



Third round of break-out sessions: tools for modernizing the IIA network The role of treaty interpretation in IIA reform¹

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This break-out session began its robust discussion by putting the issue in context: It was highlighted that while States have been refining their new treaties, it was unclear what they can and should do about their existing agreements and some of the vague or problematic provisions in those treaties. Although termination and renegotiation of existing agreements are options, survival clauses limit the effect of termination, and renegotiation can be difficult to implement. Particularly in light of those challenges, interpretation can be a low-cost strategy for resolving some problematic issues in existing agreements.

Interpretation as a Tool to Clarify Existing Treaties

The **first set of questions** considered by the group was whether States can use their interpretive authority to shape their existing treaties and, if so, whether they should do so. Several experts answered “yes” to both queries: as a legal matter, States can exercise that power and, as a practical matter, they should.

In this context, however, some noted that there were certain considerations that might limit, or that should limit, use of that interpretive power. In terms of the legal limits, it was said by several members of the break-out session that interpretations could not actually function as amendments to the existing treaty. Yet, in response to that concern, it was highlighted that the vague language in many agreements left considerable room for interpretations that would not amount to amendments. One example given to illustrate that point was that, although an interpretation likely could not change a 10-year survival clause to a 1-year survival clause, it could be used to clarify what is meant by the “fair and equitable treatment” obligation.

With respect to practical or policy-related limits on States’ use of their interpretive power, several experts stated that if States were to use interpretations to affect the outcome of pending disputes, that could raise fairness concerns, could generate additional uncertainty about the meaning of treaty obligations, and could risk politicizing disputes. One expert also pointed out that tribunals appear to be more sceptical about and unwilling to accept interpretations when those interpretations are issued during the dispute.

¹ The opinions expressed in this paper are those of the author and do not necessarily reflect the views of the UNCTAD Secretariat or its Member States.

In response to some of the concerns that were raised regarding interpretations issued while a dispute is pending, members of the group made several points, including that:

- concerns about fairness or improper use of interpretations issued in the context of disputes did not seem to be as strong when the investor's home State is also involved in giving the interpretation;
- as a practical matter, there may be no time in which there is no dispute; and
- whenever States make submissions to a tribunal (whether as a respondent or a non-disputing State party), States are actually issuing unilateral interpretations on the meaning of their treaties while the case is pending. Thus, the practice of interpretations being issued during disputes is common.

The **second set of questions** discussed by the group related to whether there were certain issues ripe for agreed interpretations. It was emphasized that interpretations should focus on vague provisions. One expert stated that the need for interpretive clarifications is most acute on issues that have produced inconsistent interpretations by tribunals. Examples cited were the most-favoured nation treatment (MFN), fair and equitable treatment, and umbrella clause provisions.

The **third set of questions** the group explored related to practical considerations: How should States issue interpretive clarifications? Through a multilateral, bilateral or unilateral process? How can this be enabled?

With respect to a multilateral approach, one expert queried whether that would even be possible due to the different approaches States have taken in their treaties. Another expert noted that without an institutional mechanism to coordinate work to identify shared understandings, a multilateral approach would be challenging.

One speaker noted that the United Nations (UN) and Organization for Economic Co-operation and Development (OECD) had issued commentaries used in interpretation of tax treaties. It was said that a similar approach could potentially be used for interpretation of investment treaties. In response, however, one expert stated that the UN and OECD commentaries were developed based on the model treaties created by those organizations, and there did not seem to be any institution well-placed to craft such instruments for investment treaties, which were not based on any particular institution's model.

Another suggestion was that multilateral interpretations could be developed and agreed through a process similar to that used by the United Nations Commission on International Trade Law (UNCITRAL) for the development of the Transparency Rules. It was said that there might be enough consensus on the meaning of certain provisions to enable a group of States to agree on interpretive language. That language could then be open for those States and other States to "opt in" to.

Similarly, the experts noted that States could try to secure agreement on interpretive language at the regional level. It was noted that there were already efforts among Latin American States to explore this option.

In terms of securing bilateral agreement, it was suggested that a State could potentially send an email to all of its treaty parties and ask them whether they agreed on a particular interpretation of a treaty provision. Comments were made that although States might wish to pursue some more formal type of agreement, this email exchange could be a useful way of beginning the process.

Some members of the break-out session pointed out that some treaties already provide a mechanism or mechanisms to enable/facilitate interpretive agreements among treaty parties, and even permit States to make those agreements binding on tribunals in pending and future disputes. It was said that absent or alongside those treaty mechanisms, States could still pursue other strategies under the Vienna Convention on the Law of Treaties

to secure agreement among treaty parties such as through an exchange of diplomatic notes, or through submissions to tribunals by both the home and host State.

With respect to unilateral interpretations, there were a number of comments that such interpretations do not carry the same legal weight as an agreed interpretation. Nevertheless, it was stated that unilateral submissions can be useful to clarify treaty standards for tribunals.

Another practical issue discussed by the group related to the capacity needed to issue interpretive statements. The experts commented that it takes resources to understand treaty obligations, monitor disputes and weigh in with submissions. Support for States in this area can therefore be important. International organizations such as UNCTAD could play a role in providing that support.

Treaty Mechanisms on Interpretation

After focusing on the use of interpretive agreements and statements to clarify and shape the meaning of existing treaties, the break-out session briefly turned to the issue of future treaties. Speakers highlighted several mechanisms that could be used to increase States' roles in treaty interpretation, some of which can already be found in existing agreements. These mechanisms included:

- developing new methods of treaty interpretation rather than relying on interpretation in accordance with the Vienna Convention on the Law of Treaties. Rather than plugging individual holes regarding certain standards or provisions, this approach could give States more systemic power;
- including a filter for disputes through which States could agree to allow or stop certain types of cases;
- providing that joint interpretations are binding on tribunals; and
- making greater references to other sources such as
 - general principles of law, or
 - other interpretive tools similar to the systems of interpretation in place for double taxation agreements.

While several experts expressed support for incorporating these mechanisms in treaties, one expert expressed concern about potential impacts on investors, asking whether it might be better to have no treaty than to have an instrument in which the States are allowed to “keep moving the goalposts”.