applicable even if one party to a WTO dispute has not ratified it.²⁰

1.3 Conclusions

In the absence of clear priorities, WTO and investment dispute settlement bodies are likely to prioritize their own set of norms over those that emanate from human rights law.²¹ In light of the above, a provision in the treaty will have to be phrased in a way that requires the adjustment of trade and investment law in way that, from amongst the reasonably available alternatives, is the course of action that does least damage to human rights objectives.²²

2. Using the Tools for Legal Conflicts: *Lex Superiori Lex Posteriori*, *Lex Specialis*

Human rights on the one hand, and trade and investment law on the other hand, are different specialized systems that were developed in isolation from each other²³. Yet, they do often come into contact with each other. When this occurs, and the requirements of the different sets of norms are irreconcilable, tribunals are expected to apply the rules of *lex posteriori* (primacy of the more recent norm), *lex specialis* (primacy of the more specific norm) and *lex superioris* (primacy of the norm with the higher status).²⁴

According to Article 30(3) of the Vienna Convention on the Law of Treaties, the applicability of the *lex posteriori* rule presupposes that the treaties relate to the same subject matter. In the case of investment law conflicting with law of the European Union, investment tribunals have regularly found that this is not the case,²⁵ since the two sets of norms have different objectives (creating a common market and providing specific guarantees for investors, respectively) and do not afford comparable substantive protection to investors, particularly with regard to access

¹⁹ Article XX, GATT (n. 12); Shrimp II (n. 17), at paras 118, 123-124, 127-128.

²⁰ Ibid at para 124.

²¹ Sarah Joseph (n. 15) at p. 50.

²² For further development of this argument, see Leader (n. 1), at p. 88, 89, 100.

²³ Sarah Joseph (n. 15) at p. 47.

²⁴ Ralf Michaels and Joost Pauwelyn, 'Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of International Law', (2012) 22 *Duke Journal of Comparative & International Law* 349-376 at p. 355-356.

²⁵ Christina Binder, 'A Treaty Law Perspective on Intra EU-BITs', (2016) 17 *Journal of World Investment & Trade* 964-983, at p. 973.

to arbitration.²⁶ Because European Union law and investment law do not address the same subject matter, the tribunals have sometimes found the *lex posteriori* rule is inapplicable and that investment law must be fully complied with, even where it conflicts with EU demands.²⁷

The requirement that the two norms relate to the same subject matter also applies to the *lex specialis* rule. Even if in a particular case a sufficient overlap of subject matters is recognized, it remains unclear which of the bodies of law would be held to be more specialized. Some might argue that investment law is a more specialized regime of international law, and should therefore apply in place of more general commitments of human rights law. Some are even likely to consider that a bilateral investment treaty is more specialized than a multilateral human rights treaty.²⁸ While one could theoretically make the opposite argument that human rights can be *lex specialis* against investment law, this has not yet been found in any jurisprudence.

This leaves investment and trade tribunals with the potential to rely on the rule of *lex superior*, which is contentious. The exact scope of the rule is unclear except for the primacy of the UN Charter over conflicting obligations which is established in Article 103 UN Charter and reaffirmed in Article 30(1) Vienna Convention on the Law of Treaties. Certain treaties contain an explicit provision establishing the primacy of other treaties when there is a conflict. For example, Article 104 NAFTA provides for the primacy of certain environmental and conservation treaties over the investment and trade protections.²⁹ Importantly, in *Kadi and Al Barakaat International Foundation v. Council and Commission*, the European Court of Justice found that the protection of fundamental rights is part of the very foundations of the Union's legal order. Therefore, human rights in European Union law prevailed over an EU regulation aimed at implementing a Security Council Resolution combating terrorism.³⁰ It is worth highlighting how the Court has argued that its decision does not challenge the supremacy of the UN Charter: It considered that the judicial review of the legality of the European Union regulation is not equivalent to the analysis of the UN resolution that is implemented by the EU regulation.³¹

Similarly, the Constitutional Court of Germany (German Bundesverfassungsgericht) in the case *Solange I* has considered the level of protection of fundamental rights in the European Law to be lower than at national level. For this reason, the Court has decided 'to reserve to itself the right to review Union action for its conformity with national fundamental rights as long as there was insufficient protection at EU level'.³² In *Solange II*, the Bundesverfassungsgericht declared

²⁶ *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, Decision on Jurisdiction, UNCITRAL (30 April 2010), paras 75-77.

²⁷ Christina Binder (n. 25) at p. 973.

²⁸ *Ibid.*

²⁹ *North American Free Trade Agreement* (1993), 32 ILM 289, 605.

