Cindy Joseline Oroza Amurrio

STATES' AUTHENTIC INTERPRETATION OF INTERNATIONAL INVESTMENT AGREEMENTS AS A MEANS FOR IMPROVING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM

Analyzing the implementation of institutionalized mechanisms for the interpretation of investment treaties by the states parties to the treaty to improve the investor-state dispute settlement system.

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Summary

States negotiated and ratified investment treaties for many years to promote their trade relations and their economic development (Chase, 2015). And for being more attractive, States provide incentives and legal instruments to foreign investors. Nevertheless, the foreign investors had no way to enforce those promises. In that sense, to enhance the foreign investors' confidence, States shaped their investment treaties to address possible controversies.

Thus, States created a direct channel for the dispute settlement, where the affected ones by a breach or violation of a treaty disposition were capable to submit a claim to a neutral tribunal. However, the increased cases caused several questions over the system's credibility and legal certainty. The interpretation and application of broader and vaguer treaty provisions generated concerns over the quality and predictability of awards pronounced by those tribunals, decreasing the legal certainty of foreign investors (United Nations Conference on Trade and Development, 2011).

In that sense, to address interpretative concerns, States highlighted their role as lawmakers by using distinct instruments for interpreting and applying their treaties

as subsequent agreements and practices (Johnson & Razbaeva, 2014; Roberts, 2010). And bearing in mind the nature of investment treaties, some international organizations suggested increasing the role of States in interpreting their treaties through joint interpretations (United Nations, 2020).

Joint interpretations can be submitted by several instruments, one of them is the institutionalized mechanism that has been quite successful in the investment field by enhancing and restituting the States' interpretative and applicative powers, generating greater control over their treaties (International Law Commission, 2018; United Nations, 2020; United Nations Conference on Trade and Development, 2011). This type of interpretation is an authentic one, which means that it comes from the lawmakers, being helpful for the explanation, elucidation, or understanding of one or more treaty meanings (Chang-fa, 2017).

Abbreviations

BITs	Bilateral Investment Treaties
CAFTA-DR	Central America-Dominican Republic Free Trade Agreement
CAPSA	Compañías Asociadas Petroleras S.A.
CETA	Canada-European Union Comprehensive Economic and Trade Agreement
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
ECT	Energy Charter Treaty
EEGSA	Empresa Eléctrica de Guatemala
EPA	Economic Partnership Agreement
FET	Fair and Equitable Treatment
FPS	Full Protection and Security
FTAs	Free Trade Agreements
FTC	Free Trade Commission
ICC	International Chamber of Commerce
ICS	Investment Court System
ICSID	International Centre for Settlement of Investment Disputes

ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
IIAs	International Investment Agreements
ILC	International Law Commission
IMF	International Monetary Fund
IPB	Investiční a Poštovní Banka A.S.
ISDS	Investor-State Dispute Settlement
LCIA	London Court of International Arbitration
MFN	Most Favored Nation
MIC	Multilateral Investment Court
NAFTA	North American Free Trade Agreement
OECD	Organization of Economic Cooperation and Development
SCC	Stockholm Chamber of Commerce
TPP	Trans-Pacific Partnership Agreement
TTIP	Transatlantic Trade and Investment Partnership
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
USMCA	United States-Mexico-Canada Agreement
US PPI	United States Producer Price Index
VCLT	Vienna Convention of the Law of the Treaties of 1969
WTO	World Trade Organization

Introduction

For a long time, whether at a bilateral or multilateral level, States have been negotiating, and ratifying International Investment Agreements (IIAs) to promote their trade relations and economic development (Chase, 2015). However, this interaction due to its nature led to several problems. States designed their investment treaties to also address controversies because it was clear that their interests could be affected by political, economic, social, or environmental issues, among others.

The establishment of a State-State arbitration procedure seemed to be the most viable option but, foreign investors that acted under the relevant treaty were unhappy because their claims could be ignored, and if not, end up in diplomatic incidents (Chase, 2015). And considering that arbitration was more welcoming than traditional court proceedings, States created a direct system of dispute settlement for foreign investors, the Investor-State Dispute Settlement (ISDS), where the affected ones by a breach or violation of a treaty disposition were capable to submit claims to a neutral tribunal. Nevertheless, the increase of ISDS cases caused several questions over the system's credibility, concerns that are alive today.

