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INTERPRETATION OF IIAs: WHAT STATES CAN DO¹

I. Introduction

Recent years have seen growing concerns with investor-State dispute settlement (ISDS). As investors continue using ISDS to challenge host countries, their claims increasingly also touch upon regulations in the public interest, such as policies to promote labour or human rights, protect public health or preserve the environment. Recent challenges against tobacco marketing and packaging restrictions in Uruguay and Australia, adopted, in part, to implement the World Health Organization Framework Convention on Tobacco Control (FCTC) are worrisome examples. Confidence in the ISDS process is further compromised by concerns related to the quality and predictability of the awards issued by tribunals: some arbitral decisions have resulted in inconsistent findings or have lacked sound reasoning, sometimes as a result of poor treaty interpretation. Taken together, these developments risk undermining the legal security, coherence and predictability of the IIA regime (see *infra* section II.2).

Highlights

- International investment agreements (IIAs) are concluded by States. Where IIAs refer to investor-State dispute settlement (ISDS), arbitral tribunals interpret IIA provisions in the context of an ISDS case.
- Some of these interpretations have raised concerns, because of a perceived lack of consistency, predictability and quality.
- As masters of their IIAs, States can be more proactive in asserting their interpretive authority to guide tribunals towards a proper and predictable reading of IIA provisions.
- States have various tools at their disposal (e.g. unilateral, bilateral and multilateral ones).
- Interpretive considerations may come into play at all the stages in the lifetime of an IIA, including the drafting, conclusion, application, dispute settlement and post-dispute stage.
- These interpretive tools constitute a complementary means for States – alongside treaty re-negotiations and amendments – for addressing some of the challenges the IIA regime faces today.

Advance
unedited
version

¹ This Note is based on background research UNCTAD commissioned to Andrea Saldarriaga to analyse the interpretation of treaties in the context of ISDS. The results of her extensive research on the issue will be published shortly as an independent article in an international law journal. The drafting of this IIA Issues Note was undertaken by Wolfgang Alschner, with guidance and inputs by Anna Joubin-Bret, Sergey Ripinsky and Elisabeth Tuerk and support from Peter Sauer. This Note also benefited from comments by Facundo Perez Aznar, Barry Appleton, Nathalie Bernasconi, Robert Howse, Katja Gehne, Christina Knahr, Markus Krajewski, Ursula Kriebaum, Andrew Mitchell, Joost Pauwelyn, Anthea Roberts, Andrea Saldarriaga, and Tania Voon.

In the recent past, States have started reacting to the challenges emerging from the current ISDS system. Some countries have terminated their investment treaties and withdrawn from ISDS, or certain aspects of it – an option that raises a number of complex and novel legal questions.² Others have worked to improve the treaty language that is at the origin of controversial claims³ or challenged ISDS awards once they have been issued.⁴

As a further alternative, States can take a more proactive attitude when it comes to the interpretation of IIA obligations. In particular, they can foster a more predictable and coherent reading of treaty terms. This IIA Issues Note aims to highlight the potential role of interpretive approaches to address some of the challenges today's ISDS system poses for investment stakeholders around the globe. The Note makes a number of innovative suggestions, some of which remain untested in their practical application. It does not, however, suggest that interpretation would be a tool for amending or changing the content of a treaty, nor does it aim at criticizing the legal reasoning developed by ISDS tribunals or seek to make direct suggestions to arbitrators. Moreover, it should be noted that no single solution will prove sufficient to remedy all the system's inadequacies. Nor will each option suit every stakeholder. Nevertheless, the note aims to provide “value added” by shedding some light on the relatively unexplored topic of interpretation that is highly relevant for addressing current challenges facing the IIA regime, with a view to fostering debate and informed decision-making by investment policy makers and affected stakeholders.

This note is divided into three parts. Part one describes the shared authority of States and tribunals in the interpretive process, and sketches some of the current deficiencies in investment arbitration. It advocates a greater involvement of States in the interpretive process, but also considers limitations to a more proactive role of the contracting parties. Part two presents international law principles of interpretation and explains how they can guide States in their actions towards fostering a “better” (i.e. more rigorous, consistent and coherent) interpretation of IIAs. Finally, part three sets out different tools States may employ to guide arbitral tribunals in the interpretation of IIAs.

II. Interpreting IIAs: Actors, Challenges and Limitations

The legal conclusion reached when applying the abstract rules of an IIA to the facts of a particular case often hinges on the critical intermediate step of interpreting the terms of the IIA. Interpretation delineates the scope of rights and obligations in IIAs and thereby helps distinguish between those acts that constitute an interference with investors' rights as set out in an IIA and those that fall within a State's legitimate right to regulate as recognized in international law. Carefully delineating this borderline is particularly important in investment law, where disputes proliferate in sensitive public policy areas and where broad and often vague protective treaty standards are common.

IIAs are inter-State treaties governed by public international law. Hence, investor-State dispute settlement proceedings, in contrast to commercial arbitrations, take place against a public international law background. It follows that unless an IIA specifies otherwise, arbitral tribunals have an obligation to interpret IIAs – like any other international treaty – following the general international law rules of treaty interpretation. These rules are primarily embodied in the Vienna Convention on the Law of Treaties (VCLT).⁵ A rigorous application of interpretation rules by tribunals contributes to legal

² UNCTAD IIA Issues Note, Denunciation of the ICSID Convention and BITs, December 2010, http://www.unctad.org/en/docs/webdiaeia20106_en.pdf.

³ UNCTAD *Series on Issues in International Investment Agreements (A Sequel)* on Most-Favoured Nations Treatment (Fair and Equitable Treatment and Expropriation forthcoming) available at <http://www.unctad.org/ia>.

⁴ UNCTAD IIA Issues Note, Latest Developments in Investor-State Dispute Settlement, March 2011, http://www.unctad.org/en/docs/webdiaeia20113_en.pdf. It has to be noted that judicial review of arbitral awards by annulment committees (under the ICSID Convention) or national courts (outside the ICSID system) is primarily intended to safeguard the procedural rights of the disputing parties and not to review the substantive outcome of the award.

⁵ Gardiner, Richard K., *Treaty Interpretation* (New York: Oxford University Press), 2008, pp. 20ff.

predictability and protects the expectations of States on how treaty standards will be interpreted.⁶

1) Shared interpretive authority between States and tribunals

In the interpretation of IIAs, both arbitral tribunals and contracting States have a role to play. By introducing an ISDS mechanism into a treaty, States delegate the task of resolving investor-State disputes to international tribunals. This delegation confers arbitrators with a certain discretion to give meaning to treaty standards. The interpretive authority of arbitral tribunals, however, is not absolute. First, it is conditioned by principles of treaty interpretation. Second, it is shared with that of State parties to the treaty.

