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## **Ripe for Refinement: The State's Role in Interpretation of FET, MFN, and Shareholder Rights**

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# Ripe for Refinement: The State's Role in Interpretation of FET, MFN, and Shareholder Rights

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**Lise Johnson**



The  
**Global  
Economic  
Governance**  
Programme



# Ripe for Refinement: The State's Role in Interpretation of FET, MFN, and Shareholder Rights



Columbia Center  
on Sustainable Investment

A JOINT CENTER OF COLUMBIA LAW SCHOOL  
AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

Lise Johnson<sup>1</sup>

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## Abstract

Over recent years, many states have taken steps to refine and modernize their investment treaties. They have done this to, among other things, clarify what were often vaguely worded standards, insert provisions on procedural and jurisdictional questions, and expand the express ability of states to issue binding interpretations on certain questions. Together, these reforms can help narrow states' exposure to claims and liability under investment treaties.

Those reforms, however, are typically only included in newer treaties or model agreements. States typically have legacies of existing treaties that are "old-style" and therefore are still exposed to claims, litigation, and potential damages awarded under those agreements. To mitigate that exposure, states can exercise the important powers they possess as "masters of their treaties" and use practice and agreement to help shape interpretation of treaty provisions. This note focuses on this strategy. In addition to setting out the general rules regarding state practice and agreement as a means of influencing treaty interpretation, it (1) identifies three issues in investment treaty law—FET, MFN, and shareholder rights—that may be particularly ripe for proactive efforts by states applying this interpretive strategy; and (2) sets out a series of questions that aim to facilitate interstate efforts to identify consensus on these controversial treaty provisions.

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# 1. The Issue: Existing Treaties

Over recent years, many states have taken steps to refine and modernize their investment treaties. They have done this to, among other things, clarify what were often vaguely worded standards, insert provisions on procedural and jurisdictional questions, and expand the express ability of states to issue binding interpretations on certain questions. Together, these reforms can help narrow states' exposure to claims and liability under investment treaties.

Those reforms, however, are typically only included in newer treaties or model agreements. States commonly have legacies of existing treaties that are of the “old-style” and therefore are still exposed to claims, litigation, and potential damages awarded under those agreements. This risk is particularly acute given that tribunals have often permitted investors to “treaty shop” to obtain favorable protections, and have also permitted investors to use the most-favored nation provision to “import” more investor-friendly (or at least less clear) provisions from other treaties.

The question therefore is what to do about existing treaties? There are three main options:

- Termination
- Renegotiation (both of which can be accomplished through negotiation of a new, umbrella treaty); and
- Interpretation

This note focuses on interpretation, which can be pursued independently or in conjunction with the other two strategies. Even if, for example, an agreement is terminated, it will likely have a survival period during which time interpretations can also apply.

## 1.2 Interpretation: Exercising the powers of states as masters of their treaties

As explained in greater detail in Annexes 1-3, under both customary international law and the Vienna Convention on the Law of Treaties (VCLT), states are considered to be “masters of their treaties”, and have the power to shape the interpretation of those treaties over time through their statements and actions.

By taking such steps as 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 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.

Importantly, states can use their statements and actions to actively mold the agreements. Interpretations need not necessarily reflect or be consistent with the original intent of the parties at the time of signing the treaty. Rather, international law recognizes that states have the power to ensure that treaties remain living instruments whose meaning can evolve over time.

But timing is important to the effectiveness and force of these interpretations. Actions taken during the course of a dispute to establish subsequent practice or agreement may, rightly or wrongly, be viewed by tribunals 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. 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>1</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.<sup>2</sup> Consequently, this note highlights certain issues that may be open and particularly ready for interpretation.

## 2. The Risks – Amounts, Claimants, and Claims

When thinking about the role of interpretation in clarifying provisions in investment treaties, an initial question that is important to consider is what are the main risks that need to be addressed. Answering that question requires an analysis of the

1. treaties that are in force,
2. quantity and type of investments and investors that they protect (including as a result of treaty shopping),
3. standards and scope of protection that are granted, and
4. uncertainties that are capable of being addressed through interpretation.

Annex 4 contains more information on analysis of the first and second factors. The remainder of this note focuses on the third and fourth.

### 2.1 Standards of Protection

As investment treaty arbitrations have been litigated and decided over the past 15 years, certain issues have emerged as being particularly controversial and significant for the scope of claims and likelihood of success. These include (1) use of the MFN obligation to expand the scope of jurisdiction/import substantive standards of protection and alter dispute settlement provisions; (2) the rise in investors' use of the FET obligation to bring claims, and the expansion, at least according to some tribunals, of the requirements that obligation imposes on host states; (3) the expansion of "treaty shopping"; and (4) the ability of shareholders (including minority, non-controlling shareholders) to bring claims seeking relief for harms to a locally established enterprise.

### 2.2 Standards Capable of Interpretation: Difference between Interpretation and Amendment

Importantly, many of the problematic issues regarding scope and standards of protection share a common origin: vaguely worded treaty provisions. These vaguely worded treaty provisions have given rise to problems for states and investors in the form of heightened uncertainties and litigation costs, and have posed unique problems for states through expanded potential and actual liabilities. Investors and tribunals have used vague language in order to stretch treaty provisions in ways often not anticipated or desired by governments.

Yet the fact that many of the problems related to investment treaties arise from vaguely worded provisions may actually be fortunate for states who have signed these agreements: Because many of the most controversial provisions do not dictate clear answers, questions as to their meaning are largely ones that can be addressed through interpretations, as opposed to needing to be addressed through formal renegotiation and amendment.<sup>3</sup>

## 3. Provisions Open for Interpretation

As noted above, there are a number of provisions (1) that have given rise to expanded actual and potential liabilities for states and (2) whose vague language may be ripe for further clarification. These clarifications can bring “old-style” treaties in line with more modern treaty practice and better express states’ understanding of their treaty commitments.

Of those provisions, this note focuses on three: (1) the MFN provision; (2) the FET language; and (3) references to shareholder rights and remedies. For each, this note discusses the different approaches tribunals have taken and the positions states have adopted in their newer treaties and disputes. It then raises a series of questions to prompt inter-state discussion regarding the possibility for agreed interpretations to clarify these provisions.

### 3.1 The MFN Provision

The MFN provision has been one of the most controversial provisions in investment treaties, with states, investors, and tribunals contesting its meaning in myriad investor-state arbitrations to date. Contrary to what treaty drafters might have expected, the provision’s main use has not been in cases when an investor from Country X argues it was actually treated differently under the laws of the host country than investors from Country Y. Rather, the MFN provision has been used to stretch and expand the investment treaties themselves.

More specifically, investors have used the MFN provision to try to:

- obtain treaty coverage over assets that, under the “basic” treaty, would not qualify as “investments”;
- import (and use ISDS to enforce) substantive standards of protection that are not included in the “basic” treaty;
- import (and use ISDS to enforce) substantive standards of protection that are broader than those in the “basic” treaty;
- import expanded provisions on damages and remedies;
- import “more favorable” procedural rules regarding conduct of investor-state arbitration than the rules provided in the “basic” treaty; and
- import broader access to investor-state arbitration under the dispute resolution provisions.

#### 3.1.1 Tribunal Decisions

Tribunals have been relatively open to some degree of “importation”, but differ with respect to what types of provisions and rights can be imported.

