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CCSI Policy Paper

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## Key Points

- 1 Investment treaties can give rise to significant liabilities for states
- 2 Uncertainty regarding vaguely worded clauses in treaties can trigger costly litigation, and creates openings for tribunals to give unintended or incorrect interpretations to treaty provisions
- 3 In order to reduce uncertainty, litigation costs, and potential liability, there are various strategies states can adopt for both their future and existing treaties
- 4 For the 3000+ existing treaties, which typically have long lives and survival periods, options include termination, amendment, and interpretation
- 5 Interpretation is a relatively efficient tool to achieve the objectives of adding clarity to and reducing exposure under existing treaties; to increase its effectiveness, interpretation should be incorporated as part of government practice on an early and ongoing basis
- 6 States have been increasingly active in establishing state agreement on key issues relevant to interpretation of investment treaties, but there is potential for them to take even greater control of their treaties through unilateral, bilateral, and multilateral actions
- 7 Tribunals and counsel should ensure appropriate consideration is being given to states' understanding of their treaties

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## State Control over Interpretation of Investment Treaties

### Introduction

This note provides an overview of the legal options and practical mechanisms for states to address concerns regarding their *existing* international investment agreements (IIAs).

IIAs (which include bilateral investment treaties and free trade agreements with investment chapters) impose obligations on host states regarding their treatment of foreign investors, and typically provide foreign investors a right to enforce those obligations through investor-state arbitration. Some IIAs also require host countries to liberalize their markets and lock countries into those liberalization commitments. Through those obligations, IIAs can expose host countries to significant potential and actual liability, and can have profound impacts on the development and implementation of industrial and other public policies. Moreover, once IIAs are concluded, both their long lives and the power given to investment tribunals to interpret and apply them, make it difficult for state parties to those treaties to address unintended and unforeseen impacts.

While states can take a fresh look at issues regarding the optimal design and impact of their IIAs when negotiating *new* treaties, they are more limited in terms of how they address issues that have arisen under *existing* treaties. Nevertheless, given the number of existing IIAs (over 3,000 worldwide), the potentially broad obligations they

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impose, and their extended duration, it is crucial for states to examine those IIAs and take steps to clarify uncertainties and ambiguities so that the texts best reflect the signatory states' intent.

For existing treaties, states have three main options: (1) termination of the treaty, (2) negotiation of amendments to the treaty (or supplanting existing agreements with new ones), and (3) interpretations and clarifications of treaty provisions that must be taken into account by tribunals interpreting the treaties. While all three are important to consider as part of an overall strategy, this note focuses on the third option as it holds promise as an effective, yet relatively low-cost, avenue for avoiding unintended effects of treaty obligations.<sup>1</sup>

States have significant – but as-yet relatively untapped – power over the interpretation and application of their investment treaties. By issuing joint interpretations with their other treaty parties, exchanging diplomatic notes, making unilateral declarations, and submitting briefs as non-disputing parties or respondents, states can clarify uncertainties and ambiguities in treaty texts on a range of jurisdictional, procedural and substantive issues such as the meaning of the fair and equitable treatment obligation, the role of the most-favored nation obligation, the significance of the “effective means” test, the scope of consent to arbitration, and a range of other issues. Under international law on interpretation of treaties, such acts, when evidencing subsequent practice and subsequent agreement, *must be taken into account* by tribunals in disputes arising under those agreements.

*“... subsequent agreements and subsequent practice ... can provide an avenue for tribunals to engage in a dialogue with states and among each other with a view to better harmonize their own body of jurisprudence....”<sup>2</sup>*

But timing is important to the effectiveness and force of those interpretations; and the time is now ripe for states that have already concluded IIAs – particularly those with the short, vaguely worded provisions leaving much open to interpretation – to take steps to address the recognized problems by proactively managing their treaties. This note, drawing on the Vienna Convention on the Law of Treaties, work by various academics, the International Law Commission, and UNCTAD, aims to aid those steps.

Section 1 provides an overview of subsequent agreement and practice and its relevance to treaty interpretation; Section 2 then describes how subsequent agreement and practice have been applied and can apply in interpreting investment treaties; Section 3 addresses additional relevant issues that concern the use of subsequent agreement and practice regarding treaty interpretation; and Section 4 concludes by providing some practical suggestions for incorporating these ideas. The annexes illustrate how a patchwork of agreement among states on various treaty provisions already exists and can be expanded.

## 1. General rule of treaty interpretation (VCLT Article 31) and supplementary means of interpretation (VCLT Article 32)

**Article 31 of the Vienna Convention on the Law of Treaties (VCLT)** provides the general rule on treaty interpretation.<sup>3</sup> VCLT Article 31(3) states that treaty interpretation *shall* take into account “(a) any **subsequent agreement** between the parties regarding the interpretation of the treaty or the application of its provisions; [and] (b) any **subsequent practice in the application of the treaty which establishes the agreement** of the parties regarding its interpretation.”<sup>4</sup> Subsequent agreement and subsequent practice establishing agreement (referred to simply as “subsequent practice”) are considered to be “objective evidence of the understanding of the parties as to the meaning of the treaty,” and are thus deemed “authentic means of interpretation” that must be applied in interpreting the relevant text.<sup>5</sup> As the International Law Commission (ILC) has explained:

By describing subsequent agreements and subsequent practice under article 31 (3) (a) and (b) as “authentic” means of interpretation [the ILC] recognizes that the common will of the parties, from which any treaty results, possesses a specific authority regarding the identification of the meaning of the treaty, even after the conclusion of the treaty. The Vienna Convention thereby accords the parties to a treaty a role which may be uncommon for the interpretation of legal instruments in some domestic legal systems.<sup>6</sup>

### 1.1 Subsequent agreement (Art. 31)

A “subsequent agreement” under VCLT Article 31(3)(a) 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.”<sup>7</sup> It need not satisfy any requirement of formality, but should constitute some form of “single common act by the parties by which they manifest their common understanding.”<sup>8</sup>

### 1.2 Subsequent practice (Art. 31)

“Subsequent practice” under VCLT Article 31(3)(b) 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 since it is generally made up of conduct that can contribute to an agreement, but that is not embodied in one common and relatively clear act. Importantly, the “conduct” that can establish subsequent agreement consists of actions and omissions (including silence) attributable to a party to a treaty under international law; this can include conduct by state organs, high-ranking as well as local officials, and even non-state actors.<sup>9</sup>

For any conduct to fall under Article 31(3)(b), it must be conduct “in the application of the treaty.” As the ILC reports, this can be broad:

*[It] includes not only official acts at the international or at the internal level which serve to apply the treaty, including to respect or to ensure the fulfillment of treaty obligations, but also, inter alia, official statements regarding its interpretation, such as statements at a diplomatic conference, statements in the course of a legal dispute, or judgments of domestic courts; official communications to which the treaty gives rise; or the enactment of domestic legislation or the conclusion of international agreements for the purpose of implementing a treaty even before any specific act of application takes place at the internal or at the international level.<sup>10</sup>*

Similarly, and as is required for “subsequent agreement” under Article 31(3)(a), “subsequent practice” under Article 31(3)(b) must seek to clarify the meaning of the treaty or its application.

### **1.3 Legal force of subsequent agreement and subsequent practice**

As noted above, 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. The fact that it must be taken into account, however, does not mean that it is “necessarily conclusive, or legally binding. Thus, when the [ILC] characterized a ‘subsequent agreement’ as representing ‘an authentic interpretation’, it did not go quite as far as saying that such an interpretation is necessarily conclusive in the sense that it overrides all other means of interpretation.”<sup>11</sup>

The ILC’s 2013 report, however, recognizes that the treaty parties can give their subsequent agreements binding force:

*[S]ubsequent agreements and subsequent practice establishing the agreement of the parties regarding the interpretation of a treaty must be conclusive regarding such interpretation when “the parties consider the interpretations to be binding upon them”.<sup>12</sup>*

The intent of the parties to give interpretations such binding effect is particularly clear when the treaty itself says that subsequent interpretive agreements entered into by the treaty parties will be binding upon them and/or those interpreting and applying the treaty.<sup>13</sup>

### **1.4 Supplemental means of treaty interpretation and other forms of subsequent conduct (Art. 32)**

If interpretation of a treaty in accordance with Article 31 leaves its meaning “ambiguous or obscure,” or would lead to a result that is “manifestly absurd or unreasonable,” tribunals may turn

to “supplementary means” of interpretation in accordance with VCLT Article 32.<sup>14</sup> Subsequent practice that does not “establish the agreement of the [treaty] parties” under Article 31 is one type of information that may be taken into account by tribunals to interpret a treaty in accordance with Article 32. Such non-Article 31 subsequent conduct can constitute a wide range of actions and omissions, including conduct by only one or some of the treaty parties; and even conduct by a state that is not specifically regarding the treaty’s interpretation.<sup>15</sup> Much “subsequent practice” that has been considered by international courts and tribunals when interpreting treaties has been this broader form of conduct rather than the narrower category of specific actions or omissions meeting the criteria of Article 31(3).<sup>16</sup>

The ILC instructs that treaty interpretation is to be conducted as a “single combined operation,” which places appropriate emphasis on the various mandatory means of interpretation under Article 31 (i.e., the ordinary meaning of the treaty’s terms, the context of the treaty, its object and purpose, relevant rules of international law and authentic interpretations by the parties) and permissive means under Article 32 (e.g., negotiating history and subsequent conduct).<sup>17</sup>

## 2. Subsequent agreement, subsequent practice, and investment treaties

With the rise in investor-state arbitration, states have responded by clarifying their treaty obligations through interpretive statements added to existing treaties; refining language in new models and agreements providing “greater certainty” regarding the parties’ understandings of the treaties’ provisions; exchanging diplomatic notes; and making submissions to tribunals as respondent-states and non-disputing state treaty parties. As is discussed further below, such conduct can, in turn, evidence and constitute subsequent agreement and subsequent practice on treaty interpretation that, under the VCLT, must be taken into account by arbitral tribunals. Parties to investment treaties have also crafted new procedures and mechanisms to give them even greater control over interpretation and application of the texts. This section examines these practices.

