



The dual role of States as respondents and treaty Parties
Subsequent practice in the application of the treaty

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Starting point: subsequent practice and treaty interpretation under the VCLT

Article 31 *General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

Article 32 *Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

Only subsequent practice establishing an agreement of the parties (other subsequent practice may be a supplementary means)

Starting point: subsequent practice and treaty interpretation under the VCLT

- The ILC's 2018 Draft Conclusions refer to 'conduct in the application of a treaty' (includes omissions/silence):
 2. A subsequent practice as an authentic means of interpretation under article 31, paragraph 3 (b), consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty.
 3. A subsequent practice as a supplementary means of interpretation under article 32 consists of conduct by one or more parties in the application of the treaty, after its conclusion.

Conclusion 4: Definition of subsequent agreement and subsequent practice

Starting point: subsequent practice and treaty interpretation under the VCLT

- The ILC's 2018 Draft Conclusions: the role of subsequent practice

Subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), being objective evidence of the understanding of the parties as to the meaning of the treaty, **are authentic means of interpretation**, in the application of the general rule of treaty interpretation reflected in article 31.

Conclusion 3: Subsequent agreements and subsequent practice as authentic means of interpretation

1. Subsequent agreements and subsequent practice under article 31, paragraph 3, contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. **This may result in narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties.**

2. Subsequent practice under article 32 may also contribute to the clarification of the meaning of a treaty.

Conclusion 7: Possible effects of subsequent agreements and subsequent practice in interpretation

Starting point: subsequent practice and treaty interpretation under the VCLT

The State as party (or non-disputing party) to ISDS:

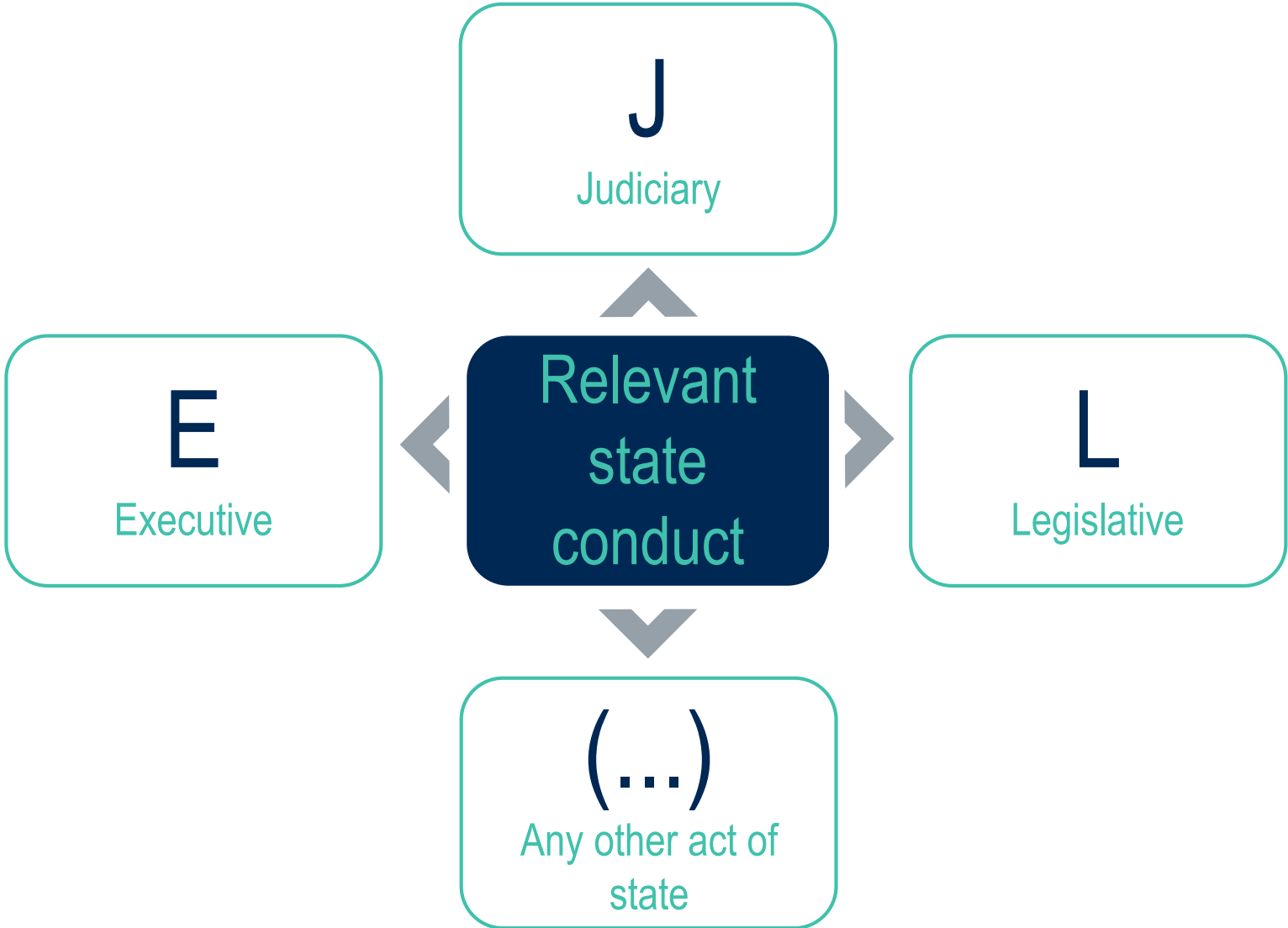
- Submissions in investment arbitrations may constitute practice for purposes of Articles 31 and 32 VCLT (and state practice and *opinio juris* for purposes of customary international law).
- But the context (litigation) is a special one. Investment tribunals may be cautious in treating submissions as ‘authentic expression’ in the sense of ‘objective’ evidence.