In some cases the tribunal have stated that the **MFN provision could be used to import, and use ISDS to enforce, substantive obligations and standards of compensation** contained in other treaties:

- MFN can be used to import the umbrella clause from another treaty (*Arif v. Moldova*, *EDF v. Argentina*).
- MFN can be used to import a more favorable FET provision from another treaty (*ATA v. Jordan*; *Bayindir v. Pakistan*; *Paushok v. Mongolia*; *MTD v. Chile*; *Rumeli Telekom v. Kazakhstan*).

- MFN can be used to import “effective means” provision from another treaty (*White Industries v. India*).
- MFN can be used to import the standard of compensation from another treaty (*CME v. Czech Republic*).

Similarly, some tribunals have stated that the **MFN provision could be used to access “more favourable” dispute settlement provisions** such as provisions that don’t require domestic litigation prior to filing the claim.<sup>4</sup> Decisions falling in this category include *Garanti Koza v. Turkmenistan*; *Gas Natural v. Argentina*; *Hochtief v. Argentina* (majority); *Impregilo v. Argentina* (majority); *Maffezini v. Spain*; *National Grid v. Argentina*; *RosInvestCo v. Russia*; *Siemens v. Argentina*; *Suez v. Argentina*; and *Teinver v. Argentina*.

Tribunals have appeared most reluctant to allow investors to use the MFN provision to broaden the definition of covered “investments”, expand the temporal reach of the BIT, or expand the scope of investor-state arbitration when the treaty indicates that arbitration is only permitted for specific issues. In *MCI v. Ecuador* and *Tecmed v. Mexico*, for example, the tribunals rejected the claimants’ attempts to expand the scope of the BIT to cover events that took place prior to the treaty’s entry into force.

And in *Telenor v. Hungary* and *Tza Yap Shum v. Peru*, the tribunals rejected the investors’ attempts to use the MFN provision to broaden the dispute resolution provision beyond disputes relating to the amount of compensation due for expropriation (cf. *RosInvestCo v. Russia* [reaching the opposite conclusion and permitting importation for this purpose]).<sup>5</sup>

Nevertheless, arbitrators and tribunals have expressed different opinions on even these issues, leaving doors open for future litigation and potential acceptance of such MFN-based arguments.

### 3.1.2 State Positions

Various states have objected to or noted their disagreement with each of these uses of the MFN provision.

#### *Treaty practice*

Sometimes states have expressed this disagreement in the context of treaty negotiations. For example, in the **US-DR-CAFTA**, a note that was included as part of the negotiating history reflects the states’ understanding **that MFN provision does not apply to international dispute resolution mechanisms**. That note stated:

The Most-Favored-Nation Treatment Article of this Agreement is expressly limited in its scope to matters ‘with respect to the establishment, acquisition, expansion, management, conduct operation and sale or other dispositions of investments.’ The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms such as those contained in Section C of this chapter, and therefore could not reasonably lead to a conclusion similar to that of the *Maffezini* case.<sup>6</sup>

More expressly, in the **Colombia-Switzerland BIT** the treaty parties **specifically barred application of MFN provision to dispute settlement mechanisms**. The BIT states:

*For greater certainty*, it is further understood that the most favourable nation treatment ... does not encompass mechanisms for the settlement of investment disputes provided for in other international agreements concluded by the Party concerned.<sup>7</sup>

The January 2015 version of the investment chapter being negotiated in the **Trans-Pacific Partnership (TPP)** likewise **prevents use of the MFN provision to import dispute settlement mechanisms from other treaties**, stating:

*For greater certainty*, the treatment referred to in this Article does not encompass international dispute resolution procedures or mechanisms such as those included in Section B.<sup>8</sup>

While these provisions add some clarity regarding the scope of the MFN provision, they leave open certain questions such as whether the MFN provision can be used to import substantive standards and arbitrate disputes regarding those substantive standards.

Those questions are addressed in the recently negotiated **CETA**. In that agreement, Canada and Europe specified that the treaty’s **MFN provision does not permit importation of procedural or substantive standards**. The treaty makes clear that, by the mere act of giving investors from one state the ability to benefit from certain procedural or substantive protections under one investment treaty, the government does not give those investors “treatment” capable of being more or less favorable than what is provided under another investment treaty. The text of the CETA states:

*For greater certainty*, the “treatment” referred to in Paragraph 1 and 2 does not include investor-to-state dispute settlement procedures provided for in other international investment treaties and other trade agreements. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute “treatment”, and thus cannot give rise to a breach of this article, absent measures adopted by a Party pursuant to such obligations.<sup>9</sup>

***Submissions as respondents and non-disputing state parties***

Aln the contest of disputes, a number of states have similarly objected to interpretations of the MFN provision that read the clause as allowing importation of other treaty rights and protections.<sup>10</sup>

<b>Argentina</b>	In <i>EDF v. Argentina</i> , Argentina argued “that the MFN Clause is unable to incorporate ‘umbrella clauses’ because the question of whether there has been a breach of such standards does not arise ‘in the sense of [the Argentina-France BIT].” <sup>11</sup>
<b>Bolivia</b>	In <i>Guarachi v. Bolivia</i> , Bolivia argued that the “effective means standard may not be imported into the United-Kingdom-Bolivia BIT by way of the MFN clause, as this would also require the relevant negotiation process to be incorporated and applied to investors from the United Kingdom. Therefore, the effect of the negotiation prerequisite cannot be escaped merely by resorting to the MFN clause, especially where the purpose of such clause is to avert discriminatory treatment by reason of investors’ nationality.” <sup>12</sup>
<b>Ecuador</b>	In <i>Perenco v. Ecuador</i> , Ecuador rejected “any suggestion that the Treaty’s most favoured nation clause permits Perenco to borrow the provision of any other BIT signed by Ecuador that offers protections to indirectly controlled companies of the other State party. They assert[ed] that such a claim merely begs the question, because the MFN clause only applies to ‘nationals or companies’ within the meaning of the Treaty.... Perenco’s argument that Article 5

	operates to expand the category of persons to whom the Treaty applies is hopeless.” <sup>13</sup>
<b>United States</b>	In <i>Apotex Holdings v. United States</i> , the United States argued that it, <b>Canada</b> , and <b>Mexico</b> agreed that the MFN provision in the NAFTA could not be used to alter the meaning of the NAFTA’s FET article by importing substantive provisions from the US-Jamaica BIT. <sup>14</sup>
<b>Uruguay</b>	In <i>Philip Morris Brands v. Uruguay</i> , Uruguay argued that “MFN clauses, especially narrow ones like Article 3(2) of the Uruguay-Switzerland BIT, do not apply to the dispute resolution provisions of the BIT, and do not nullify or otherwise affect jurisdictional preconditions for recourse to the international arbitration of disputes arising under the Treaty.” <sup>15</sup>

### 3.1.3 Questions for Discussion

- What is your position on the use of the MFN provision to
  - expand jurisdiction,
  - import (and use ISDS to enforce) treaty standards that are included in other treaties,
  - import (and use ISDS to enforce) treaty standards that are differently worded than those in the basic treaty, and
  - alter dispute settlement procedures?
- What position(s) has your state taken in disputes?
- What has been the outcome?
- Has your state revised your treaty practice over time? If so, how?
- Is there an opportunity for an agreed interpretation on any or all of the above questions?

