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Possible reform of investor-State dispute settlement (ISDS)
Interpretation of investment treaties by treaty Parties

Note by the Secretariat

Contents

I. Introduction

1. At its thirty-fourth to thirty-seventh sessions, the Working Group undertook work on the possible reform of investor-State dispute settlement (ISDS), based on the mandate given to it by the Commission at its fiftieth session, in 2017.[1] At those sessions, the Working Group identified and discussed concerns regarding ISDS and considered that reform was desirable in light of the identified concerns.

2. At its thirty-eighth session, the Working Group agreed on a project schedule on reform options.[2] It requested the Secretariat to undertake preparatory work on treaty interpretation by States Parties (A/CN.9/1004, para. 25).

3. Accordingly, this Note addresses the question of treaty interpretation in the context of ISDS, highlighting the existing interpretative tools, and considering how to foster their use by treaty Parties.

4. As is the case for other documents provided to the Working Group, this Note was prepared with reference to a broad range of published information on the topic,[3] and does not seek to express a view on the possible reform options, which is a matter for the Working Group to consider.

II. Interpretation of investment treaties

A. Treaty interpretation in the context of ISDS

1. Proposals and comments in the Submissions

5. At its thirty-sixth session, the Working Group heard preliminary proposals on the means to strengthen the involvement of States in the interpretation and application of their treaties. Examples of how States were currently addressing this matter included the development and use of treaty provisions on unilateral, joint or multilateral interpretative declarations, guidance to arbitral tribunals on the meaning of certain terms and standards, binding interpretations of the underlying investment treaty obligations, and establishment of joint committees or commissions on treaty interpretation (A/CN.9/964, para. 38; see also A/CN.9/935, para. 43).

[1] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), paras. 263 and 264. The deliberations and decisions of the Working Group at the thirty-fourth to thirty-seventh sessions are set out in documents A/CN.9/930/Rev.1 and its Addendum, A/CN.9/935, A/CN.9/964, and A/CN.9/970, respectively.

[2] The deliberations and decisions of the Working Group at the thirty-eighth session are set out in document A/CN.9/1004; document A/CN.9/WG.III/WP.166 provides an overview of reform options.

[3] This Note was prepared with reference to a broad range of published information on the topic: Gordon, K. and Pohl, J. Investment Treaties over Time – Treaty Practise and Interpretation in a Changing World, OECD Working Papers on International Investment 2015/02; Gaukrodger, D., The Legal Framework Applicable to Joint Interpretative Agreements of Investment Treaties, OECD Working Papers on International Investment, 2016/01; Johnson, L. and Razbaeva, M., State Control over Interpretation of Investment Treaties, April 2014; Boisson de Chazournes L., Kohen M., and Viñuales J., Diplomatic and Judicial Means of Dispute Settlement, Chapter by Kaufmann-Kohler, G., Non-Disputing State Submissions in Investment Arbitration: Resurgence of Diplomatic Protection?; Kaufmann-Kohler, G., Interpretive Powers of the Free Trade Commission and the Rule of Law, Fifteen Years of NAFTA Chapter 11 Arbitration, JurisNet, LLC 2011; Legum, B., Lessons Learned from the NAFTA: The New Generation of U.S. Investment Treaty Arbitration Provisions, ICSID Review - Foreign Investment Law Journal, Volume 19, Issue 2, 1 (Oct. 2004) 344; Menaker A.J, Thornton and N., U.S. Model Bilateral Investment Treaty (2004) (US BIT), in World Arbitration Reporter (2nd Edition 2010); UNCTAD IIA Issues Note, Interpretation of IIAs: what States can do, 3 December 2011; Sharpe J., The Agent's Indispensable Role in International Investment Arbitration, ICSID Review, Vol.33, No. 3 (2018), pp. 675-701; Gáspár Szilágy S., Behn D. and Langford M., Adjudicating Trade and Investment Disputes, Convergence or Divergence? Chapter by Chernykh Y., Assessing Convergence between International Investment Law and International Trade Law through Interpretative Commissions/Committees: A Case of Ambivalence? Cambridge University Press; Arato J., Brown C., and Ortino F., Parsing and Managing Inconsistency in ISDS, (2020) 21 Journal of World Investment and Trade and Academic Forum on ISDS Concept Paper 2019/3.