Starting point: subsequent practice and treaty interpretation under the VCLT

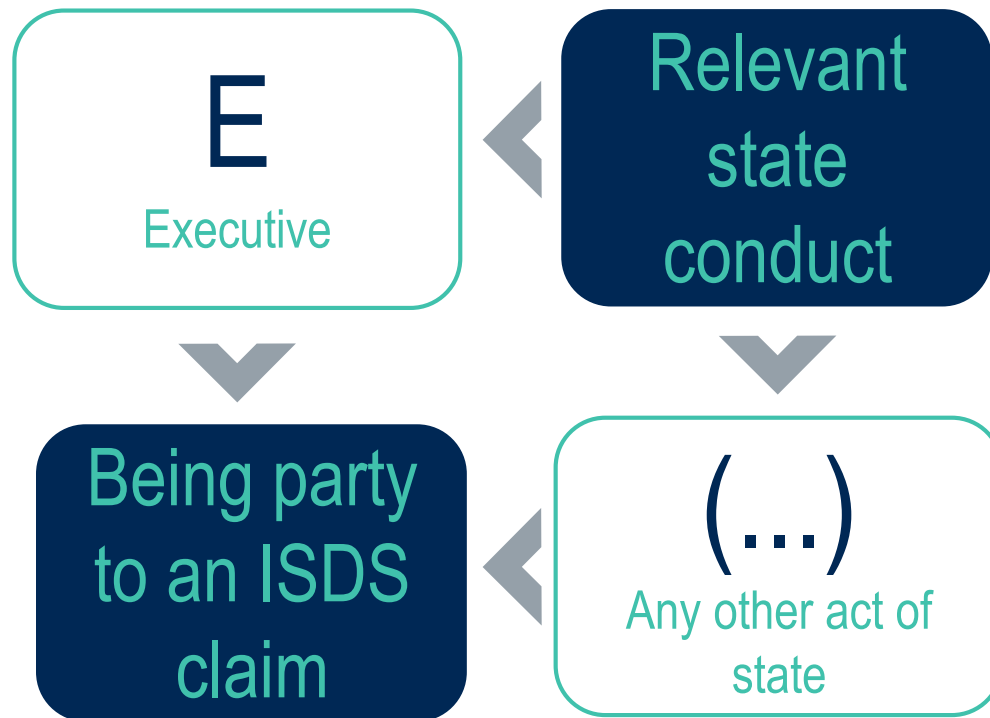
The State as party (or non-disputing party) to ISDS:

- Subsequent practice establishing an agreement not necessarily legally binding (ILC), but should be recognized as authoritative.
- Submissions by individual states (not establishing agreement) may be taken into account under Article 32 VCLT. Importance of the State's in-house counsel.