## 3.2 The FET Standard

Allegations that the host state has breached the FET obligation are now a standard feature of investors’ claims, and appear to be the most common grounds upon which investors prevail. In less than fifteen years, the standard has morphed from one that had been largely ignored in investment treaties, to one that now serves as a type of “catch-all” cause of action for investors claiming to be aggrieved.<sup>16</sup>

### 3.2.1 Tribunal Decisions

Assessing potential liability under the FET standard is particularly difficult as the content of the FET obligation is infamously vague, and tribunals’ views vary widely with respect to (1) what it requires (e.g., due process, transparency, protection of investors’ legitimate expectations, stability of the legal framework), and/or (2) what standard of review to apply when assessing breach. In some cases, the standard of review has been rather deferential to states, only finding violations where government conduct is “egregious”, “shocking”<sup>17</sup> or “grossly subvert[s] a domestic law or policy for an ulterior motive.”<sup>18</sup> In other cases, however, tribunals have applied much stricter scrutiny to governments’

statements regarding the underlying facts and law, and have also applied rather low thresholds for finding liability.

One factor that has influenced some tribunals' interpretations of the FET obligation is their view of the relation between the FET standard and the minimum standard of treatment (MST) under customary international law (MST). The MST is a floor below which conduct is not to fall, and is based on the general and consistent practices of states "accepted as law."<sup>19</sup> Establishment of the MST requires two elements: (1) evidence of state practice of sufficient "density, in terms of uniformity, extent and representativeness;"<sup>20</sup> and (2) *opinio juris*, meaning that states follow the practice out of a sense of legal duty.

There are four general approaches tribunals have taken regarding the relationship between the FET obligation and the floor set by the MST. The first is to hold that the FET standard does not simply codify the MST, but is an ***autonomous standard that is independent of and goes beyond the MST.***

*Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentina*: "It might well be that in some circumstances where the international minimum standard is sufficiently elaborate and clear, fair and equitable treatment might be equated with it. But in other more vague circumstances, the fair and equitable standard may be more precise than its customary international law forefathers. This is why the Tribunal concludes that the fair and equitable standard, at least in the context of the Treaty applicable to this case, can also require a treatment additional to, or beyond that of, customary law. The very fact that recent FTC interpretations or investment treaties have purported to change the meaning or extent of the standard only confirms that those specific instruments aside, the standard is or might be a broader one."<sup>21</sup>

*Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*: "The Tribunal sees no basis for equating principles of international law with the minimum standard of treatment. First, the reference to principles of international law supports a broader reading that invites consideration of a wider range of international law principles than the minimum standard alone. Second, the wording of Article 3 requires that the fair and equitable treatment conform to the principles of international law, but the requirement for conformity can just as readily set a floor as a ceiling on the Treaty's fair and equitable treatment standard. Third, the language of the provision suggests that one should also look to contemporary principles of international law, not only to principles from almost a century ago."<sup>22</sup>

*Perenco v. Ecuador*: "With respect to the general approach to be taken to the meaning of the fair and equitable treatment standard, Article 4 of the Treaty requires a Contracting Party to accord "[fair] and equitable treatment, in accordance with the principles of international law". This particular formulation of the standard is not tethered to the international minimum standard of treatment under customary international law."<sup>23</sup>

The second approach is to hold that the ***FET obligation is the same as the MST owed to aliens under customary international law.*** Under this view, when including the FET obligation in their treaties, states were merely incorporating the MST standard. The FET obligation encompasses the MST but does not go beyond it. Notably, there is evidence that such practice of expressly tethering the FET standard to the MST standard will lead the tribunal to interpret the scope of the FET obligation (and potential liability thereunder) as being narrower than under a treaty without such an express reference. Statistics gathered by UNCTAD suggest that inclusion of language aligning the FET obligation to the MST can improve states' chances of successfully defending claims.<sup>24</sup>

Decisions viewing the FET obligation as being tied and limited to the MST include:

- *Glamis Gold v. United States*: “[T]o violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act 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 and constitute a breach of Article 1105(1).”<sup>25</sup>
- *Apotex Holdings and Apotex Inc. v. United States*: “For all these reasons, the Tribunal concludes that the Claimants have not established the existence of the specific procedural rights required by customary international law ... As the Party bearing the legal burden of establishing its case, this determination would suffice to dismiss the Claimants’ case under NAFTA Article 1105(1).”<sup>26</sup>
- *Mobil v. Canada*: What the foreign investor is entitled to under Article 1105 is that any changes are consistent with the requirements of customary international law on fair and equitable treatment. Those standards are set, as we have noted above, at a level which protects against egregious behaviour. It is not the function of an arbitral tribunal established under NAFTA to legislate a new standard which is not reflected in the existing rules of customary international law. The Tribunal has not been provided with any material to support the conclusion that the rules of customary international law require a legal and business environment to be maintained or set in concrete.<sup>27</sup>

The third approach is to indicate that the ***difference between FET and the MST is not significant in practice***. To some extent, this has arisen from the view that the “minimum” standard is an evolving concept that has expanded over time to approximate if not subsume what might previously have only been barred under a more exacting FET standard.<sup>28</sup> It has also resulted from the fact that tribunals have not always strictly required claimants to prove the existence of state practice and *opinio juris* on a specific issue.<sup>29</sup>

- *CMS Gas Transmission Company v. Argentina*: “While the choice between requiring a higher treaty standard and that of equating it with the international minimum standard might have relevance in the context of some disputes, the Tribunal is not persuaded that it is relevant in this case. In fact, the Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law.”<sup>30</sup>
- *Occidental Exploration and Production Company v. Ecuador*: “The Tribunal is of the opinion that in the instant case the Treaty standard is not different from that required under international law concerning both the stability and predictability of the legal and business framework of the investment. To this extent the Treaty standard can be equated with that under international law as evidenced by the opinions of the various tribunals cited above. It is also quite evident that the Respondent’s treatment of the investment falls below such standards.”<sup>31</sup>
- *Duke Energy Electroquil Partners and Electroquil S.A. v. Ecuador*: “[T]he minimum requirement to satisfy [the FET] standard has evolved and the Tribunal considers that its content is substantially similar whether the terms are interpreted in their ordinary meaning, as required by the Vienna Convention, or in accordance with customary international law.’ The Tribunal concurs with this statement and with the conclusion that the standards are essentially the same.”<sup>32</sup>
- *Biwater Gauff (Tanzania) Limited v. Tanzania*: “[T]he Arbitral Tribunal also accepts, as found by a number of previous arbitral tribunals and commentators, that the actual content of the

treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law.”<sup>33</sup>

- *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan*: “The only aspect on which the parties differ is that for Respondent, the concept does not raise the obligation upon Respondent beyond the international minimum standard of protection. The Arbitral Tribunal considers that this precision is more theoretical than real. It shares the view of several ICSID tribunals that the treaty standard of fair and equitable treatment is not materially different from the minimum standard of treatment in customary international law.”<sup>34</sup>

The fourth is to not address the relationship, or to draw no clear conclusion about the relationship.

