Columbia Center on Sustainable Investment
A JOINT CENTER OF COLUMBIA LAW SCHOOL AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

REFORM OPTION:

GREATER STATE CONTROL OVER TREATY INTERPRETATION AND APPLICATION

There are several ways that state parties can try to influence interpretation of their treaties. These include unilateral statements or submissions made by treaty parties after ratification of the agreements; as well as through state-state agreements or decisions by treaty bodies. This note provides a brief overview of three paths that have been referred to in the UNCITRAL discussions and submissions: (1) non-disputing state party submissions, (2) binding treaty interpretation mechanisms, and (3) state-state filters or first rights of decision.

Non-disputing State Party (NDSP) Submissions

Brief overview: When a case is brought against a respondent state, the respondent state will submit briefs to the tribunal on issues of interpretation. Tribunals, however, do not defer to those briefs on interpretation nor do they appear to give them any special weight. If, however, the NDSP makes a submission taking the same or similar position on that issue of interpretation, this can evidence the treaty parties' subsequent "agreement" on the issue; and this "agreement" must be taken into account by tribunals.

Legal basis (Box 1):

- These are contemplated and have legal force pursuant to the Vienna Convention on the Law of Treaties (VCLT) and notion that states are the "masters of their treaties"
- These are expressly authorized under the UNCITRAL Rules on Transparency
- These are expressly authorized under some IIAs (typically in the sections on dispute settlement)

Box 1 Legal bases relating to NDSP submissions, some examples

Vienna Convention on the Law of Treaties, Article 31

…

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

…

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

…

UNCITRAL Transparency Rules, Article 5: Submission by a non-disputing Party to the treaty

1. The arbitral tribunal shall, subject to paragraph 4, allow, or, after consultation with the disputing parties, may invite, submissions on issues of treaty interpretation from a nondisputing Party to the treaty.

2. The arbitral tribunal, after consultation with the disputing parties, may allow submissions on further matters within the scope of the dispute from a non-disputing Party to the treaty. In determining whether to allow such submissions, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant, the factors referred to in article 4, paragraph 3, and, for greater certainty, the need to avoid submissions which would support the claim of the investor in a manner tantamount to diplomatic protection.

3. The arbitral tribunal shall not draw any inference from the absence of any submission or response to any invitation pursuant to paragraphs 1 or 2.

…

Central America-Korea FTA, Article 9.21: Conduct of the arbitration

…

1. The non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement. On the request of a disputing party, the nondisputing Party should resubmit its oral submission in writing.

…

CETA, Article 8.38: Non-disputing Party

…

2. The Tribunal shall accept or, after consultation with the disputing parties, may invite, oral or written submissions from the non-disputing Party regarding the interpretation of this Agreement. The non-disputing Party may attend a hearing held under this Section.

3. The Tribunal shall not draw any inference from the absence of a submission pursuant to paragraph 2.

…

Impact:

- Under the VCLT, subsequent practice establishing agreement, and subsequent agreement, ***shall be taken into account*** by tribunals. But these individual submissions, even where they establish agreement, are not binding (unless the IIA states otherwise).

Advantages:

- Can be a way to clarify interpretation of treaties
- Can permit continued evolution of the meaning of the treaty
- May involve fewer formalities and procedures than amendments or agreed interpretations
- May be easier to file a unilateral submission that form an agreement with the treaty party on the issue of interpretation and precise language to use
- Can be relevant for issues of interpretation and application, though most commonly used and more clearly permitted when addressing interpretation