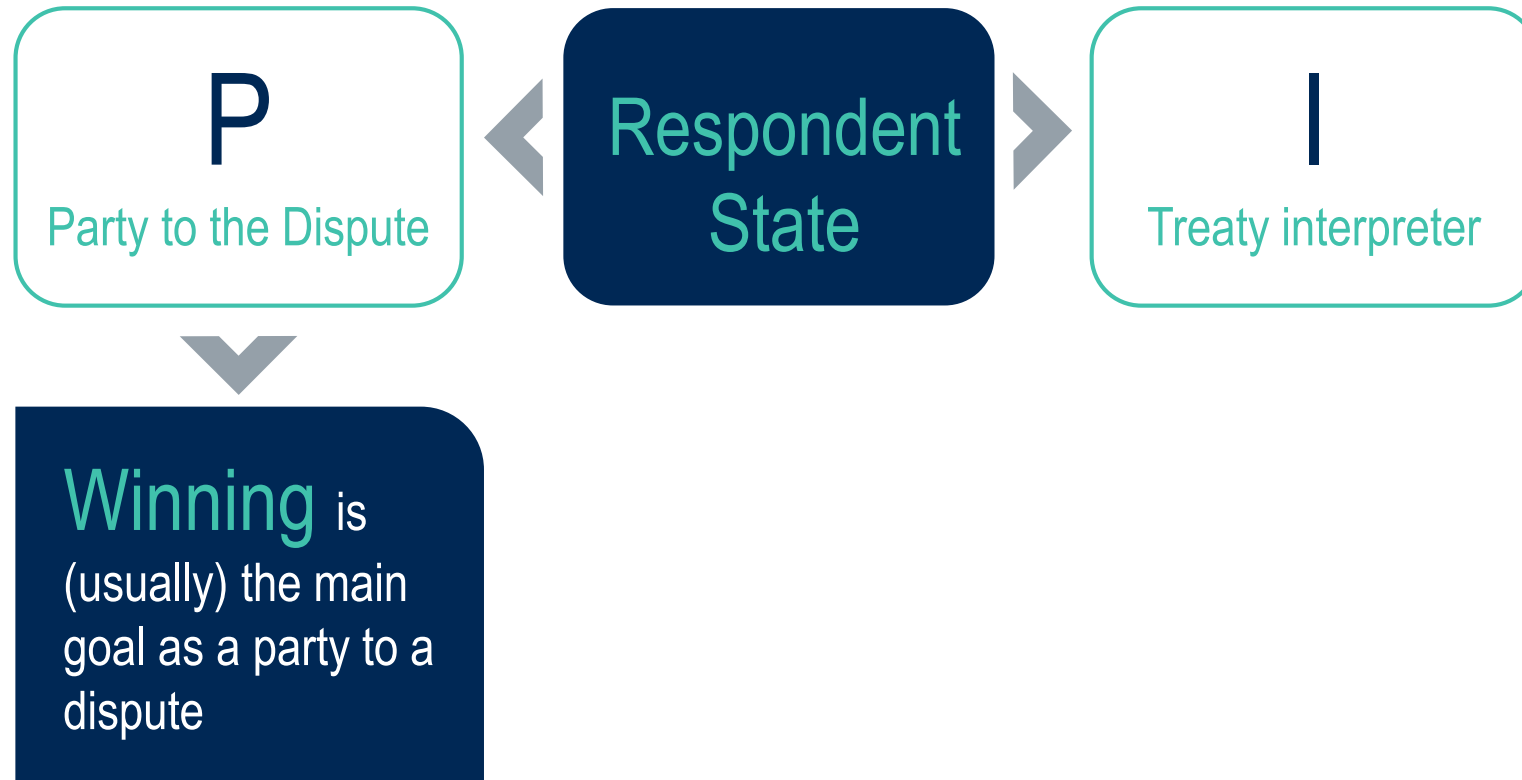
State conduct to establish treaty interpretation