### 3.2.2 State Positions

#### *Treaty practice*

In their newer treaties and models, a number of states, including various Latin American countries, have inserted language expressly indicating that the fair and equitable treatment means the minimum standard of treatment under customary international law. The **Central America-Mexico FTA** is one of many examples. It states:

#### **Artículo 11.3: Nivel Mínimo de Trato**

1. Cada Parte otorgará a las inversiones de los inversionistas de la otra Parte, un trato acorde con el derecho internacional consuetudinario, incluido trato justo y equitativo, así como protección y seguridad plenas dentro de su territorio.
2. Para mayor certeza, el párrafo 1 prescribe que el nivel mínimo de trato a los extranjeros según el derecho internacional consuetudinario es el nivel mínimo de trato que se le otorgará a las inversiones de los inversionistas de la otra Parte. Los conceptos de "trato justo y equitativo" y "protección y seguridad plenas" no requieren un tratamiento adicional o más allá de aquel exigido por ese nivel, y no crean derechos sustantivos adicionales. La obligación en el párrafo 1 de otorgar:
  - (a) "trato justo y equitativo" incluye, pero no está limitado a, la obligación de no denegar justicia en procedimientos penales, civiles o contencioso administrativos, de conformidad con el principio de debido proceso incorporado en los principales sistemas legales del mundo; y
  - (b) "protección y seguridad plenas" exige a una Parte otorgar el nivel de protección policial que es exigido por el derecho internacional consuetudinario.
3. La determinación que se ha violado otra disposición de este Tratado o de otro acuerdo internacional, no establece que se ha violado este Artículo.
4. Con respecto a este Artículo, el nivel mínimo de trato a los extranjeros del derecho internacional consuetudinario se refiere a todos los principios del derecho internacional consuetudinario que protegen los derechos e intereses económicos de los extranjeros.

The January 2015 version of the **TPP** is another example. It states:

For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments. 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 that standard, and do not create additional substantive rights.

.....<sup>35</sup>

The TPP also contains an annex providing additional information on the meaning of the customary international law MST.

### **Submissions as respondents and as non-disputing state parties**

States have also clarified the relationship between the FET and MST in their pleadings. Submissions made by North and South American states on that issue include the following:

<b>Argentina</b>	<p>The 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, award (June 11, 2012), para. 343 (noting the respondent’s position)</p> <p>(link not express in the treaty)</p>
<b>Canada</b>	<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, respondent’s counter-memorial (June 29, 2010), <del>para.</del></p> <p>(link not express in the treaty)</p>
<b>Ecuador</b>	<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, track 2 counter-memorial on the merits of the Republic of Ecuador (February 18, 2013), para. 387.</p> <p>(link not express in treaty)</p>
<b>El Salvador</b>	<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, submission by non-disputing state party, <i>El Salvador</i> (January 1, 2012), para. 3.</p> <p>(link express in the treaty)</p>
<b>Guatemala</b>	<p>“Article 10.5 of CAFTA limits the Parties’ fair and equitable</p>

	<p>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 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>
<p><b>Honduras</b></p>	<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] Articulo 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 internacional 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>
<p><b>United States</b></p>	<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 10.5. 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>

In addition to making submissions on the link between the FET and MST, states have also informed tribunals of their view of the content of those standards:

<p><b>Argentina</b></p>	<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, (award June 11, 2012), para. 359 (paraphrasing respondent’s arguments)</p>
<p><b>Canada</b></p>	<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>
<p><b>Guatemala</b></p>	<p>The FET/MST obligation does not “ ‘create additional substantive rights.’ ” <i>Railroad Development Corporation v. Republic of Guatemala</i>, ICSID Case No. ARB/07/23, <i>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>
<p><b>El Salvador</b></p>	<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</p>

	<p>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>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>
<b>Honduras</b>	<p>“Debido al origen de 'Nivel Minimo de Trato' en el derecho internacional consuetudinario, como un 'piso' absoluto que complementa la obligacion de los Estados de otorgar a los extranjeros al menos el mismo nivel de trato que los Estados otorgan a sus propios nacionales, solamente 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 mnimo 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>
<b>United States</b>	<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</p>

	<p>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, art. 10.20.2 submission of a non-disputing state party, <i>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, second article 1128 submission of the <i>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, counter-memorial on merits and objections to jurisdiction of respondent <i>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 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, counter-memorial of respondent <i>United States of America</i> (September 19, 2006), pp. 180-84.</p>
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### 3.2.3 Questions for Discussion

- What is your position on the meaning of the FET provision and its relationship to the MST under customary international law?
- What position(s) has your state taken in disputes?
- What has been the outcome?
- Has your state revised your treaty practice over time? If so, how?
- Is there an opportunity for an agreed interpretation to help clarify the meaning of the MST?

### 3.3 Shareholder Rights and Remedies

Many treaties expressly state that they include stocks or equity shares in their definitions of “investments”. Based on that language, tribunals have determined that shareholders are not only able to bring claims for direct harms to their rights as shareholders (e.g., measures taking their shares or their voting rights), but are also able to bring claims and recover damages for government actions that negatively impact the company in which they hold shares. These types of claims now make up a “substantial part” of ISDS cases.<sup>36</sup>

Notably, the approach of tribunals to permit shareholders to secure recovery for harms to the company in which they hold shares contrasts with domestic law of many countries in which shareholders are generally *not* able to bring such claims. The common approach in domestic law is to provide that, except in certain narrow and carefully defined circumstances, claims alleging and seeking relief for harm to a company belong to the company itself. Any recovery secured by the company only reaches shareholders after creditors and others with superior claims to the damages are paid.

By allowing shareholders to bring claims and recover damages for harms to the company in which they hold shares, tribunals give rise to risks that

- one government action can give rise to parallel claims by multiple shareholders in the same company;
- claims can be brought by foreign shareholders in a company even if the company and the government agreed to settle the dispute; and
- shareholders covered by an investment treaty will jump ahead of creditors and others who would otherwise have the same or higher “priority” to recovery under domestic corporate law.

These outcomes threaten to broadly expand states’ exposure to litigation and liability, make it difficult for states to ensure that settlement agreements actually dispose of claims, and can prejudice the rights and interests of creditors, domestic shareholders, and other individuals and entities who are not party to the investor-state arbitration. Consequently, the issue of shareholder claims and recoveries is one that experts and international organizations such as the OECD have identified as needing greater attention and clarification.

#### 3.3.1 Tribunal Decisions

As one study has highlighted, there have been a significant number of cases in which “tribunals have expressly held that shareholders can recover” for harms to the company (also described as claims for “reflective loss”).<sup>37</sup> The study also notes that “[a] number of commentators have described the issue of the admissibility of shareholder claims for reflective loss in ISDS as settled law.”<sup>38</sup>

Tribunals have permitted shareholder claims for company harms by:

- 100% parent companies,
- majority shareholders,
- minority shareholders,
- indirect shareholders with ultimate control, and
- other indirect shareholders, such as intermediate holding companies.<sup>39</sup>

The decision on jurisdiction in *Total v. Argentina* is just one of many examples in which the tribunal recognized these types of shareholder claims. It stated:

Having found ... that the assets and rights that Total claims have been injured in breach of the BIT fall under the definition of investments under the BIT, it is immaterial that they belong to Argentine companies in accordance with the law of Argentina.<sup>40</sup>

### 3.3.2 State Positions

#### *Treaty practice*

Many treaties expressly state that shares or equity interests fall within the definition of “investments” covered by the treaty. Nevertheless, they typically do not state whether claims for harms to those investments are limited to direct claims relating to the shares or equity interests themselves (e.g., revocation of shareholding or voting rights), or can extend to claims for reflective loss. (Tribunals have interpreted that silence to include that such reflective loss claims are permitted).