In international law States are the drafters and masters of their treaties. Even though States have delegated the task of ruling on investor claims to arbitral tribunals, they retain a certain degree of interpretive authority over their treaties: by virtue of general public international law, they can clarify their authentic intentions and issue authoritative statements on the proper reading of their treaties. As the Permanent Court of International Justice (PCIJ) noted “the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it.”⁷ This was later reaffirmed by the International Law Commission (ILC)⁸, the International Court of Justice (ICJ)⁹ as well as arbitral tribunals themselves.¹⁰ Put differently, while it remains the task of the arbitral tribunal to decide a case and interpret and apply an IIA to this end, the contracting States retain the power to clarify the language/meaning of a treaty through an authoritative interpretation.

Therefore, although tribunals and contracting States play different roles in the interpretation of IIAs, they share interpretive authority. Interpreting IIAs is hence not a monologue by tribunals, but could be understood as a “constructive dialogue between investment tribunals and treaty parties”.¹¹ However, until present, States have largely neglected their role in interpreting IIAs. Instead, they left the task of giving meaning to treaty provisions solely to arbitral tribunals. Yet, rising concerns among States and other stakeholders demonstrate the challenges of an overly wide discretion of arbitrators coupled with the often broad and imprecise language of IIAs.

2) Lack of predictability in current IIA interpretation by tribunals

There are a number of issues that raise concerns about the legal predictability of IIAs in ISDS proceedings. One relates to divergent interpretations of identically or similarly worded treaty obligations. For example, in response to its economic crisis in 2001, Argentina enacted a number of measures that were later challenged in investment proceedings, in the course of which tribunals and subsequent ICSID *ad hoc* Committees disagreed on the proper reading of the scope and content of Argentina’s necessity defense pursuant to Article XI of the Argentina-*United States* Bilateral Investment Treaty (BIT) and its relationship to customary rules on State responsibility.¹²

Furthermore arbitral tribunals have not always rigorously followed general international rules of treaty interpretation and produced poorly reasoned awards. In 2008, Fauchald found that “*only in exceptional decisions did tribunals integrate the VCLT into their*

⁶ See for more detail Arsanjani, Mahnoush H./ Reisman, W. Michael, «Interpreting Treaties for the Benefit of Third Parties: The “Salvors’ Doctrine” and the Use of Legislative History in Investment Treaties» Editorial Comment, *American Journal of International Law*, Vol. 104, No. 1, 2010, p. 598.

⁷ Permanent Court of International Justice, *Jaworzina*, Advisory Opinion, 1923, P.C.I.J., Series B, No. 8, p. 37.

⁸ Yearbook of the International Law Commission, 1966, Vol. II, p. 221, para. 14.

⁹ International Court of Justice in the *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgement (13 December 1999), para. 63.

¹⁰ See for example *ADF Group Inc. v. United States*, ICSID No. ARB(AF)/00/1 (9 January 2003), para. 177.

¹¹ Roberts, Anthea, «Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States», *American Journal of International Law*, Vol. 104, No. 1, 2010, p. 225.

¹² For instance *CMS v. Argentina*, Award, ICSID Case No. ARB/01/8 (12 May 2005); *Enron v. Argentina*, ICSID, Award, Case No. ARB/01/3 (22 May 2007); *LG&E v. Argentina*, Decision on Liability, ICSID Case No. ARB/02/1 (3 October 2006); *Sempra v. Argentina*, Annulment Decision, ICSID Case No. ARB/02/16 (29 June 2010); *Enron v. Argentina*, Annulment Decision, ICSID Case No. ARB/01/3 (30 July 2010).

reasoning beyond general references.”¹³ In 2010 Arsanjani and Reisman criticized the improper use of the *travaux préparatoires* by tribunals.¹⁴ The use and application of interpretation rules, however, is an essential element of an arbitral tribunal's mission to produce a well reasoned decision.

Finally, some arbitral awards fail to interpret IIAs in a manner giving due consideration to the balance of rights and obligations. The tribunal in *SGS v. Philippines*, for instance, found that it is “legitimate to resolve uncertainties in [the IIA’s] interpretation so as to favor the protection of covered investments”.¹⁵ Failing to pay due regard to legitimate considerations other than investment protection, however, curtails the State’s regulatory autonomy to the detriment of sustainable development. Along these lines, the tribunal in *Noble Ventures v. Romania* stated, “it is not permissible, as is too often done regarding BITs, to interpret clauses exclusively in favor of investors”.¹⁶

In sum, deficiencies in the interpretive process with potentially negative consequences for public policy making merit attention by States. While ideally tribunals should employ international rules of treaty interpretation rigorously producing solidly reasoned awards, and make ISDS more consistent, predictable and legitimate, States can play an important role in fostering such outcome.

3) Greater involvement of States in interpretation and potential limitations of such an approach

State involvement in interpretation can help guide tribunals in their reading of IIAs, enhancing, amongst others, the predictability of awards. It also proactively clarifies the protective scope of investment treaties for investors and can thus prevent disputes. Moreover, interpretation may be a way to strengthen the public policy dimensions of existing IIAs. For instance, in the context of a recent claim against Australia’s plain packaging legislation on tobacco products, it has been suggested that Hong Kong and Australia as contracting parties to the IIA forming the basis of the claim could clarify the meaning of certain treaty provisions to ensure that investment protection does not trump broader public health objectives. It has also been suggested in this regard that an interpretation of the BIT could have retrospective effect and might be relevant for determining the current claim.¹⁷

While so far, States have rarely given interpretive guidance, this can play an important part in determining the extent of States’ commitments under IIAs and to ensure that IIAs reflect the underlying public policy considerations. Compared to complicated and time consuming treaty re-negotiation, modification or denunciation, interpretation may be an efficient option to improve predictability of awards. Interpretive instruments can thus complement better treaty language and other current efforts to remedy the challenges posed by today’s IIA regime.

At the same time, State involvement in the interpretation of IIAs can be controversial. Hence, a number of potential limitations need to be considered.

First, States play a dual role in investment law. On the one hand, they are the contracting parties and masters of their IIAs. In that capacity States may provide authentic and authoritative interpretations of their treaties.¹⁸ On the other hand, States may also be respondents in specific ISDS proceedings. Hence, States could potentially use interpretive instruments to influence litigation of ongoing cases to their benefit, raising questions about the equality of arms between the disputing parties. To avoid concerns on abusive interpretations, States may want to issue interpretive statements proactively – in advance – and outside of a particular dispute. However, as the experience from

¹³ Ole Kristian Fauchald, «The Legal Reasoning of ICSID Tribunals – An Empirical Analysis», *European Journal of International Law*, Vol. 19, No. 2, 2008, p. 314.