6. The Working Group may wish to note that the proposals for reform submitted by Governments in preparation for the deliberations on the third phase of the mandate ("Submissions") also address this matter, underlying that it may serve to ensure a better control by treaty Parties over the interpretation of their treaties and to address concerns of lack of consistency, coherence, predictability and correctness of decisions by ISDS tribunals.[4]

7. It is underlined in a Submission that the reform of ISDS should focus on ensuring consistency in the interpretation of the provisions of investment treaties, in particular the substantive clauses of such treaties, in order to develop homogeneous case law that promotes legal certainty.[5]

8. Regarding the means to achieve more consistent treaty interpretation, various suggestions are made. A suggestion is that the use of binding joint interpretation of treaty provisions by Parties should be encouraged,[6] and it should be ensured that such joint interpretations would be binding on the ISDS tribunals. As noted in Submissions, recent investment treaties provide for the ability of the treaty Parties to adopt binding interpretations of the underlying obligations.

9. In addition, it is suggested that a mechanism could be developed so that treaty Parties could jointly determine the law or principles of interpretation to be used by ISDS tribunals so as to ensure that the treaty would be interpreted as intended by the Parties.[7]

10. Submissions underline that the non-disputing Party to the treaty under which the dispute arises should be given the possibility to participate in the proceedings by addressing issues of treaty interpretation.[8] It is also suggested that arbitral tribunals should be able to consult State authorities on the interpretation in case of doubt.[9]

11. A Submission which proposes to establish a standing multilateral mechanism suggests to consider whether and, if so, under what conditions other governments that are party to the instrument establishing the standing mechanism should be able to intervene in disputes on questions of interpretation of systemic importance under investment treaties to which they are not contracting Parties, while ensuring at the same time that this does not compromise the ability of the treaty Parties to retain control over its interpretation.[10]

12. As to the means to implement a reform on treaty interpretation, various suggestions are made in the Submissions, such that a treaty interpretation mechanism should be provided in the form of a model treaty provision,[11] that it could be made part of an amended version of the UNCITRAL Arbitration Rules,[12] or of a multilateral standing mechanism.[13] It is also suggested that joint interpretative committees or commissions existing alongside arbitral

[4] Submission from the European Union and its Member States (A/CN.9/WG.III/WP.159/Add.1); Submission from the Government of Morocco (A/CN.9/WG.III/WP.161); Submission from the Government of Thailand (A/CN.9/WG.III/WP.162); Submission from the Governments of Chile, Israel and Japan (A/CN.9/WG.III/WP.163); Submissions from the Government of Costa Rica (A/CN.9/WG.III/WP.162 and A/CN.9/WG.III/WP.178); Submission from the Government of Ecuador (A/CN.9/WG.III/WP.175); Submission from the Government of South Africa A/CN.9/WG.III/WP.176; Submission from the Government of Bahrain (A/CN.9/WG.III/WP.180); Submission from the Governments of Chile, Israel, Japan, Mexico and Peru (A/CN.9/WG.III/WP.182).

[5] Submission from the Government of Morocco (A/CN.9/WG.III/WP.161).

[6] Submissions from the Government of Costa Rica (A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178); Submission from the Governments of Chile, Israel, Japan, Mexico, Peru (A/CN.9/WG.III/WP.182).

[7] Submission from the Government of Thailand (A/CN.9/WG.III/WP.162).

[8] Submission from the European Union and its Member States (A/CN.9/WG.III/WP.159/Add.1); Submission from the Government of Ecuador (A/CN.9/WG.III/WP.175, para. 26); Submission from the Governments of Chile, Israel, Japan, Mexico, Peru (A/CN.9/WG.III/WP.182).

[9] Submission from the Government of Costa Rica (A/CN.9/WG.III/WP.164, Annex II).

[10] Submission from the European Union and its Member States (A/CN.9/WG.III/WP.159/Add.1).

[11] Submission from the Governments of Chile, Israel, Japan, Mexico and Peru (A/CN.9/WG.III/WP.182).

[12] Submission from the Government of Thailand (A/CN.9/WG.III/WP.162).

[13] Submission from the European Union and its Member States (A/CN.9/WG.III/WP.159/Add.1).

tribunals could be established.[14] Finally, it is proposed that, in keeping with the developments on transparency in treaty-based ISDS, pleadings, awards, and other documents regarding treaty interpretation should be published so that future parties and tribunals are aware of the interpretative statements.[15]

2. Shared interpretative authority between treaty Parties and ISDS tribunals

13. Although treaty Parties and ISDS tribunals play different roles in the interpretation of investment treaties, they share interpretive authority. By introducing ISDS in investment treaties, treaty Parties have delegated the authority to ISDS tribunals to settle investor-State disputes by applying the relevant investment treaty provisions to a particular fact situation relating to a specific dispute.