There are, however, a few treaties that try to more expressly address the issue of whether and in what circumstances shareholders can bring claims for harm to the company. The **NAFTA** and **US-CAFTA-DR** are notable examples. Under the NAFTA, for example, there are two separate provisions that enable shareholders to bring claims. One, Article 1116, allows for claims by shareholders seeking relief for harms to their own rights or interests. The second, Article 1117, permits shareholders, in certain circumstances, to bring claims for harms to the company:

The shareholder brings the art. 1117 claim, but the company is the beneficiary of the award. Art. 1135(2) ensures that recovery for all art. 1117 claims goes to the company rather than the shareholder. Recovery for the company protects company creditors and all shareholders, as derivative action mechanisms generally do under domestic law.

The claimant shareholder must own or control the company directly or indirectly to bring a claim under art. 1117. Non-controlling shareholders cannot bring claims under art. 1117. Where a shareholder brings an art. 1117 claim, the company is expressly prohibited from bringing a claim on its own behalf. As noted by Meg Kinnear, this likely helps avoid the possibility that a foreign company could make one ISDS claim while its controlling owner makes another.

Several provisions specifically address and reduce the risk of multiple proceedings. Waiver of claims is required as a pre-condition to bringing a claim, which largely precludes the possibility of multiple claims. If a claim is brought under art. 1117, both the investor and the company must waive the right to initiate or continue local proceedings (art. 1121(2)). Consolidation of related shareholder claims under arts. 1116 and 1117 is mandated unless the tribunal finds that a disputing party would be prejudiced.<sup>41</sup>

#### ***Submissions as respondents and as non-disputing state parties***

States have also addressed the issue of shareholder claims as respondents in disputes and as non-disputing parties. Argentina, for instance, has expressly taken “the position that a shareholder cannot bring a claim in respect of harm done to a company merely because the shareholder has been prejudiced through a diminution in the value of the shares.”<sup>42</sup> Similarly, Canada, Mexico and the United States have asserted that a “minority non-controlling shareholder may not bring a claim under the NAFTA for loss or damage incurred directly by an enterprise.”<sup>43</sup>

### 3.3.3 Questions for Discussion

- What are the rules in your domestic law regarding the rights of shareholders to bring claims and seek relief for harms to the company in which they hold interests (“reflective loss” claims)?
- What is your position regarding the ability of shareholders to bring ISDS claims for reflective loss?
- What position has your state taken in disputes?
- What have been the outcomes?
- Has your state revised your treaty practice over time? If so, how?
- Is there an opportunity for an agreed interpretation to help clarify the rights of shareholders to bring claims for reflective loss?

# Annex 1. Shaping Interpretation of Existing Treaties: The Role of Subsequent Agreement and Subsequent Practice

Treaties are not static instruments but can evolve over time. Crucially, under the Vienna Convention on the Law of Treaties (VCLT) and customary international law on treaty interpretation, states themselves can be important forces in shaping that evolution through their express agreement and even unilateral conduct. This section provides an overview of relevant rules and principles of treaty interpretation in order to highlight the potential role of states in influencing the meaning of their investment treaties, and to guide states in how to exercise that power.

## 1. General rule of treaty interpretation (VCLT Article 31)

As this section explains, the VCLT gives states an ongoing role as “masters of their treaties”, and recognizes their ability to shape the meaning of their treaties over time.

Article 31 of the VCLT, which also applies as customary international law, provides the general rule on treaty interpretation. It states:

### *Article 31, GENERAL RULE OF INTERPRETATION*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
  - (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There **shall be taken into account**, together with the context:
  - (a) **Any subsequent agreement** between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) **Any subsequent practice** in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - (c) Any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Unless the treaty states otherwise, Article 31 is thus the first place tribunals must go when interpreting treaty language. Article 31 specifies that, along with the text, object and purpose, tribunals need to take into account evidence of “subsequent agreement” and “subsequent practice establishing agreement” (collectively referred to as “subsequent agreement/practice”) on the meaning of the treaties.<sup>44</sup>

Subsequent agreement/practice is considered to be “objective evidence of the understanding of the parties as to the meaning of the treaty,” and an “authentic means of interpretation” that must be applied in interpreting the relevant text.<sup>45</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>46</sup>

The term “subsequent” is important to emphasize. It refers to actions and statements **after** the treaty was concluded, making post-treaty agreements and conduct crucially important to interpretation. In contrast, evidence of **intent at the time** of concluding the treaty, such as evidence of negotiating history are only “supplementary means” of interpretation that can be considered pursuant to Article 32 of the VCLT. According to Article 32 of the VCLT, such supplementary means of interpretation may be taken into account, but only to (1) “confirm the meaning resulting from the application of Article 31” or (2) determine the meaning when application of Article 31 “[l]eaves the meaning ambiguous or obscure” or “[l]eads to a result which is manifestly absurd or unreasonable.”<sup>47</sup> The VCLT thus accords states’ views of the meaning of their treaties over time a greater interpretive weight than their views of the meaning during negotiations.

## 2. What constitutes subsequent agreement/practice?

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>48</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>49</sup> One example of “subsequent agreement” is an exchange of diplomatic notes recording an agreement, or a joint interpretive statement.

“Subsequent practice in the application of the treaty” under VCLT Article 31(3)(b) is “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 practice” 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 document or act.

The “conduct” that can establish subsequent practice under VCLT Article 31 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>50</sup> 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>51</sup>

Not all such conduct, nor even all inter-state agreements, however, will establish subsequent agreement/practice under Article 31. In order to constitute subsequent agreement/practice that must be taken into account under Article 31 of the VCLT, the agreement/practice needs to be regarding the

interpretation of a treaty.<sup>52</sup> The clearer it is that any agreement or conduct aims to interpret or apply the treaty, the more likely it is to be considered as subsequent agreement/practice under the VCLT.

### 3. The Legal Effect of Subsequent Practice: Automatically Relevant, Potentially Binding

As noted above, Article 31(3) states that 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>53</sup>

A 2013 report of the ILC, 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>54</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>55</sup>

## Annex 2. Draft Conclusions of ILC on Subsequent Agreement and Subsequent Practice

### **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

#### **Draft conclusion 1**

##### **General rule and means of treaty interpretation**

1. Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth, respectively, the general rule of interpretation and the rule on supplementary means of interpretation. These rules also apply as customary international law.
2. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.
3. Article 31, paragraph 3, provides, inter alia, that there shall be taken into account, together with the context, (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; and (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.
4. Recourse may be had to other subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32.
5. The interpretation of a treaty consists of a single combined operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in articles 31 and 32.

#### **Draft conclusion 2**

##### **Subsequent agreements and subsequent practice as authentic means of interpretation**

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

#### **Draft conclusion 3**

##### **Interpretation of treaty terms as capable of evolving over time**

Subsequent agreements and subsequent practice under articles 31 and 32 may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time.

#### **Draft conclusion 4**

##### **Definition of subsequent agreement and subsequent practice**

1. A “subsequent agreement” as an authentic means of interpretation under 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.
2. A “subsequent practice” as an authentic means of interpretation under article 31 (3) (b) consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty.
3. Other “subsequent practice” as a supplementary means of interpretation under article 32 consists of conduct by one or more parties in the application of the treaty, after its conclusion.

