



## World Investment Forum 2014: Investing in Sustainable Development

### IIA Conference - 16 October 2014

Ms. Lise Johnson  
Head of Investment Law and Policy Program  
Columbia Center for Sustainable Investment (CCSI)

The myriad concerns and criticisms of IIAs and the ISDS regime have been well documented through input at this Forum and in other venues;<sup>1</sup> the whole system needs a major rethink and reform. This note focuses on the practical ways in which change can be accomplished for the thousands of treaties that currently exist.

In particular, for existing treaties, states have three main complementary options for reform: (1) interpreting the treaties, (2) amending the treaties, and (3) terminating the treaties. While all three are important to consider, this note highlights the first two – interpretation and amendment – as holding particular promise as effective avenues states can immediately pursue.

#### **Interpretation – Increasing the Role of States<sup>2</sup>**

Through their interpretation of treaty provisions in the context of disputes, arbitral tribunals have largely defined the contents and parameters of “investment law.” Indeed, through the hundreds of awards that have been issued, tribunals have assumed the dominant role in giving content to vague or ambiguous treaty provisions. In so doing, these awards proclaim what the law is, and are subsequently used by other tribunals, building up a de facto jurisprudence on the meaning of investment treaty provisions.

In this development of the law through arbitral decisions, states have been largely absent. And, problematically, the awards’ determination of the law is often different from what states say they understand the treaties to mean. Narrowing that gap between tribunal pronouncements and states’ positions is one way to ease concerns about IIAs and ISDS. Importantly, international law provides a roadmap for that to happen.

Under the Vienna Convention on the Law of Treaties, which governs treaty interpretation, states are recognized as masters of their treaties. And as masters of their treaties, states’ statements and practices reflecting their understanding of and agreement on treaty provisions are authentic means of interpretation that **must be taken into account by tribunals** when interpreting the treaties.

---

<sup>1</sup> See, e.g., collection of articles in “Reform of Investor-State Dispute Settlement: In Search of A Roadmap,” *Transnational Dispute Management*, vol. 11, no. 1 (January, 2014), available at: <http://www.transnational-dispute-management.com/journal-browse-issues-toc.asp?key=52>.

<sup>2</sup> For more information, see Lise Johnson and Merim Razbaeva, *State Control over Interpretation of Investment Treaties* (CCSI 2014), available at [ccsi.columbia.edu](http://ccsi.columbia.edu).

To date, however, states' power over the interpretation and application of their investment treaties has been relatively dormant. Tribunals have not adequately given weight to states' positions, and states are not actively asserting their views.

Some states have been active in this regard. Under the NAFTA, for example, there have been roughly 50 cases filed, giving each of the three NAFTA states 50 opportunities to tell tribunals how they interpret the treaty provisions. All three states have made frequent submissions – even when they are not the respondents – in trying to ensure the text is interpreted in line with their intent, making submissions on issues of causation, standards of liability, standards of deference, and a host of other issues.

Other states can take similar action. More specifically, in order to exercise greater control over the interpretation of their treaty obligations, and in accordance with their rights under international law governing treaty interpretation, states can take any of the following concrete steps:

In their treaties, states can insert provisions

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

In disputes, states can

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

Alone and with other countries, states can

- make public their understanding of vague or uncertain treaty provisions through unilateral action (e.g., posting interpretative statements on a website, along with their treaties);
- monitor statements and practice of their treaty parties to identify areas of agreement and disagreement; and
- cooperate with other states to establish agreement clarifying ambiguous language and to indicate whether they intend those agreements to be binding.

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

### **New Umbrella Treaty**

The second mechanism for reform is amendment, which can be accomplished through the creation of a new umbrella treaty, supplementing or supplanting provisions in existing IIAs on substantive obligations and procedural mechanisms for investor-state arbitration.

Similar to subsequent agreement and subsequent practice, the legal authority for this approach derives from the Vienna Convention on the Law of Treaties. Pursuant to Article 30 of the Vienna Convention, when the relevant parties to an existing investment treaty (e.g., the investor's home state and the respondent state) are also party to a new treaty dealing with the same subject matter, that new treaty prevails over the original treaty. That new treaty could be used to allow states to replace procedures for

arbitration in their existing investment treaties, or supplement those treaties with a new option for dispute resolution or appeals. Similarly, it could be used to reshape substantive provisions in existing investment treaties.

Importantly, there is recent precedent for this effort in the area of investment law. In July 2014, the United Nations Commission on International Trade Law (UNCITRAL) adopted a Transparency Convention<sup>3</sup> that uses the Article 30 mechanism to enable its state parties to require all investor-state arbitrations to be conducted under UNCITRAL's Rules on Transparency in Treaty-Based Investor-State Arbitration. In addition to changing the procedures according to which investor-state arbitrations under existing treaties will be conducted, this new Transparency Convention also addresses existing investment treaties' substantive obligations by precluding certain uses of those treaties' most-favored nation provisions.

The model of the Transparency Convention can be readily used as a model by willing states to achieve even more comprehensive reforms of IIAs and ISDS.<sup>4</sup>

### **Next Steps**

CCSI has been working with governments, individually and collectively, to start work on proactively managing their investment treaties, but more coordinated action and support for governments in this area is necessary. UNCTAD, which has already done significant work to raise awareness of these issues, could play a key role in this regard.

Similarly, while CCSI and others have done work on analyzing how an umbrella treaty would work and what it could do, negotiation of such an instrument would require a platform. The Transparency Convention was drafted under the auspices of the UN and benefited from the logistical and administrative support of the UN affiliation. UNCTAD could provide a similar institutional home for negotiation of a new umbrella treaty.

---

<sup>3</sup> For more on the Transparency Convention, formally titled the "Mauritius Convention on Transparency," see Lise Johnson, *The Mauritius Convention on Transparency: Comments on the Treaty and Its Role in Increasing Transparency of Investor-State Arbitration* (CCSI 2014), available at [ccsi.columbia.edu](http://ccsi.columbia.edu).

<sup>4</sup> Additional information on this approach, including using the Transparency Convention as a model for a new umbrella treaty, see <http://ccsi.columbia.edu/our-focus/investment-in-law-and-policy/>.