### 2.1 Joint Interpretations through a treaty mechanism

Some investment treaties include provisions stating that the treaty parties can issue interpretations that will then be binding on investor-state tribunals. By stating in the treaty that the parties’ agreements are conclusive, the parties remove any doubt regarding their force, and also might be able to bypass procedural requirements imposed by domestic law that must otherwise be satisfied before states can enter into other binding international agreements like amendments or new treaties.

An early and relatively well-known example of a binding-interpretation-provision in an investment treaty is in the North American Free Trade Agreement (NAFTA). The treaty established a Free Trade Commission (FTC) made up of cabinet-level representatives of the NAFTA parties or their designees;<sup>18</sup> and Article 1131(2) states that any “interpretation by the [Free Trade Commission] shall be binding” on investor-state tribunals.

Following NAFTA claims and decisions that triggered concerns by the NAFTA states regarding tribunals’ interpretations of the “fair and equitable treatment” (FET) requirement, the states used that FTC mechanism to issue the following interpretation:

*Minimum Standard of Treatment in Accordance with International Law*

*Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investors of another Party.*

*The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.*

*A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).*<sup>19</sup>

Tribunals have accepted that interpretation as controlling – and narrowing – the meaning of the provision. This, in turn, seems to have benefitted the NAFTA states: UNCTAD’s statistics of investment treaty cases decided by October 2010 show that tribunals in NAFTA cases found in favor of investors on their FET claims 22 percent of the time (in 4 out of 18 cases where an FET breach was alleged). In contrast, in non-NAFTA cases where the investor alleged a breach of the FET obligation, tribunals found that the state violated the standard in 62 percent of the cases (41 out of 66).<sup>20</sup> Although there may be other reasons for these different success rates, it seems likely that the effort by the NAFTA parties to tighten up the standard has played a role.

The NAFTA also provides that respondent states in an investor-state arbitration may request the FTC to issue an interpretation regarding whether an exception or reservation will apply. Interpretations issued on a timely basis by the FTC on the issue are binding on the tribunal.<sup>21</sup>

The BIT between China and Canada similarly has provisions that expressly enable the state parties to issue binding interpretations, both general and in particular disputes. Article 18 states that the “Contracting Parties may take any action as they may jointly decide, including ... issuing binding interpretations of [the] Agreement.” Article 20 then adds that if a respondent state in an investor-state arbitration invokes a specific exception to the treaty as a defense, the Contracting Parties are to consult each other in order to determine whether the defense is valid and any determination they reach on the issue will be binding on the tribunal.

These types of treaty provisions, which are now present in a number of agreements,<sup>22</sup> create special rules giving the parties’ subsequent agreement greater force than it might otherwise have under Article 31(3) of the VCLT. Nevertheless, as noted above, even in the absence of treaty language specifically stating that subsequent agreements are binding, at least some authority indicates that states could give those agreements conclusive force by indicating their intent to be bound.

## **2.2. Subsequent agreement under VCLT art. 31(3)(a)**

States may establish their agreement on issues of treaty interpretation through a variety of means, including a joint written instrument, exchange of diplomatic notes, or an oral statement.

The United States, for instance, has exchanged diplomatic notes with eight countries (Bulgaria, the Czech Republic, Estonia, Latvia, Lithuania, Romania, Poland, and the Slovak Republic)

seeking to clarify specific aspects of the treaties it had concluded with those states. Each interpretation was designed to ensure that the bilateral investment treaties were deemed to be consistent with EU law and could be maintained in force when those eight countries joined the EU.<sup>23</sup> The following exchanges of diplomatic notes between the United States and Lithuania illustrate the content of these subsequent agreements. The United States recorded its understanding in two separate notes – one for each topic. In the first, it stated:

*The Embassy [of the United States of America] confirms the understanding of the Government of the United States of America that Article IX, paragraph 1, of the Treaty [Between the Government of the United States of America and the Government of the Republic of Lithuania for the Encouragement and Reciprocal Protection of Investment] reserves the right of each Party to take measures that it considers necessary for the protection of its own essential security interests.*

*The Embassy further confirms the understanding of the Government of the United States of America that, in the case of the Republic of Lithuania, these interests may include interests deriving from its membership in the European Union.*

*The Ministry would be grateful if the Ministry of Foreign Affairs would confirm, by an affirmative Note in response, that these understandings are shared by the Government of the Republic of Lithuania.<sup>24</sup>*

In the other note, sent that same day, the Embassy wrote that it:

*confirms the understanding of the Government of the United States of America that the prohibition on performance requirements set forth in Article II, paragraph 6, of the Treaty does not extend to conditions for the receipt or continued receipt of an advantage, such as any advantage resulting from the establishment of a market organization for agricultural products and its market stabilizing effects.<sup>25</sup>*

It then requested that Lithuania's Ministry of Foreign Affairs respond in writing to affirm that it shared the United States' understanding.<sup>26</sup>

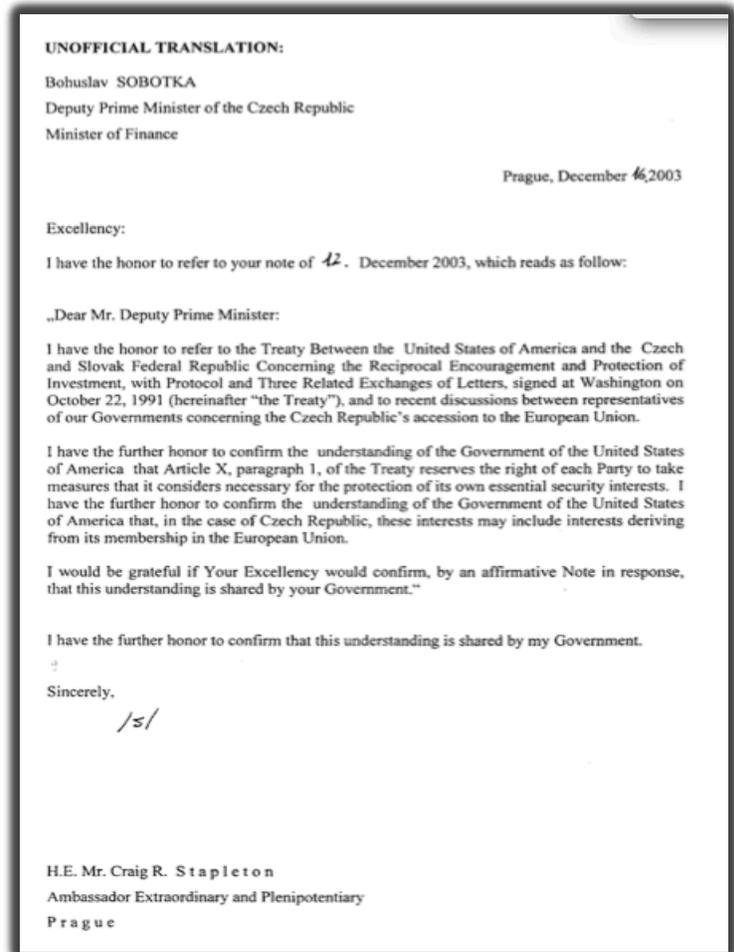
The next day, Lithuania's Ministry of Foreign Affairs replied with two separate written confirmations that it agreed with the United States on the interpretation of both the essential security exception and the restriction on performance requirements.<sup>27</sup>

Argentina and Panama took similar action in order to establish their shared understanding of the most-favored nation provision, exchanging diplomatic notes with an “interpretative declaration” stating that the most-favored nation (MFN) clause in their treaty did not and never was intended by them to extend to dispute resolution clauses.<sup>28</sup>

## 2.3 Forming subsequent practice through unilateral statements and actions – with a focus on submissions

### 2.3.1 Unilateral conduct – examples from the investment treaty context

Unilateral conduct may contribute to the formation of subsequent practice under VCLT Art. 31(3)(b) when it is explicitly agreed to or tacitly accepted by other treaty parties.<sup>30</sup>



To date there are myriad examples of unilateral conduct in the investment treaty context.

For instance, in response to the tribunal’s decision in *SGS v. Pakistan* reading the “umbrella clause” in the Switzerland-Pakistan BIT narrowly, the Swiss government sent a letter to the ICSID Deputy Secretary-General attaching a three-page reaction to the tribunal’s decision and interpretation of the provision. In the interpretation, Swiss officials stated that they were “alarmed” by the tribunal’s reading and considered it to be “counter” to the government’s intent and the intent of other states.<sup>31</sup>

During the annulment proceedings in *Siemens v. Argentina*, the United States submitted a letter to the ad hoc annulment committee explaining its interpretation of several articles of the ICSID Convention.<sup>32</sup>

The tribunal in *National Grid v. Argentina* discussed the role of unilateral conduct in establishing subsequent practice for the purpose of treaty interpretation. At issue in the case was whether the MFN provision in the bilateral investment treaty between Panama and the United Kingdom expanded to cover issues of dispute resolution.