## **Draft conclusion 5**

### **Attribution of subsequent practice**

1. Subsequent practice under articles 31 and 32 may consist of any conduct in the application of a treaty which is attributable to a party to the treaty under international law.
2. Other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty.

### **Subsequent agreements and subsequent practice in relation to the interpretation of treaties**

Texts and titles of draft conclusions 6 to 10 provisionally adopted by the Drafting Committee on 27 and 28 May and on 2 and 3 June 2014

## **Draft Conclusion 6**

### **Identification of subsequent agreements and subsequent practice**

1. The identification of subsequent agreements and subsequent practice under article 31, paragraph 3, requires, in particular, a determination whether the parties, by an agreement or a practice, have taken a position regarding the interpretation of the treaty. This is not normally the case if the parties have merely agreed not to apply the treaty temporarily or agreed to establish a practical arrangement (modus vivendi).
2. Subsequent agreements and subsequent practice under article 31, paragraph 3, can take a variety of forms.
3. The identification of subsequent practice under article 32 requires, in particular, a determination whether conduct by one or more parties is in the application of the treaty.

## **Draft Conclusion 7**

### **Possible effects of subsequent agreements and subsequent practice in interpretation**

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

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

3. It is presumed that the parties to a treaty, by an agreement subsequently arrived at or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it. The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized. The present draft conclusion is without prejudice to the rules on the amendment or modification of treaties under the Vienna Convention on the Law of Treaties and under customary international law.

### **Draft Conclusion 8**

#### **Weight of subsequent agreements and subsequent practice as a means of interpretation**

1. The weight of a subsequent agreement or subsequent practice as a means of interpretation under article 31, paragraph 3, depends, inter alia, on its clarity and specificity.
2. The weight of subsequent practice under article 31, paragraph 3 (b), depends, in addition, on whether and how it is repeated.
3. The weight of subsequent practice as a supplementary means of interpretation under article 32 may depend on the criteria referred to in paragraphs 1 and 2.

### **Draft Conclusion 9**

#### **Agreement of the parties regarding the interpretation of a treaty**

1. An agreement under article 31, paragraph 3 (a) and (b), requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept. Though it shall be taken into account, such an agreement need not be legally binding.
2. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (b), may vary. Silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction.

### **Draft Conclusion 10**

#### **Decisions adopted within the framework of a Conference of States Parties**

1. A Conference of States Parties, under these draft conclusions, is a meeting of States parties pursuant to a treaty for the purpose of reviewing or implementing the treaty, except if they act as members of an organ of an international organization.
2. The legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty and any applicable rules of procedure. Depending on the circumstances, such a decision may embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3 (a), or give rise to subsequent practice under article 31, paragraph 3 (b), or to subsequent practice under article 32. Decisions adopted within the framework of a Conference of States Parties often provide a nonexclusive range of practical options for implementing the treaty.

3. A decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including by consensus.

## Annex 3. Excerpt from OECD Roundtable on Freedom of Investment 19 (15-16 October 2013)

### Part IV. Investment treaties over time – Treaty practice and interpretation in a changing world

FOI began their discussions of this subject by noting that investment treaty law, like all systems of law, embodies a tension between stability and flexibility. Stability nurtures predictability and compliance, while flexibility helps legal systems stay aligned with changing circumstances and evolving needs. A background paper prepared by the Secretariat reviews treaty partners' options as they attempt to find the right balance between stability and flexibility and to ensure that their intentions are as clear to arbitration panels who interpret treaties and others (e.g. investors) who might want to use the treaties for dispute settlement. These options were divided into two categories – 'exit' and 'voice'.

Exit involves the radical move of leaving the treaty system entirely (e.g. by renunciation of treaties), thereby eliminating the need for treaty interpretation. The background paper found the following in relation to exit as an option for treaty partners:

- Exit is rare, at least for now. To date, unilateral exit from investment treaty obligations has been exceptionally rare, with only ten treaties known to have been terminated unilaterally.
- Investment treaties lock state parties into obligations for extended periods of time. In order to investigate how long treaty commitments last, the Secretariat ran a simulation using a scenario of immediate and unilateral termination all of the 1900 treaties in the FOI treaty sample as soon as such termination is permitted under the treaty. The simulation uses as inputs more than 2000 treaties' provisions on validity periods (these prohibit unilateral termination by treaty partners for a fixed period of time) and survival clauses (which extend certain treaty protections for specified – usually already made – investments). The simulation shows:
  - Long survival periods for investment treaty obligations. Ninety per cent of the treaties in the sample would continue to have some binding effect until at least 2024 – that is, at least some investments would continue to benefit from protections provided under the treaties until that date. Thus, investment treaties appear, on average, to provide for significant stability in treaty-based protections for covered investors via their validity and survival clauses.
  - Expanding potential for treaty renunciation. The scope for legal, unilateral renunciation of treaties is now high. Simulations run by the Secretariat show that two thirds of treaties in the sample could be unilaterally terminated within a year's time – that is, by the end of 2014.

The second option explored in the Secretariat background paper for countries influencing investment treaty interpretation is 'voice'. Voice refers to the use by treaty partners of unilateral or multilateral tools to influence the use and interpretation of their investment treaties. The paper examines treaty parties' options for voice and maps relevant treaty practice and produces the following findings.

- Options for voice are numerous. Options for voice include: crafting of clear treaty language during negotiations, amicus curiae filings for ISDS cases, other evidence of state practice such as model treaties, authoritative interpretations and other statements clarifying the meaning of treaty provisions, treaty amendments and protocols and treaty replacement through renegotiation.
- Silence is the dominant approach. The survey of treaty practice shows that by far the most common approach is silence on partners' options for influencing treaty interpretation.

- Very few countries avail themselves of their options for voice. Although there are a large range of options for exercising voice, recourse to these options appears to be numerically small. Very few countries provide for filings by non-respondent treaty partners during ISDS proceedings and for authoritative interpretations by treaty partners of treaty texts – fewer than 1 per cent of the total treaty sample in both cases and these few cases tend to involve at least one signatory locate in the Americas.
- Treaty renegotiation is rare. A survey of investment treaty replacement through renegotiation shows that this is also very rare. However, renegotiation of treaties has, to a limited extent, made treaties both more detailed and more similar to one another. Participants in FOI Roundtable 19 made a number of points about exit and voice in an investment law context: Silence may be golden. One country stated its view that governments should use their treaties to establish principles that guide treaty interpretation, but, once ratified, countries should abstain from intervening. Such intervention, under this perspective, looks like de facto amendment of the investment treaty. In this countries' view, the key is to develop clear treaty drafting from the outset in order to preserve government neutrality in the dispute resolution process. Thus, with respect to opportunities to participate in ongoing interpretations, this country generally prefers to maintain silence so as to preserve neutrality. Clarity of treaty drafting is a cornerstone for an effective system of investment treaty law. A number of countries stressed the importance of clear drafting of treaties. One country noted that it had consistently made use of voice mechanism, clarifying the state interpretation on the content of many treaties and stated that this practice should become more widespread. Another country offered the view that longer and more detailed treaties are not necessarily clearer treaties. Legal certainty (e.g. through clear treaty drafting) can be difficult to achieve since not all scenarios can be anticipated. Some FOI participants highlighted the limits to how much clear treaty drafting can help in producing more predictable treaty interpretations. They identified a number of difficulties. First, it is difficult or even impossible to foresee all of the legal issues that are likely to arise as a treaty is used by investors, arbitrators and counsel. One country clearly expressed skepticism that treaty drafting could reasonably be expected to provide a sufficient level of legal certainty for state parties and concluded that some amount of subsequent interpretation (post-ratification) is likely to be necessary. Another country noted that it exports capital to one group of countries, but imports it from another group of countries. While this country proposes one model to all negotiating partners, it is not confident that all issues that might arise – either for its investors as claimants or for its government in responding to claims – are covered in its treaties and model.