¹⁴ Arsanjani/ Reisman, *supra* note 6, p. 597.

¹⁵ *SGS v. Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction (29 January 2004), para. 116.

¹⁶ *Noble Ventures, Inc. and Romania*, ICSID Case No. ARB/01/11, Award, (12 October 2005), para. 52.

¹⁷ Tania Voon and Andrew Mitchell, «Time to quit? Assessing International Investment Claims against Plain Tobacco Packaging in Australia», *Journal of International Economic Law*, Vol. 14, No. 3, 2011, p. 529.

¹⁸ See *supra* note 7-10.

NAFTA's Free Trade Commission's interpretation shows (*infra* Box 3), even in ongoing proceedings, tribunals have deferred to the interpretations of the contracting States.

Second, unlike most other international treaties in the economic area, IIAs create rights for individuals. These rights of foreign investors and the legitimate expectations arising thereof could potentially be compromised by subsequent authoritative interpretations by the contracting States. Yet, treaties are not set in stone. States retain the authority to modify or even terminate the IIAs that give rise to investor rights. Similarly investors have to accept that their rights deriving from a treaty may be clarified through subsequent interpretive statements. In any case, legitimate expectations do not protect a specific reading of an IIA provision to the exclusion of other reasonable interpretations.

Third, the interpretation of IIAs has to be distinguished from treaty amendments. Interpretation is in principle confined to clarifying the terms of a treaty and not aimed at filling them with a new meaning. In contrast, amendments may add to or modify existing obligations and they typically require formal adoption, for example, through domestic ratification. In practice, however, the borderline between interpretation and amendment may be blurred.¹⁹ Indeed, international courts and tribunals in the past have accepted interpretations amounting to a *de facto* amendment.²⁰ It must be noted that such State practice may be highly controversial.

Despite these potential limitations, State involvement in interpretation may, under certain circumstances, offer an efficient and attractive option for States.

III. Interpretation Rules as a Roadmap for State Involvement

1) Interpretation rules under public international law

Interpretation of public international law treaties follows a specific canon of interpretation rules. The most important and widely used canon of interpretation rules is found in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) (see Box 1). These rules establish the elements interpreters must take into account when giving meaning to treaty provisions and how to prioritize amongst the different elements.²¹ The Convention constitutes a codification of international customary rules on treaty interpretation relevant to all States.²² In consequence, arbitral tribunals are required to apply the VCLT rules irrespective of whether the contracting States have ratified the VCLT or whether an IIA explicitly provides for the VCLT's application. The rules of interpretation in the VCLT are extensively used by international adjudicating bodies such as the ICJ, panels and the Appellate Body of the World Trade Organization (WTO), and international criminal courts and tribunals.

The VCLT embodies three main approaches to treaty interpretation. Article 31 of the VCLT contains elements of (i) the "textual" school which places emphasis on the "ordinary meaning of the word" and (ii) the "teleological" school which refers to the object and purpose of a treaty. Article 32 partly reflects (iii) the historical "original intention of the parties" approach, but only serves as a supplementary means of treaty interpretation. The primary interpretation rules in Article 31, however, are not hierarchical. They are to be used in a single "holistic exercise" giving weight to all of Article 31's elements (not only the "ordinary meaning").²³ If applied rigorously, the VCLT interpretation rules ensure high legal security and predictability.

¹⁹ Roberts, Anthea, «Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States», *American Journal of International Law*, Vol. 104, No. 1, 2010, pp. 201-202.

²⁰ For example, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion (21 June 1971), para. 22. Case concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment of the International Court of Justice (13 July 2009), para. 64.

²¹ VCLT Article 31(1) begins with «A treaty shall be interpreted...» (emphasis added).

²² Gardiner, Richard K., *Treaty Interpretation* (New York: Oxford University Press), 2008, pp. 12ff.

²³ WTO Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts* (EC – Chicken Cuts), WT/DS269/AB/R, WT/DS286/AB/R, at para. 176. See also Yearbook of the International Law Commission, 1966, Vol. II, at 219–220.

Box 1. Articles 31 and 32 of the Vienna Convention on the Law of Treaties

Articles 31 and 32 codify customary rules of treaty interpretation. Article 31 contains three main elements. The first paragraph underlines the importance of the careful wording of a treaty. It states that treaty terms should be interpreted in accordance with their ordinary meaning and in light of their object and purpose.

The second paragraph of Article 31 refers to the “context of a treaty.” This comprises its “text including its preamble and annexes” as well as “any agreement” or “any instrument” accepted by both parties and made in conclusion with the treaty. Hence, by concluding side-agreements, protocols, understandings and other instruments together with the treaty, contracting States can guide tribunals regarding the object and purpose of specific IIA provisions.

The third paragraph of Article 31 deals with the subsequent application of a treaty that may provide further “context” for the interpretation. This includes (a) any subsequent agreement, (b) any subsequent practice establishing agreement between the contracting parties regarding the treaty’s interpretation, and (c) any relevant rules of international law applicable between the parties. Therefore, both the evolving practice between the contracting parties as well as the development of the general system of international law applicable to the parties can affect interpretation.

Finally, Article 32 concerns supplementary means of treaty interpretation. This includes but is not limited to the *travaux préparatoires* of the treaty. They may be relevant “to confirm the meaning resulting from an application of Article 31, or to determine the meaning when the interpretation according to Article 31 (a) leaves the meaning ambiguous, or obscure or (b) leads to a result which is manifestly absurd or unreasonable”. In these circumstances, the *travaux préparatoires* or any other supplementary means, including even unilateral instruments, may provide helpful guidance for the interpretation of a treaty.

Source: UNCTAD.

The VCLT does not entail an exhaustive list of interpretive techniques. Other interpretive rules may be implicitly contained in the VCLT rules, such as the principle of effective interpretation.²⁴ Some interpretive techniques are not mentioned in the VCLT at all, such as *in dubio mitius* (principle of restrictive interpretation), *expressio unius est exclusio alterius* (express mention of one thing excludes all others) or the *eiusdem generis* (of the same kind) approach.²⁵ The status of the latter group of principles, however, is subject to some debate. Hence, whereas the VCLT may not be exhaustive, it is the most widely accepted set of interpretation rules.