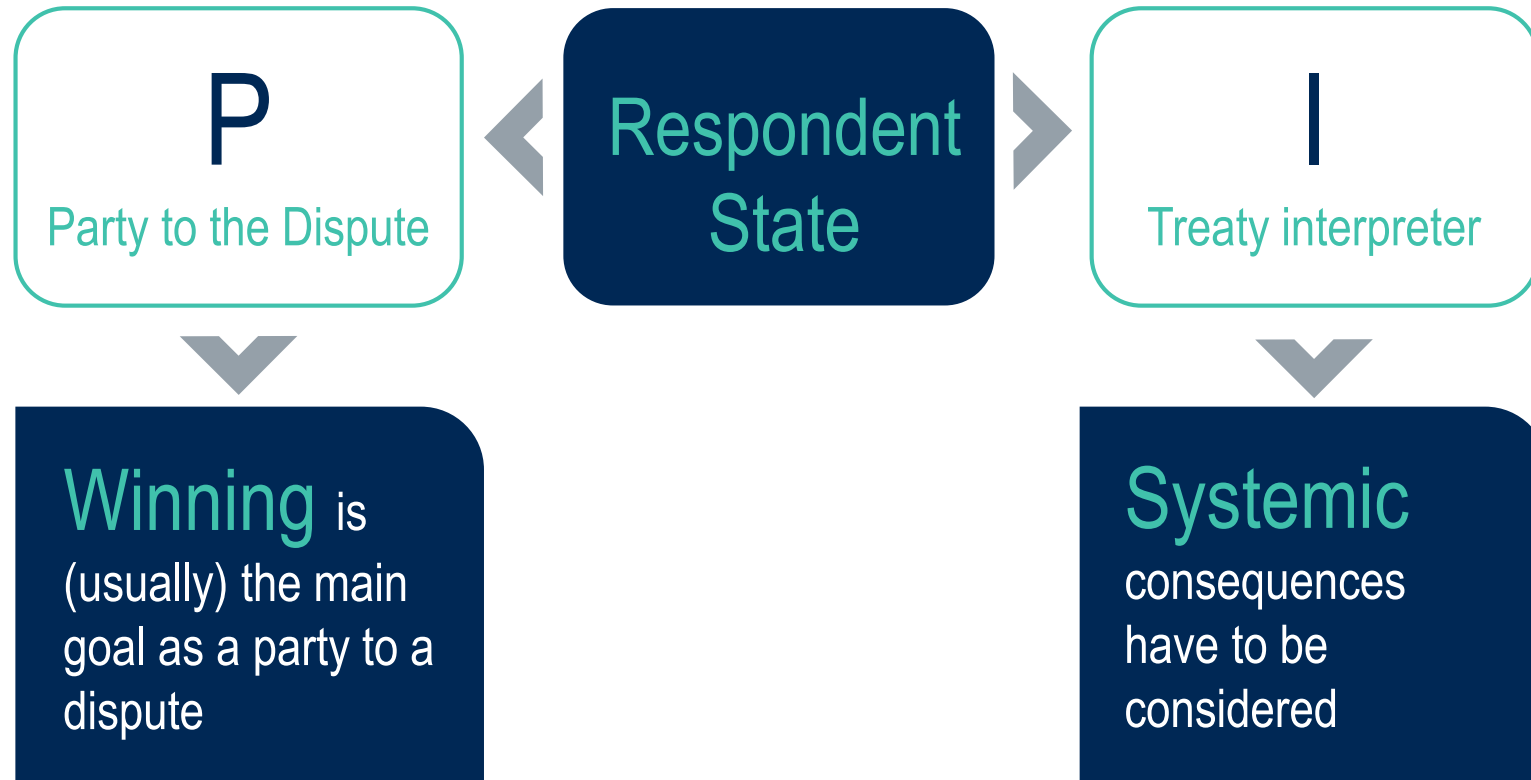
State conduct to establish treaty interpretation: IIAs and ISDS



