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State interpretations of investment treaties: Feasible strategies for developing countries

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Over 3,000 investment treaties are in force today. Many contain vague provisions that give arbitration tribunals insufficient guidance and leave states vulnerable to unintended interpretations.

Under international law, governments have the right to use interpretive tools to clarify these provisions. Yet to date states have made only modest use of such mechanisms. In this brief, we distil lessons from an ongoing process to facilitate interpretative statements, asking what constrains states' use of interpretive statements and how such constraints might be alleviated. We find that the primary constraints are logistical and practical, rather than any deep-seated political opposition. Given this finding – and states' expressed desire to pursue greater use of interpretive statements – we suggest three objectives for facilitating states' use of interpretive statements:

1. Increase awareness of interpretive statements as a legal tool
2. Encourage states to share experiences and identify common areas of interest
3. Identify possible institutional forums to support plurilateral interpretive statements

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THE ISSUE: OUT-DATED TREATIES AND UNPREDICTABLE DECISIONS

Many investment treaties contain broad standards and vague language, leaving the arbitration tribunals that decide investment treaty cases with substantial discretion. This discretion means arbitration rulings can be unpredictable, as different groups of arbitrators may draw different conclusions from the same set of facts. And when arbitrators use their discretion to adopt expansive interpretations of state obligations, states may perceive that investment treaties are being used by investors in ways governments didn't intend or foresee. With arbitration awards against states sometimes reaching hundreds of millions of dollars, the stakes over interpretation are high.

In light of such concerns, a number of recent investment treaties clarify and circumscribe these standards. Some recent treaties also limit arbitrator discretion by emphasizing that treaty parties can issue binding interpretive statements to correct tribunal errors.[1] These innovations in treaty language are useful, but they leave untouched the stock of around 3,000 existing treaties – the majority of which are decades old.

Governments have three options for dealing with outdated treaties: termination, renegotiation, and interpretation. Termination and renegotiation can be costly and take years to have effect. Interpretation is lower-cost, faster, and more feasible. Yet to date states have rarely pursued treaty interpretation.

INTERPRETIVE TOOLS: THE BASICS

States are the creators and masters of their treaties – and remain so even after treaties have been ratified. When states delegate the task of resolving investor-state disputes to arbitration tribunals, this is a limited delegation – it is not the same thing as granting full interpretive power to arbitrators.[2] After treaties are in force, states can shape their interpretation through subsequent statements and actions.

Such interpretations offer a promising avenue for states seeking to regain control, and reorient, the international investment regime.

States can issue interpretations as unilateral statements and actions, joint statements with treaty partners, or as plurilateral statements. While states have made limited use of the first two options, they have not pursued interpretation through plurilateral statements.

What would a plurilateral interpretive statement look like? A group of states could come together and issue a statement on one or more specific issues in international investment law, such as the definition of the "fair and equitable treatment" (FET) standard. The statement would be endorsed by states individually, and could be left open for endorsement by other states. (In this sense, the process would be similar to the recent "Mauritius Convention on Transparency," which to date has been signed by 11 countries.[3]) If both state parties to a treaty signed a plurilateral statement, then it would need to be taken into account by tribunals deciding cases arising out of that treaty. If only one state party to a treaty endorsed a plurilateral statement, a tribunal would not necessarily need to take the interpretive statement into account, although they still might.[4] A clear statement endorsed by many states and issued outside the context of any particular dispute would constitute relevant information for an arbitration tribunal grappling with vague treaty language.

A plurilateral statement would likely have greater benefits and lower costs than a unilateral one. Additionally, once a forum is established future interpretations would be easier to issue. Such an initiative could aim for a high political profile – offering ministers the opportunity for a photo-op and publicity over reforms to international investment law – or could be kept technical, depending on the preferences of the states involved.

Table 1 provides a brief overview of the three options for state interpretation of their investment treaties.