2) Interpretation of IIAs – different stages, different tools

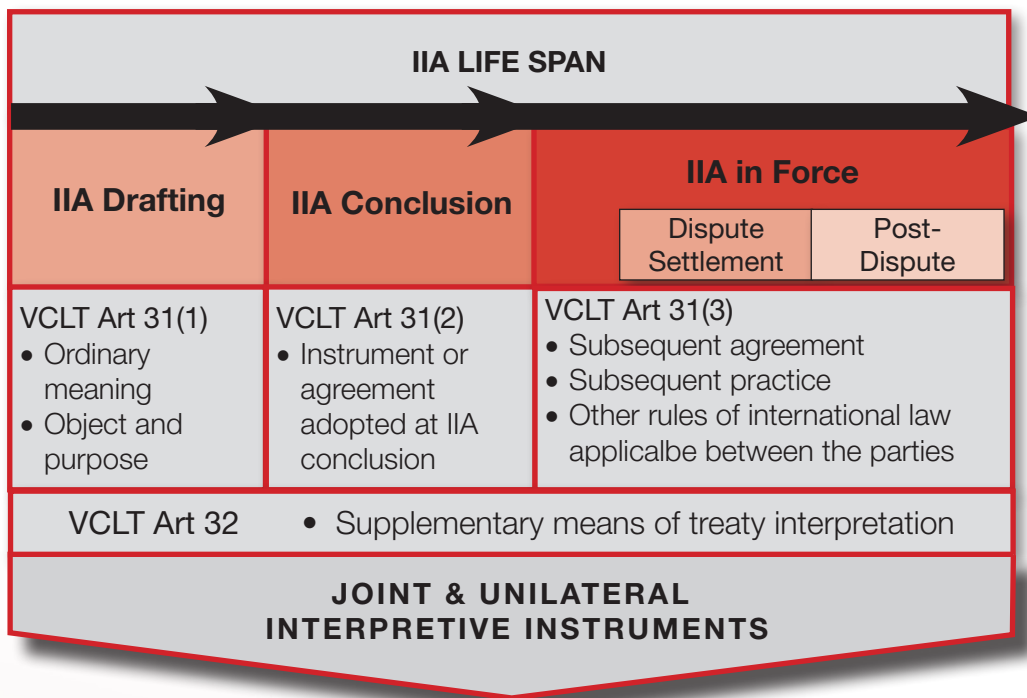
The life of an IIA is characterized by different stages from its drafting over its implementation to its potential application by international arbitral tribunals. At each of these stages, interpretation and tools to guide it play a different role (figure 1).

In the treaty negotiating process, the drafters need to anticipate future interpretations with farsighted and precise treaty language and clear interpretation guidelines. Once the treaty is concluded, the contracting States can clarify the treaty language by issuing interpretive statements and agreements. In addition, States may intervene in dispute settlement proceedings. Furthermore, after the dispute has been decided States can scrutinize arbitral awards and comment on the interpretation by tribunals. Therefore, at every stage States have different interpretive tools at their disposal.

²⁴ Yearbook of the International Law Commission, 1966, Vol. II, p. 218.

²⁵ See for instance Schreuer, Christoph, «Diversity and Harmonization of Treaty Interpretation in Investment Arbitration,» in Olufemi Elias, Malgosia Fitzmaurice, and Panos Merkouris (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Leiden: Martinus Nijhoff Publishers, 2010), pp. 129-151.

Figure 1. The VCLT is guiding interpretation at every stage in the lifespan of an IIA



This sequenced approach is supported by the Vienna Convention. The VCLT interpretation rules themselves reflect a distinction between different stages and different tools. In other words, the VCLT provides a roadmap for stage-specific State intervention.

3) Interpretation of IIAs: joint and unilateral approaches

IIAs are a product of at least two State parties. In addition to multilateral tools (see Box 2), interpretative tools can accordingly originate from one or several (at least two) State parties.

Joint acts and statements by the contracting parties are considered to be reflective of the intention of all States concerned and, as such, they must be treated as authoritative by subsequent arbitral tribunals.²⁶ Any agreement or accepted practice, regardless of its legal form²⁷ (e.g. a joint declaration, an exchange of letters or even verbal notes),²⁸ establishing consent between the contracting parties as to a treaty's interpretation is to be considered as authoritative.²⁹ This is reflected in the VCLT rules Article 31(2) and (3)(a) and (b).

In addition, some *unilateral* instruments are available to States such as ratification documents or declarations.³⁰ States cannot unilaterally give *authoritative* meaning to treaty terms. However, in the absence of conclusive joint interpretations some unilateral documents or statements may provide guidance to arbitrators as supplementary means of treaty interpretation under VCLT Article 32.

²⁶ See *supra* note 7-10.

²⁷ Judgment of the International Court of Justice in the *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgement (13 December 1999), I.C.J. Reports 1999, p. 1045, para. 49.

²⁸ See *Gruslin v. Malaysia*, Award, ICSID Case No. ARB/99/3 (27 November 2000), para. 23.4.

²⁹ Gardiner, Richard K. *Treaty Interpretation* (New York : Oxford University Press), 2008, pp. 216-220. See also Yearbook of the International Law Commission, 1999, Vol. II, UN Doc. A/CN.4/SER.A/1999/Add.1 (Part 2) p. 125, Rule 1.5.3.

³⁰ See Section IV 2)-5) below.

Some interpretive tools are only available if the contracting parties explicitly provide for them in their IIAs. Examples for such *IIA specific interpretive mechanisms* are treaty-based institutions such as the NAFTA Free Trade Commission or the renvoi procedure giving the tribunal the option to send certain questions back to the contracting parties for interpretation.³¹

IV. Interpretive Instruments of the Contracting Parties

1) Drafting of IIAs

During negotiations, drafters need to consider how a treaty provision may be interpreted in the future. Accordingly, States can provide a clear roadmap for future interpreters both in terms of substance and procedure.

➤ **Precise wording of treaty provisions**

Many IIA provisions are loosely phrased. Recently, however, the drafting of IIAs has gradually gained in precision. In part, this has been prompted by the increase of ISDS proceedings coupled with the States' desire to reduce the margin of discretion for tribunals' interpretation.³² Farsighted and precise drafting thus plays a crucial role in delineating the discretion of future interpreters hence fostering greater predictability.

One option for negotiators to increase the precision of treaty terms is to supplement broad standards with specific clarifications. Some recent formulations of the provisions on most-favoured-nation treatment (MFN), fair and equitable treatment (FET) and expropriation are illustrative of this trend.³³ Another, related way to avoid tribunals giving broader than intended meaning to certain treaty terms is to include an exhaustive or a negative list. For instance the Canada-Peru BIT (2007) in Article 1 excludes from the definition of "investment" specific assets such as trade financing transactions.³⁴ Hence, clarity can be enhanced in two ways: (i) by specifying what the treaty obligation entails³⁵ and (ii) by delineating what is not covered.³⁶

➤ **Reference to rules of treaty interpretation**

Governments may also want to clearly state the rules to be followed when interpreting a treaty.