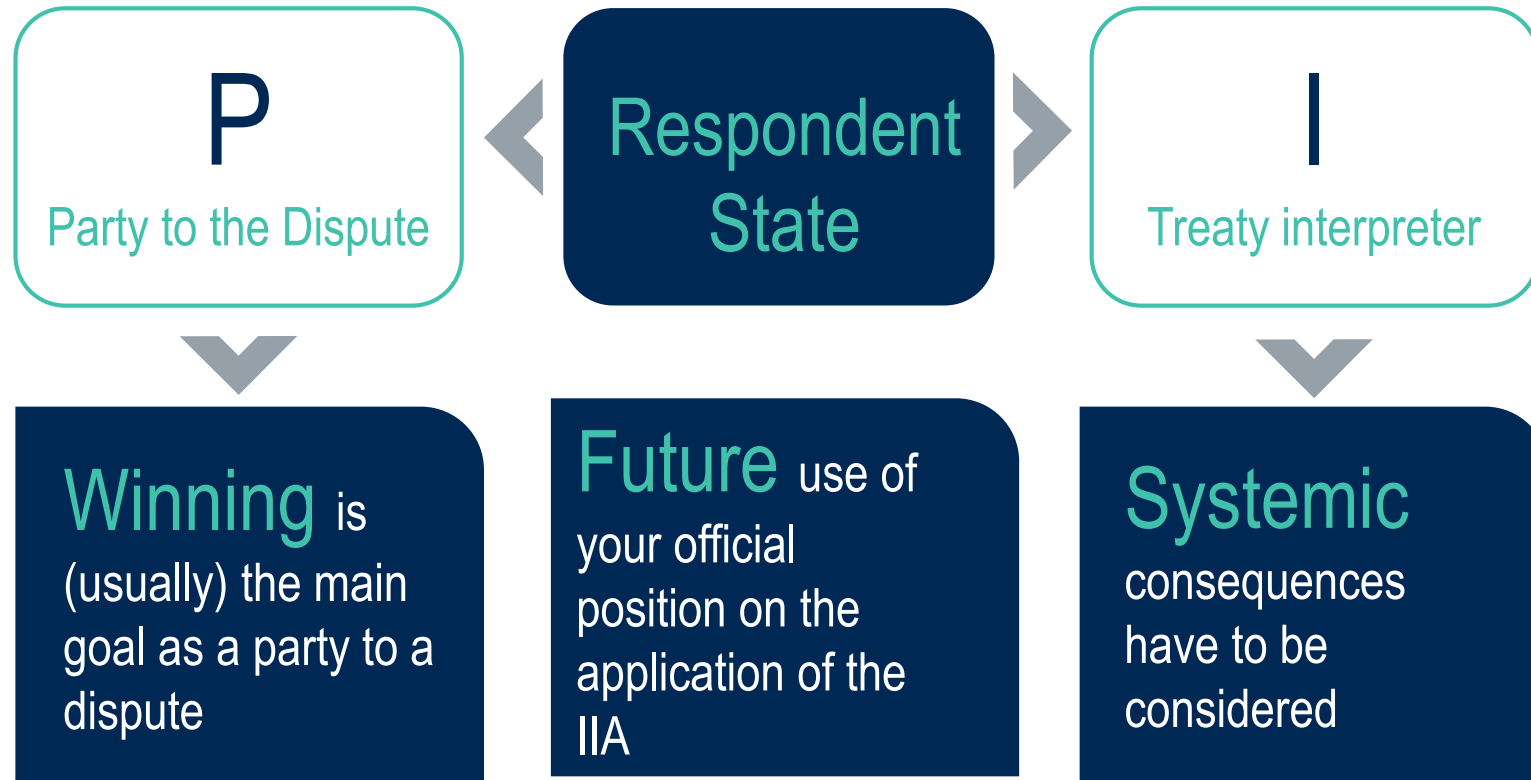
A respondent state's dual role in ISDS: party and interpreter



