



## **Columbia FDI Perspectives**

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### **Recalibrating interpretive authority**

by

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There have been many calls for a rebalancing of investor protection and state sovereignty in the investment treaty system. However, another equally important shift is underway: the recalibration of interpretive authority between treaty parties and arbitral tribunals. In newer-style investment treaties, states are increasingly protecting and enhancing their role in interpreting and applying their treaties.

Older-style investment treaties were typically highly protective of investors' rights, providing little express recognition of the need to safeguard host states' regulatory authority. These treaties shifted considerable interpretive power from treaty parties to investor-state tribunals because they empowered tribunals to interpret and apply broad and vague treaty terms. Arbitral tribunals gave content to these treaty provisions and referenced each other's awards as persuasive authority. As a result, much of the content of investment treaties was forged by tribunals, often in ways going beyond the intentions of the treaty parties.

Newer style investment treaties evidence two important shifts: (1) a substantive rebalancing of investor protection and state sovereignty; and (2) a procedural recalibration of interpretive power between investor-state tribunals and treaty parties. As much has been written about the first development, I focus here on the second, which is taking place in at least four ways.<sup>1</sup>

First, states are increasing the specificity of their treaty commitments by defining vague protections (e.g., indirect expropriation), specifying the relationship between treaty commitments and custom (e.g., fair and equitable treatment and the minimum standard of treatment) and including exceptions clauses.<sup>2</sup> The more "rule-like" a treaty prescription, the more treaty parties decide *ex ante* what categories of behavior are acceptable and unacceptable; the more "standard-like" the prescription, the more often this determination is left to be made *ex post* by investment tribunals. These newer-style treaties evidence a shift on the standards-to-rule spectrum, though many of the clarifications remain vague and open-ended compared to more rule-based regimes like international trade law.

Second, many states are including interpretive mechanisms that permit treaty parties to provide an interpretation of the treaty that is binding on investor-state tribunals.<sup>3</sup> The most famous example is NAFTA's Free Trade Commission, which the NAFTA parties used to clarify the content of NAFTA's fair and equitable treatment provision and its relationship with custom. Even without such a mechanism, the subsequent agreements and practices of treaty parties are relevant to interpretation, though it is unclear whether these are binding or merely persuasive.<sup>4</sup> Treaty parties are building on this general international law right by expressly providing for it in their treaties and declaring that these interpretations will be binding.<sup>5</sup>

Third, states are increasingly including provisions permitting non-disputing treaty parties to make submissions on interpretation in investor-state disputes.<sup>6</sup> Submitting pleadings is an important way to influence the interpretation of treaty provisions in a particular case. Pleadings by respondent states and non-disputing treaty parties are also evidence of state practice, so they may be relevant in influencing the interpretation of treaty provisions outside the confines of the particular case.

Finally, many states are giving host states individually or treaty parties collectively the power to determine certain sensitive issues. For instance, some states are specifying that exceptions clauses to protect their essential security interests are self-judging.<sup>7</sup> Other states are including provisions on taxation or financial services that provide for a joint determination by the competent financial authorities of the treaty parties that can either prevent arbitration or bind the arbitral tribunal.<sup>8</sup> In other treaties, the investor-state tribunal cannot decide certain defenses but must defer instead to an agreement by the treaty parties or, failing that, a ruling by a state-to-state tribunal.<sup>9</sup>

In 2011, the United Nations Conference on Trade and Development issued a paper arguing that “[a]s masters of their [treaties], States can be more proactive in asserting their interpretive authority to guide tribunals towards a proper and predictable reading of IIA provisions” by playing a more active role in drafting investment treaties, participating in investor-state disputes as non-disputing parties, and issuing interpretive declarations.<sup>10</sup> States are beginning to do just that and, in the process, they are recalibrating interpretive authority in the investment treaty field.

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<sup>1</sup> Anthea Roberts, “Clash of paradigms: Actors and analogies shaping the investment treaty system,” 107 AJIL 45, 78-83 (2013).

<sup>2</sup> E.g., US Model BIT, art. 5 and Annex B; Canada Model BIT, arts. 5, 10 and Annex B.13(1).

<sup>3</sup> E.g., US Model BIT, art. 30(3); Canada Model BIT, arts. 40(2), 41, 51(2)(b); ASEAN Comprehensive Investment Agreement (ACIA), art. 40(3); Canada-China FIPA, arts. 18(2), 30.

<sup>4</sup> 1969 Vienna Convention on the Law of Treaties, arts. 31(3)(a) and (b).

<sup>5</sup> See, generally, Anthea Roberts, “Power and persuasion in investment treaty interpretation: The dual role of states,” 104 AJIL 179 (2010).

<sup>6</sup> E.g., US Model BIT, arts. 28(2); Canada Model BIT, arts. 35(1); Canada-China FIPA, art. 27(2). The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration also require tribunals to permit pleadings by non-disputing parties on interpretation (art. 5(1)).

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<sup>7</sup> E.g., US Model BIT, art. 18; Canada Model BIT, art. 10(4); ACIA, art. 18.

<sup>8</sup> E.g., US Model BIT, arts. 20 and 21; Canada-China FIPA, art. 17.

<sup>9</sup> E.g., Canada-China FIPA, arts. 20(2), 33(3).

<sup>10</sup> UNCTAD, “Interpretation of IIAs: What states can do”, *IIA Issues Note*, No. 3 (2011).

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