While the VCLT rules apply by default, their inclusion into IIAs through reference may be useful to ensure their rigorous application by arbitral tribunals.

The *Australia-United States FTA* (AUSFTA), for example, provides in Article 21.9 (2) that a panel should "*consider this Agreement in accordance with applicable rules of interpretation under international law as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (1969).*"³⁷ Recognizing that the AUSFTA does not have investor-State, but only State-to-State dispute settlement, policy makers may

³¹ See Section IV 3) and 4) below.

³² UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* (United Nations, New York and Geneva, 2007), at p. 30.

³³ For a detailed analysis of these provisions consult the UNCTAD *Series on Issues in International Investment Agreements (A Sequel) on Most-Favoured Nations Treatment* (Fair and Equitable Treatment and Expropriation forthcoming) available at <http://www.unctad.org/iaa>.

³⁴ See UNCTAD *Series on Issues in International Investment Agreements (A Sequel) on Scope and Definition*, available at: http://www.unctad.org/en/docs/diaaia20102_en.pdf.

³⁵ Examples include i) listing the type of assets covered by an IIA's scope and definition clause, ii) specifying the type of government action that is prohibited by a particular clause, or iii) defining the extent of coverage of the MFN clause.

³⁶ Examples include i) specifying the type of assets are not covered by an IIA's scope and definition clause; ii) clarifying the type of government action that is not prohibited (e.g. regulatory takings), or iii) stating that the MFN clause does not apply to ISDS.

³⁷ Similar language, referring to customary rules of interpretation of public international law, is used in the WTO Dispute Settlement Understanding Article 3.2 and in many FTAs with investment chapters such as Article 190 (3) China-New Zealand FTA.

still wish to consider including such language also in the context of investor-State proceedings.

Contracting parties can also include autonomous interpretation standards in their IIAs corresponding to the specific needs of the investment law regime supplementing or substituting the VCLT rules. They may refer to separate interpretive principles such as *in dubio mitius* or devise treaty specific canons of interpretation to be followed.³⁸

➤ Reference to other fields of international law

Given the increasing overlap and interaction between the international investment regime and other fields of international law such as the WTO Agreements and treaties relating to the protection of the environment, public health, and human rights, IIAs should not be considered in isolation.

In an effort to achieve coherence between IIAs and the wider spectrum of public international law, some treaties suggest that the interpretation of provisions shall be compatible with other rules of international law. This facilitates the “systemic interpretation” approach in Article 31 3(c) of the VCLT that takes into account other relevant rules of international law applicable between the parties. One step in that direction is the *Belgium-Togo BIT* (2009) in Article 11 (3) that contains a specific reference to Multilateral Environmental Agreements (MEAs): “*The Contracting Parties reaffirm their commitments under the international environmental agreements, which they have accepted.*”

Box 2. Multilateral instruments

Beyond unilateral and bilateral interpretive instruments, multilateral approaches to interpretation can also play a role in fostering a coherent and predictable reading of IIAs. This is particularly useful when it comes to addressing global challenges such as climate change and problems common to the investment regime as a whole. For example, one could consider a multilateral declaration on the relationship between IIAs and the climate change regime clarifying that IIAs do not constrain climate change measures and ensure that investment treaties are read in line with the related multilaterally agreed global policies.^a

A process of multilateral consensus building can be a starting point to formulate new multilateral solutions e.g. for clarifying the scope of core IIA obligations or shedding light on the relationship between IIAs and other fields of international law. Such a process may result in multilateral interpretive tools taking different forms ranging from soft law instruments, such as guidelines and interpretive principles for arbitrators, to hard legal instruments.

^a UNCTAD, World Investment Report 2010: Investing in a Low-Carbon Economy (United Nations, New York and Geneva, 2010), pp. 138, 147 (available at www.unctad.org/en/docs/wir2010_en.pdf).

➤ Non-economic treaty objectives in the preamble

VCLT Article 31(1) provides that a treaty provision has to be interpreted in light of its “context” and “object and purpose”. An agreement’s preamble forms part of its “context” and typically states the objectives of the agreement. Many preambles in IIAs refer to the protection of investments as the sole object and purpose of the treaty. This has led some tribunals to adopt an interpretation focusing primarily on investors’ interests.³⁹ States can prevent such an occurrence by clearly stipulating that investment protection is not an end in itself. Instead it should serve as a means to facilitate sustainable development and reaffirm a State’s right to regulate in the public interest.

³⁸ Noting that it is not an IIA, the WTO Anti-Dumping Agreement, for instance, reads in Article 17.6 “the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities’ measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.”

³⁹ See *supra* note 15 and 16.

For instance, in the preamble of their 2005 FTA, India and Singapore recall “their right to pursue economic philosophies suited to their development goals and their right to regulate activities to realize their national policy objectives.”

In general, States have already used the preamble of their IIAs to reaffirm regulatory flexibilities (such as their right to regulate),⁴⁰ to reiterate their commitment to human rights, labour or environmental standards,⁴¹ or to promote other policy objectives (such as sustainable development and transfer of technology).⁴²

2) Conclusion of an IIA

At the conclusion of an IIA, contracting States can adopt additional instruments such as side-agreements, protocols, understandings or exchanges of letters. In addition, a number of unilateral tools may be open to governments and parliaments at the moment of concluding IIAs.

A. Joint instruments

➤ Formal side-agreements

An illustrative example of a joint side-instrument is the FTA practice of Canada and the United States. Instead of including extensive environmental and labour standards in their agreements, these countries sign so-called side-agreements to their FTAs, addressing these issues specifically.⁴³ These side-agreements form part of the IIA's "context" for interpretation pursuant to VCLT Article 31(2). Other examples, more common with bilateral treaties, are protocols signed together with IIAs. These protocols sometimes also constitute an integral part of the original IIA, as is the case for the *China-Finland BIT (2004)*,⁴⁴ and hence influence the interpretation of the rights and obligations set out in the IIA.

➤ Informal side-instruments

While the instruments above create direct legal obligations between the contracting States, other informal instruments that are agreed upon at the conclusion of the treaty can also inform the interpretation of IIAs as part of its “context”. The letter exchange between the United States Trade Representative and the Moroccan Minister Delegate for Foreign Affairs and Cooperation at the conclusion of the *Morocco-United States FTA*, for instance, clarifies the scope of the labour and environmental provisions of that treaty,⁴⁵ and in so doing, guides a tribunal's interpretation of the rights and obligations established in the IIA.