In support of its argument that the MFN provision did not permit the investor to import more favorable dispute resolution provisions from other treaties, Argentina pointed to the interpretive agreement between it and Panama (referred to above) and argued that that understanding evidenced its state practice. The tribunal, however, concluded that the actions of Argentina and Panama may have been relevant as a subsidiary means of interpretation under Article 32 but, standing alone, did not establish subsequent agreement or practice for the purposes of the UK-Argentina treaty.

There were three key factors on which the tribunal based its conclusion. The first was that Argentina had apparently only adopted such an interpretation with Panama and not any of the approximately 50 other states with which it had investment treaties.<sup>33</sup> The second was that the tribunal appeared to require state practice to establish the state parties' intent at time of concluding the treaty.<sup>34</sup> And the third was its view that the UK's state practice signaled a different understanding.

“...  
*pleadings  
count as  
state  
practice*  
”<sup>29</sup>  
“...  
”

The first consideration is valid and provides an important practical lesson for states. Namely, if a state wishes to clarify certain articles or obligations of investment treaties that are common in more than one of the agreements to which it is party, it should (1) ideally seek to establish a clear agreement on interpretation with the other state party or parties and, (2) make broadly applicable unilateral statements similarly reflecting their understanding for treaties where that formal agreement has not been secured. A state can do this through such means as posting an interpretive declaration on its website along with its treaties.<sup>35</sup>

Importantly, by making its positions known to its treaty parties through such overt acts and statements, a state will have a stronger argument that those other states – even if silent – agreed with its understanding. Establishing subsequent practice through action of one party and inaction by another will likely be much more difficult if the allegedly acquiescing party had no knowledge of its treaty counterparty's conduct and views.<sup>36</sup>

The second factor cited by the tribunal when discounting the significance of the Argentina-Panama interpretation, in contrast, is questionable. Contrary to the tribunal's assessment, subsequent agreement and subsequent practice need not establish that the parties' had a shared view of the agreement at the time of concluding the treaty.<sup>37</sup> The parties' interpretations of the treaty provisions can shift over time, and subsequent practice can be used to establish a common understanding that was formed years after the treaty entered into force.<sup>38</sup>

The third factor the tribunal relied on to support its finding that there was no subsequent practice within the meaning of VCLT Article 31(3)(b) was its view of the UK's practice with respect to the MFN provision. It noted:

*Since 1991, the MFN clause in the UK model investment treaty has included a third paragraph stating that: "For the avoidance of doubt", the MFN clause extends to Articles 1 to 11 of the treaty and, hence, to dispute resolution matters. The implication in the wording of this additional paragraph is that, all along, this was the UK's understanding of the meaning of the MFN clause in previously concluded investment treaties. ... [I]t is possible to conclude from the UK investment treaty practice contemporaneous with the conclusion of the Treaty that the UK understood the MFN clause to extend to dispute resolution.....<sup>39</sup>*

This aspect of the tribunal's reasoning helps highlight another form of unilateral conduct that can potentially support subsequent practice under VCLT Article 31(3)(b): development of model texts. According to the tribunal, the generality of the language used in the model investment treaty and

inclusion of the phrase "for the avoidance of doubt" served as important evidence of the UK's understanding of the scope of the MFN provision in the treaties it had actually concluded.

***"[T]he boundary between interpretation and potentially impermissible modification is hazy; even if modification were considered a limit ..., interpretation could support quite an expansive degree of change in and of itself."<sup>40</sup>***

### 2.3.2 The role of respondent memorials and non-disputing party submissions

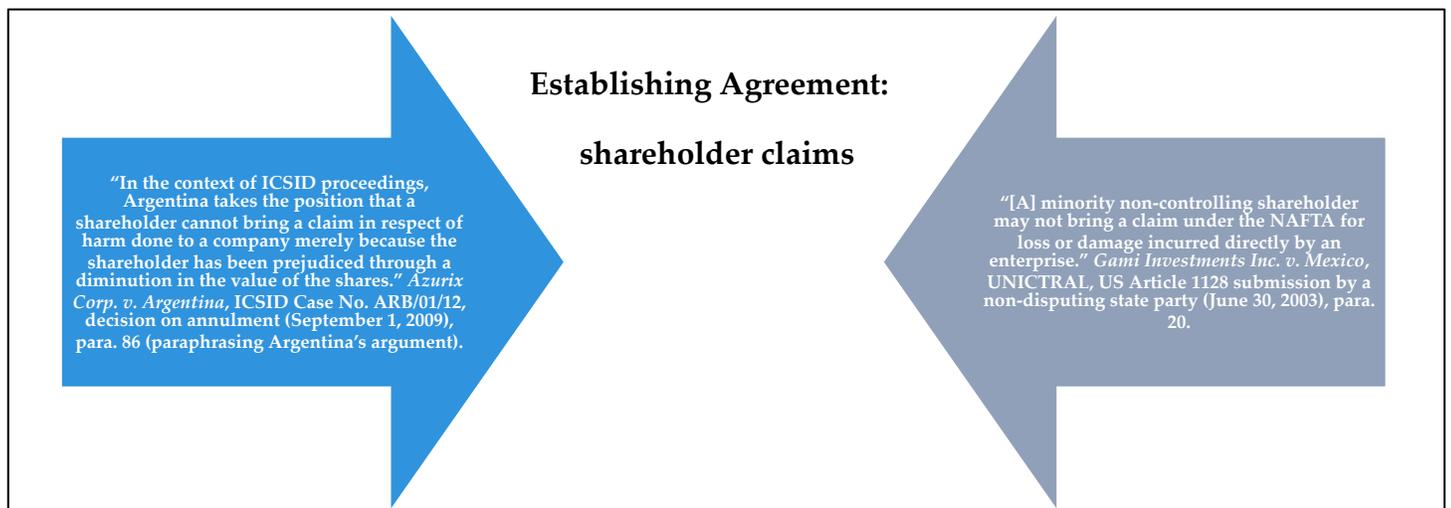
One extremely rich yet currently underexploited form of unilateral statements that can establish subsequent agreement and practice are submissions filed by states in investment disputes – whether acting as a respondent or as a non-disputing state party to the treaty.

In investment treaty law, much of what we "know" and say about the law has been developed by tribunals through their decisions. States' voices – whether contained in respondent briefs or submissions by non-disputing parties to the treaty – have, in contrast, commonly remained out of the public view or been relatively ignored. While awards are increasingly making it to the public domain, and are being cited as support in other decisions, submissions by states regarding their understanding of the meaning of their treaties have remained largely hidden, with only a relatively small number of pleadings by a handful of states being regularly made publicly available in disputes. What is known about states' positions on the interpretation and application of their treaties is often limited to what can be gleaned from quoted or paraphrased excerpts from their oral and written contributions when those are referenced in awards.

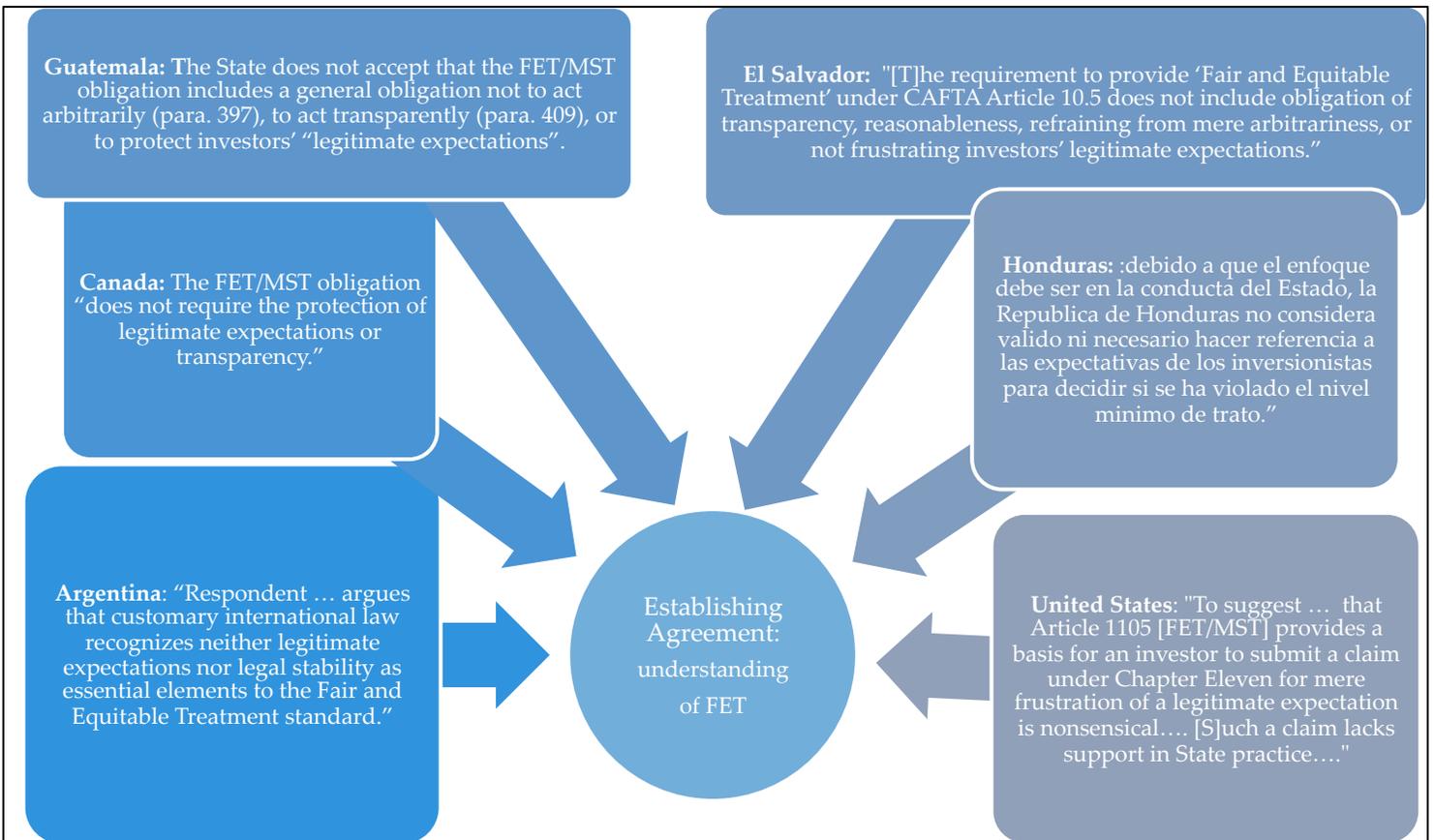
The fact that awards are increasingly public but states' submissions are not weakens states' role in shaping the law, and leaves inaccessible a potentially important source of practice that would have to be taken into account by tribunals under the VCLT. But some states and tribunals have indeed recognized the important role of state submissions in guiding treaty interpretation. Parties to the NAFTA and Dominican Republic-Central America-United States FTA (CAFTA), in particular, have relatively well-developed and consistent practice of making submissions to tribunals on issues of treaty interpretation even in cases where they are not respondents.<sup>40</sup>