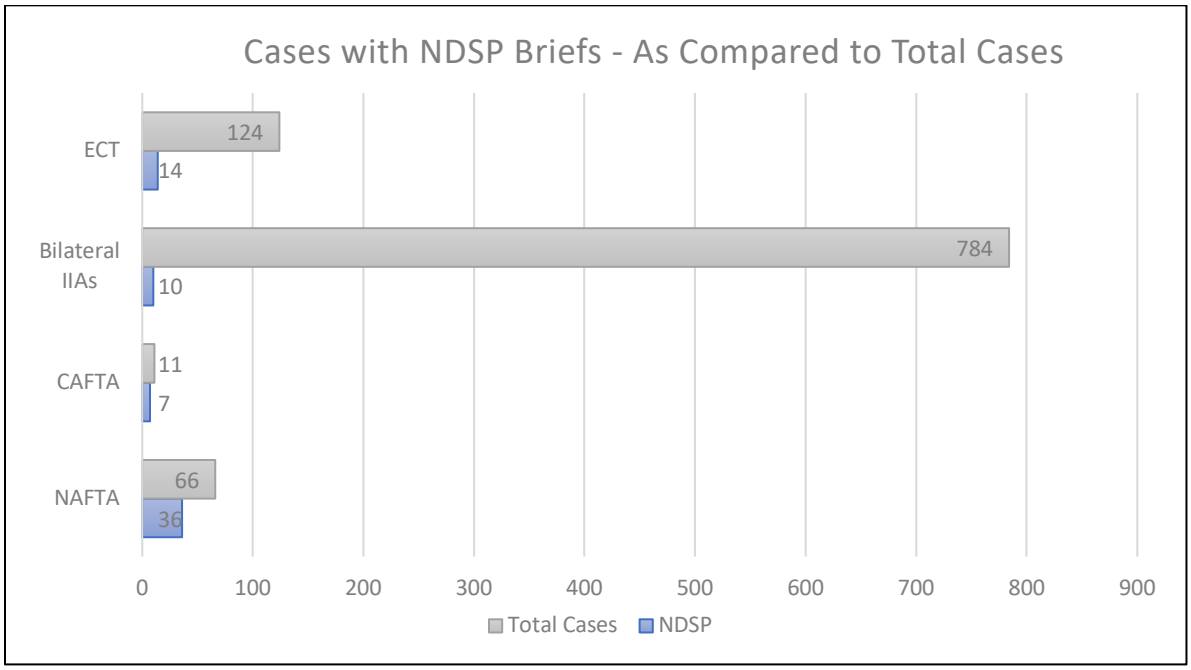
Disadvantages:

- This mechanism can only be used when a dispute has been filed (though submissions may help inform treaty interpretation in subsequent cases)
- Under BITs in particular, states may never or only rarely be a NDSP
- When a state is primarily the capital importing state, its capital exporting state treaty party may not wish to file NDSP submissions (or submissions that offer narrowing interpretations helpful to the capital importing state)
- Filing NDSP submissions requires the NDSP to dedicate resources to follow disputes and prepare submissions for those disputes
- The submissions are not binding on tribunals, even when all treaty parties are saying exactly the same thing (unless the IIA states otherwise)

Use to date

- Reflecting the political realities informing whether/when a state will file a NDSP submission, the relatively asymmetrical nature of many IIAs, the resources required to file these briefs, and/or uncertainty about their effectiveness, NDSP submissions have been relatively rare, except for certain pockets of activity (Table 1):
    - NAFTA – 34 (out of 66) cases have had at least one NDSP brief;
    - CAFTA - 7 (out of 11) cases have had at least one NDSP brief;
    - Bilateral IIAs – of all ISDS disputes under bilateral IIAs (784 cases), only 10 cases have had at least one NDSP brief. Moreover, one of those was in an annulment proceeding, addressing a multilateral treaty, the ICSID Convention, not the BIT;
    - ECT - there have been *no* NDSP submissions by individual governments; the European Commission has made submissions in 14 cases (out of 124).

Figure 1 NDSP submissions made under different types of IIAs



Sources: Data on claims under the different treaties is from UNCTAD (search done October 9, 2019); data on NDSP submissions is collected from the PITAD databases, supplemented and corrected by CCSI (internal spreadsheet updated as of October 9, 2019)

Binding Treaty Interpretation Mechanisms

Brief overview: Some treaties contain provisions specifying that treaty bodies or treaty parties may issue interpretations of the treaty that are binding on any tribunal interpreting or applying that treaty. This approach can be used, for instance, to correct previous interpretations deemed erroneous, or in pending cases to address an argument being raised by an investor.

Legal basis:

- Included in the underlying bilateral investment treaty (typically in the portion relating to dispute settlement) (Box 2)
- Example NAFTA
    - Only one known example of state parties using this to clarify the interpretation of a substantive treaty standard, and this was done nearly twenty years ago (NAFTA 1105 – FTC statement of 2001) (Box 3)

Box 2 Treaties providing for binding interpretations

Central America-Korea FTA, Article 9.23

…

2. A decision of the Joint Committee declaring its interpretation of a provision of this Agreement under Article 21.1 (Joint Committee) shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision.