There are several reasons why confidence in the system is eroding. Nevertheless, the most recurrent and controversial issue is the lack of consistency and coherence in interpreting IIA provisions. The broader and vaguer sense of these dispositions generated concerns over the quality and predictability of awards pronounced by ISDS tribunals (United Nations Conference on Trade and Development, 2011). Reducing the legal certainty of foreign investors.

Even when these differences are justified –considering the ISDS fragmented nature– there are cases where the decisions of ISDS tribunals are ambiguous or completely different from one case to another without justification (Brown et al., 2020). In that sense, to address interpretative concerns, States highlighted their role as lawmakers by using distinct instruments for interpreting and applying their IIAs (Roberts, 2010). Through subsequent agreements and practice –authentic interpretation– States clarified the scope of the given rights and obligations and controlled its potential liability (Johnson & Razbaeva, 2014).

This quite unusual. In general, ISDS tribunals disregard the States interpretation. But there are several examples where States limit the ISDS tribunal interpretative discretion.

Having in mind the ISDS nature, as well as the advantages and disadvantages of the most traditionalist proposals –the creation of an ICS or MIC and the implementation of an appellate body–, the UNCITRAL through its Working Group III has been parsing other approaches to address the lack of consistency and coherence in the ISDS system (Johnson & Sachs, 2018). One of them suggested increasing the role of States in in-

terpreting their IIAs through joint interpretations (United Nations, 2020).

As previously mentioned, the interpretation, especially the authentic one, is an efficient tool for the explanation, elucidation, or understanding of one or more meanings of a treaty, mostly where there are vaguer and broader provisions (Chang-fa, 2017). Of course, States parties to the treaty can take greater control over the interpretation and application of their treaties through subsequent agreements and practices, and under those, interpretative statements can be submitted by several instruments (International Law Commission, 2018; United Nations, 2020; United Nations Conference on Trade and Development, 2011). One of them is the institutionalized mechanism that is not very used in the ISDS, but booster the States' interpretative and applicative powers, enhancing the legal certainty and avoiding unjustifiable inconsistencies in pronounced awards by ISDS tribunals.Owing to this, in the present research we are going to focus on the ISDS and its reform efforts, the interpretative problems found in awards pronounced by ISDS tribunals and other main considerations of treaty interpretation, and the implementation of institutionalized mechanisms under IIAs to improve the ISDS system.

Chapter I: The investor-state dispute settlement system, and its reform efforts

Investment is an atypical sub-field of international law, and due to its decentralized nature, the ISDS is facing several approaches to reform its system. Therefore, in this chapter, the purpose will be to study the ISDS system and its reform efforts that have been debated among State members of UNCITRAL and other non-State actors.

1.1 The Investor-State Dispute Settlement system

Oriented to place capital and risk in far-off territories under a different regulation, IIAs are channels for States' economic prosperity.

For this reason, in the 1980s debt crisis, States tried to obtain and provide IIAs with better incentives and legal instruments, and as there was a strong competition, foreign investors began to require safeguards to enforce the States offer, the reason why, States developed the ISDS system (Tienhaara, 2017). Despite that the ISDS was launched in the fifties by the Organization of Economic Cooperation and Development (OECD) as a sys-

tem that protects alien's property, it was not until that moment that it becomes relevant (Tienhaara, 2017).

The ISDS was born as an Investor-State arbitration initiated under an IIA breach or violation (Mukiibi & Ngobi, 2016; Parra, 2020). That means that it is a legal instrument of international law traditionally established in IIAs to grant foreign investors security, protection, and the right of directly litigate with States in the event of an alleged breach or violation of the relevant treaty. For example, the most controversial issues reviewed by ISDS tribunals are in respect of breaches or violations of IIA rules, obligations or standards as fair and equitable treatment (FET), full protection and security (FPS), direct and indirect expropriation, most favored nation (MFN), and umbrella clauses (Brown et al., 2020; Mukiibi & Ngobi, 2016; Sabahi et al., 2019; Tienhaara, 2017).

