With respect to *ex post* efforts, we may hear diverse views. While this approach may help to some extent, it may also further complicate the dispute settlement process if the state parties to a particular BIT are not able to agree on what the correct interpretation is. Furthermore, different views may arise on whether and to what extent arbitrators are bound by the *ex post* positions submitted by a non-disputing party while a specific dispute is pending. In reality, it is difficult to expect that a non-disputing state party will present a position adverse to the position put forward by its own investor. The tribunals will face another difficult task of interpreting such efforts under the applicable interpretative rules. A constructive discussion of these issues is imperative for the sound and progressive development of international investment law.

Do States Have a Duty to Cooperate in the Interpretation of Investment Treaties?

By Mark Clodfelter[*]

At the core of the current backlash against investor-state arbitration are the actual outcomes of investor-state proceedings which, in many instances, have been based upon unanticipated, and many would say overly broad, interpretations of investment treaties' substantive limits on state conduct and bases for arbitral jurisdiction.

These outcomes are, on issue after issue, frequently inconsistent with other decisions involving identical or similar treaty language. And by definition, this means that many of them are wrong; the same language cannot normally mean very different things.

The problem of incorrect interpretations goes to the very legitimacy of the system and has many causes, not the least of which is the absence of mechanisms for review and correction sufficient to instill accountability. But it also stems from the fact that tribunals have had to operate without much guidance from the state parties about what it was that they actually intended. Thus, the latitude enjoyed by arbitral tribunals is at the same time largely unchecked and less than fully informed concerning the parties' intent.

But the intention of the state parties is paramount in the process of treaty interpretation. As a result, there have been increased calls for states to more actively affect the interpretation of investment agreements by arbitral tribunals, including through increased resort to subsequent agreements by the state parties under Article 31(3)(a) of the Vienna Convention. That provision declares that ''any subsequent agreement between the parties regarding the interpretation of the treaty'' shall be ''taken into account.'' According to the 1966 ILC Commentary, this means that any such agreement shall be considered as ''an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation.''[1]

Past such agreements have included the NAFTA Free Trade Commission's interpretation of NAFTA Article 1105, the agreement of the Netherlands and the Czech Republic on ''common positions'' in *CME v. Czech Republic*, and the Argentine and Panamanian ''interpretative declaration'' that their treaty's MFN clause was not intended to extend to dispute resolution clauses.

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[1] *Report of the International Law Commission on the Work of Its Eighteenth Session*, at 221, para. 14, UN Doc. A/CN.4/L.116, *reprinted in* [1966] 2 Y.B. Int'l L. Comm'n 172, UN Doc. A/CN.4/SER.A/1966/Add.1. (emphasis added).

https://doi.org/10.5305/procannmeetasil.108.0188 Published online by Cambridge University Press

But one difficulty with subsequent agreements is that both parties to a BIT must actually be in agreement upon the interpretation.

One of the treaty parties may have a clear conception of a shared intent and may have good reason to achieve a subsequent agreement on the question. For example, it may have faced an unfounded request for arbitration claims premised upon what it considers an incorrect reading of a substantive standard of the treaty. In these circumstances, does the other party have a duty to cooperate in exploring the meaning of their treaty and indicating its concurrence or lack thereof?

Such cooperation is not always easy. The instigating state's interest is directly opposed to that of the other state's investor, and it is not always easy for a state to oppose the interests of its own nationals even if they lack merit. This was the situation faced by Argentina with regard to its essential security defense to numerous investor claims under the Argentine-U.S. BIT. One wonders how less burdened Argentine public finances might be today if the United States had joined Argentina, as the latter desired, in a subsequent agreement on what appears to be their shared view of the self-judging nature of the essential security clause.

This was also the situation faced by Ecuador after the partial award on liability in the Chevron Commercial Cases arbitration against it. That award found that Ecuador had committed, not a denial of justice in connection with decade-long delays experienced by a Chevron subsidiary in seven commercial lawsuits, but a breach of the ''effective means'' requirement of Article II(7) of the Ecuador-U.S. BIT. Ecuador considered that the Tribunal's interpretation of Article II(7) was erroneous and that that provision did not state any obligation beyond what was already required by customary international law principles. As a result, Ecuador could not know whether its judicial system, which was already undergoing major reforms, had to meet customary standards with respect to delays or the more exacting standards applied by the Chevron tribunal. Ecuador subsequently sought the United States' agreement with its view of Article II(7) and invited talks on the issue, indicating that, absent agreement, a dispute would exist. The United States determined not to respond to this request at all and so informed Ecuador.

In such circumstances, do the treaty parties have an obligation to cooperate in reaching a conclusion about whether they are in agreement on the interpretation of their treaty? There are a number of principles that may imply such an obligation.