CETA, Article 8.31

…

3. Where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may, pursuant to Article 8.44.3(a), recommend to the CETA Joint Committee the adoption of interpretations of this Agreement. An interpretation adopted by the CETA Joint Committee shall be binding on the Tribunal established under this Section. The CETA Joint Committee may decide that an interpretation shall have binding effect from a specific date.

NAFTA Article 1131

…

2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.

Box 3 Use of binding treaty mechanisms - NAFTA FET example

NAFTA, Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA Free Trade Commission, July 31, 2001

B. Minimum Standard of Treatment in Accordance with International Law

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

2. 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.

3. 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).

Impact:

- These provisions specify that interpretations agreed by the treaty parties (or treaty body) will be binding on that and any other tribunal under the treaty
- Treaties can indicate that they only apply prospectively (i.e., to future cases), but otherwise can apply to pending disputes and disputes that had arisen before the interpretation was issued

Advantages:

- Add clarity to treaty
- Are expressly binding on all tribunals (even in pending cases), making effectiveness more certain than NDSP submissions

Disadvantages:

- Given the clear binding nature, states may be reluctant to use this mechanism as they will subsequently be bound to it; need to be certain of what interpretation is being advanced
- It may be difficult to secure agreement with the other treaty party or parties (or through the relevant treaty body)
- Especially when invoked for ongoing disputes, questions may be raised about whether the binding agreement will negatively affect claimants' "rights"
- There are concerns that it may be an improper way of amending the treaty

Use to date:

- It seems that this mechanism has only been used one time to clarify an issue of interpretation; this was under the NAFTA in 2001.

3. State Filters or First Rights of Decision

These mechanisms give treaty bodies or relevant domestic officials the ability to resolve issues (on interpretation and/or application of the treaty) before they can go to tribunals. They are most commonly seen in provisions giving domestic officials or treaty parties the ability to decide issues related to claims about taxation or financial services, and provisions giving treaty parties the ability to determine whether protections for non-conforming measures apply. Other examples include treaties using them to protect against ISDS claims challenging "social welfare" measures.

Legal basis:

- These are included in IIAs, often in the sections on dispute settlement but also in provisions on "exceptions" modifying otherwise applicable provisions on dispute settlement
- Examples are included in Boxes 4, 5, and 6

Impact:

- Positions or decisions taken pursuant to these provisions have binding effect on tribunals
- The provisions allow for case-specific binding decisions on interpretation *and* application

Advantages:

- Enable state parties (generally upon request of respondent party) to decide issues of special policy and/or legal importance, complexity, and sensitivity rather than having those issues decided by tribunals
- Allow for state parties to decide on issues of interpretation and application (e.g., whether a challenged tax measure is an expropriation; and/or whether a challenged action is protected by a reservation for non-conforming measures advancing designated policy aims)
- Can be designed to give state parties first rights of decision on application of substantive provisions to viability of claims, policy areas, exceptions, etc.
- Can send issues, as appropriate, to treaty bodies, domestic political officials, or domestic technical experts
- Can be used to resolve cases or issues within them on a relatively early basis

Disadvantages:

- Information on use to date and effectiveness is limited
- Securing agreement from a non-disputing state party or parties on a decision may be difficult (raising questions of whether tribunals should be permitted/directed to draw inferences from silence)

Use to date:

- It is difficult to track use to date as the provisions appear to involve activities that do not go to tribunals, and may happen at early phases of the case.

Box 4 Filter for "social welfare" measures

Chapter 9, Article 9.11: Consultations

4. Measures of a Party that are non-discriminatory and for the legitimate public welfare objectives of public health, safety, the environment, public morals or public order shall not be the subject of a claim under this Section.

5. The respondent may, within 30 days of the date on which it receives a request for consultations (as provided for in paragraph 1), state that it considers that a measure alleged to be in breach of an obligation under Section A is of the kind described in paragraph 4, by delivering to the claimant and to the non-disputing Party a notice specifying the basis for its position (a 'public welfare notice').

6. The issuance of a public welfare notice shall trigger a 90 day period during which the respondent and the non-disputing Party shall consult. The dispute resolution procedure contemplated by this Section shall be automatically suspended for this 90 day period.