These dispositions have been treated numerous times due to the dramatic increase of ISDS cases. Most of them, initiated by foreign investors against developing countries,[1] and commonly, these controversies occur due to mining, oil, and gas activities that are performed under the relevant IIA (Transnational Institute, 2019). Moreover, from 1996 to 2019, the claimed amounts ascended to USD. 223.613 million, while the awarded amount arrived at USD. 31.170 million (Transnational Institute, 2019). These astronomic quantities troubled

1 Of the 938 ISDS cases registered until 2019, 282 of them were initiated by foreign investors against developing countries. Just Argentina, Bolivia, Peru, Ecuador, Venezuela, and Mexico represent 73% of the submitted claims against Latin-American countries (Transnational Institute, 2019).

States because they never expected that claimed amounts would be this high.

Some institutions widely renamed in the dispute settlement are the International Centre for Settlement of Investment Disputes (ICSID)[2] and the United Nations Commission on International Trade Law (UNCITRAL),[3] which provide rules for ISDS cases, guiding the disputing parties. Some academics stated that these types of procedures were developed to replace domestic courts because they are not fully capable of directly invoking international law provisions (Mukiibi & Ngobi, 2016).

Procedurally, ISDS tribunals are normally composed of three members, the foreign investor chooses one, the government of the State another, while the third one –

2 The ICSID was established in 1966 through a treaty formulated by the Executive Directors of the World Bank, known as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), and established as an institution devoted to the administration of dispute settlement among States and national of another States, it was expected to serve as a vehicle to promote international investment (International Centre for Settlement of Investment Disputes, n.d.). Nowadays, the ICSID is the most used institution, attending the majority of ISDS cases.

3 The UNCITRAL is a legal body of the United Nations (UN) specialized in international trade law (United Nations Commission on International Trade Law, n.d.). Established by the General Assembly in 1966 through Resolution 2205 (XXI), the UNCITRAL has as mission the reform of commercial law by the modernization and harmonization of international rules, to ensure UN participation in reducing and removing trade obstacles (United Nations Commission on International Trade Law, n.d.).

the president– is selected on mutually agreement. Having the authority to resolve a specific controversy that rises between a State and a national of another State –both parties to the relevant IIA–, ISDS tribunals will find if there was or not a breach or a violation of the IIA disposition, this, to provide compensation to the affected party (Tienhaara, 2017). Regarding the nature of the ISDS system, ISDS tribunals are not capable of invoking the applicable rules to bring the measure into conformity, as another arbitration mechanism such as the World Trade Organization (WTO) does (Mukiibi & Ngobi, 2016). It is worth mentioning that only foreign investors can initiate ISDS proceedings because IIAs provide security and protection in the host State to only alien's property and investments (Mukiibi & Ngobi, 2016). Therefore, as local investors do not require an international law instrument to ensure their investments in their State, they must go to its domestic courts (Chase, 2015).

Nevertheless, the scope of these treaties in actuality is a nuisance for States since ISDS tribunals intruded into the domain of public policy by trying to regulate in a certain way the health and environmental protection. As a result, concerns have arisen among developed and developing countries in respect of ISDS proceedings and States' sovereignty, causing abandonment of the system and withdrawal from it by some countries.

1.2 The reform of the Investor-State Dispute Settlement system

The ISDS reform idea has been going on for several years. The increasing discontent and criticism of developed and developing countries, international organiza-

tions, and also civil society groups resulted in the restricted use of ISDS provisions in Bilateral Investment Treaties (BITs) or Free Trade Agreements (FTAs)[4] (Kaufmann-Kohler & Potesta, 2019; Parra, 2020; Sabahi et al., 2019). Moreover, some States have adopted a more rigorous position by terminating their IIAs with ISDS provisions and withdrawing from the ICSID Convention [5] (Sabahi et al., 2019).

As a result, in 2017, the UNCITRAL entrusted its Working Group III, a three-phase mandate regarding the ISDS reform (Kaufmann-Kohler & Potesta, 2019; Parra, 2020). Its mission was to identify the concerns regarding ISDS, the desire for ISDS reform, and the possible solutions to be recommended to UNCITRAL if the second task was affirmative (Kaufmann-Kohler & Potesta, 2019). Therefore, Working Group III identified the following concerns in respect of the ISDS system (Kaufmann-Kohler & Potesta, 2019; Parra, 2020; Sabahi et al., 2019):

- Legitimacy and transparency of the ISDS system.