First, there is the general duty of cooperation under international law. As Professor Patricia Wouters has stated, ''[f]rom a legal perspective, cooperation is the bedrock of international law.''[2] The 1970 UN Declaration of Principles of International Law states that ''States have the duty to co-operate with one another . . . to promote international economic stability and progress.''[3]

Second, there is the specific duty to consult regarding parties' respective rights under treaties, even in the absence of a treaty provision calling for such consultations. The ICJ held in *Fisheries Jurisdiction* (UK/Germany v. Iceland) that the obligation to consult and negotiate ''flows from the very nature of the respective rights of the Parties'' and that ''negotiations are required in order to define or delimit the extent of those rights.''[4] The *Lac*

[2] Patricia Wouters, '*Dynamic Cooperation' in International Law and the Shadow of State Sovereignty in the Context of Transboundary Waters*, 3 ENV. LIABILITY 88 (2013).

[3] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, Annex 25, UN GAOR, 25th Sess. Supp. No. 28, UN Doc. A/5217, at 121 (1970).

[4] Fisheries Jurisdiction (UK v. Ice.), Judgment, 1974 I.C.J. 3, paras. 74–75 (July 25).

Lanoux tribunal held that the party consulted has an obligation, ''in accordance with the rules of good faith, to take into consideration the different interests, to try to give them every satisfaction compatible with the pursuit of its own interests and to show that it has a real desire to reconcile the interests of the other [Party].''[5]

Third, perhaps the most obvious source for a duty to cooperate on interpretation is found in Vienna Convention Article 26's prescription that ''every treaty in force is binding upon the parties to it and must be performed by them in good faith.'' In the *Gabčíkovo-Nagymaros* case, the ICJ said that the principle of good faith ''obliges the Parties to apply [the treaty] in a reasonable way and in such a manner that its purpose can be realized.''[6]

It is clear that if one party is put into doubt concerning the nature of its obligations, the views of its treaty partner on their common intentions might need to be ascertained. Indeed, Sir Gerald Fitzmaurice stated that ''[a] treaty must be carried out in good faith, and so as to give it a reasonable and equitable effect according to the correct interpretation of its terms,''[7] thereby putting the correct interpretation of treaty terms at the very heart of the *pacta sunt servanda* principle.

Moreover, if an investor uses the treaty to obtain a benefit not provided by the treaty as properly interpreted, the home state of that investor may have thereupon obtained something it was not entitled to obtain for its investors. As Bin Cheng stated in his *General Principles*, ''the principle of good faith . . . prohibits a party from exacting from the other party advantages which go beyond their common and reasonable intention at the time of the conclusion of the treaty, as, for example, by invoking the treaty to cover cases which could not reasonably have been in the contemplation of the parties at the time of its conclusion.''[8] Could not this mean that the home state has a duty under Article 26 to prevent this from happening? In the *Sartori* case before the Peruvian-U.S. Claims Commission, the tribunal stated that good faith ''requires that neither government shall allow the citizens so to abuse the protection and guarantees conceded to them by the treaty as to consider them a species of immunity under which they may infringe the laws.''[9]

But what if the other party refuses to announce whether it agrees or disagrees with the requesting party? When it was faced with this stance, Ecuador invoked the state-to-state arbitration clause of the Ecuador-U.S. BIT. The United States objected that its silence could not give rise to a dispute and no subsequent agreement or substitute award on interpretation resulted in that case. But the question remains open. May a state truly be said to be performing in good faith if it stands on the sidelines and watches while its treaty partner faces possible losses based upon what that state silently agrees is a wrongful interpretation of their treaty?

It may well be that other state-to-state arbitration tribunals may conclude, in the words of the ICJ in *Georgia v. Russia*, that ''the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for.''[10] What circumstance would call for such a response? I suggest that it might just be the duty to perform in good faith.

[5] Lake Lanoux Arbitration (Fr. v. Spain), 12 R.I.A.A. 281, at 315 (1957) (free translation).

[6] Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. 7, para. 142 (Sept. 25).

[7] Fourth report by Sir Gerald Fitzmaurice, art. 4, para. 1, UN Doc. A/CN.4/120 (1959), *reprinted in* [1959] 2 Y.B. Int'l L. Comm'n 37, UN Doc. A/CN.4/SER.A/1959/Add.1.

[8] Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals 118 (2006).

[9] Peru v. U.S. Cl. Comm'n (1863): Sartori Case, 3 Int. Arb. 3120, 3122, *cited in* Cheng, *supra* note 8, at 119, n.64.

[10] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), 2011 I.C.J. 70, para. 30 (Apr. 1).