14. Interpretation of treaty provisions by ISDS tribunals is necessary to delineate the scope of the rights and obligations of the disputing parties and thereby helps distinguish between those acts that constitute an interference with investors' rights and those that fall within a State's legitimate conduct. Lack of precise wording of many investment treaties amplifies the need for interpretation that allows these broadly worded provisions to be applied to specific fact situations.

15. While it remains the task of the arbitral tribunal to decide a case and interpret and apply an investment treaty to this end, the treaty Parties retain the power to clarify the meaning of a treaty through an authoritative interpretation. By virtue of general public international law, they can clarify their authentic intentions and issue authoritative statements on the interpretation of their treaties.[16] The most widely used interpretative rules are found in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). These rules establish the elements interpreters must take into account when giving meaning to treaty provisions. The Convention constitutes a codification of international customary rules on treaty interpretation (see below, paras. 34 and 35).[17]

16. In addition, a submission by a respondent State on the interpretation of provisions of a treaty, supported by the non-disputing treaty Party may potentially serve to evidence agreement.[18] As indicated above (see para. 12), pleadings supported by non-disputing parties could therefore give guidance when it comes to interpreting a treaty.

17. It may be noted that treaty Parties have rarely made use of the mechanisms available to them to ensure correct treaty interpretation, as shown in an analysis of State practice presented in a paper by the OECD (see also below, para. 38).[19] Treaty Parties could therefore take a more proactive attitude when it comes to the interpretation of obligations in investment treaties. A pro-

[14] Submission from the Government of Bahrain (A/CN.9/WG.III/WP.180).

[15] Submission from the Government of Thailand (A/CN.9/WG.III/WP.147, paras. 24 and 25); Submissions from the Government of Costa Rica (A/CN.9/WG.III/WP.164, Annex I a) 1); A/CN.9/WG.III/WP.178, Annex II a) 2).

[16] The Permanent Court of International Justice (PCIJ) noted that "the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it." (Permanent Court of International Justice, *Jaworzina,* Advisory Opinion, 1923, P.C.I.J., Series B, No. 8, p. 37) This was later reaffirmed by the International Law Commission (Yearbook of the International Law Commission, 1966, Vol. II, p. 221, para. 14), the International Court of Justice (International Court of Justice in the *Kasikili/Sedudu Island (Botswana/Namibia*), Judgement (13 December 1999), para. 63) as well as arbitral tribunals (see for example *ADF Group Inc. v. United States*, ICSID No. ARB(AF)/00/1 (9 January 2003), para. 177).

[17] The rules of interpretation in the VCLT are extensively used by international adjudicating bodies such as the ICJ, international criminal courts and tribunals.

[18] Roberts A., Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States, American Journal of International Law, Vol. 104, No. 1, 2010, p. 217.

[19] Gordon, K. and J. Pohl (2015), "Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World", OECD Working Papers on International Investment, 2015/02, OECD Publishing: a statistical study of the legal reasoning used by ICSID tribunals in treaty-based cases finds that decisions of other arbitration panels are, by far, the most cited external references in these awards, accounting for 38% of the total interpretive citations in the 98 awards surveyed. Legal doctrine (academic articles) are cited in 73 of the 98 ICSID decisions studied and account for 16% of total interpretive sources cited in decisions. Sources from treaty parties (e.g. preparatory work, the treaties themselves, model treaties, and object and purpose as described in the treaty itself) account for only 29% of interpretive sources cited.

active attitude could foster a more predictable and coherent reading of treaty terms. Interpretation of investment treaties by Parties can thus complement better treaty language and other current efforts to remedy certain identified concerns.

