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TREATY INTERPRETATION BY STATE PARTIES IN INVESTOR STATE DISPUTES

AN OVERVIEW OF CANADA'S EXPERIENCE AND PRACTICE



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TREATY INTERPRETATION BY STATE PARTIES IN INVESTOR STATE DISPUTES

Canada has used different instruments to guide tribunals in the interpretation of IIAs, including:

- Joint interpretative statements and declarations (e.g. CETA Joint Interpretative Instrument on the Agreement)
- 3 binding interpretations
- 29 Non-disputing state party submissions

Selection of the appropriate instrument depends on various considerations



CANADA'S TREATY PROVISIONS - BINDING INTERPRETATIONS

- Canada's FTAs and recent IIAs contain provisions that allow the treaty parties to issue interpretations

- | | |
|---------------------------------|------------------------------|
| ✓ NAFTA, Art. 1131 | ✓ Canada-Peru FTA, Art. 837 |
| ✓ CETA, Art. 8.31.3 | ✓ Canada-Chile, Art. G-32 |
| ✓ CPTPP, Art. 9.25(3) | ✓ Canada-China FIPA, Art. 18 |
| ✓ Canada-Colombia FTA, Art. 832 | ✓ Etc. |

- Clarifications on the interpretation of the Agreement
- Binding on tribunals
- Must be issued by commission or joint committee
- Rarely used to date



CANADA'S TREATY PROVISIONS - BINDING INTERPRETATIONS

Canada-China FIPA, Article 18 Consultations

1. The representatives of the Contracting Parties may hold meetings for the purpose of:
 - (a) reviewing the implementation of this Agreement;
 - (b) reviewing the interpretation or application of this Agreement;
 - (c) exchanging legal information;
 - (d) addressing disputes arising out of investments;
 - (e) studying other issues in connection with the facilitation or encouragement of investment, including measures referred to in paragraph 3.
2. Further to consultations under this Article, the Contracting Parties may take any action as they may jointly decide, including making and adopting rules supplementing the applicable arbitral rules under Part C of this Agreement and issuing binding interpretations of this Agreement.



CANADA'S TREATY PROVISIONS - BINDING INTERPRETATIONS

CETA Art. 8.31.3: interpretation by the CETA Joint Committee binding on the Tribunal

Draft decision of the CETA Joint Committee - procedure for the adoption of interpretations

- “in order to ensure that the Tribunals [...] in all circumstances respect the intent of the Parties as set out in the Agreement”
- “Canada and the European Union and its Member States are committed to using these provisions to avoid and correct any misinterpretation of the Agreement by the Tribunals”
- “where serious concerns arise as regards matters of interpretation that may affect investment”
- “the CETA Joint Committee may decide that an interpretation shall have binding effect from a specific date”
- “interpretations may *inter alia* address the question of whether and under which conditions a certain type of measure is to be considered as compatible with Chapter Eight (Investment)”

<https://data.consilium.europa.eu/doc/document/ST-6965-2020-INIT/en/pdf>



CANADA'S TREATY PROVISIONS ON NDSP PARTICIPATION

- Canada's FTAs and recent IIAs provide a right to the non-disputing state party to make submissions

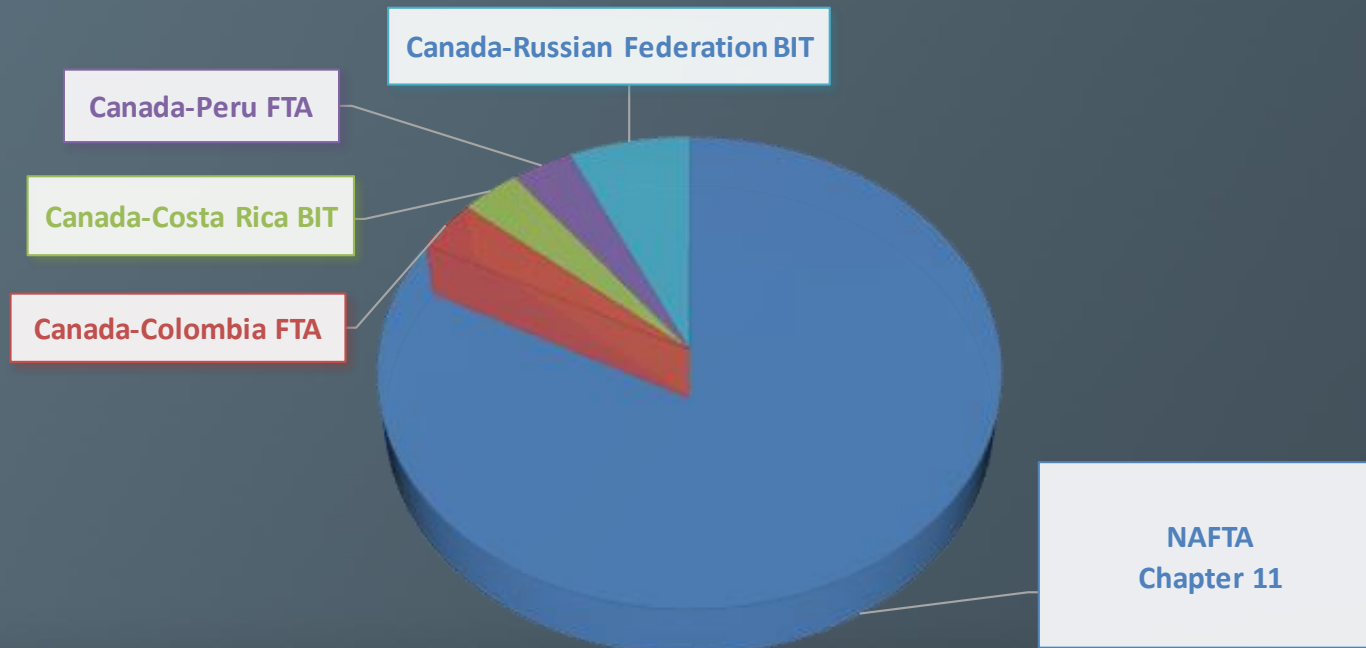
- | | |
|---------------------------------|-----------------------------------|
| ✓ NAFTA, Art. 1128 | ✓ Canada-Peru FTA, Art. 832 |
| ✓ CETA, Art. 8.38 | ✓ Canada-Honduras FTA, Art. 10.31 |
| ✓ CPTPP, Art. 9.23(2) | ✓ Etc. |
| ✓ Canada-Colombia FTA, Art. 827 | |