Different treaty practice for FTAs and BITs. One country noted that it had replaced some of its BITS with FTA with investment chapters. Treaty practice for FTAs are substantially different than the treaties they replaced.

Clarifying the relationship between older treaties with older language and treaty interpretation. One country noted that, if countries have lots of treaties, fixing one treaty (e.g. through re-negotiation) cannot be expected to solve problems of interpretation because the interpretation of the other treaties is unaffected.

Another representative advanced the view that it is a pity that States are not more active in influencing how their treaties are interpreted, since they are the major actors in the investment law 'system'– both as treaty drafters and respondents to treaty based investor claims. This participant wondered with government silence on this matter was not due to either a lack of ability and capacity of states to participate in dialogue on investment treaty law.

Request for more work on state-to-state consultations on treaty application. One country asked the Secretariat to extend its survey treaty provisions to cover treaty texts that call for state-to-state consultations on how treaty language establishing special treatment of prudential, financial, tax measures in the context of the treaty. If the respondent invokes some of these areas as a defense, then the proceedings are suspended and the treaty partners attempt to reach an agreement on whether the special provision applies (e.g. whether the measure is a prudential measures).

The importance of encouraging UNCITRAL transparency rules, was noted. In particular, some FOI participants emphasized the value of providing non-disputing parties (e.g. home-states) with the right to make submissions to ISDS proceedings. As the modified rules may become retroactive, they may in the future cover more than 1% of the treaties (the percentage of Secretariat treaty sample that provide for submissions by respondents).

## Annex 4. Analysis of Treaties Concluded and Investors and Investments That Are Covered

### 1. Quantity of Investment Covered

An important starting point for an assessment of risks is an assessment of the treaties that are in force, and with whom; this enables countries to begin to understand the investors and investments that are covered based on FDI between the countries. For a number of reasons, however, this assessment likely underestimates exposure.

One reason is that, due to treaty shopping and the use of corporate networks, investors have various options for securing treaty coverage over any given investment. A treaty with one home state can, depending on the language of the treaty, provide coverage for parents/beneficial owners and subsidiaries located in states not party to the treaty. Data on FDI between two countries can thus fail to capture the full amount of capital flows that are effectively covered by the treaty.<sup>56</sup>

Additionally, given the wide range of “assets” that are often covered under the definition of an “investment”, claimants can bring actions for a range of holdings that would not be captured in data on FDI or in data on other types of capital flows.<sup>57</sup> Moreover, many of these assets – such as securities traded on international markets – are often highly liquid and transferrable, meaning that the amount of assets covered by a treaty can change quickly and without the knowledge of the host state, making exposure even more difficult to assess or control.

### 2. Variety of Potential Claimants

While data on the amount of foreign investment covered by investment treaties helps government assess the overall *amount* of potential liability that can arise from international law claims, there is another important issue that needs to be addressed: namely, the number of claimants that can bring claims alleging that their “investments” had been harmed. Under current interpretations of investment treaties, governments may face independent treaty claims from a number of different investors (under the same or different treaties) relating to an investment in just one project or enterprise. Even foreign minority non-controlling shareholders have been able to bring claims alleging harm to the company in which they invested, even if the company is majority owned and/or controlled by domestic investors or investors from third states. As noted above in Section 3.3, this exposes states to risks that multiple claims will be brought relating to the same measure and set of facts. For host states, this potential for multiple claims raises a number of significant problems including increased litigation costs and increased chances for the investors to prevail and the state to lose.

### 3. Sector

On a global level, the majority of investment disputes arise in the primary/extractive industries and services sectors.<sup>58</sup> Foreign investment in manufacturing is less likely to give rise to disputes. Comparing these patterns regarding claims with patterns regarding the amount of FDI in the three different sectors reveals that there is a disproportionately high number of disputes in the extractive industries relative to the amount of FDI that goes into that sector, and a disproportionately low number of claims relating to manufacturing as compared to the amount of FDI in manufacturing.

The relatively high number of claims in the extractive industries (particularly as compared to manufacturing) may be due to the long-term, often capital-intensive nature of investments in the extractive industries. Other factors may be that the investments in extractive industries are often complex, involve significant uncertainties and unknowns, and are in activities that attract and warrant significant government oversight and control through regulations, investor-state contracts, and/or quasi contractual arrangements such as licenses or permits.

Governments seeking to minimize future claims and liability might, therefore, want to focus on the types of issues and uncertainties that arise in extractive industries investments. Common substantive issues that arise in these projects include (1) whether the investor has a right or an expectation to obtain or maintain a permit or license; (2) whether an investor has a right or expectation regarding stability in the business or legal environment, including the fiscal regime; (3) circumstances in which contract-based disputes can give rise to treaty claims; and (4) impacts of investment treaties on renegotiation of contracts initiated by (a) investors, and/or (b) states.

**Table 1. Global FDI stocks by sector, 2012**



<sup>1</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>2</sup> 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. 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>3</sup> The line between interpretation and amendment can be blurry and difficult to define.<sup>3</sup> But international law appears not to give the distinction determinative weight. Even interpretations that are inconsistent with the plain text and original intent of the state parties to the treaty have been accepted as authoritative.<sup>3</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. For a discussion of treatment of the distinction in drafting the VCLT and in subsequent application of the issue, see 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), n.450. See also, e.g., Anthea Roberts, "Power and persuasion in investment treaty interpretation: The dual role of states," 104 *American Journal of International Law* 179-225 (2010), pp. 200-201.

<sup>4</sup> Decisions rejecting the claimant's attempt to import more favorable dispute resolution provisions include *ICS v. Argentina* (importation to bypass 18-month litigation requirement not allowed); *Daimler v. Argentina* (importation to bypass the 18-month litigation requirement not allowed); *Wintershall v. Argentina* (same); *Plama v. Bulgaria* (importation to permit access to ICSID arbitration not allowed); *Salini v. Jordan* (ssame).

<sup>5</sup> Other decisions reaching conclusions similar to those in *Telenor* and *Tza Yap Shum* include the majority decision in *Austrian Airlines v. Slovakia* (but see dissenting opinion of Judge Brower, the majority decision in *Renta4 v. Russia* (but see dissenting opinion of Judge Brower), and *Bershadar v. Russia* (but see dissenting opinion by Todd Grierson)).

<sup>6</sup> This note in the negotiating history is quoted in Andreas R. Ziegler, "The Nascent International Law on Most-Favoured Nation (MFN) Clauses in Bilateral Investment Treaties," in *European Yearbook of International Economic Law* (2010), 77-101, p. 93.

