

Treaty Interpretation and Control by State Parties in the Context of ISDS Reform Discussions

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Treaty Interpretation: Ever More Challenging Task

- Always, a difficult task in international law
- More so in IIAs
 - Widening mismatch between norm and reality
 - Rigid rule of treaty interpretation
 - Each IIA as a self-contained regime
 - Both limited and expansive roles of arbitrators
 - Dealing with a state's regulatory space
 - A wide spectrum in treaty texts
- Structural issues, rather than individual IIAs' problems

Vienna Convention on the Law of Treaties

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:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

What Could States Consider?

- ▶ How to preserve contracting parties' control
- ▶ IIA Negotiation Stage
 - Ensuring Consistency and Coherence in Texts
 - Stipulation of Exceptions and Carve-outs, if any
 - Thinking Outside an IIA Silo - Many IIAs Interlinked
- ▶ IIA Implementation Stage
 - Joint Committee and Binding Interpretation
 - Joint Committee's Text Review on a Regular Basis
 - Non-Disputing Party Submission
 - Non-Binding Dispute Settlement Proceedings
 - Enhancing Transparency

Interpretation of IIAs

Negotiation

Clarity

- Text Consistency
- Clear Language
- Detailed Provision
- Model Treaty
- IIAs Intertwined

Implementation

Management

- Active JC
- Regular JC Review
- Text Clarification
- Case/Law Updates
- Transparency

ISDS Proceeding

Participation

- JC Interpretation
- NDP Submission
- Addressing Amicus
- Other ISDS Cases
- Transparency

Post-ISDS

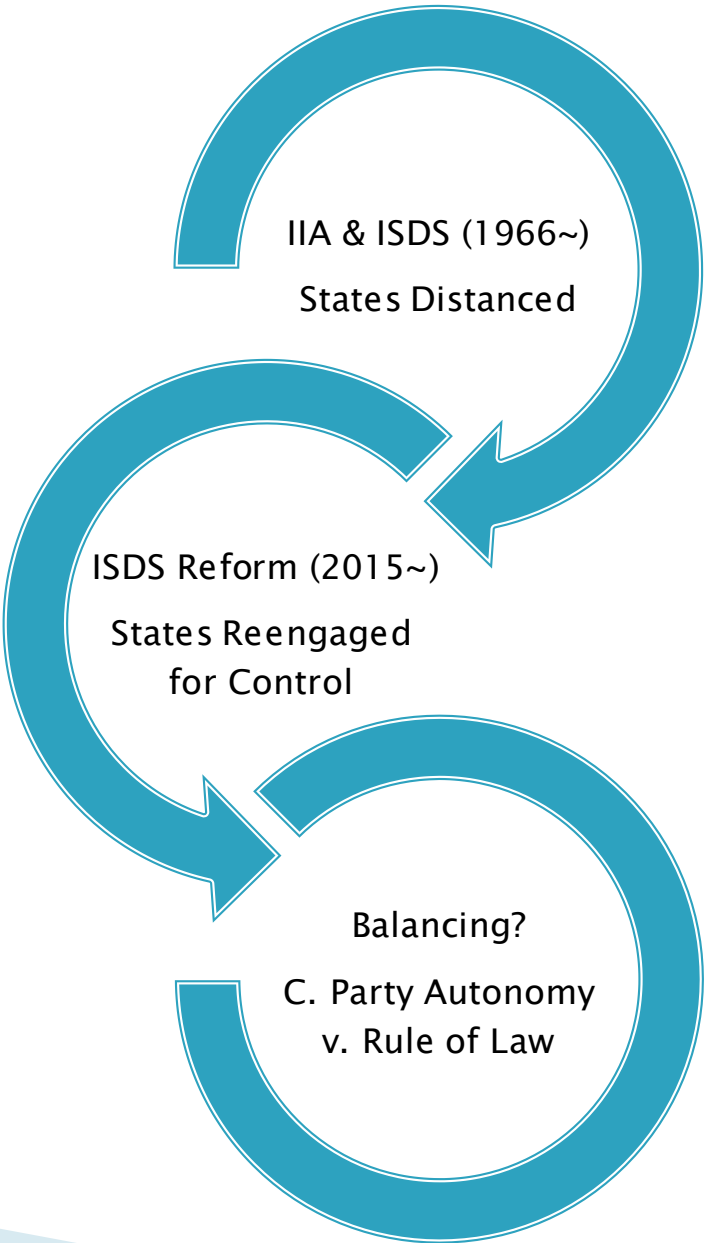
Reflection

- Policy Adjustment
- IIA Amendment
- Review Other IIAs
- New Negotiations
- Non-Binding DS

Party Control >>> Continuous Involvement in Interpretation

Related Issues to Contemplate

- ▶ Interpretation vs. Amendment
- ▶ Possible Implication on Rule of Law
- ▶ Importance of Capacity Building
- ▶ Decision Making Process of a Joint Committee
- ▶ Impact on the Length of the Proceeding
- ▶ Scope of a Binding Interpretation
- ▶ Failure to Respect Binding Interpretation
- ▶ Handling Multiple Joint Committees



IIA & ISDS (1966~)
States Distanced

ISDS Reform (2015~)
States Reengaged
for Control

Balancing?
C. Party Autonomy
v. Rule of Law