3. Outline of issues specific to treaty interpretation in the context of ISDS

18. The Working Group may wish to note the following issues regarding interpretation by treaty Parties in the context of ISDS.

a) Treaty Party and respondent in a case

19. Treaty Parties which may use authentic and authoritative means of interpretations of their treaties, may also be respondents in ISDS proceedings arising under such treaties. The Working Group may wish to note that submissions by respondent treaty Party in pending disputes qualify as conduct that can establish subsequent agreement on interpretation; and submissions by non-disputing Parties can likewise be used to guide interpretation and application of the treaties in ongoing ISDS. Recent investment treaties expressly grant treaty Parties the ability to make binding determinations during ISDS proceedings. However, some treaties also explicitly foresee the non-applicability of a joint interpretation rendered after the establishment of the tribunal.[20]

20. To alleviate concerns on possible abusive interpretations after the establishment of the tribunal, treaty Parties may consider issuing interpretive statements proactively – in advance – and outside of a particular dispute.

b) Rights of foreign investors under the investment treaty

21. Investment treaties, unlike most other international treaties in the economic area, create rights for individuals. These rights of foreign investors could potentially be affected or even compromised by subsequent authoritative interpretations by the treaty Parties. The general regime under the VCLT leaves treaty Parties with flexibility to modify or revoke the rights of third-party States, including through amendments of the treaty. The VCLT does not address modifications or revocations of the rights or interests of private third parties.[21]

c) Treaty interpretation and treaty amendment

22. Third, the interpretation of investment treaties ought to be distinguished from treaty amendments. Interpretation is meant to clarify the terms of a treaty. In contrast, amendments may add to or modify existing obligations and they typically require formal adoption, for example, through domestic ratification. Distinction between treaty amendment (to which the principle of non-retroactivity applies because the amendment creates a new norm) and treaty interpretation (to which the principle of non-retroactivity does not apply because an interpretation clarifies the content of a norm) is important. In practice, however, the borderline between interpretation and amendment may be blurred.[22]

B. Interpretative authority of treaty Parties

1. Interpretative tools available to treaty Parties

23. Treaty Parties have different interpretive tools at their disposal at different stages: (i) in the treaty negotiating process, the drafters could ensure precise treaty language and clear interpretation guidelines; (ii) after the treaty is concluded, the Parties can clarify the treaty language by issuing interpretive statements and agreements; (iii) in the event of a dispute arising under a treaty, the Parties may

[20] See, for insstance, article 24 (2) of The Netherlands Model BIT (2018).

[21] Gaukrodger, D., The legal framework applicable to joint interpretative agreements of investment treaties, OECD Working Papers on International Investment, 2016/01

[22] Roberts A., Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States, American Journal of International Law, Vol. 104, No. 1, 2010, pp. 201-202; Kaufmann-Kohler, G., Interpretive Powers of the Free Trade Commission and the Rule of Law, Fifteen Years of NAFTA Chapter 11 Arbitration, JurisNet, LLC 2011.

intervene in dispute settlement proceedings; and (iv) after the dispute has been decided, the Parties can scrutinize arbitral awards and comment on the interpretation by ISDS tribunals.

a) At the stage of drafting the investment treaty

24. The question of treaty interpretation can be tackled at the stage of the drafting of the investment treaty. The primary and efficient way for treaty Parties to ensure that treaty interpretations are closely aligned with their intent is to craft treaty language carefully.

- *Precision of treaty terms*

25. Precision of treaty terms has been increased in recently concluded investment treaties, which also supplement broad standards with specific clarifications,[23] and delineate what is or not covered under the treaty.[24] A survey of ISDS provisions in investment treaties shows that the provision on ISDS are much more detailed – thus, governments appear to be also providing more extensive guidance on how ISDS proceedings are to be conducted. [25]

- *Consideration of the preamble of the investment treaty*

26. Article 31(1) of the VCLT provides that a treaty provision has to be interpreted in light of its "context" and "object and purpose". The preamble of an investment treaty typically states the objectives of the treaty. Many preambles in investment treaties refer to the protection of investments as the sole object and purpose of the treaty. This has led some tribunals to adopt an interpretation focusing primarily on investors' interests.[26] To prevent such an interpretation, preambles of recent investment treaties reaffirm regulatory flexibilities (such as their right to regulate), reiterate commitment to human rights, labour or environmental standards, or the promotion of wider policy objectives (such as sustainable development and transfer of technology).

- *Determination of interpretation rules*

27. The rules to be followed by ISDS tribunals when interpreting a treaty can also be indicated by treaty Parties in the treaty, either by expressly referring to the VCLT or by including autonomous interpretation rules, standards or canons corresponding to the specific needs of the investment law regime supplementing or substituting the VCLT rules.