4 The United States-Mexico-Canada Agreement (USMCA) is an early example. The North American Free Trade Agreement (NAFTA) update brought us several changes, one of them was the withdrawal of Canada to ISDS due to the various lawsuits present by foreign investors against it. For instance, under the USMCA, only United States investors in Mexico and Mexico investors in the United States can initiate ISDS proceedings (Parra, 2020).

5 Some countries that have withdrawn from the ICSID Convention are Bolivia, Ecuador, and Venezuela (Transnational Institute, 2019). It is worth mentioning that some countries that are extremely distant from ICSID are Canada, Cuba, Mexico, and the Dominican Republic, while Brazil did not even sign it (Boeglin, 2013).

- Excessive duration and costs of proceedings.
- Lack of consistency and coherence in the interpretation of IIA similarly-worded provisions.
- The incorrectness of decisions of ISDS tribunals.
- Lack of independence and impartiality of arbitrators.
- Third-party funding.
- Treaty shopping.

Parsing the results, Working Group III concluded that the ISDS necessitated a reform (Sabahi et al., 2019). So, expecting that States obtain more control in their IIAs interpretation and application, especially when disputes arise under those treaties, the United Nations Conference on Trade and Development (UNCTAD) categorized the ISDS reform in three main groups (Lee, 2020; Parra, 2020; Sherard Chow et al., 2020):

- Fixing the current ISDS with the improvement of arbitral proceedings.
- Adding new elements to ISDS, such as the exhaustion of local remedies, the introduction of mediation and conciliation, the establishment of an appellate body, or even the limitation of foreign investors access to those systems.
- Replacing the ISDS with the creation of an investment court.

However, despite the multiple concerns about the ISDS system, the lack of consistency and coherence acquired such importance that academics stated that any reform should be around it, because ISDS tribunals have interpreted IIA provisions in a broader and vaguer sen-

se, and due to statements that pointed that foreign investors curtailed the sovereignty of States through ISDS, including their right to regulate in favor of the public interest (Mukiibi & Ngobi, 2016; Tienhaara, 2017). That means that arbitrators were creating rules and acting as regulators, generating uncertainty over the ISDS utility and efficiency (Tienhaara, 2017). In that sense, due to the lack of consistency, uniformity, coherence, predictability, and correctness of ISDS awards, the Working Group III heard proposals to strengthen the involvement of States in the interpretation and application of their IIAs, raising as possible solutions the followings ideas (Parra, 2020; United Nations, 2020):

- IIA provisions for interpretative declarations of their States parties, whether unilateral or jointly.
- Mechanisms for authoritative interpretations, such as an interpretative commission or committee[6] settled under the relevant IIA.
- Binding treaty interpretation.
- Guidelines of terms, principles, and applicable norms for ISDS tribunals.
- An investment court with full-time adjudicators.
- An appellate body.

6 These commissions or committees are composed by a representative of each IIA party to supervise the treaty application and the emission of interpretative declarations, despite the current ad-hoc mechanism that is applied if there is no mutual consensus in the proceedings to interpret an IIA disposition (United Nations, 2020).

Those options have been admitted with caution. Nevertheless, in 2011, the European Union suspended the Transatlantic Trade and Investment Partnership (TTIP) negotiations,[7] due to the rejection by the European Parliament of the ISDS system for being outdated.[8] And after launching a consultation relative to the inclusion or not of an ISDS disposition in the TTIP, the European Parliament adopted a resolution where the ISDS reform was imminent because the system has minimized the States right to regulate (Chase, 2015). Since then, the European Union has been pressing for the creation of a single and permanent Investment Court System (ICS) or Multilateral Investment Court (MIC) jointly to an appellate body to replace the traditional ISDS (Bernardini, 2017; Chase, 2015; Parra, 2020). Of course, this proposal is not something new because it was previously applied by the European Commission in the Canada-European Union Comprehensive Economic and Trade Agreement (CETA), EU-Singapore Free Trade Agreement, and the

7 In the TTIP negotiations, the European Commission defined its position over the ISDS system and planned to present the MIC to the United States as an ISDS alternative (Bernardini, 2017). The proposal pretended a migration from the ad-hoc instances to a permanent one, adding also the establishment of an appellate body (Bernardini, 2017). Nevertheless, negotiations stalled.