³⁰ *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Case C-402/05 P and C-415/05, ECR I-6351, European Court of Justice (2008).

³¹ *Ibid.*

³² BVerfGE 37, 271 [1974] (*Solange I*).

that insofar as the European Union maintained an elevated standard of protection, this review was no longer needed.³³

These cases at least implicitly recognize the superiority of human rights over other bodies of international law. However, the legal reasoning underpinning these results is unclear, and trade or investment tribunals have never recognized the superiority of human rights. In sum, the application of existing rules of conflict resolution, whether contained in trade and investment treaties or in the Vienna Convention on the Law of Treaties or as customary international law, do not guarantee that human rights will prevail over competing investment and trade interests.

3. Responding to the Problem

To reverse this situation, the Treaty would have to contain specific language not only establishing the primacy of human rights as explained above, but also giving priority of this rule of conflict resolution over competing rules.

The proposal of a provision of conflict resolution that admits interpretation of trade and investment law in a way that causes least damage to the States' ability to respect and ensure their human rights obligations, inverts the requirement of 'necessity' contained in Article XX GATT. In this sense, a combination of *lex specialis*, *lex superiori* and *lex posteriori* would be applied to ensure the primacy of human rights obligations over trade and investment agreements: On a substantive level, the Treaty establishes the primacy of human rights over trade and investment law (*lex superiori*). To establish the priority of this rule of conflict resolution over competing rules of conflict resolutions, the *lex specialis* and *lex posteriori* rules are used.

By including a conflict resolution norm in the treaty, the treaty can supersede the standards for conflict resolution identified in both customary international law and existing trade and investment agreements. The provision providing the primacy of the Treaty would be *lex specialis* over norms that exist in customary international law. While both customary international law and the new treaty would cover the same subject area (conflict resolution), the treaty's provision would be more specific to the issue of how this treaty should interact with trade and investment agreements. Where the provision establishing the treaty's primacy conflicts with a competing clause in existing trade or investment agreements, the new provision would prevail as *lex posteriori*. In order to avoid any doubt, however, it is preferable that the primacy of the conflict resolution rule be explicitly stated in the Treaty.

In order to address future trade or investment agreements which may yet again attempt to give priority to themselves, the Treaty should include a provision requiring states to ensure that any future treaties do not conflict with the priority given to human rights. Such a provision reaffirms an existing human rights obligation of all states to not conclude treaties that conflict with their

³³ BVerfGE 73, 339 [1986] (*Solange II*).

existing obligations.³⁴ Drafting the Treaty in this way means making human rights part of the very foundation of the international legal and economic order.³⁵ This fundamentality and ultimate priority of human rights is recognized in the *Kadi* and *Solange* jurisprudence³⁶, and captured in Art. 28 of the Universal Declaration of Human Rights which provides that “everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized”. With this recognition, the rule of *lex superior* is meant to be applied in conflict resolutions, guaranteeing the primacy of human rights obligations over trade and investment agreements.

4. Suggestions for draft elements

In light of the above concerns, we recommend the following language to address the need raised by the Elements for the Draft Legally Binding Instrument regarding the supremacy of human rights over conflicting investment and trade disputes:

“The Parties agree that any future trade and investment agreements they negotiate, whether amongst themselves or with third parties, shall not contain any provisions that conflict with the primacy for human rights.

When negotiating trade and investment agreements, whether amongst themselves or with third parties, each State Party shall ensure the inclusion of clauses that protect human rights. These clauses must require investors to uphold human rights in the host state and must protect the right of states to continuously adopt new regulations for the protection of human rights.

The Parties agree that all existing and future trade and investment agreements shall be interpreted in a way that is least restrictive on their ability to respect and ensure their national and international human rights obligations, including the obligation to progressively realize economic, social and cultural rights using maximum available resources. As such, the Parties agree that tribunals hearing relevant cases must provide a detailed analysis of the relevant human rights obligations taking into account, *inter alia*, the General Comments and jurisprudence issued by the relevant United Nations human rights bodies. This rule of conflict resolution shall take priority over other existing rules of conflict resolution arising from customary international law or from existing trade and investment agreements.”

³⁴ UN Committee on Economic, Social and Cultural Rights, General Comment 24: State Obligations under the ICESCR in the Context of Business Activities (2017) UN Doc E/C.12/GC/24, para 13.

³⁵ Antônio Augusto Cançado Trindade, ‘General Course on Public International Law’, (2005) *Collected Courses*, Vol. 316 at p. 90-91.

³⁶ See Juliane Kokott and Christoph Sobotta, ‘The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?’, (2012) 23 *European Journal of International Law* 1015, at p. 1016.