The legal relevance of these submissions has been addressed in investor state disputes. In *Canadian Cattlemen for Fair Trade v. United States*, for instance, the tribunal affirmed that states' statements and acts, **including unilateral submissions as non-disputing state parties to investment tribunals, and submissions made as respondent states**, can establish agreement under VCLT Article 31(3).<sup>41</sup> Looking at the states' statements and practices in the case before it, the tribunal determined that the NAFTA parties' unilateral statements, respondent submissions, and non-disputing party submissions did not together constitute a "subsequent agreement" under VCLT Article 31(3)(a).<sup>42</sup> The tribunal did find, however, **that those unilateral acts and statements did constitute "subsequent practice" under Article 31(3)(b) sufficient to "establish[] the agreement of the parties regarding" the treaty's application that it had to take into account.**<sup>43</sup>

Because there is no hierarchy among the sources that tribunals must take into account under VCLT Article 31(3), the fact that the states' submissions did not qualify as subsequent agreement, but did count as subsequent practice, did not undermine their legal force. Although subsequent agreement is clearer on its face than subsequent practice both, when established, must be taken into account.



**Figure 1**



**Figure 2**

Notably, in agreeing with the respondent about the use of subsequent agreement and practice in treaty interpretation, the tribunal rejected the claimant’s contention that by allowing states this role, tribunals would enable them to improperly “taint” interpretation of the treaty and distort original intent through “revelation or revision by NAFTA Party officials subsequent to their learning that a NAFTA claim has been commenced.”<sup>44</sup>

*ADM v. Mexico* represents another case where the tribunal relied on positions taken by NAFTA states in their submissions as respondents and non-disputing state parties in various NAFTA disputes, as well as in related domestic court proceedings, to establish the meaning of the treaty and conclude that, contrary to the claimants’ contention, the NAFTA only accorded procedural, and not substantive, rights to investors.<sup>45</sup>

To illustrate the role and relevance of briefs in demonstrating state agreement on treaty standards, the figures above and the tables included in the annex below collect submissions by various states – some acting as a non-disputing party or as a respondent state – on the particularly contentious issue of the meaning of the fair and equitable treatment obligation. In Table 1 of the annex, each state contends that the obligation requires no more than the minimum standard of treatment; in Table 2, each submission declares the state’s position that the standard does not

entail a requirement to protect investors' "legitimate expectations." Although they contain just a small sampling of the information that can be gleaned from briefs, the annex and the figures provide a glimpse into how one can identify common positions reflecting agreement on various contentious treaty issues.

Five factors are helping advance states' use of briefs to give content to treaty standards and reduce uncertainty regarding how they will be interpreted and applied: (1) the growth in the number of treaties requiring pleadings to be made publicly available, (2) practices of states voluntarily disclosing their briefs, (3) explicit inclusion in treaties like the NAFTA and CAFTA of mechanisms for non-disputing state parties to make submissions to tribunals, (4) the 2013 UNCITRAL arbitration rules requiring disclosure of pleadings and requiring tribunals to accept submissions by non-disputing state parties on issues of treaty interpretation<sup>46</sup> and (5) raised awareness and interest of states in asserting their roles as masters of their treaties.<sup>47</sup> Through these practices, the skeletal but illustrative collection reproduced in the figures above and in the annex can grow into a more well-developed framework evidencing authentic interpretations of investment treaties to be considered by tribunals.

As noted above, in addition to these relatively formal types of conduct such as submissions to tribunals and diplomatic exchanges, practice can also take other, less formal forms, such as statements posted on a government's website along with its treaties, and less active forms, such as tacit acceptance of another treaty party's position.<sup>48</sup> In the context of the NAFTA, because of the numbers of disputes that have been brought against the United States, Canada, and Mexico under that single treaty, each state party has had roughly 50 distinct disputes giving rise to issues and questions for them to weigh in on with interpretations. In contrast, many other states and many other treaties have figured less prominently in investor-state arbitration, meaning that there are fewer opportunities to provide input. For these states and treaties, joint and unilateral action *other* than submissions in briefs will be particularly important for attempting to fine-tune treaties' meaning.

With respect to the issue of tacit acceptance, submissions by non-disputing state parties on certain issues commonly seek to prevent tribunals from drawing unintended inferences from silence of others. The submissions often state that they only aim to address discrete questions of interpretation, that silence on other issues should not be interpreted to have any meaning, and that the submitting party is not taking a position on how the relevant interpretation will apply in the relevant dispute based on the facts of the case.<sup>49</sup>

Also relevant to the issue of silence, one notable development in investment treaties is for the parties to state what significance, if any, should be attributed to the non-disputing party's failure to provide input in a dispute. The 2012 U.S. Model BIT illustrates this practice, stating that if a non-disputing party does not provide an oral or written submission regarding the respondent state's

attempt to invoke certain defenses, “the non-disputing Party shall be presumed, for the purposes of the arbitration, to take a position [on the applicability of the defense] not inconsistent with that of the respondent.”<sup>50</sup>

### 3. Other issues and considerations – timing, third-party rights, interpretation v. amendment, state-to-state arbitration, and unintended attribution

#### 3.1 The timing of the interpretation

Actions taken during the course of a dispute to establish subsequent practice or agreement may, rightly or wrongly, be viewed as improper tactics to avoid liability rather than legitimate efforts to clarify vague standards. Indeed, the timing of interpretations has seemed to influence both the *Pope & Talbot* tribunal's critical view of the FTC interpretation of NAFTA Article 1105, and the United States' view of Ecuador's efforts to secure common interpretation of the "effective means" provision (see below sections 3.3 and 3.5). Both the FTC's interpretation and Ecuador's attempt at a joint interpretation came after a tribunal had issued its decision on liability in favor of the claimants, and both were questioned as attempts to interfere with those awards.<sup>51</sup>

To avoid these concerns, it would be ideal for states to take steps to clarify the meaning of their treaties on a prompt and ongoing basis, especially before disputes arise. Nevertheless, even submissions by respondent states in pending disputes do qualify as conduct that can establish subsequent agreement on interpretation; and submissions by non-disputing state parties can likewise be used to guide interpretation and application of the treaties in ongoing arbitrations. Indeed, as shown by the growing body of treaties expressly granting states the ability to make binding determinations, states have deemed it important to be able to control interpretation and application of their treaties by ensuring their ability to conclusively determine even investors' pending claims.<sup>52</sup>

#### 3.2 Relevance of third-party rights

As noted above, subsequent agreement and subsequent practice may not necessarily be binding, and, pursuant to Article 31 of the VCLT, tribunals must also take into account other means of interpretation including the object and purpose of the treaty. In this context, one relevant factor that might impact the weight a tribunal gives to subsequent agreement and practice is the effect it would have on non-parties to the treaty. Where interpretations solely impact the scope and nature of the parties to the treaty, tribunals may not be concerned about potential abuse. But where interpretations narrow rights or interests of non-parties to the treaties, as might be the case under human rights or investment treaties, tribunals might accord them less weight.<sup>53</sup> The ILC, for instance, noted in a footnote that "[i]t had been asserted that the interpretation of treaties which establish rights for other states or actors is less susceptible to 'authentic' interpretation by their parties, for example in the context of investment treaties."<sup>54</sup>

Georg Nolte, the Special Rapporteur for the ILC's work on "Subsequent agreements and subsequent practice in relation to the interpretation of treaties," has addressed these issues. He

responded to concerns about the power of states to affect interpretation of their investment treaties by affirming the enduring value of subsequent agreement and subsequent practice:

The comparatively limited use of subsequent agreements and subsequent practice by ICSID tribunals as means of treaty interpretation or modification has been criticized. The point has been made that the reluctance of the tribunals may be due to the consideration that a wider use of subsequent practice would give states an inappropriate possibility to retroactively affect and diminish the rights of private investors. This consideration would, however, underestimate the role of states as masters of the treaty and law-givers. The jurisprudence of the European Court of Human Rights indeed demonstrates that an international court can guarantee fundamental rights and at the same time amply take subsequent practice of the parties into account as a pragmatic orientation for where to draw the line between rights and possible limitations. In addition, taking subsequent agreements and subsequent practice more into account can provide an avenue for tribunals to engage in a dialogue with states and among each other with a view to better harmonize their own body of jurisprudence, and thus to compensate somewhat for the lack of a common appeals procedure.<sup>55</sup>