8 The European Parliament's recommendation emanates from the Lange Report published in 2015, which contained several proposals for improving the ISDS system (Bernardini, 2017).

EU-Vietnam Free Trade Agreement[9] (Bernardini, 2017; Titi, 2018).

However, even if those options may create greater consistency and coherence in any legal system, the establishment of an investment court and/or an appellate body would be extremely complex and bureaucratic. Some concerns of these trends are related to its inclusion into IIAs, whether through a bilateral or multilateral level, because States shall amend their numerous treaties, probably losing control over the meaning of their IIAs (Brown et al., 2020; Parra, 2020). Moreover, it is unknowable the effect that ISDS awards would have or the type of domestic and international law that would create (Johnson & Sachs, 2018). Thus, promoting those alternatives may be risky because decisions would set precedents, and if there is a wrong one, the interests of the States parties to the treaty and the legitimate expectations of the foreign investors will get hurt (Johnson & Sachs, 2018).

For this reason, academics studied other alternatives that seem to be more viable to address the lack of consistency and coherence, like the role increase of States to control de interpretation and application of its IIA through joint interpretation (Brown et al., 2020; Johnson & Sachs, 2018). This alternative is thought to coexist with ISDS tribunals and to guarantee that IIA dispositions would be interpreted according to the intention of

9 In those treaties, the ICS or MIC is composed of almost fifteen independent and competent members capable of adjudicating claims between the States parties to the treaty (Bernardini, 2017). Another characteristic of these courts is that they have an appellate instance (Bernardini, 2017).

the States parties to the treaty. However, it would be important to bear in mind the interpretation timing, that means, if the interpretations take place before, during, or after a controversy because depending on, the interpretation will have different recourses, as well as the retroactive and binding effect of the interpretation (Titi, 2020).

1.2.1 Inconsistency and incoherence of Investor-State Dispute Settlement awards.

Under the three-phase mandate, Working Group III stated that the ISDS system has serious problems. One of those concerns, and maybe the most important among the member States of UNCITRAL is the lack of consistency and coherence in ISDS awards, and more specifically, in the interpretation of legal issues about similarly-worded provisions[10] (Brown et al., 2020).

The inconsistent and incoherent outcomes of ISDS tribunals generated rigid critics about the system stability and continuity. Nevertheless, in its mission, Working Group III seeing that IIAs have a similar conception, identified two kinds of inconsistencies in ISDS awards, the justifiable and unjustifiable inconsistencies (Brown et al., 2020). The justifiable inconsistencies are those where the interpretation of an ISDS tribunal is similar but materially different, while unjustifiable inconsistencies are those where the same rule or standard, whether from an IIA or customary international law, are interpreted differently without justification (Brown et al., 2020).

10 Some of the member States allowed that, was essential to address the lack of consistency and coherence of awards pronounced by ISDS tribunals because they were related to the legitimacy of the whole system (Roberts & Bouraoui, 2018).

Besides the classification of inconsistencies, the unjustifiable ones are the most problematic because they are related to basic and substantive obligations or standards, or structural aspects that are known as the rules of the game (Brown et al., 2020). In consequence, they are required to be carried through treaty drafting, amendment, or joint interpretation, the reason why, ISDS tribunals must be careful at its interpretation (Brown et al., 2020).

Additionally, under unjustifiable inconsistencies, distinguishing rules and obligations or standards will be essential because IIAs are composed by legal directives of a distinct level of specificity.[11] For example, rules are more precise, while obligations or standards are vaguer (Brown et al., 2020).

Usually, interpretative inconsistencies and incoherencies in the ISDS awards are found in claims that treat FPS, FET, and MFN dispositions. And due to its nature of primary obligation, these kinds of dispositions are drafted in broader and vaguer terms (Brown et al., 2020). Existing in consequence, different meanings that in most cases are ambiguous. Some examples are described below.