1 The European Union emphasized that an interpretation clause in its recent agreement with Canada (CETA) would serve as a "safety valve in the event of errors by the tribunal." European Commission "Investment Provisions in the EU-Canada Free Trade Agreement." 26 Septmber 2014. http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf

2 Therefore investment treaty law is "characterized by sharing of responsibilities for treaty interpretation between governments – who provide guidance for interpretation on behalf of their citizens – and arbitrators – who have received delegated authority to interpret treaties in specific fact situations." Gordon, Kathryn, and Joachim Pohl. 2015. "Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World", OECD Working Papers on International Investment. Page 13. See also Roberts, Anthea. 2010. "Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States." American Journal of International Law 104 (12): 190.

3 Schill, Stephan. 2015. "The Mauritius Convention on Transparency: A Model Law for Investment Law Reform?" EJIL Talk, April 8.

4 If there was evidence that the other state party to the treaty was aware of the interpretive statement and chose to remain silent – i.e. did not voice any opposition to the interpretive statement – then tribunals may construe this silence as a form of tacit approval.

TABLE 1: OPTIONS FOR STATE INTERPRETATION OF INVESTMENT TREATIES

	UNILATERAL STATEMENTS AND ACTIONS	JOINT STATEMENTS WITH TREATY PARTNERS	PLURILATERAL OPT-IN STATEMENTS
OVERVIEW	States can express their interpretations of particular clauses in their treaties. They may do so formally through a non-disputing party submission (or as a disputing party) in a specific dispute, or they may issue statements less formally.	Treaty partners can jointly issue statements clarifying agreed interpretations of clauses for future tribunals. A few treaties include formal mechanisms for this; in the absence of such a mechanism states may exchange diplomatic notes recording their joint interpretation.	A number of states – not necessarily parties to the same treaty – could issue a joint statement on mutually agreed interpretations of provisions common to many investment treaties. States which agreed with such interpretations could endorse the statement.
EXAMPLES	El Salvador non-disputing party submission in Spence International Investments et al. v. Republic of Costa Rica Swiss letter to ICSID in response to SGS v Pakistan, noting the tribunal's interpretation of the umbrella clause was "counter" to the government's intent	NAFTA Free Trade Commission, 2001 Joint Interpretive Statement narrowing the FET Clause Ad hoc exchange of diplomatic notes between the US and a number of Eastern Europe states upon their accession to the EU	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention)
STRENGTHS	Least costly, doesn't require cooperation	Strong effectiveness, the Vienna Convention on the Law of Treaties requires arbitral tribunals to take these statements into account	If all parties to a particular treaty agree, then the statement would need to be taken into account by tribunals in a case arising from that treaty Even if not all parties agree, the statement might build longer-term support for the interpretation
WEAKNESSES	Statements from non-disputing parties may be influential, but statements from respondent states during disputes may be viewed as self-serving	Requires participation of all treaty partners, which may be difficult to attain	If not all parties to a particular treaty agree, then tribunals do not necessarily have to take the statement into account

WHAT KEEPS STATES FROM INTERPRETING THEIR INVESTMENT TREATIES?

Many states are concerned about expansive arbitral tribunal rulings, yet most states have refrained from issuing interpretive statements to clarify vague treaty provisions. Why?

We recently asked investment treaty negotiators this question directly, and found surprising results.[5] Below we discuss six potential constraints to state interpretation of investment treaties and examine how officials perceive these constraints.

Lack of knowledge on legal standing. One clear constraint is that some government officials have little awareness of the legal standing of interpretive statements under the Vienna Convention on the Law of Treaties. While some countries have experience issuing statements during a dispute, many government officials had given little thought to the possibility of issuing statements outside of an established forum or outside a particular dispute. The option of several states coming together to issue a plurilateral statement was even more remote.