<sup>7</sup> Colombia-Switzerland BIT, Ad Article 4, para. 2(2) (emphasis added).

<sup>8</sup> TPP Draft, January 20, 2015, Investment Chapter, Art II.5(3).

<sup>9</sup> CETA, Article X.7(4) (emphasis added).

<sup>10</sup> In some cases, states have not taken a strong position. *MTD v. Chile* is an example. There, the tribunal stated:

The Claimants have based in part their claims on provisions of other bilateral investment treaties and have alleged that these provisions apply by operation of the MFN clause of the BIT. The Respondent has not argued against the application of these provisions but, in the case of Article 3(1) of the Denmark BIT and Article 3(3) and (4) of the bilateral investment treaty between Chile and Croatia ("the Croatia BIT"), the Respondent has qualified its arguments by stating that, even in the event that the clause concerned would apply, the facts of the case are such that it would not have been breached. Because of this qualification in the Counter-Memorial and the Rejoinder, the Tribunal considers it appropriate to examine the MFN clause in the BIT and satisfy itself that its terms permit the use of the provisions of the Denmark BIT and Croatia BIT as a legal basis for the claims submitted to its decision.

*MTD v. Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004, para. 100.

<sup>11</sup> *EDF et al. v. Argentina*, ICSID Case No. ARB/03/23, Award, June 11, 2012, para. 216.

<sup>12</sup> *Guarachi v. Bolivia*, Award, January 31, 2014, para. 326.

<sup>13</sup> *Perenco v. Ecuador*, ICSID Case No. ARB/08/6, Decision on Jurisdiction, June 30, 2011, para. 79 (internal citations omitted).

<sup>14</sup> *Apotex Holdings and Apotex Inc. v. United States*, Award, August 25, 2014, para. 9.71.

<sup>15</sup> *Philip Morris Brands et al. v. Uruguay*, Uruguay's Memorial on Jurisdiction, September 24, 2011, para. 97.

<sup>16</sup> UNCTAD, Series on International Investment Agreements II: FET, p. 43 (2012).

<sup>17</sup> *Glamis Gold v. United States*, UNCITRAL, Award, June 8, 2009, para. 616.

<sup>18</sup> *Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, para. 103.

<sup>19</sup> Statute of the International Court of Justice, Art. 38(1)(b).

<sup>20</sup> Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law, Vol. 1: Rules (Cambridge University Press, 2009), p. xlv (citing International Law Association, Final Report of the Committee on the Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law, Report of the Sixty-Ninth Conference, London, 2000, commentary (b) to Principle 12, p. 731).

<sup>21</sup> ICSID Case No. ARB/01/3, Award, May 22, 2007, para. 258.

<sup>22</sup> ICSID Case No. ARB/97/3, Award, August 20, 2007, para. 7.4.7.

<sup>23</sup> ICSID Case No. ARB/08/6, Award, September 12, 2014, para. 557.

<sup>24</sup> UNCTAD, Series on International Investment Agreements II: FET (2012), pp. 60-61.

<sup>25</sup> *Glamis Gold v. United States*, UNCITRAL, Award, June 8, 2009, para. 22.

<sup>26</sup> ICSID Case No. ARB(AF)/12/1, Award, August 25, 2014, para. 9.40.

<sup>27</sup> ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum, May 17, 2012, para. 153.

<sup>28</sup> See, e.g., *RDC v. Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012, paras. 216-219; UNCTAD, FET, supra n. 16, at pp. 59-60.

<sup>29</sup>See *RDC v. Guatemala*, Award, paras. 216-219; cf. *Glamis Gold v. United States*, UNCITRAL, June 8, 2009, para. 628.

<sup>30</sup>ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 284.

<sup>31</sup>LCIA Case No. UN3467, Final Award, July 1, 2004, para. 190.

<sup>32</sup>ICSID Case No. ARB/04/19, Award, August 18, 2008, para.

<sup>337</sup>:

<sup>33</sup>ICSID Case No. ARB/05/22, Award, July 24, 2008, para. 592.

<sup>34</sup>ICSID Case No. ARB/05/16, Award, July 29, 2008, para. 611.

<sup>35</sup>TPP, January 20, 2015 Draft, Investment Chapter, Art. II.6(2).

<sup>36</sup>David Gaukrodger, *Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency*, OECD Working Papers on International Investment 2013/03, p.3.

<sup>37</sup>*Id.* p. 26.

<sup>38</sup>*Id.*

<sup>39</sup>*Id.*

<sup>40</sup>*Total v. Argentina*, ICSID Case No. ARB/04/01, Decision on Objections to Jurisdiction, para. 80, Aug. 25, 2006.

<sup>41</sup>Gaukrodger, *supra* n. 36, pp. 52-53.

<sup>42</sup>*Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, decision on annulment (September 1, 2009), para. 86 (paraphrasing Argentina's argument).

<sup>43</sup>*Gami Investments Inc. v. Mexico*, UNICTRAL, US Article 1128 submission by a non-disputing state party (June 30, 2003), para. 20.

<sup>44</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>45</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) [hereinafter U.N. Report A/68/10], at Conclusion 2, p. 20.

<sup>46</sup>*Id.*, Commentary to Conclusion 2, para. 3, p. 21.

<sup>47</sup>VCLT, Art. 32.

<sup>48</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>49</sup>U.N. Report A/68/10, *supra* n.3, at Commentary to Conclusion 4, para. 10, p. 34.

<sup>50</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>51</sup>U.N. Report A/68/10, *supra* n.45, at Commentary to Conclusion 4, para. 17, pp. 35-36.

<sup>52</sup>A/CN.4/671, pp. 4-11.

<sup>53</sup>U.N. Report A/68/10, *supra* n.45, Commentary to Conclusion 2, para. 4 (internal citations omitted),

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<sup>54</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>55</sup>*Id.*, Commentary to Conclusion 2, para. 6, p. 22.

<sup>56</sup>For example, in *Perenco v. Ecuador*, the underlying treaty was the BIT between France and Ecuador. The direct investor, a Bahamian company, was indirectly held by other Bahamian companies that, in turn, were beneficially owned by a French family. Due to the complex corporate network established to hold the investment through the Bahamas, statistics on FDI (or even other types of capital flows) between France and Ecuador would not likely not have included the extent of the claimant's investment (or Ecuador's exposure under the France-Ecuador BIT).

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<sup>57</sup> In light of the relevance of the amount of foreign investment to exposure to claims, Figures 1 and 2 show the amount of FDI stock in South and Central American countries, respectively. Figures 2 and 3 illustrate the amount of FDI stock as a percentage of domestic GDP in South and Central American countries.

<sup>58</sup> See UNCTAD, IIA Issues Note: Recent Trends in IIAs and ISDS, No. 1 (February 2015), p. 7 (“About 61 per cent of cases filed in 2014 relate to the services sector. Primary industries account for 28 per cent of new cases while the remaining eleven per cent arose out of investments in manufacturing. Looking at the industries in which investments were made, the most numerous was generation and supply of electric energy (at least eleven cases), followed by oil, gas and mining (ten), construction (five) and financial services (three).”). See also ICSID, The ICSID Caseload – Statistics (Issue 2012-2), p. 12 (showing sectoral distribution of all cases under the ICSID Convention and under the Additional Facility Rules).

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