B. Unilateral instruments

➤ Statements and documents in the course of the ratification process

Not only international instruments play a role in treaty interpretation, but also purely national statements may be of relevance. This is especially the case if they are made during the course of the ratification process. Letters and memorials to government or legislature, commentaries, official statements and parliamentary debate may shed light on the meaning of IIA provisions. As the tribunal in *Mondev International Ltd. v. United States* stated: “[E]xplanations given by a signatory government to its own legislature in

⁴⁰ *India-Singapore FTA*, preamble (2005); *Panama-Taiwan FTA*, preamble (2003).

⁴¹ *United States-Uruguay BIT*, preamble (2005); *CARIFORUM-EC Economic Partnership Agreement*, preamble (2008).

⁴² *ASEAN-China Agreement on Investment (2009) preamble*; *CARIFORUM-EC Economic Partnership Agreement*, preamble (2008).

⁴³ For instance, the *Canada-Panama FTA*, signed on 14 May 2010, is supplemented by two side agreements on labour and the environment. Side agreements were also concluded in connection with NAFTA.

⁴⁴ Protocol to the Agreement on the Encouragement and Reciprocal Protection of Investments between the Republic of Finland and the People's Republic of China, signed on 15 November 2004.

⁴⁵ Letter by Catherine A. Novelli, Assistant United States Trade Representative for Europe and the Mediterranean to the Honorable Taïb Fassi Fihri, Minister Delegate for Foreign Affairs and Cooperation, Kingdom of Morocco, Washington, D.C., June 15, 2004, available at <http://www.moroccousafta.com/pdf/letter-labor-env.pdf>.

the course of ratification or implementation of a treaty [...] can certainly shed light on the purposes and approaches taken to the treaty.”⁴⁶

3) Subsequent agreements and practice - clarifying existing IIAs

A. Joint instruments

➤ Ad-hoc authoritative interpretation by contracting parties

State parties may clarify the content of their original treaty commitments through subsequent practice or agreement. This possibility follows from VCLT Article 31 (3) (a) and (b).

Two points made above must be reiterated. First, a joint interpretation may be authoritative irrespective of its legal form.⁴⁷ However, it is important that the document or letter exchange not merely implies but clearly establishes a common understanding in order to qualify as agreement between the contracting parties. Similarly, concordant practice requires at least a tacit acceptance of an interpretation by all parties.⁴⁸ Second, by virtue of general international law contracting parties can provide a joint interpretation of the IIA regardless of whether the treaty expressly authorizes them to do so.⁴⁹

Some IIAs, however, expressly address the issue of authoritative interpretations. For instance, Article X (6) of the *Canada-Czech Republic BIT* (2009) provides: “An interpretation of this Agreement agreed between the Contracting Parties shall be binding on a Tribunal established under this Article.” Some treaties provide for “consultations” to be proposed by each party to the treaty and on any matter concerning interpretation. An example of this can be found in the *Ghana-Netherlands BIT* (1989) Article 12: “Either Contracting Party may propose the other Party to consult on any matter concerning the interpretation or application of the Agreement. The other Party shall accord sympathetic consideration to and shall afford adequate opportunity for such consultation.”

Consultations were used in *CME v. Czech Republic* to arrive at a common position between the Dutch and Czech Governments with regard to the BIT’s interpretation.⁵⁰ The tribunal used this joint act to support its findings.⁵¹

➤ Interpretation by IIA institutions

In addition to ad-hoc mechanisms, a number of IIAs establish institutionalized cooperation between the contracting States. These commissions or committees consist of representatives from the State parties and are charged with the task of monitoring the implementation of the treaty and issuing interpretive statements on treaty provisions. The existence of such standing bodies facilitates the exchange of views and the formulation of common interpretations.

⁴⁶ *Mondev Int’l Ltd. v. United States*, ICSID No. ARB(AF)/99/2 (Oct. 11 2002), para. 111. See also: *CMS Gas Transmission Co. v. Argentina*, ICSID No. ARB/01/08 (May 12 2005), paras. 362, 369; *Generation Ukraine Inc. v. Ukraine*, ICSID No. ARB/00/9 (Sept. 16 2003), paras. 15.4–15.7; *CMS Gas Transmission Co. v. Argentina*, ICSID No. ARB/01/08, Jurisdiction (July 17, 2003), para. 82; *Bayview Irrigation District et al. v. Mexico*, ICSID Case No. ARB(AF)/05/1, Award (19 June 2007), para.106.

⁴⁷ See *supra* note 26.

⁴⁸ Aust, Anthony, *Modern Treaty Law and Practice* (Cambridge University Press, 2007), pp. 231-243. Proving the existence of a joint interpretation can hence be very fact-intensive. In a number of arbitral proceedings, the tribunals rejected documents presented by the respondent State on the premise that they did not establish an explicit agreement or a concordant practice between the contracting parties. See also discussion in Newcombe, Andrew Paul/Paradell, Lluís, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009), pp. 117-119.

⁴⁹ The International Law Commission provides that «The interpretation resulting from an interpretative declaration made in respect of a bilateral treaty by a State or an international organization party to the treaty and accepted by the other party constitutes the authentic interpretation of that treaty.» Yearbook of the International Law Commission, 1999, Vol. II, UN Doc. A/CN.4/SER.A/1999/Add.I (Part 2) p. 125, Rule 1.5.3.

⁵⁰ *CME Czech Republic B.V. v. Czech Republic*, Final Award (UNCITRAL, 14 March 2003), paras. 87-93.

⁵¹ *Ibid.* paras. 400, 437, 504.

For instance, Article 165 of the *Japan-Mexico* FTA (2004) provides for the creation of a Joint Committee to serve as a forum for consultations to review and implement the FTA, adopt interpretations of the FTA, and decide on the rules of procedure for arbitration. The role of such commissions or committees has already been tested in the context of NAFTA (see Box 3).

➤ **Release of travaux préparatoires**

VCLT Article 32 considers the *travaux préparatoires* to be a merely supplementary means of treaty interpretation. Nonetheless, arbitrators may resort to these documents to confirm a particular interpretation reached on the basis of primary interpretive tools, or to clarify an ambiguous term. Especially in the latter case, the *travaux préparatoires* may guide tribunals to the authentic reading among competing reasonable interpretations. In that sense, the release of *travaux préparatoires* may be a means for countries to ensure that their original intent is preserved. To this end, for instance, the NAFTA Parties have released negotiating texts of NAFTA's investment chapter.⁵²

B. Unilateral instruments

➤ **Unilateral documents and declarations**

A State can unilaterally publish or release documents which are *indicative* of its negotiating position, which can assist arbitrators in the interpretation of treaty terms. For example, States may release letters that reflect their interpretation of terms of the IIA as of the time of its negotiation. In some cases unilateral acts may also constitute the first step towards a joint interpretation between the parties.⁵³ If the other contracting parties endorse or acquiesce to a unilateral interpretive declaration, this may indicate subsequent practice.⁵⁴

➤ **Model IIAs**

Model IIAs can provide guidance to arbitral tribunals and facilitate an evolutionary reading of IIAs, especially if they are publicly available and supplemented by an official commentary.⁵⁵ Amongst several other functions, model IIAs mirror a country's investment policy approach.⁵⁶ They are periodically reviewed, either to adjust to new policy priorities, or to respond to the need for clarifying the content of IIAs.