Reputational risk. States might fear that issuing public statements that clarify and restrict the rights granted under investment treaties would spook investors and damage a state's reputation as a business-friendly country. There is, at least theoretically, potential for such statements to be viewed by investors – as well as capital-exporting states – as

5 As noted above, all attendees participated in a personal capacity, and their views should not be construed as reflecting official government positions.

a negative signal about the level of political risk in a country and the trajectory of a government's investment policy. Yet, for the most part, the officials we spoke with expressed very little concern about this potential constraint. Especially when one partner was a major capital exporter, the perceived reputational risks were very low. Even in hypothetical examples involving only capital importing countries, there appeared to be little concern that potential investors would view such actions as negative signals—especially since interpretations would often confirm that old treaties are to be understood in a similar way as newer treaties, increasing predictability. The one area of concern involved hypothetical plurilateral groupings of states with differing approaches toward the international investment regime. In these instances states might be wary that a combined statement would suggest greater overlap in interests and priorities than actually exists. One way to overcome such constraints is to form groupings of like-minded states, or coordinate interpretative statements within existing forums of like-minded states.

Difficulty in identifying and cooperating with partner states. A third potential constraint on states' ability to issue interpretations is difficulty identifying appropriate partners. States are not always aware of how their treaty practice aligns with that of other states, and may not know the issues of international investment law on which they agree or disagree. To overcome this constraint, participants at the workshop expressed considerable interest in collecting and comparing their own experiences and views on particular contentious issues in the investment regime, with the goal of identifying specific areas of mutual concern. A further question, raised by many at the conference, was whether major capital exporting states – notably the US and EU – had any interest in partnering with capital importing states on issuing interpretive statements. For instance, in the past both Ecuador and Argentina have attempted to secure joint statements with the US over investment treaty interpretation, and both were unsuccessful. Yet recent practice suggests that the US and EU on the one hand and capital importing states on the other may actually share an interest in delimiting the scope of contentious clauses. As the US and EU increasingly consider the risks of being a respondent in investment disputes – evident in the public debate over the Transatlantic Trade and Investment Partnership (TTIP), for example – they may welcome opportunities to issue statements interpreting past treaties.

Low perceived impact on tribunals. A common concern among participants was that interpretive statements would have little impact on tribunals, despite the Vienna Convention. Even if states issued clear interpretive statements, participants worried that in practice tribunal arbitrators would choose to ignore or otherwise discount them. Yet, even if certain arbitrators might ignore interpretive statements, others would likely give significant weight to such statements. Some arbitrators may welcome interpretive statements as providing helpful precision. The timing of statements is vital; if respondent states can demonstrate a history of statements and activity regarding a particular interpretation, arbitrators will be more likely to view their actions as a good faith interpretation rather than an opportunistic attempt to avoid liability in the context of a dispute.

Bureaucratic constraints. Another important obstacle voiced by government officials, which may surprise analysts working outside government, was that it is difficult to spur their bureaucracies into action to pursue interpretive statements. The bureaucratic agencies responsible for international investment have many different priorities competing for their time, resources and political capital, and participants said that drawing attention to the relatively arcane issue of investment treaty interpretation would be an uphill battle. Explaining the complexity and nuance to busy ministers and high-ranking officials would be a challenge, and it could be difficult to justify action, particularly as there would not necessarily be an immediate payoff from issuing an interpretive statement. Thus even in instances where technical experts agreed interpretive statements would be valuable in avoiding potential future risks, this would not necessarily be enough to catalyse action.

Transaction costs. A final potential constraint is that the process can entail high transaction costs – planning meetings, sending visiting delegations, etc. A few treaties, such as NAFTA, include institutionalized forums for state officials to regularly meet and discuss issues of mutual concern, but most bilateral investment treaties lack such mechanisms. This leaves treaty partners without a focal point for initiating discussions on an interpretive statement. If a state wanted to issue joint statements with all of its treaty partners, the transaction costs could be prohibitive for many governments. A plurilateral arrangement would conceivably offer substantially lower transaction costs than a series of bilateral agreements. Using existing organizations to host the plurilateral process would lower the transition costs further.