7. The issuance of a public welfare notice is without prejudice to the respondent's right to invoke the procedures described in Article 9.16.5 or Article 9.16.6. The respondent shall promptly inform the claimant, and make available to the public, the outcome of any consultations.

8. In any proceeding brought pursuant to this Section, the tribunal shall not draw any adverse inference from the non-issuance of a public welfare notice by the respondent, or from the absence of any decision between the respondent and the non-disputing Party as to whether a measure is of a kind described in paragraph 4.

Box 5 Opportunity to resolve issues of interpretation and application

Central America-Korea FTA, Article 9.24: Interpretation of annexes

1. Where a respondent asserts as a defense that the measure alleged to be a breach is within the scope of an entry set out in Annex I or Annex II [on non-conforming measures relating to certain sectors, existing measures, or policy areas], the tribunal shall, on request of the respondent, request the interpretation of the Joint Committee on the issue. The Joint Committee shall submit in writing any decision declaring its interpretation under Article 21.1 (Joint Committee) to the tribunal within 90 days of delivery of the request.

2. A decision issued by the Joint Committee under paragraph 1 shall be binding on the tribunal, and any decision or award issued by the tribunal must be consistent with that decision. If the Joint Committee fails to issue such a decision within 90 days, the tribunal shall decide the issue.

Box 6 Referring certain issues to domestic officials with special competence

EU-Mexico Agreement in Principle (21 August 2018), Exceptions, Article X.4, Taxation

4. (a) Where an investor submits a request for consultations pursuant to Article 3 (Consultations) claiming that a taxation measure breaches an obligation under [the Investment Chapter], the respondent may refer the matter for consultation and joint determination by the Parties as to whether:

(i) the measure is a taxation measure;

(ii) the measure, if it is found to be a taxation measure, breaches [a relevant] obligation under [the Investment Chapter]; or

(iii) there is an inconsistency between the obligations in this Agreement that are alleged to have been breached and those of a tax convention.

(b) A referral pursuant to subparagraph (a) cannot be made later than the date the Tribunal fixes for the respondent to submit its counter-memorial. Where the respondent makes such a referral the time periods or proceedings specified in Section C (Resolution of investment disputes between investors and states) of Chapter XX (Investment) shall be suspended. If within 180 days from the referral the Parties do not agree to consider the issue, or fail to make a joint determination, the suspension of the time periods or proceedings shall no longer apply and the investor may proceed with its claim.

(c) A joint determination by the Parties pursuant to subparagraph (a) shall be binding on the Tribunal.

(d) Each Party shall ensure that its delegation for the consultations to be conducted pursuant to subparagraph (a) shall include persons with relevant expertise on the issues covered by this Article, including representatives from the relevant tax authorities of each Party. For Mexico, this means officials from the Ministry of Finance and Public Credit.

Discussion Questions:

- Have you considered making or made a NDSP submission in a previous case. Why/why not?

    - If so, what were circumstances and impressions regarding effectiveness?
- Have any of your treaty parties made NDSP submissions in cases when you were a respondent state? Why/why not?
    - If so, what were circumstances and impressions regarding effectiveness?
- What can be done to ensure that the NDSP mechanism is useful for capital importing states under BITs?
    - E.g., if you request your treaty party to provide input on a particular issue of interpretation but it does not, should an inference that your treaty party agrees with your interpretation be drawn for that particular case?
- What can be done to ensure adequate weight is given to NDSP submissions? (What weight should be given to them?)
- Have you had a case where the tribunal has disagreed with your interpretation of a relevant provision? Do you think the non-disputing party shared your interpretation? Did the non-disputing party file a NDSP submission?

- Why do you think treaty mechanisms for joint interpretations have not been used more commonly or widely?
    - For instance, under the NAFTA it has only been used once to clarify a substantive provision under the investment chapter, though the three states commonly make submissions saying essentially the same thing on other disputed issues of interpretation. Why do you think they prefer the NDSP route? What does this mean for the use of similar mechanisms under other treaties?

- Have you had any disputes that have involved the use of state-state screens or first rights of decision? If so, did they involve cooperation between state authorities or treaty bodies? What were the outcomes and your perceptions?

- Does the Australia-China example seem to be a useful dispute prevention mechanism?

- What do you think about issues of timing (e.g., NDSP submissions during disputes before tribunals v filters and screens before disputes make it to tribunals)?