4) Dispute intervention by States

In response to the increased awareness among States on ISDS claims, a growing number of mechanisms for unilateral or joint State intervention in investment disputes have found their way into IIAs.

A. Joint instruments

➤ **Renvoi of an interpretation issue back to the Parties**

A mechanism introduced by recent treaties is the *renvoi* of certain questions, which are explicitly defined in the treaty, to the State parties for interpretation. In these cases, the treaty provides that the contracting parties (or sometimes the specifically created joint Commission or Committee) shall interpret certain matters or provisions and issue

⁵² Available at <http://www.naftaclaims.com/commission.htm>. However, a comprehensive compilation of the *travaux préparatoires* of NAFTA, including negotiation minutes, is not yet publicly available.

⁵³ It must be noted, however, that the weight given to unilateral acts may differ. In the past, arbitral tribunals have been reluctant to accept arguments made in the context of an ISDS proceedings by one contracting party and later endorsed by the other contracting party as a respondent in a subsequent proceeding as evidence for concordant practice. See for instance *Gas Natural SDG SA v Argentina*, Decision on Jurisdiction, ICSID Case No. ARB/03/10 (17 June 2005), para. 47, footnote 12.

⁵⁴ See Roberts, Anthea, «Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States», *American Journal of International Law*, Vol. 104, No. 1, 2010, p. 200, in particular footnotes 101, 102.

⁵⁵ UNCTAD, *World Investment Report 2010: Investing in a Low-Carbon Economy* (United Nations, New York and Geneva, 2010), p. 85, available at www.unctad.org/en/docs/wir2010_en.pdf.

⁵⁶ «Model IIAs», UNCTAD Yellow Series, forthcoming.

Box 3. Lessons from the NAFTA Free Trade Commission's interpretation

The NAFTA Free Trade Commission (FTC), a body of cabinet level officials from each of NAFTA's signatories established under the treaty, is authorized to issue interpretations binding on tribunals established under NAFTA's investment chapter.^a In July 2001, the FTC issued its only interpretation to date concerning, among others, the minimum standard of treatment in NAFTA Article 1105(1). The Commission clarified that the provision refers to the customary international law minimum standard and that the obligations of "fair and equitable treatment" and "full protection and security" do not mandate a treatment beyond this minimum standard.^b

At the time when the FTC issued this interpretation multiple arbitrations were ongoing.^c *Pope & Talbot v. Canada* and *ADF Group, Inc. v. U.S.*, are two examples that illustrate how tribunals reacted to the FTC's interpretation. They addressed possible challenges for ongoing proceedings arising out of such State intervention, in particular, with regard to due process and whether these interpretations amounted to a *de facto* amendment of NAFTA itself.

The tribunal in *Pope & Talbot* had already issued an interim award on the merits before the FTC interpretation was made. Faced with the prospect of applying the interpretation retroactively to an already issued decision, the *Pope & Talbot* Tribunal was concerned with due process considerations. It initiated a letter exchange with Canada and the other NAFTA Parties to explore how the FTC's statements were compatible with basic standards of fairness. Although the Tribunal was sympathetic to the claimant's argument that the interpretation constituted a *de facto* amendment of NAFTA, it eventually accepted the FTC interpretation as such. However, this conclusion did not disturb the Tribunal's findings with respect to Canada's NAFTA violations, and accordingly, the Tribunal did not have to make a decision on the validity of an interpretation that would retroactively reverse a prior ruling.

In contrast to the reaction of the tribunal in *Pope & Talbot*, the tribunal in *ADF Group, Inc. v. U.S.* accepted the FTC interpretation readily stating "[n]o more authentic and authoritative instruction on what the parties intended to convey in a particular provision of NAFTA, is possible." With respect to the issue of a *de facto* amendment of NAFTA, the ADF Tribunal explicitly accepted the FTC statement as an interpretation on the grounds that "[n]o document purporting to be an amendment has been submitted by either the Respondent or the other NAFTA Parties".

In both cases the tribunals addressed the issues differently, but essentially reached the same conclusions. Namely, that the FTC interpretation is binding and does not amount to a formal amendment to NAFTA. Subsequent tribunals have followed this lead. Yet, as for instance the recent *Merrill & Ring Forestry v. Canada* pointed out, the impact of the FTC interpretation only provided limited guidance since uncertainties as to the current scope of customary international law remain.

^a See, NAFTA, Arts. 1131(2), 2001(1) & 2(c).

^b NAFTA Free Trade Commission, Notes of Interpretation of Certain Chap. 11 Provisions (31 July 2001) available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/nafta-interpr.aspx?lang=en>.

^c See, e.g., *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, paras. 100-125, 11 October 2002; *Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Award on Merits, paras. 125-128, 26 June 2003; *Methanex v. United States*, UNCITRAL.

a binding interpretation on the tribunal. Failing agreement between the parties, the tribunal regains the ability to interpret the relevant provisions.

The *Japan-Mexico* FTA (2004) provides an example:

*“[w]here a disputing Party asserts as a defense that the measure alleged to be a breach is within the scope of a reservation or exception set out in Annex 6, Annex 7, Annex 8 or Annex 9, on request of the disputing Party, **the Tribunal shall request the Joint Committee to adopt an interpretation on the issue.** The Joint Committee, within 60 days of delivery of the request, shall adopt an interpretation and submit in writing its interpretation to the Tribunal.*

An interpretation adopted and submitted under paragraph 1 above shall be binding on the Tribunal. If the Joint Committee fails to submit an interpretation within 60 days, the Tribunal shall decide the issue.” (Article 89, emphasis added)

A similar provision can be found in Article 31 of the *United States-Uruguay* BIT (2005). In that context, no institutional set-up exists so that the *renvoi* is addressed directly to the contracting parties.

➤ **Consultation of draft award**

Certain IIAs, like the *Colombia-Peru* BIT (2007) in Article 25 (14)a) provide that, before issuing a decision, any disputing party can request the tribunal to send the draft award for comments to the disputing parties and the non-disputing State party to the treaty. All State parties have 60 days to provide comments. The tribunal shall consider these comments and issue its decision within 45 days from receipt of the parties' comments.