- *Provision of specific mechanisms*

28. A mechanism introduced by recent treaties is the *renvoi* of certain questions, which are explicitly defined in the treaty, to the treaty Parties for interpretation. In these cases, the treaty provides that the treaty Parties (or sometimes the specifically created joint committee or commission) shall interpret certain matters or provisions and issue a binding interpretation on the tribunal.[27]

29. Certain investment treaties provide that, before issuing a decision, any disputing party can request the tribunal to send the draft award for comments

[23] Some recent formulations of the provisions on most-favoured-nation treatment, fair and equitable treatment and expropriation are illustrative of this trend (see for instance, UNCTAD *Series on Issues in International Investment Agreements (A Sequel) on Most-Favoured Nations Treatment* (Fair and Equitable Treatment and Expropriation forthcoming) available at http://www.unctad.org/iia.)

[24] Examples include i) specifying the type of assets that are not covered under the scope and definition clause; ii) clarifying the type of government action that is not prohibited (for instance, regulatory takings), or iii) stating that the most-favoured-nation treatment clause does not apply to ISDS.

[25] Pohl, J., Mashigo K., and Nohen A., (2012), Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey, OECD Working Papers on International Investment, 2012/02, page 39.

[26] *SGS v. Philippine*s, ICSID Case No. ARB/02/6, Decision on Jurisdiction (29 January 2004); *Noble Ventures, Inc. and Romania*, ICSID Case No. ARB/01/11, Award, (12 October 2005).

[27] As an illustration, damages commissions have been created to either provide interpretation on the rules for calculation of damages under a treaty or to undertake the actual calculation of damages and provide precedents; see Desierto D., Behn D., n Bonnitcha J., Langford M., Damages and ISDS Reform, Academic Forum on ISDS Concept Paper 2019/18.

to the disputing parties and the non-disputing State party to the treaty. All treaty Parties may provide comments within a determined time frame. The tribunal shall consider these comments before issuing its decision.[28]

Non-disputing party submission

30. As indicated above (see paras. 12 and 16), one extremely rich yet currently underexploited form of unilateral statements that can establish subsequent agreement and practice are submissions filed by a treaty Party in investment disputes – whether acting as a respondent or as a non-disputing treaty Party.

31. Some treaties explicitly provide for the intervention by the other, non-disputing State party or parties into the proceedings.[29] Submission by the non-disputing Party to the treaty is also provided for under article 5 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.[30] Even when a treaty or applicable rules do not explicitly provide for submissions by the non-disputing Party to the treaty, tribunals are likely to pay attention to statements made by the non-disputing Party.[31]

b) At the stage of the conclusion of the investment treaty

32. At the conclusion of an investment treaty, the Parties can adopt additional instruments such as formal or informal side-agreements, understandings or exchanges of letters.

33. In addition, a number of unilateral tools may be open to governments and parliaments at the moment of concluding investment treaties. Letters and memorials to government or legislature, commentaries, official statements and parliamentary debate may shed light on the meaning of treaty provisions.

c) Subsequent interpretative agreement or practice

- *General rule of interpretation*

34. As indicated above, the most widely used interpretative rules are found in Articles 31 and 32 of the VCLT.

35. Treaty Parties may clarify the content of their original treaty commitments through subsequent agreement or practice. This possibility follows from Article 31 (3) (a) and (b) of the VCLT. A "subsequent agreement" under Article 31(3)(a) of the VCLT is "an agreement between the parties, reached after the conclusion of a treaty, regarding the interpretation of the treaty or the application of its provisions."[32] "Subsequent practice" under Article 31(3)(b) of the VCLT may be defined as "conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty." While it carries the same force as a "subsequent agreement" under Article 31(3)(a), "subsequent conduct" under Article 31(3)(b) may be more difficult to establish.[33] Article 31(3) states that subsequent agreement and subsequent practice must be taken into account in treaty interpretation, along with other elements such as the ordinary meaning of the treaty's terms and its object and character. If interpretation of a treaty in accordance with Article 31 leaves its meaning "ambiguous or obscure," or

[28] See, for instance, Colombia-Peru BIT (2007) in Article 25 (14)(a).

[29] Article 35(1) of the Canada-Peru BIT (2006) for example provides that: *"On written notice to the disputing parties, the non-disputing Party may make submissions to a Tribunal on a question of interpretation of this Agreement*."

[30] See https://uncitral.un.org/fr/texts/arbitration/contractualtexts/transparency. Article 5 of the Transparency Rules provides that "the arbitral tribunal shall (...) allow, or, after consultation with the disputing parties, may invite, submissions on issues of treaty interpretation from a non-disputing Party to the treaty". Similar provisions can be found under the ICSID Arbitration Rules, which provides that "after consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute".