- Submissions on the interpretation of the IIA
- Can address interpretations of the IIA in previous awards
- Not binding



NDSP SUBMISSIONS: CANADA'S EXPERIENCE

Canada filed 29 submissions in ISDS cases where it was not the respondent:



CANADA'S TREATY PROVISIONS ON NDSP PARTICIPATION

Canada - Honduras Free Trade Agreement

Article 10.30: Notice to the Non-Disputing Party

A disputing Party shall deliver to the non-disputing Party a copy of the notice under Article 10.21 and other documents, within 30 days of the date that those documents are delivered to the disputing Party.

Article 10.31: Participation of the Non-Disputing Party

1. The non-disputing Party may make submissions to a Tribunal on a question of interpretation of this Agreement, if it gives notice in writing to the disputing parties.
2. The non-disputing Party has the right to attend a hearing held under this Section, whether or not it makes submissions to the Tribunal.

Article 10.32: Documents

1. The non-disputing Party is entitled, at its cost, to receive from the disputing Party, a copy of:
 - (a) the evidence that has been tendered to the Tribunal;
 - (b) the written argument of the disputing parties; and
 - (c) all pleadings filed in the arbitration.
2. The non-disputing Party receiving information pursuant to paragraph 1 shall treat the information as if it were a disputing Party.



CANADA'S TREATY PROVISIONS ON NDSP PARTICIPATION

- Co-exist with provisions on binding interpretations
- Right to make oral or written submissions
- Related provisions (e.g. right to obtain copies of documents, right to attend the hearing)
- Absent right of participation in the IIA, intervention as *amicus* may be possible:
 - at the Tribunal's discretion (e.g. Canada's amicus submission in *Infinito Gold Ltd. v. Costa Rica*)
 - or at the invitation of the Tribunal to comment on a particular issue (e.g. *Bayview Irrigation District v. Mexico*)



NDSP SUBMISSIONS: CONSIDERATIONS

- Requires timely access to submissions
- Time/resource commitment
- Practical and procedural issues
- Interpretative issues can arise at different stages of the proceedings
- Articulating a proper interpretation and consistency with previous positions
- Internal approval process



MEASURING THE IMPACT OF NDSP SUBMISSIONS

- Weight given by tribunals to individual NDSP submissions is difficult to measure precisely
- Based on NAFTA experience, Tribunals have been influenced by repeated and consistent positions expressed by the 3 NAFTA Parties on certain issues
- Over time greater predictability and coherence in NAFTA tribunals' interpretation of the Agreement



RELEVANCE OF COMMON POSITIONS OF THE TREATY PARTIES

VCLT Article 31(3)(a) and (b):

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;



RELEVANCE OF COMMON POSITIONS OF THE TREATY PARTIES

Mobil Investments Canada Inc. v. Canada (II) - Decision on Jurisdiction and Admissibility

158. In addition, such an approach has clearly been rejected by all three NAFTA Parties in their practice subsequent to the adoption of NAFTA. In accordance with the principle enshrined in Article 31(3)(b) of the Vienna Convention on the Law of Treaties, 1969, the subsequent practice of the parties to a treaty, if it establishes the agreement of the parties regarding the interpretation of the treaty, is entitled to be accorded considerable weight.



RELEVANCE OF COMMON POSITIONS OF THE TREATY PARTIES

Ontario Court of Appeal in *Cargill, Incorporated v. Mexico*:

[84] I agree that if that position of the three Parties was a clear, well-understood, agreed common position, in accordance with Article 31(3)(b) of the *Vienna Convention*, that prohibited the award of any losses suffered by the investor in its home business operation, even caused by the breach, it would be an error of jurisdiction for the tribunal to fail to give effect to that interpretation of the relevant provisions of Chapter 11. However, that does not appear to be the



WEIGHT OF NON-DISPUTING PARTY SUBMISSIONS OVER TIME

- The common, concordant and consistent positions of the Parties evidenced through the Parties' submissions constitute authentic interpretations - should be given significant weight
- NAFTA NDSP submissions have resulted in a body of interpretations on the meaning of key standards and procedural provisions
- Some of these interpretations have been incorporated in subsequent treaties like CPTPP (*e.g.* indirect expropriation)
- Influence on the interpretation of similarly worded provisions in other treaties.



CONCLUSION

- Interpretations by the Parties are a useful tool to ensure the proper interpretation of the IIAs consistent with the intent of the Parties
- Not an amendment mechanism
- Binding interpretations have been rare
- NDSP submissions have been frequently used in NAFTA context – over time influence on the interpretation by tribunals