There is thus nothing inherent in or about investment treaties' investor protections that preclude states' use of subsequent agreement and practice to shape treaty interpretation. Those sources remain valid and useful, though issues relating to timing of the clarification and the existence, nature and scope of impacted third-party rights might affect the weight a tribunal gives to evidence of subsequent agreement and practice in a particular dispute.<sup>56</sup>

### 3.3 The line between interpretation and amendment

The line between interpretation and amendment can be blurry and difficult to define.<sup>57</sup> But international law appears not to give the distinction determinative weight, accepting as authoritative even those interpretations that are inconsistent with the plain text and original intent of the state parties to the treaty.<sup>58</sup> Indeed, it is well-settled that the meaning of treaties may change over time as states' understanding of the texts' aims and effects evolves. Subsequent agreement and subsequent practice can be used to evidence and establish that evolution.<sup>59</sup>

There are, however, arguments that interpretation and amendment are and should be considered distinct.<sup>60</sup>

Some of those issues relating to the interpretation/amendment distinction arose in connection with the NAFTA states' efforts to clarify the meaning of their investment treaties. In response to the FTC interpretation of the FET obligation, investor claimants argued that the FTC statement was an improper amendment, and not an interpretation binding on tribunals. The issue first arose in *Pope & Talbot v. Canada*,<sup>61</sup> a case that was well underway when the NAFTA parties issued their FTC

interpretation. The *Pope & Talbot* tribunal considered the FTC statement to be an amendment to the treaty rather than an interpretation,<sup>62</sup> but concluded that its findings of liability would stand irrespective of whether it applied the standard set forth in that statement or the one that it had applied.<sup>63</sup>

In contrast, subsequent tribunals have been less concerned about the interpretation/amendment divide. For instance, the tribunal in *ADF v. United States*, a NAFTA case that had also been commenced when the FTC interpretation was issued, stated:

[T]he Investor urges that the Tribunal, in the course of determining the governing law of a particular dispute, is authorized to determine whether an FTC interpretation is a “true interpretation” or an “amendment.” We observe in this connection that the FTC Interpretation of 31 July 2001 expressly purports to be an interpretation of several NAFTA provisions ... and not an “amendment,” or anything else.... Nothing in NAFTA suggests that a Chapter 11 tribunal may determine for itself whether a document submitted to it as an interpretation by the Parties acting through the FTC is in fact an “amendment” which presumably may be disregarded until ratified by all the Parties under their respective internal law. We do not find persuasive the Investor’s submission that a tribunal is impliedly authorized to do that as part of its duty to determine the governing law of a dispute...Such a theory ... overlooks the systemic need not only for a mechanism for correcting what the Parties themselves become convinced are interpretative errors but also for consistency and continuity of interpretation, which multiple ad hoc arbitral tribunals are not well suited to achieve and maintain.<sup>64</sup>

Because the NAFTA specifically states that treaty interpretations by the FTC are *binding*, tribunals handling claims under that treaty may be more willing to accept the controlling nature of FTC interpretations, and less willing to question whether they are amendments, than tribunals might be when the relevant treaty does not contain a similar mechanism.

Yet even outside the context of the NAFTA and its provision regarding binding FTC interpretations, the distinction between interpretation and amendment in investment treaties may in many situations have limited practical impact due to the vague nature of many provisions in those agreements: when treaties set forth obligations as broad standards rather than specific rules, it is likely there will be more room (and need) for interpretations to provide guidance as to what those standards actually mean.<sup>66</sup> As evidenced by the lengthy and costly litigation on the meaning of covered “investors” and “investments”, the FET obligation, the line between legitimate regulations and expropriations, the elements and scope of the non-discrimination obligations, and many other provisions, there is much room for clarification and correspondingly little danger that the clarification will depart from treaty text in such a way that it looks like an amendment.

### 3.4 Unintended attribution

Because actions attributable to states under international law can constitute subsequent practice influencing treaty interpretation, it is important for states to ensure that their conduct conveys the right meaning. States that have adequate knowledge and resources to follow investment disputes arising under their treaties and participate in those disputes whether as respondents or non-disputing state parties, have a greater ability to manage their messages than states lacking such capacity. States that outsource and are not adequately involved in their defense or knowledgeable about relevant legal issues may unwittingly concede points or take stances not consistent with their actual understanding of their treaties. Even where briefs are drafted and submitted by private lawyers, states can be bound by their contents.

*“The importance of such subsequent practice in the application of a treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty.”<sup>65</sup>*

Another issue regarding attribution relates to state-owned or –controlled enterprises acting as claimants. If a state-owned or –controlled entity of State A brings an investment treaty action as a claimant against respondent host State B, that entity’s arguments about the treaty’s provisions may be more investor-friendly than arguments made by State A when acting as a respondent state (or even as a non-disputing state party). Due to these issues, provisions in treaties, arbitral rules, and domestic law that require home states to be notified of disputes filed under their treaties and receive documents submitted to and issued by tribunals, and that also allow them to make submissions to tribunals, are especially important.

### 3.5 State-to-state arbitration

When one state seeks to clarify an issue of treaty interpretation, the other state may respond by agreeing, disagreeing, or remaining silent. The examples cited above have largely illustrated circumstances in which states have agreed – either through joint statements, exchanges of diplomatic notes, or unilateral submissions to tribunals taking common positions on questions of interpretation.

But agreement may not always be so easy, particularly when the capital flows between the treaty parties are largely one-directional.<sup>67</sup> The state that is predominantly the capital importing treaty party might face challenges getting the capital exporting treaty party to respond to, much less support, a request for an express statement setting forth the states’ shared understanding of a treaty provision, especially if that understanding were one designed to advance a narrow view of states’ obligations to foreign investors.<sup>68</sup>

In these circumstances, as discussed above, a state may and should still take steps to make its own reading of the treaty known through such unilateral actions as postings on its website.

It might also be able to initiate formal action under the investment treaty to compel state-to-state consultations on the issue, or have a tribunal decide the question of interpretation.

Ecuador pursued the strategy of formal state-to-state dispute resolution after unsuccessfully seeking express agreement from the United States on a provision in the bilateral investment treaty between the two countries. Objecting to the interpretation a tribunal in an investor-state dispute had given to the “effective means” provision in the US-Ecuador BIT,<sup>69</sup> Ecuador informed the United States of its view of the proper interpretation, and asked for confirmation that the United States shared Ecuador’s understanding.<sup>70</sup> After the US declined to respond to Ecuador’s request, Ecuador initiated an arbitration against the United States under the investment treaty. The tribunal ultimately dismissed the action, finding that it did not have jurisdiction over the matter because there was no “dispute” between the United States and Ecuador.<sup>71</sup>

That decision, however, has been criticized both by the dissenting member of the tribunal and by academics.<sup>72</sup> Particularly in light of these critiques, it is uncertain whether future tribunals would take a similarly hands-off approach to cases in which one party to a BIT refuses to engage with the other state party’s efforts to resolve issues of treaty interpretation.

A final note on the practical challenges that arise with different states having different stakes in clarifying their treaties is that the investment treaties themselves can potentially help address these issues. As noted above, treaties can state that silence in response to a respondent state’s position on some or all issues of interpretation in a dispute should be read as accepting (or not opposing) that interpretation. Many treaties also contain provisions stating that the parties must consult to resolve “issues” or “disputes” regarding treaty interpretation and/or application. States could potentially draft those “obligation to consult” articles more explicitly to ensure their requests for interpretations are answered.

## 4. Conclusions for practical steps and considerations

The infamously vague language in existing investment treaties means that tribunals, investors, and states spend much time and resources trying to establish more precisely the implications of those agreements. States can help provide this clarity, and, in doing so, control the scope of their potential liability (and litigation costs) under their existing, long-lasting investment treaties. Whether inserted as an explanatory note appended to a treaty, developed in model agreements, asserted in non-disputing state party submissions, explained in respondents' pleadings, or conveyed by other means, these statements and practices must be taken into account by tribunals.

Even through the simple approach of making submissions to tribunals public as a matter of course, states help establish a "matching" mechanism enabling them to identify positions they share with other treaty parties. To date, however, states' briefs have rarely been making it into the public domain, preventing them from playing the role they could play in shaping development of and promoting coherence in investment treaty law.

In order to retain greater control over the interpretation of their treaty obligations, and in accordance with their rights under international law governing treaty interpretation, states can and should take a number of concrete steps:

### **In their treaties, states can insert provisions**

- ensuring that their joint interpretations on some or all issues are binding on tribunals;
- governing the meaning given to silence on certain matters;
- encouraging (if not requiring) state parties to consult and cooperate to resolve ambiguities on questions of interpretation and/or application;
- requiring that home states or other non-disputing state parties (1) are notified of claims filed under their treaties, (2) receive documents submitted to and issued by tribunals, and (3) can make submissions to tribunals on issues of treaty interpretation.

### **In disputes, states can**

- remain informed on the interpretation and application of their treaties;
- make their submissions public;
- participate as non-disputing state parties in disputes arising under those agreements; and
- make clear when they disagree with interpretations given by tribunals.

### **Alone and with other countries, states can**

- make public their understanding of vague or uncertain treaty provisions through unilateral action (e.g., postings on a website listing their treaties);

- monitor statements and practice of their treaty parties to identify areas of agreement and disagreement; and
- cooperate with other states to establish agreement clarifying ambiguous language, and clarify whether they intend those agreements to be binding.

States' counsel can and should also play an important role in helping their clients carefully manage interpretation of their treaties through subsequent agreement and subsequent practice, as opposed to simply addressing issues on a case-by-case basis as they arise through costly litigation of disputes. And finally, tribunals have a crucial responsibility to ensure that they properly apply rules of treaty interpretation and give adequate consideration to states' understanding of their treaties.