TABLE 2: THE PERCEIVED SEVERITY OF POTENTIAL CONSTRAINTS TO STATE INTERPRETATION OF INVESTMENT TREATIES

Potential Constraint	UNILATERAL STATEMENTS	JOINT STATEMENTS WITH TREATY PARTNERS	PLURILATERAL OPT-IN STATEMENTS
Lack of Knowledge on Legal Standing	Moderate	Moderate	High
Reputational Risk from a Negative Signal	Low	Very Low	Low (though potentially increasing with heterogeneity of membership)
Difficulty in Identifying and Cooperating with Partner States	NA	Moderate (Are capital exporters interested?)	Moderate (Which states have common views, and on what issues?)
Low Perceived Impact on Tribunals	High	Low	High (though perhaps lower with more signatories)
Bureaucratic Logistic Constraints	Moderate	High	High
Transaction Costs	Low	High (though lower if institutionalized forum exists)	High (In absence of institutional support)

Table 2 summarizes these findings. Are the constraints and obstacles raised by government officials severe enough to prevent states from issuing interpretive statements? We do not believe this need be the case. Participants generally agreed that interpretive statements could be helpful, and highlighted logistical and practical obstacles to moving forward rather than any fundamental opposition or strong political constraint. Thus the following section of this brief discusses practical steps to alleviate existing constraints and facilitate state interpretation of investment treaties.

PRAGMATIC STEPS FORWARD

Given that government officials expressed interest in moving forward with interpretive statements, these recommendations highlight pragmatic steps to facilitate their use:

- **Increase awareness of interpretive statements as a legal tool:** Many government officials appear unaware of the potential – clearly established by the Vienna Convention – to use interpretive statements to clarify existing treaties. Thus greater capacity building and information diffusion – led by academics, NGOs, international organizations such as the UN Conference on Trade and Development (UNCTAD), or states themselves – could help alert government officials to this mechanism for reforming the investment regime.
- **Encourage states to share experiences and identify common areas of interest:** If states are to issue common statements, then they must first identify where they agree – on which issues and with which other states. Government officials, academics and NGOs can work to compile evidence of which states have asserted similar legal arguments in arbitration hearings, identifying commonalities across states and groups of states which may form the basis for joint interpretive statements.
- **Identify possible institutional forums to support plurilateral interpretive statements:** Arguably the largest constraint identified by government officials is that at present there is no institutional forum to kickstart such a discussion. Currently states tend to discuss international investment law only in the context of charged treaty negotiations or hostile arbitrations. Forums which allow states to consult with each other about shared challenges in a less formal, less confrontational manner could pave the way toward plurilateral interpretive statements. States should consider if any existing institutional forums – perhaps regional institutions of like-minded states – may be willing and able to host such discussions.

CONCLUSION

Hundreds of outdated investment treaties with vague clauses remain in force, leaving tribunals with little guidance and leaving states at risk of expansive interpretations of treaty obligations. One way states can limit their exposure is by issuing interpretive statements. Based on discussions with numerous government officials, this brief has outlined the principal constraints to the use of interpretive statements and outlined paths to greater use of such statements.

In particular, there appears to be considerable potential for more plurilateral interpretive statements issued by groups of like-minded states. As many states have similar concerns regarding the investment regime, joining forces to issue plurilateral statements could be both more powerful and less costly than acting alone. This is a promising new area in international investment law. At a moment of considerable controversy in the investment regime, plurilateral interpretive statements may prove to be a useful – if modest – mechanism for states seeking to reform the regime.

FURTHER READING

Johnson, Lise, and Merim Razbaeva (2014) *State Control Over Interpretation of Investment Treaties. Columbia Center on Sustainable Investment*. http://ccsi.columbia.edu/files/2014/04/State_control_over_treaty_interpretation_FINAL-April-5_2014.pdf

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