[31] See, for instance, *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (21 October 2005), paras. 249-263.

[32] Report of the International Law Commission on its sixty-fifth session A/68/10 (2013), Conclusion 4 p. 12.

[33] Report of the International Law Commission on its sixty-fifth session: A/68/10 (2013), Conclusion 5 & Commentary, p. 41.

would lead to a result that is "manifestly absurd or unreasonable," tribunals may turn to "supplementary means" of interpretation in accordance with Article 32 of the VCLT.

- *Binding interpretation*

36. Some investment treaties include provisions stating that the treaty Parties can issue interpretations that will then be binding on ISDS tribunals. [34] By stating in the treaty that the parties' agreements are conclusive, the parties remove any doubt regarding their force. Provisions expressly contemplating the subsequent agreement of treaty parties on binding interpretations have recently been included in an increasing range of investment treaties.[35]

37. Recently, several States issued joint interpretations for existing investment treaties and/or established joint bodies in their treaties with a mandate to issue binding interpretations of treaty provisions (see below, paras. 39 and 40), as highlighted in the UNCTAD, World Investment Report 2019.[36]

38. It should be noted that, according to UNCTAD's Investment Policy Hub, 126 of the 2,573, treaties analysed (4.9 per cent) are marked as expressly allowing for binding interpretations by the contracting parties or by interpretative committees or commissions. Only thirty-one treaties, or slightly over 1,56 percent contain institutional arrangements in the form of interpretative committees or commissions.[37]

- *Institutionalized cooperation for treaty interpretation*

39. In addition to ad-hoc mechanisms, a number of investment treaties have established institutionalized cooperation between the treaty Parties. These commissions or committees consist of representatives from the treaty Parties and are charged with the task of monitoring the implementation of the treaty and issuing interpretive statements on treaty provisions. The existence of such standing bodies facilitates the exchange of views and the formulation of common interpretations.[38]

40. Depending on the treaty, interpretations can be issued on the initiative of the committees or commissions, at the request of either of the contracting parties, at the request of the tribunal if a respondent or a disputing party asks for an interpretation, or as the result of various combinations of grounds. Some investment treaties give committees or commissions the exclusive authority to

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[34] For instance, Article X (6) of the Canada-Czech Republic BIT (2009) provides: "*An interpretation of this Agreement agreed between the Contracting Parties shall be binding on a Tribunal established under this Article.*"

[35] Provisions expressly contemplating the subsequent agreement of treaty Parties on binding interpretations were initially introduced into the 1994 NAFTA Agreement; they are now well-established in the model BITs and treaty practice of the NAFTA governments: 2012 United States Model BIT, article 30(3); 2004 Agreement between Canada and [...] for the Promotion and Protection of Investments (Model Canadian FIPA), article 40(2); they are also found in various treaties, such as ASEAN Comprehensive Investment Agreement (2009), article 40(3) ("A joint decision of the Member States, declaring their interpretation of a provision of this Agreement shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with the joint decision"); Dominican Republic-Central America-United States Free Trade Agreement (2004) (CAFTA-DR), article 10.22(3), Chile-Peru BIT, article 11.22(2); People's Republic of China (China)-Mexico BIT, article 19(2).

[36] UNCTAD, World Investment Report 2019, p. 109 and 110.

[37] For instance, Australia-China Free Trade Agreement (2015), Belgium-Luxembourg Economic Union-Montenegro BIT (2010), Belgium-Luxembourg Economic Union-Peru investment treaty (2005), Canada-EU Comprehensive Economic and Trade Agreement (2016), Canada-Honduras Free Trade Agreement (2013), Republic of Korea-Vietnam Free Trade Agreement (2015), Mexico-Panama Free Trade Agreement (2014), Pacific Alliance Additional Protocol (2014), The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). The number of treaties containing institutional arrangements for interpretation in the form of interpretative commissions/committees is slightly less than a quarter (only 22.4 per cent) of those 126 investment treaties that choose to expressly recognise the right of the States to joint interpretation.