<sup>1</sup> UNCTAD, “Interpretation of IIAs: What states can do,” UNCTAD/WEB/DIAE/IA/2011/10 (December 2011), p. 4. (“Compared to complicated and time consuming treaty re-negotiation, modification or denunciation, interpretation may be an efficient option to improve predictability of awards.”). For more on these other options see UNCTAD, “International Investment Policymaking in Transition: Challenges and opportunities of treaty renewal,” UNCTAD IIA Issues Note, No. 4 (June 2013).

<sup>2</sup> Georg Nolte, “Jurisprudence under special regimes relating to subsequent agreements and subsequent practice,” in Georg Nolte, ed., *Treaties and Subsequent Practice* (Oxford, United Kingdom: Oxford University Press, 2013), p. 237.

<sup>3</sup> U.N., “Report of the International Law Commission on its sixty-fifth session: held at the United Nations Office, Geneva, from 6 May to 7 June 2013 and from 8 July to 9 August 2013,” A/68/10 (2013), pp. 13-15 [hereinafter U.N. Report A/68/10].

<sup>4</sup> Vienna Convention on the Law of Treaties art. 31(3)(a), (b), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT] (emphasis added).

<sup>5</sup> U.N. Report A/68/10, *supra* n.3, at Conclusion 2, p. 20.

<sup>6</sup> *Id.*, Commentary to Conclusion 2, para. 3, p. 21.

<sup>7</sup> *Id.*, Conclusion 4 p. 12; U.N., General Assembly, “Report on subsequent agreements and subsequent practice in relation to the interpretation of treaties: Text of draft conclusions 1–5 provisionally adopted by the Drafting Committee at the sixty-fifth session of the International Law Commission: held at the United Nations Office, Geneva, from 6 May to 7 June 2013 and from 8 July to 9 August 2013,” A.CN.4/L.813 (2013), Draft Conclusion 4, para. 1, p. 2.

<sup>8</sup> U.N. Report A/68/10, *supra* n.3, at Commentary to Conclusion 4, para. 10, p. 34.

<sup>9</sup> *Id.*, Conclusion 5 & Commentary, p. 41; see also U.N., General Assembly, “First report on subsequent agreements and subsequent practice in relation to treaty interpretation: held at the United Nations Office, Geneva, from 6 May to 7 June 2013 and from 8 July to 9 August 2013,” A/CN.4/660 (2013), paras. 117, 120-124.

<sup>10</sup> U.N. Report A/68/10, *supra* n.3, at Commentary to Conclusion 4, para. 17, pp. 35-36.

<sup>11</sup> *Id.* Commentary to Conclusion 2, para. 4 (internal citations omitted), p. 21.

<sup>12</sup> *Id.* Commentary to Conclusion 2, para. 5, pp. 21-22. Domestic law of the treaty parties might impact their abilities to conclude such binding agreements; but the relevant treaty can anticipate and avoid such restrictions by specifically stating that subsequent agreements entered into by the treaty parties regarding its interpretation or application will be binding upon them and/or those interpreting and applying the treaty. *Id.* paras. 5-6.

<sup>13</sup> *Id.*, Commentary to Conclusion 2, para. 6, p. 22.

<sup>14</sup> VCLT, art. 32.

<sup>15</sup> U.N. Report A/68/10, *supra* n.3, Commentary to Conclusion 4, paras. 15-16, 22-23, pp. 35, 37.

<sup>16</sup> *Id.*, Commentary to Conclusion, paras. 24-36, pp. 37-41.

<sup>17</sup> *Id.*, Commentary to Conclusion 1, paras. 12-16, pp. 17-19.

<sup>18</sup> North American Free Trade Agreement, art. 2001, chapter VII, January 1, 1994 [hereinafter NAFTA], available at <https://www.nafta-sec-alena.org/Default.aspx?tabid=97&ctl=FullView&mid=1588&language=en-US> (last visited March 28, 2014).

<sup>19</sup> Interpretation of the Free Trade Commission of Certain Chapter 11 Provisions, section B, July 31, 2001, available at <http://www.state.gov/documents/organization/38790.pdf> (last visited November 30, 2013).

<sup>20</sup> UNCTAD, “Fair and equitable treatment,” UNCTAD series on issues in international investment agreements II, UNCTAD/DIAE/IA/2011/5 (2012), p. 61.

<sup>21</sup> NAFTA art. 1132, *supra* n.18.

<sup>22</sup> See Gabrielle Kaufmann-Kohler, “Interpretive powers of the free trade commission and the rule of law,” in Emmanuel Gaillard and Frederic Bachand eds., *IAI International Arbitration Series No. 7, Fifteen Years of NAFTA Chapter 11 Arbitration* (International Arbitration Institute: Juris Publishing, 2011), pp. 175-194.

<sup>23</sup> See, e.g., Letter of Submittal from Colin L. Powell, Department of State to President George W. Bush, January 3, 2004, regarding the Additional Protocol between the Government of the United States of America and the Government of the Republic of Lithuania (“The understanding is designed to preserve our bilateral investment treaties (BITs) with these countries after their accession to the EU by establishing a framework for avoiding or remedying present and possible future incompatibilities between our BITs with these eight countries and their future obligations of EU membership.”), available at <http://www.gpo.gov/fdsys/pkg/CDOC-108tdoc21/html/CDOC-108tdoc21.htm> (last visited March 26, 2014).

<sup>24</sup> Diplomatic Note No. 205/03 from the Embassy of the United States of America to the Ministry of Foreign Affairs, Lithuania, Vilnius, December 16, 2003.

<sup>25</sup> Diplomatic Note No. 205/03 from the Embassy of the United States of America to the Ministry of Foreign Affairs, Lithuania, Vilnius, December 16, 2003.

<sup>26</sup> *Id.*

<sup>27</sup> Letter from the Ministry of Foreign Affairs of the Republic of Lithuania to the Embassy of the United States of America, Vilnius, December 17, 2003.

<sup>28</sup> *National Grid PLC v. Argentine Republic*, UNCITRAL, *decision on jurisdiction* (June 20, 2006), para. 85, n.72, p. 26.

<sup>29</sup> Anthea Roberts, “State-to-State investment treaty arbitration: A hybrid theory of interdependent rights and shared interpretive authority,” 55 *Harvard International Law Journal* (forthcoming 2014), p.58. See also Anthea Roberts, “Power and

persuasion in investment treaty interpretation: The dual role of states,” 104 *American Journal of International Law* 179-225 (2010), pp. 217-221 [hereinafter, Roberts, “Power and Persuasion”].

<sup>30</sup> Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Int’l Ct. Justice, (July 13, 2009), para. 64 (“[S]ubsequent practice of the parties, within the meaning of Article 31(3)(b) can result in a departure from the original intent on the basis of a tacit agreement between the parties.”).

<sup>31</sup> ICSID Tribunal’s Interpretation of BIT Article 11 Worries Swiss, 19-2 Mealey’s International Arbitration Report 1 (February 2004).

<sup>32</sup> Letter from Lisa J. Grosh, Acting Assistant Legal Adviser, Office of the Legal Adviser, International Claims and Investment Disputes, US Department of State to Ms. Claudia Frutos-Peterson, Secretary of the *Ad Hoc* Committee, ICSID (May 1, 2008), p. 2, in Siemens A.G. v. Argentine Republic, ICSID Case No ARB/02/8, available at <http://ita.law.uvic.ca> (last visited November 30, 2013).

<sup>33</sup> *National Grid*, *supra* n.28.

<sup>34</sup> *Id.*

<sup>35</sup> Roberts, “Power and Persuasion,” *supra* n.29, at 221; UNCTAD, *supra* n.1, p. 15.

<sup>36</sup> See generally Julian Arato, “Subsequent practice and evolutive interpretation: Techniques of treaty interpretation over time and their diverse consequences,” 9 *The Law and Practice of International Courts and Tribunals* 443 (2010); Roberts, “Power and Persuasion,” *supra* n.29.

<sup>37</sup> *National Grid*, *supra* n.28

<sup>38</sup> See generally Arato, *supra* n.33; Roberts, “Power and Persuasion,” *supra* n.29; see also Georg Nolte, *supra* n.2.

<sup>39</sup> *National Grid*, *supra* n.28, para. 85 (emphasis and internal citations omitted).

<sup>40</sup> States also commonly make written and oral non-disputing party submissions in WTO disputes. For a recent example, see the submissions referred to in China – Measures Related to in the Exportation of Rare Earths, Tungsten and Molybdenum, Report of the Panel, March 26, 2014, WT/DS431/R, WT/DS432/R, and WT/DS433/R, Annex C. See also WTO Dispute Settlement System Training Module: Ch. 6.3, “The Process – Stages in a Typical WTO Dispute Settlement Case,” available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c6s3p3\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p3_e.htm) (referring to processes by which third-party states participate in disputes).

<sup>41</sup> The Canadian Cattlemen for Fair Trade v. United States of America, UNCITRAL, *award on jurisdiction* (January 28, 2008), paras. 181-89, pp. 108-110.

<sup>42</sup> *Id.* paras. 186-87, p. 109.

<sup>43</sup> *Id.* paras. 184-89, pp. 109-110.

<sup>44</sup> *Id.* paras. 181- 89, 99. 108-09 (discussing the claimants’ position).

<sup>45</sup> Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/5, *award* (November 21, 2007), paras. 175-177. The tribunal referred to some submissions as “Article 1128” submissions (or submissions made by non-disputing state parties to the treaty) even where they were submissions by the respondent state.