Firstly, claims which involve FPS dispositions leave to the ISDS tribunals, the faculty to decide over the type of protection and security that a State shall provide to a foreign investor, having to set the boundaries of its scope. Typically, these dispositions apply on behalf of the foreign investor in insurrection periods, civil unrest, and

11 Under the ISDS system is pretty normal that IIA dispositions be addressed explicitly or implicitly. For example, the clause providing ISDS is one of those dispositions that are always explicitly, while matter as damage rules for treaty breach are just implicitly (Brown et al., 2020).

other public disturbances (Brown et al., 2020; Mukiibi & Ngobi, 2016). Consequently, any damage or loss suffered due to the violence is supposed to be repaired by the host State. The FPS is a good faith standard (Mukiibi & Ngobi, 2016). However, ISDS tribunals have emitted different and contradictory interpretations about the FET, as in the cases of *BG Group plc v. the Argentine Republic*, and the *National Grid plc v. the Argentine Republic.*

On the one hand, the *BG Group*, a foreign shareholder of a State-owned oil company, alleged the breach of several treaty dispositions, among them, the FPS standard, due to the measures adopted by the government of Argentina to avoid the economic, social, and political crisis[12] (*BG Group plc v. the Argentine Republic*, 2007). In that time, some tribunals had interpreted the FPS as a standard of legal framework stability, where State shall provide protection and security, as well as fair and equitable treatment, but the tribunal in this case observing that this standard was related to physical security, found it inappropriate to depart from this traditional conception. As a result, the tribunal decided to deny the investor claim because there was not physical violence or damage by the restrictive measures (*BG Group plc v. the Ar-*

12 Due to the economic crisis suffered in the nineties, the government of Argentina adopted several measures to address the macroeconomic pressures that were leading to a profound crisis. In the following years, Argentina was worst, and decided to suspend the application of United States Producer Price Index (US PPI) for six months, as the creation of "The Corralito" which frozen all bank accounts for ninety days, and the promulgation of emergency laws that allowed States to renegotiates its contracts with public services providers (*BG Group plc v. the Argentine Republic*, 2007).

gentine Republic, 2007). Concluding that under the relevant treaty, Argentina did not breach the FPS standard.

On the other hand, the *National Grid* and others established a consortium to invest in a State-owned energy company, and once established, the profound crisis of Argentina guided its government to promulgate several electricity regulations that suspended and modified concessions and licenses (*National Grid plc v. the Argentine Republic*, 2008). The government of Argentina was accused of expropriation due to the violation of the scope of protection and security granted under the United Kingdom-Argentina BIT. Moreover, according to this tribunal, the FPS was a complement of the FET disposition, implying that these provisions require due diligence or reasonable care to provide the adequate protection and security (*National Grid plc v. the Argentine Republic*, 2008). Nevertheless, as the treaty terms were not specific over the physical limitation, the tribunal concluded that Argentina failed at applying the rules to govern and protect foreign investment, breaching a United Kingdom-Argentina BIT obligation.

In other words, both cases were presented under the same FET disposition of the United Kingdom-Argentina BIT, but each tribunal pronounced materially different and opposed interpretations despite being similar. The tribunal interpretation of the FET was restrictive in the *BG Group plc v. the Argentine Republic*, while in the *National Grid plc v. the Argentine Republic* was expansive.

Secondly, FET dispositions divided ISDS tribunals due to the numerous doubts about the standard requirement. Academics argue that this disposition, as its name said, grant fair and equitable treatment to foreign investors, but some believe that FET must be applied as part

of the customary international law, while others sustain that it is not necessary because its application occurs case by case (Mukiibi & Ngobi, 2016). In other words, interpretative inconsistencies have been raised in the application of FET. Some well-known cases in this field are *Técnicas Medioambientales Tecmed S.A. v. the United Mexican States*, *Saluka Investments B.V. v. the Czech Republic*, *and El Paso Energy International Company v. the Argentine Republic.*

In the first case, *Tecmed S.A.*, a Spanish company brought a claim against Mexico due to the expropriation of its landfill acquired in 1996, additionally, there were alleged FET and FPS violations of the Spain-Mexico BIT that occurred by the non-renewal of the landfill operational licenses that Tecmed required (*Técnicas Medioambientales Tecmed S.A. v. the United Mexican States*, 2003). The rejection by Mexican authorities caused considerable pecuniary losses to the company. And examining the facts, the tribunal concluded that Mexico expropriated the landfill and violated the FET disposition of the relevant treaty (*Técnicas Medioambientales Tecmed S.A. v. the United Mexican States*, 2003). The tribunal highlighted that in its interpretation, the standard was under customary international law, to say, the host State is supposed to act consistently and transparently, having to exercise this conduct in its contractual relationships, guidelines, directives, resolutions, and other types of regulations (*Técnicas Medioambientales Tecmed S.A. v. the United Mexican States*, 2003). In the second and third cases, the tribunals applied the same logic as in the *Tecmed S.A.* case but, noted the importance of setting reasonable and proportional obligations, and the State right to regulate.