[38] For instance, Article 165 of the Japan-Mexico FTA (2004) provides for the creation of a Joint Committee to serve as a forum for consultations to review and implement the FTA, adopt interpretations of the FTA, and decide on the rules of procedure for arbitration.

issue interpretations, which expires within a certain time limit in case no interpretation is issued.[39]

Consultations

41. Some investment treaties provide for "consultations" to be proposed by each Party to the treaty and on any matter concerning interpretation. Such mechanisms relate, for instance in the context of the definition of investment and investor, to issues of "control" of a company or an investment; to the nationality of an investor; or to the denial of benefits for investors from third countries.[40]

- *Documents for the purpose of interpreting an investment treaty*

42. A number of other documents may be used for the purpose of interpreting an investment treaty, including:

- The *travaux préparatoires* to which ISDS tribunals may resort, for instance, to clarify an ambiguous term; the release of *travaux préparatoires* may be a means for treaty Parties to ensure that their original intent is preserved;
- Documents unilaterally published or released by a treaty Party which are indicative of its negotiating position, and can assist ISDS tribunals in the interpretation of treaty terms;
- Model investment treaties, which can provide guidance to ISDS tribunals and facilitate an evolutionary reading of the treaty, in particular if they are publicly available and supplemented by an official commentary.

- *Post dispute phase*

43. The post-dispute phase provides an opportunity for treaty Parties to react to interpretations in arbitral awards. Done either unilaterally or jointly, the treaty parties can endorse or reject particular interpretations. By publishing these interpretations, treaty Parties may provide guidance for future decisions by ISDS tribunals.[41]

2. Proactive use of interpretative tools

44. As indicated above, treaty Parties have numerous tools at their disposal to ensure proper interpretation. From drafting clear and precise treaty language, to issuing joint interpretive notes or making unilateral statements, and making submissions as non-disputing party, treaty Parties can guide the process of interpretation through actions relating to the different stages. In that light, the Working Group may wish to consider how to foster the use by treaty Parties of such tools.

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[39] Gáspár Szilágy S., Behn D. and Langford M., Adjudicating Trade and Investment Disputes, Convergence or Divergence? Chapter by Chernykh Y., Assessing Convergence between International Investment Law and International Trade Law through Interpretative Commissions/Committees: A Case of Ambivalence*?* Cambridge University Press

[40] See Gordon, K. and J. Pohl (2015), "Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World", OECD Working Papers on International Investment, 2015/02, OECD Publishing. available at http://dx.doi.org/10.1787/5js7rhd8sq7h-en.

[41] In *Société Générale de Surveillance v. Pakistan*, Switzerland complained to the ICSID Secretariat that the tribunal had failed to seek its interpretive views before reaching a controversial interpretation of the BIT umbrella clause. The Swiss authorities made clear that they rejected the narrow reading given to the umbrella clause by the tribunal: *Société Générale de Surveillance v. Pakistan* (Pakistan-Switzerland BIT), Switzerland submitted: "[T]he Swiss authorities are wondering why the Tribunal has not found it necessary to enquire about their view on the meaning of Article 11 [the umbrella clause] in spite of the fact that the Tribunal attributed considerable importance to the intent of the Contracting Parties in drafting this Article and indeed put this question to one of the Contracting Parties (Pakistan). . . . [T]he Swiss authorities are alarmed about the very narrow interpretation given to the meaning of Article 11 by the Tribunal, which not only runs counter to the intention of Switzerland when concluding the Treaty but is quite evidently neither supported by the meaning of similar articles in BITs concluded by other countries nor by academic comments on such provisions. " Note on the Interpretation of Article 11 of the Bilateral Investment Treaty Between Switzerland and Pakistan, attached to the Letter of the Swiss Secretariat for Economic Affairs to the ICSID Deputy-Secretary General (1 October 2003), *reprinted in Mealey's International Arb. Rep.*, Feb. 2004.

a) Unilateral interpretation

45. Treaty Parties could be made aware of steps that they can take on a unilateral basis, such as:

- Making public the understanding of vague or uncertain treaty provisions;
- Monitoring statements and practice resulting from their treaties to identify areas of agreement and disagreement with other treaty Parties; and
- Cooperating with other treaty Parties to establish agreement clarifying ambiguous language and clarifying whether they intend those agreements to be binding.

b) Joint interpretation

Treaty provisions

46. Joint interpretive agreements are likely to be an increasingly important tool for ensuring that treaties are interpreted in accordance with the treaty Parties' intent and achieve their purposes. Treaty Parties can provide in their investment treaties for an express mechanism allowing them to agree on interpretations over time.