<sup>46</sup> UNICTRAL Rules on Transparency in Treaty-based Investor-State Arbitration, art. 5, effective April 1, 2014, available at [http://www.uncitral.org/uncitral/uncitral\\_texts/arbitration.html](http://www.uncitral.org/uncitral/uncitral_texts/arbitration.html) (last visited December 2, 2013).

<sup>47</sup> This awareness has been facilitated by research and analysis contained in Roberts, “Power and Persuasion,” *supra* n.29 and UNCTAD/WEB/DIAE/IA/2011/10, *supra* n.1.

<sup>48</sup> See Roberts, “Power and Persuasion,” *supra* n.29, at 215-222.

<sup>49</sup> See, e.g., United Parcel Service of America Inc. v. Government of Canada, UNCITRAL, *third submission of the United States* (August 23, 2002).

<sup>50</sup> 2012 US Model Bilateral Investment Treaty art. 20(3)(c)(iv), available at <http://www.state.gov/e/eb/ifa/bit/> (last visited December 2, 2013).

<sup>51</sup> See, *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, tribunal letter to disputing parties (September 17, 2001); *Republic of Ecuador v. United States of America*, PCA Case No. 2012-5, memorial of respondent United States of America on objections to jurisdiction (April 25, 2012).

<sup>52</sup> See, e.g., *Foreign investment promotion and protection agreement between Canada and China*, art. 18, September 9, 2012, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-text-chine.aspx?lang=eng> (last visited December 2, 2014); *North American Free Trade Agreement*, art. 1132, December 17, 1992, available at <https://www.nafta-sec-alena.org/Default.aspx?tabid=87&language=en-US> (last visited December 2, 2013).

<sup>53</sup> For this point, see also Roberts, “Power and Persuasion,” *supra* n.29, pp. 202-07.

<sup>54</sup> A/CN.4/660 (2013) *supra* n.9, p.76.

<sup>55</sup> Nolte, 2013, *supra* n.2, p. 237.

<sup>56</sup> See Roberts, “Power and Persuasion,” *supra* n. 107, p. 183; Anthea Roberts, “Subsequent Agreements and Practice: The Battle over Interpretative Power,” in Nolte, *supra* n.2. While issues of timing may give rise to issues of appearance, and concerns about whether they are attempts to take away the investors’ rights once those rights have vested, it should be noted, however, that there are significant questions regarding whether commitments made between states in investment

treaties confer rights on investors. Indeed, in some treaties and models, states have specified that the treaties (or specific articles therein) do not in fact create additional rights for non-parties to the treaties such as investors. See, e.g., 2012 US Model BIT, Art. 5(2) (“The concepts ‘fair and equitable treatment’ and ‘full protection and security’ do not ... create additional substantive rights.”); EU-Singapore FTA, Art. 17.15 (“For greater certainty, nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons, other than those created between the Parties under public international law.”).

<sup>57</sup> For a discussion of treatment of the distinction in drafting the VCLT and in subsequent application of the issue, see Arato, *supra* n.36, n.450. See also, e.g., Roberts, “Power and Persuasion,” *supra* n.29, pp. 200-201.

<sup>58</sup> See Roberts, *supra* n.29, p. 201 & nn. 108-109; Julian Arato, *supra* n.36, pp. 456-57, 461-64 and associated footnotes.

<sup>59</sup> See *Treaties over Time in Particular: Subsequent Agreement and Practice*, ILC Report on the Work of Its Sixtieth Session, Annex A, UN GAOR, 63d Sess., Supp. No. 10, UN Doc. A/63/10 (2008) [hereinafter ILC Report, A/63/10 (2008)]; *Treaties over Time*, ILC Report on the Work of Its Sixty-first Session, UN GAOR, 64th Sess., Supp. No. 10, p. 353, UN Doc. A/64/10 (2009).

<sup>60</sup> See Roberts, “Power and Persuasion,” *supra* n.29, p. 201 & n.106.

<sup>61</sup> *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL (2000).

<sup>62</sup> *Pope & Talbot, award in respect of damages* (May 31, 2001), para. 47.

<sup>63</sup> *Id.* paras. 47-69.

<sup>64</sup> *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, *award* (January 9, 2003), para. 177.

<sup>65</sup> Yearbook of the International Law Commission, 1966, vol. II, pp. 221–222, para. 15.

<sup>66</sup> *Id.* see also ILC Report, A/63/10 (2008) *supra* 59, Annex A, para. 14, p. 370 (“As important treaties reach a certain age, in particular law-making treaties of the post-1945 era, the context in which they operate becomes different from the one in which they were conceived. As a result, it becomes more likely that some of these treaties’ provisions will be subject to efforts of reinterpretation, and possibly even of informal modification. This may concern technical rules as well as more general substantive rules. As their context evolves, treaties face the danger of either being ‘frozen’ into a state in which they are less capable of fulfilling their object and purpose, or of losing their foundation in the agreement of the parties. The parties to a treaty normally wish to preserve their agreement, albeit in a manner which conforms to present-day exigencies. Subsequent agreement and subsequent practice aim at finding a flexible approach to treaty application and interpretation, one that is at the same time rational and predictable.”).

<sup>67</sup> Anthea Roberts, “State-to-State investment treaty arbitration: A hybrid theory of interdependent rights and shared interpretive authority,” *Harvard International Law Journal* 55 (forthcoming 2014), pp. 20, 47.

<sup>68</sup> *Id.*

<sup>69</sup> *Republic of Ecuador v. United States of America*, PCA Case No. 2012-5, *request for arbitration* (June 28, 2011).

<sup>70</sup> Note No. 13528-GM/2010 dated June 8, 2010 (delivered by Note No. 4-2-87110 on June 11, 2010) from the Republic of Ecuador to the Government of the United States.

<sup>71</sup> *Occidental Petroleum Company v. Republic of Ecuador*, *award* (September 29, 2012).

<sup>72</sup> Roberts, *supra* n.67 p. 8; Jarrod Hepburn and Luke Eric Peterson, “US-Ecuador Inter-State Investment Treaty Award Released to Parties; Tribunal Members Part Ways on Key Issues,” *Investment Arbitration Reporter* (October 30, 2012), available at [www.iareporter.com/articles/20121030\\_1](http://www.iareporter.com/articles/20121030_1).

**Table 1. Link with MST Asserted in Submissions**

Country	Clarification of FET/MST Link
Argentina	<p>According to reference to “Fair and Equitable Treatment according to the Principles of International Law” is a reference to and coextensive with the “minimum standard of objective treatment” under “customary international law” and not an “autonomous and independent standard.” <i>EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic</i>, ICSID Case No. ARB/03/23, <i>award</i> (June 11, 2012), para. 343 (noting the respondent’s position)</p> <p>(link not express in the treaty)</p>
Canada	<p>“[T]he Note of Interpretation rejects the interpretation of ‘fair and equitable treatment’ ... as a standard of fairness autonomous of the customary international law minimum standard of treatment. It confirms that customary international law is the applicable source of law to determine the minimum standard of treatment under Article 1105(1), and that ‘Article 1105 requires no more, nor less, than the minimum standard of treatment demanded by customary international law.’” <i>V.G. Gallo v. Government of Canada</i>, PCA Case No. 55798, <i>respondent’s counter-memorial</i> (June 29, 2010), para. 262.</p> <p>(link not express in the treaty)</p>
Czech Republic	<p>Treaty reference to the “fair and equitable treatment” standard is a reference to the customary international law minimum standard of treatment. <i>Saluka Investments B.V. v. Czech Republic</i>, UNICITRAL, <i>partial award</i> (March 17, 2006), para. 289 (noting the respondent’s position)</p> <p>(link not express in treaty)</p>
Ecuador	<p>“The fair and equitable treatment provision also does not create new, treaty-based standards, but merely incorporates or references the minimum standard of treatment under customary international law.” <i>Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador</i>, UNCITRAL, PCA Case No. 2009-23, <i>track 2 counter-memorial on the merits of the Republic of Ecuador</i> (February 18, 2013), para. 387.</p> <p>(link not express in treaty)</p>
El Salvador	<p>“The text of CAFTA makes it clear that ‘Fair and Equitable Treatment’ is a ‘floor’ or ‘bottom’ to the acceptable treatment of foreign investments – treatment that does not fall below this minimum standard does not give rise to a treaty violation, even if such treatment may not be considered ideal by a party or a tribunal.” <i>Railroad Development Corporation v. Republic of Guatemala</i>, ICSID Case No. ARB/07/23, <i>submission by non-disputing state party, El Salvador</i> (January 1, 2012), para. 3.</p> <p>(link express in the treaty)</p>
Guatemala	<p>“Article 10.5 of CAFTA limits the Parties’ fair and equitable treatment obligation to the minimum standard of treatment under customary international law. A claimant alleging a violation of the minimum standard of treatment under customary law bears two burdens: first, as examined in this section, it must prove as a matter of law that this particular standard of treatment is within the scope of the minimum standard of treatment under customary international law; second, ... it must prove as a matter of fact that the respondent State violated that particular standard of</p>

