

This report represents the views of the rapporteurs on the discussions among the participants of the respective break-out session. It does not represent the views of the UNCTAD Secretariat or its member States.

**UNCTAD High-level IIA Conference
13 November 2019**

**Break-out sessions: Multilateral processes related to investment policymaking and
their contribution to Phases 1 and 2 of SD-oriented IIA reform
“Ensuring responsible investment”**

Co-rapporteurs:

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Speakers in the session reiterated the view expressed in the plenary on the importance of ensuring responsible investment as part of the investment reform and praised UNCTAD's efforts in this area. Speakers also highlighted the need for increasing efforts to accelerate the integration of investors' responsibility in the investment regime. A speaker pointed to the urgency to act: we have only ten years to meet the 2030 Sustainable Development Goals (SDGs) and we are only 1.5 C° away from the point of no return on climate change. Investment plays a pivotal role to enable societies to meet these challenges.

It was noted how there is remarkable consensus at the international level on what investors should be doing to ensure investment is responsible. Speakers pointed to the convergence of normative standards like the UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises that define the corporate responsibility to respect human rights as well as corporate responsibilities in other areas such as environment, taxation and consumer protection. They also pointed to the increasing domestic regulation that is reflecting these international standards, particularly on environment and human rights. It was even mentioned how companies are integrating this notion of responsibility and advocating for regulation in this area that provides clarity, coherence and fosters a level playing field.

In contrast, it was noted how International Investment Agreements (IIAs) are lagging behind this trend and sending contradictory signals to investors when IIAs are silent on investor's conduct or this conduct is considered irrelevant by arbitral tribunals.

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Speakers considered that the topic is particularly reach and that it is key to continue the work and discussion.

In relation to the specific questions asked for reflecting on the progress made on the UNCTAD reform phases speakers commented:

- (i)** Strengthening reform: consistent views were expressed on the need for collaboration among international organisations – continue breaking the silos. It was mentioned in particular, the need to align the efforts of investment reform with the work and progress made in areas such as environment and human rights; the process of the binding treaty on human rights was mention as an example.
- (ii)** Challenges: speakers discussed the challenges of innovating in this area. First, it was noted how it is a long process as it involves trying to get consensus from the different stakeholders involved. Second, speakers refer to the importance of the question about how to implement the changes and what kind of outcomes will be obtained; it is difficult to predict those outcomes in advance. Finally, it was mention the difficulty to enforce responsible business standards: even when these standards are included IIAs the question remains as to how investors can be made accountable under those treaties and then what impact these treaty references can have in practice.
- (iii)** Innovative, outside the box processes or actions that were mentioned or suggested:
 - Innovative practices are coming not only from developed countries but also from developing countries; efforts where noted in the African context – at the national and regional levels.
 - Innovation in IIAs: in addition to already known clauses including sustainable development as part of treaty objectives and provisions on compliance with domestic laws and regulations, one of the speakers mentioned the use of the compensation clause to address issues of investor responsibility. The clause allows the tribunal to take into account - when deciding compensation - the non-compliance by investors with commitments under UNGPs and OECD Guidelines. In addition, another speaker mentioned the effort to develop guidance on responsible investment issues, following reform action No. 1 and UNCTAD's work on this topic.

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- Beyond treaties: beyond IIAs, some examples were highlighted on innovative practices for investment policymaking including the so called “performance agreements.” These are agreements entered by the government with investors to support the SDGs. The agreements include consultation with interested parties, publication of the agreement and the inclusion of tailored means and investors’ commitments for achieving the SDGs.

(iv) Follow-up actions to the IIA Conference 2019:

It was mentioned the need to bring attention to the practices and the ways companies, third-party funders, and even law firms are using investment law – as it relates to their own responsibilities to respect human rights

The work and research that UNCTAD is doing on harmonizing and developing guidance for companies to report on sustainable issues like environment and human rights, through its work on corporate sustainability reporting – e.g. the Intergovernmental Working Group of Experts on International Standards of Accounting and Reporting, was also discussed. The question was asked as to how to use this data in the context of the investment reform to spark interest among stakeholders and illustrate the trend towards consistent approaches to responsible conduct.

Finally, it was highlighted that the OECD has made a decision to work on the area of responsible investment and IIAs, that it has produced a first scoping paper on the topic and that it is organising a meeting in March 2020.