B. Unilateral instruments

➤ **Intervention by the non-disputing State**

Some treaties explicitly provide for the intervention by the other, non-disputing State party or parties into the arbitral proceedings.

For example, the non-disputing State (or States) may make submissions to a tribunal regarding questions of interpretation of the agreement. Article 35(1) of the *Canada-Peru* BIT (2006) for example provides that: *“On written notice to the disputing parties, the non-disputing Party may make submissions to a Tribunal on a question of interpretation of this Agreement.”* Similarly, NAFTA also allows for the intervention of the other State Party in accordance with its Article 1128.⁵⁷

However, even when a treaty does not explicitly provide for this mechanism, tribunals are likely to pay attention to statements made by the non-disputing State party in order to find confirmation of subsequent agreement or practice between the contracting parties.⁵⁸ When *all* of the non-disputing treaty parties intervene in support of the reading proposed by the respondent State, this amounts to an authoritative interpretation.

➤ **Expert advice: calling on the original negotiators**

One instrument available to a disputing State party is to call upon the expert advice of original negotiators from both Contracting Parties to clarify an issue of interpretation. In *Tza Yap Shum v Peru* Chinese and Peruvian BIT treaty negotiators were invited to give evidence before the tribunal. The arbitrators considered their statements as proof to the effect that the contracting parties did not contemplate the MFN clause to extend to dispute settlement matters.⁵⁹

⁵⁷ See, for example Submission of United States of America regarding the relationship of the MFN and FET provision in the NAFTA dispute *Chemtura Corporation v Canada*, available at <http://www.state.gov/documents/organization/128849.pdf>.

⁵⁸ This was done, for instance, in *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (21 October 2005), paras. 249-263. However, the tribunal did not find a subsequent practice or agreement.

⁵⁹ *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence (19 June 2009), paras. 210-212.

5) Post-dispute phase

The post-dispute phase provides an opportunity for States to react to interpretations in arbitral awards. Done either unilaterally or jointly, the contracting parties can carefully examine the reasoning of arbitrators and endorse or reject particular interpretations. By publishing these evaluations, either in print or on their websites, treaty parties may provide guidance for future tribunals.

In *Société Générale de Surveillance v. Pakistan*, Switzerland complained to the ICSID Secretariat that the tribunal had failed to seek its interpretive views before reaching a controversial interpretation of the BIT umbrella clause. The Swiss authorities made clear that they rejected the narrow reading given to the umbrella clause by the tribunal.⁶⁰ To avoid such complaints, future tribunals may be enticed to involve the contracting parties in the interpretation process.

V. Conclusion

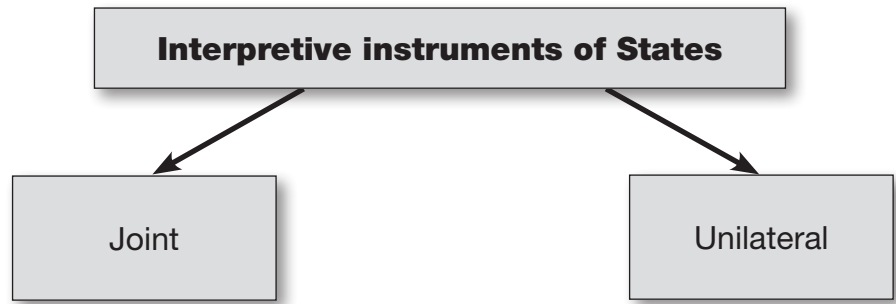
Both, States and arbitral tribunals have a role to play in the interpretation of IIAs. As masters of their treaties, States have numerous tools at their disposal to influence how tribunals interpret IIAs. From drafting clear and precise treaty language, to issuing joint interpretive notes or making unilateral statements States can guide the process of interpretation through actions relating to the different stages of an IIA's lifetime. Entry points for States' pro-active engagement for guiding arbitral tribunals in the interpretation of IIAs can either be derived from public international law, in particular the VCLT rules on interpretation, or made available through the inclusion of specific mechanisms in an IIA. In practice, however, interpretative tools have been rarely used and the principle task of giving meaning to rights and obligation in IIAs has been left to arbitral tribunals.

In light of the challenges posed by investor-State arbitration, State parties may benefit from exercising their interpretive powers in a more assertive and proactive manner. Interpretive instruments often involve little cost and do not require ratification procedures, yet they can direct tribunals in their reading of IIA obligations. Interpretation can thus play an important supplementary role in ongoing efforts to reform the current IIA regime with a view to strengthening its contribution to sustainable development.

In addition, international organizations can also play a role, for example, by providing analysis of tribunals' recent treaty interpretations or of the procedures through which cases have been settled and awards rendered.

⁶⁰ *Société Générale de Surveillance v. Pakistan* (Pakistan-Switzerland BIT), Switzerland submitted: "[T]he Swiss authorities are wondering why the Tribunal has not found it necessary to enquire about their view on the meaning of Article 11 [the umbrella clause] in spite of the fact that the Tribunal attributed considerable importance to the intent of the Contracting Parties in drafting this Article and indeed put this question to one of the Contracting Parties (Pakistan). . . . [T]he Swiss authorities are alarmed about the very narrow interpretation given to the meaning of Article 11 by the Tribunal, which not only runs counter to the intention of Switzerland when concluding the Treaty but is quite evidently neither supported by the meaning of similar articles in BITs concluded by other countries nor by academic comments on such provisions. " Note on the Interpretation of Article 11 of the Bilateral Investment Treaty Between Switzerland and Pakistan, attached to the Letter of the Swiss Secretariat for Economic Affairs to the ICSID Deputy-Secretary General (1 October 2003), reprinted in Mealey's *Int'l Arb. Rep.*, Feb. 2004.

Figure 2. Policy options for States



IIA Drafting	<ul style="list-style-type: none"> • Clear and precise wording • Reference to rules of interpretation • Reference to other fields of international law • Appropriate objectives in the preamble 	
IIA Conclusion	<ul style="list-style-type: none"> • Formal side-agreements • Informal side-instruments 	<ul style="list-style-type: none"> • Statements and documents of the ratification process
IIA in Force	<ul style="list-style-type: none"> • Ad-hoc authoritative interpretation • Authoritative interpretation by treaty institutions* • Release of travaux préparatoires 	<ul style="list-style-type: none"> • Unilateral documents and declarations • Model BITs
Dispute Settlement	<ul style="list-style-type: none"> • Renvoi-mechanism of interpretive questions* • Consultation of draft awards* 	<ul style="list-style-type: none"> • Intervention of non-disputing State Party* • Expert advice
Post-Dispute	<ul style="list-style-type: none"> • Public evaluation of rendered awards 	

* only available if explicitly provided for in the IIA

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