	<p>treatment.” <i>Railroad Development Corporation v. Republic of Guatemala</i>, ICSID Case No. ARB/07/23, <i>respondent’s counter-memorial on the merits</i> (October 5, 2010), para. 346.</p> <p>(link express in the treaty)</p>
Honduras	<p>“El trato justo y equitativo’ solamente se menciona con el rango de un ‘concepto’ que esta incluido en el_’Nivel Minimo de Trato.’ El segundo parrafo del [CAFTA] Artículo 10.5 establece claramente que este concepto de ‘trato justo y equitativo’ no puede ir mas alla del nivel minimo de trato a los extranjeros segun el derecho intemacional consuetudinario.” <i>Railroad Development Corporation v. Republic of Guatemala</i>, ICSID Case No. ARB/07/23, <i>submission by non-disputing state party, Honduras</i> (Jan. 1, 2012), para. 5.</p> <p>(link express in the treaty)</p>
Sri Lanka	<p>The “fair and equitable treatment” requirement is tied to the minimum standard of treatment under customary international law. <i>Deutsche Bank AG v. Sri Lanka</i>, ICSID Case No. ARB/09/02, <i>award</i> (October 31, 2012), para. 414 (discussing the respondent’s position).</p> <p>(link not express in the treaty)</p>
United States	<p>Under the NAFTA, “ ‘[F]air and equitable treatment’ ... do[es] not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.” <i>ADF Group Inc. v. United States of America</i>, ICSID Case No. ARB(AF)/00/1, <i>US counter-memorial on competence &amp; liability</i> (November 29, 2001), p. 50.</p> <p>(link not express in the treaty)</p> <p>The provisions of the CAFTA-DR demonstrate the “Parties’ express intent to incorporate the minimum standard of treatment required by customary international law as the standard for treatment in CAFTA-DR Article 105. Furthermore, they express an intent to guide the interpretation of that Article by the Parties’ understanding of customary international law, i.e., the law that develops from the practices and opinio juris of States themselves, rather than by interpretations of similar but differently worded treaty provisions. The burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets these requirements.” <i>Railroad Development Corporation v. Republic of Guatemala</i>, ICSID Case No. ARB/07/23, <i>submission by non-disputing state party, United States of America</i> (January 31, 2012), para. 3.</p> <p>(link express in the treaty)</p>

**Table 2. State Submissions on Content of FET or FET/MST**

Country	Stance (as disputing or non-disputing State party to the treaty) on FET and/or MST
Argentina	<p>“Respondent ... argues that customary international law recognizes neither legitimate expectations nor legal stability as essential elements to the Fair and Equitable Treatment standard. (See, Respondent’s Rejoinder, at paras. 249-50, 255). Respondent asserts that such broad interpretation extending to the protection of legitimate expectation constitutes a legislative expansion inconsistent with the contracting parties’ intentions as well as the principles of treaty interpretation under Articles 31 and 32 of the Vienna Convention.” <i>EDF International S.A., SAUR International S.A. and Leon Participaciones Argentinas S.A. v. Argentina Republic</i>, ICSID Case No. ARB/03/23, (June 11,</p>

	2012), para. 359 (paraphrasing respondent's arguments)
Canada	<p>The FET/MST obligation sets an "absolute minimum 'floor below which treatment of foreign investors must not fall." <i>V.G. Gallo v. Government of Canada, respondent's counter-memorial</i> (June 29, 2010), para. 263.</p> <p>The FET/MST obligation "does not require the protection of legitimate expectations or transparency." <i>V.G. Gallo, respondent's counter memorial</i>, p. 95, heading D.1.</p> <p>Claimants have "submitted no evidence of practice of the three NAFTA Parties regarding the protection of legitimate expectations, let alone evidence of practice by any of the other 189 members of the United Nations, as would be necessary to prove that a rule of custom crystallized through widespread and consistent practice undertaken out of a sense of legal obligation." <i>Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada, respondent's reply post-hearing brief</i> (January 31, 2011), para. 98.</p>
Czech Republic	The treaty's FET obligation (which is not expressly linked to the MST in the treaty) requires an examination of the "governmental action in question was willfully wrong, actually malicious, or so far beyond the pale that it cannot be defended among reasonable members of the international community." <i>Saluka Investments B.V. v. Czech Republic, UNICTRAL, partial award</i> (Mach 17, 2006), para. 290.
Guatemala	<p>The FET/MST obligation does not " 'create additional substantive rights.' " <i>Railroad Development Corporation v. Republic of Guatemala, ICSID Case No. ARB/07/23, respondent's counter-memorial</i> (October 5, 2010), para. 348 (internal citations omitted).</p> <p>The claimant has not established, and the State does not accept that the FET/MST obligation includes a general obligation not to act arbitrarily (para. 397), to act transparently (para. 409), or to protect investors' "legitimate expectations" (paras. 424-428). <i>Railroad Development Corporation, respondent's counter-memorial</i>.</p>
El Salvador	<p>"The text of CAFTA makes it clear that 'Fair and Equitable Treatment' is a 'floor' or 'bottom' to the acceptable treatment of foreign investments – treatment that does not fall below this minimum standard does not give rise to a treaty violation, even if such treatment may not be considered ideal by a party or a tribunal." <i>Railroad Development Corporation v. Republic of Guatemala, ICSID Case No. ARB/07/23, submission by non-disputing state party, El Salvador</i> (January 1, 2012), para. 3.</p> <p>The FET/MST obligation does not " 'create additional substantive rights.' " <i>Railroad Development Corporation, submission by non-disputing state party, El Salvador</i>, para. 3 (internal citations omitted).</p> <p>In El Salvador's view, to violate the minimum standard of treatment under customary international law included in CAFTA Article 10.5, a measure to be able to the State "must be sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards... Conversely, ... the requirement to provide 'Fair and Equitable Treatment' under CAFTA Article 10.5 <u>does not</u> include obligation of transparency, reasonableness, refraining from mere arbitrariness, or not frustrating investors' legitimate expectations." <i>Railroad Development Corporation, submission by non-disputing state party, El Salvador</i>, paras. 6-7.</p>

Honduras	<p>“Debido al origen de "Nivel Minimo de Trato" en el derecho internacional consuetudinario, como un "piso" absoluto que complementa la obligaci6n de los Estados de otorgar a los extranjeros al menos el mismo nivel de trato que los Estados otorgan a sus propios nacionales, solam.ente acciones de caracter chocante, excesivo, ultrajante, de parte de un Estado, pueden violar el nivel minimo de trato, incluyendo el trato justo y equitativo como un concepto incluido en el nivel minimo de trato.</p> <p>“La Republica de Honduras considera validos los siguientes ejemplos especificos de conducta que puede violar el nivel mfximo de trato: una grave denegaci6n de justicia., tma arbitrariedad manifiesta, una injusticia flagrante, una completa falta de debido proceso, una discriminacion manifiesta, o la ausencia manifiesta de las razones para una decision. Sin embargo, debido a que el enfoque debe ser en la conducta del Estado, la Republica de Honduras no considera valido ni necesario hacer referencia a las expectativas de los inversionistas para decidir si se ha violado el nivel minimo de trato.” <i>Railroad Development Corporation v. Republic of Guatemala</i>, ICSID Case No. ARB/07/23, <i>submission by non-disputing state party, Honduras</i> (January 1, 2012), paras. 9-10.</p>
Sri Lanka	<p>“The obligation of fair and equitable treatment is in Respondent’s view not breached where regulatory measures serve a legitimate purpose and are based on legal standards, rather than prejudice or personal preference. Even if, hypothetically, legislation were objectively imperfect, this does not violate fair and equitable treatment. A fortiori, imperfect implementation of existing regulation is no breach of the international standard.” <i>Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka</i>, ICSID Case No. ARB/09/2, <i>award</i> (October 31, 2012), para. 416 (paraphrasing the respondent’s position).</p>
United States	<p>“States may modify or amend their regulations to achieve legitimate public welfare objectives and will not incur liability under customary international law merely because such changes interfere with an investor’s ‘expectations’ about the state of regulation in a particular sector. Regulatory action violates ‘fair and equitable treatment’ under the minimum standard of treatment where, for example, it amounts to a denial of justice, as that term is understood in customary international law, or manifest arbitrariness falling below the international minimum standard.” <i>TECO Guatemala Holdings LLC v. Republic of Guatemala</i>, ICSID Case No. ARB/10/23, <i>art. 10.20.2 submission of a non-disputing state party, United States of America</i> (November 23, 2012), para. 6.</p> <p>“[A] claim under Article 1105 [FET/MST] would not be admissible if it were based only on an allegation of a breach of another provision of the NAFTA.” <i>United Parcel Service of America, Inc. v. Government of Canada</i>, UNICTRAL, <i>second article 1128 submission of the United States of America</i> (May 13, 2002).</p> <p>“Sufficiently broad State practice and opinio juris thus far have coincided to establish minimum standards of State conduct in only a few areas, such as the requirements to provide compensation for expropriation; to provide full protection and security (or a minimum level of internal security and law); and to refrain from denials of justice. In the absence of an international law rule governing State conduct in a particular area, a State is free to conduct its affairs as it deems appropriate.” <i>Apotex Holdings Inc. and Apotex Inc. v. United States of America</i>, ICSID Case No. ARB(AF)/12/1, <i>counter-memorial on merits and objections to jurisdiction of respondent United States of America</i> (December 14, 2012), para. 353.</p> <p>“To suggest ... that Article 1105 [FET/MST] provides a basis for an investor to submit a claim under Chapter Eleven for mere frustration of a legitimate</p>

	<p>expectation is nonsensical.... In addition to the fact that such a claim lacks support in State practice, the consequences of agreeing with Glamis that mere frustration of a foreign investor's legitimate expectations rises to the level of a customary international law violation would be momentous.... In sum, the Tribunal should reject the notion that the customary international law minimum standard of treatment requires States to compensate foreign investors merely because their expectations have been frustrated. Glamis provides no evidence of such a rule of customary international law and, indeed, State practice refutes it." <i>Glamis Gold Ltd. v. United States of America</i>, UNICTRAL, <i>counter-memorial of respondent United States of America</i> (September 19, 2006), pp. 180-84.</p>
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