47. The Working Group may wish to consider whether to develop model treaty provisions on questions such as:

- Ensuring that joint interpretations by treaty Parties on some or all issues are binding on tribunals;
- Determining the interpretative rules that the ISDS tribunal should follow and governing the meaning given to silence on certain matters;
- Encouraging (or requiring) treaty Parties to consult and cooperate to resolve ambiguities on questions of interpretation and/or application;
- Providing for the establishment of committees or commissions tasked with treaty interpretation; and
- Requiring that home States or other non-disputing Parties (i) are notified of claims filed under their treaties, (ii) receive documents submitted to and issued by tribunals, and (iii) can make submissions to tribunals on issues of treaty interpretation.

48. Such model treaty provisions could be made applicable to existing investment treaties, in addition to providing a basis or a model for future treaties.

49. In addition to treaty provisions, the Working Group may wish to consider providing guidance to treaty Parties. Such guidance could address not only general principles of treaty interpretation and the various tools that can be used, but also how certain issues could be addressed, such as the impact of treaty interpretation on investors rights and whether and how covered investors would be protected if the treaty Parties expressly agree that such an interpretation should apply retroactively.

50. Such guidance could also aim at clarifying whether the treaty Parties can agree on a subsequent interpretation based on a common view about the treaty's meaning that they reach after the treaty is concluded. A report from the International Law Commission suggests that the VCLT gives the treaty parties the flexibility to base their interpretive agreements on their current intent as of the date of the subsequent agreement.[42] In contrast, some ISDS tribunals, for

[42] International Law Commission, Report on the work of the sixty-fifth session A/68/10 (2013), p. 21 (post-treaty agreed intent, which expresses the common will of the parties, possesses a specific authority regarding the identification of the

example, have suggested that subsequent agreements are only relevant if they address original intent.[43]

51. Guidance could also be provided regarding interpretations that are not binding. To increase their effectiveness, such interpretations could be incorporated as part of government practice on an early and ongoing basis. As highlighted in studies, the persuasive power of an interpretation depends on a number of factors, including:

- The reasonableness of the interpretation;
- The quality of the process by which the interpretation is generated;
- The clarity of the interpretation;
- The reasoning for the interpretation, including compliance of the interpretation with the fundamental principles and rules of international law;
- The consistency with earlier and later interpretations; and
- The timing of the interpretation.

52. It may also be conceived that some guidance would be provided through the services of an advisory centre.

At the stage of the ISDS proceedings

53. A rigorous application of interpretation rules by ISDS tribunals contributes to legal predictability and protects the expectations of treaty Parties on how treaties will be interpreted. A first aspect is to ensure proper application of treaty interpretation rules by ISDS tribunals. A second one is to ensure that ISDS tribunals would abide by treaty interpretation by the treaty Parties.

54. The Working Group may wish to consider whether guidance should also be provided to address the steps that treaty Parties could take the stage of ISDS proceedings to ensure that they:

- Remain informed on the interpretation and application of their treaties;
- Make their submissions public;
- Participate as non-disputing Parties in disputes arising under those treaties; and
- Make clear when they disagree with interpretations given by tribunals.

c) Encouraging or providing the framework for multilateral interpretations

55. Multilateral interpretation is particularly useful when it comes to addressing global challenges and formulating new multilateral solutions, for instance for clarifying the scope of core obligations in investment treaties or shedding light on the relationship between such treaties and other fields of international law such as climate change and problems common to the investment regime as a whole. For example, one could consider a multilateral declaration on the relationship between investment treaties and the climate change regime clarifying that investment regimes do not constrain climate

meaning of the treaty, "even after the conclusion of the treaty". It considers that the VCLT "thereby accords the parties to a treaty a role which may be uncommon for the interpretation of legal instruments in some domestic legal systems").

[43] *Sempra Energy International v. Argentina*, Award, 28 September 2007, §§ 385-86; *Enron v. Argentina*, Award, 22 May 2007, § 337).

change measures and ensure that investment treaties are read in line with the related multilaterally agreed global policies.

56. A process of multilateral consensus building may result in multilateral interpretive tools taking different forms ranging from soft law instruments, such as guidelines and interpretive principles for ISDS tribunals, to hard legal instruments.

d) Specific investment treaty interpretative tool

57. The vast bulk of investment treaties do not address government interpretive action.[44] They are thus subject to more general principles of treaty interpretation. The Working Group may wish to consider whether the work could take the form of the development of autonomous interpretative principles and rules that could complement or replace the general principles of treaty interpretation and would correspond to the specific need of the investment law regime.

[44] Pohl, J., Mashigo K., and Nohen A., (2012), "Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey", OECD Working Papers on International Investment, 2012/02.