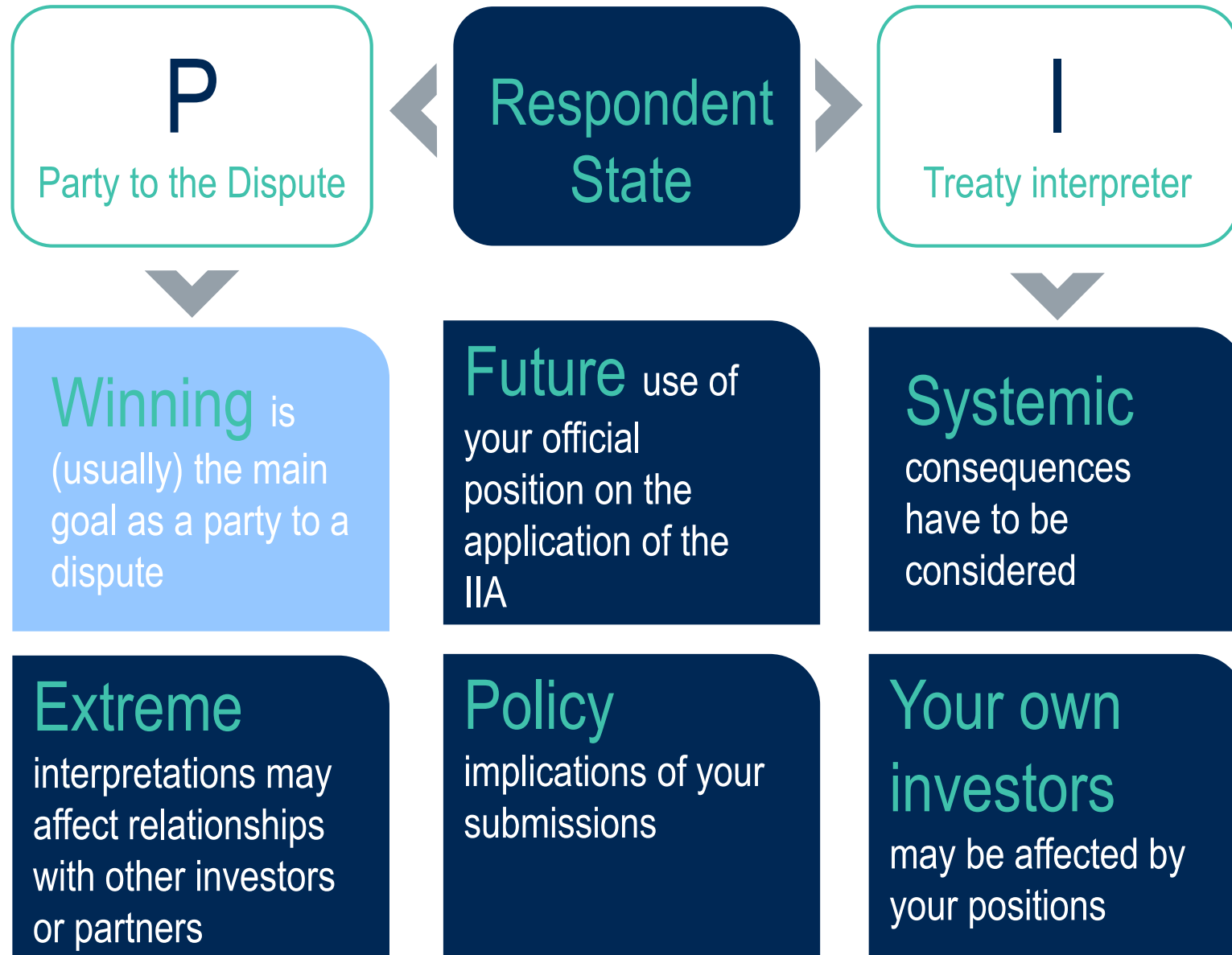
A respondent state's dual role in ISDS: party and interpreter



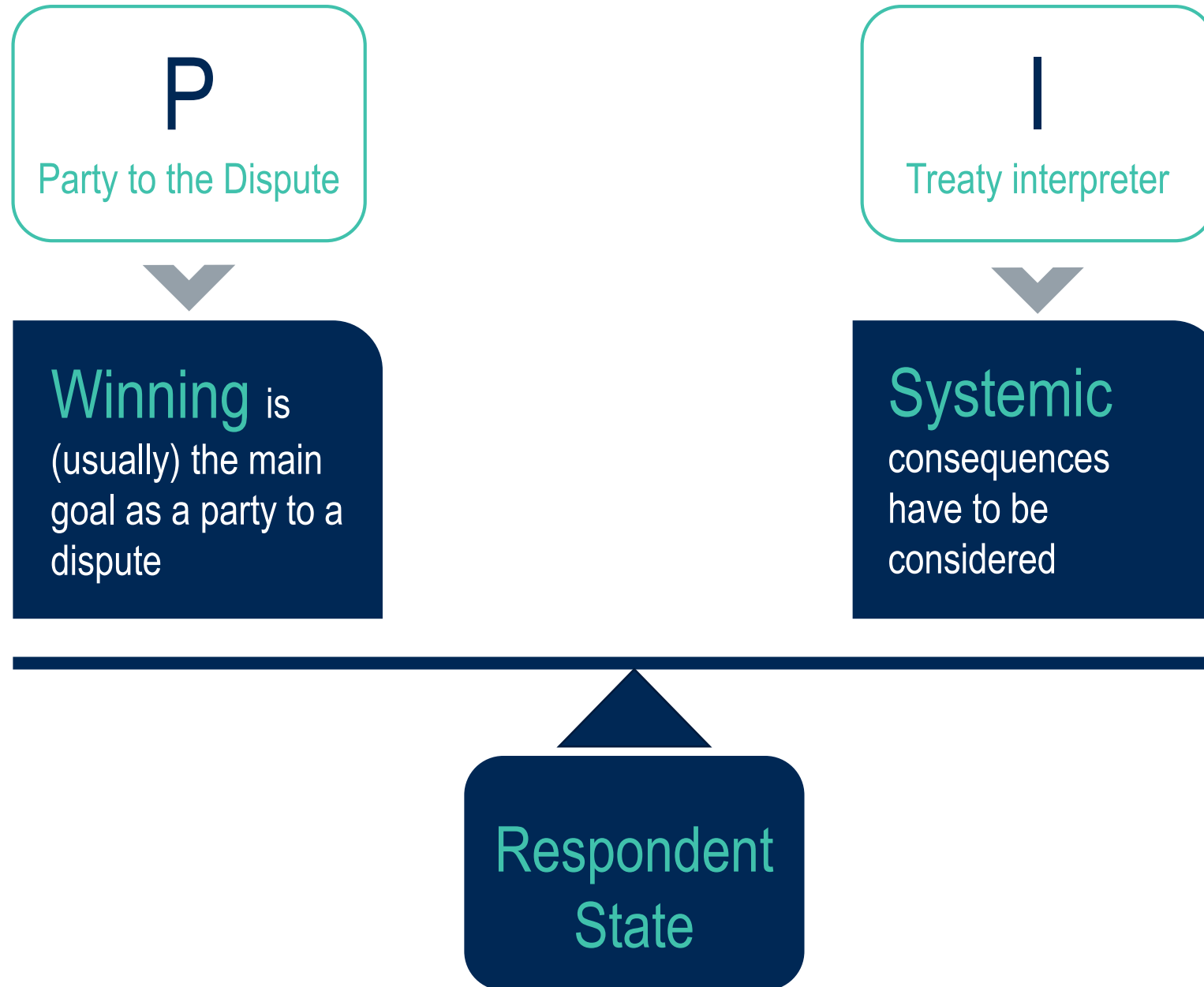
A respondent state's dual role in ISDS: party and interpreter



A respondent state's dual role in ISDS: party and interpreter



A respondent state's dual role in ISDS: party and interpreter – an important equilibrium



A respondent state's dual role in ISDS:
the investor is off the hook

States have to keep a balance between
winning their case and the policy implications of their positions

Investors do not face this dilemma
they may bring their positions to the extent they wish in order to win their case

Preserving the balance between successful litigation and broader policy considerations

Clear policy goals identify need for IIAs and potential ISDS cases against the state or brought by your investors, collaboration between state organs and agencies.

Treaty negotiations (or renegotiations) are the right time to set out the best text you would eventually have to rely on during a dispute.

Constant engagement with treaty partners, joint declarations, non-disputing party submissions may set the ground for a future dispute involving your state or your investors.

Constant engagement with treaty partners as subsequent practice

Joint ex ante/general declarations or agreements between the states parties to the Treaty may be more effective than statements in litigation (either as party or as non-party)

Thank you!

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