In the second case, *Saluka Investments B.V. v. the Czech Republic*, the State implemented innumerable steps to transform its economy, among them, the privatization of its third-largest bank (*Saluka Investments B.V. v. the Czech Republic*, 2006). Being an attractive investment, the Nomura Group acquired shares from the Investiční a Poštovní Banka A.S. (IPB), which in turn transferred to *Saluka Investments (Saluka Investments B.V. v. the Czech Republic, 2006)*. However, as the privatization increased, the State supervision too. These strict regulations and requirements affected the IPB functioning, and caused the State to intervene in its administration. So, the State took the Nomura Group shares and blocked the available ones in the *Saluka Investments*, causing them to lose the bank's control (*Saluka Investments B.V. v. the Czech Republic*, 2006). According to the foreign investor, there was no fair and equitable treatment. As a result, *Saluka Investments* sued the State for inconsistent actions that breached its obligations under The Netherlands-Czech Republic BIT (*Saluka Investments B.V. v. the Czech Republic*, 2006). The tribunal's FET interpretation concluded that according to the object and purpose set in the relevant treaty, the Czech Republic had an obligation to protect foreign investor interests by applying rational, consistent, and transparent policies without undermining its right to regulate (*Saluka Investments B.V. v. the Czech Republic*, 2006). As mentioned, this final appreciation achieved a substantial modification in the FET scope.

In the third case, *El Paso Energy International Company v. the Argentine Republic*, the State was sued for a treaty breach. The company owned indirect and non-controlling shares in various Argentinian companies such as the Compañías Asociadas Petroleras S.A. (CAPSA) and CAPEX S.A., destined for oil and electric power produc-

tion (*El Paso Energy International Company v. the Argentine Republic*, 2011). Nevertheless, the State by different measures affected the current functioning and independence of the latest companies. Consequently, *El Paso* alleged several violations under the Argentina-United States of America BIT, such as expropriation, discriminatory treatment, FET, and FPS (*El Paso Energy International Company v. the Argentine Republic*, 2011). These allegations were denied by the State, which mentioned that these measures were taken on behalf of the public order and protection of their essential interests (*El Paso Energy International Company v. the Argentine Republic*, 2011). Based on the FET disposition, the tribunal established that the mutually agreed treatment depended on the treaty content, scope, and international law (*El Paso Energy International Company v. the Argentine Republic*, 2011). In that sense, the tribunal set that under the FET, foreign investors can expect legal security because rules would not be changed without justification but, it was important to bear in mind that a State is not capable of committing this kind of promises, this means, to maintain the same regulation forever (*El Paso Energy International Company v. the Argentine Republic*, 2011). Therefore, according to the tribunal, this standard implies reasonableness and proportionality.

To sum up, in the latest two cases, tribunals stated that the FET interpretation in the *Tecmed S.A.* was extremely rigorous because, it imposes on the host State inappropriate and unrealistic obligations, trimming its right to regulate in the public interest.

And finally, MFN dispositions have modified the conditions of access to ISDS by expanding the ISDS tribunals jurisdiction. The interpretation inconsistencies of

this provision allowed to invoke other IIA for more favorable arrangements, and to restricted this approach for being a treaty shopping practice (Mukiibi & Ngobi, 2016). For example, MFN inconsistencies can be found in the *Emilio Agustín Maffezini v. The Kingdom of Spain*, *Plama Consortium Limited v. Republic of Bulgaria*, *TECO Guatemala Holdings LLC v. Republic of Guatemala*, and the *Iberdrola Energía S.A. v. Republic of Guatemala.*

An Argentinian investor, *Emilio Agustín Maffezini* invested in a Spanish company that produced and distributed chemical products in the Spanish region of Galicia (*Emilio Agustín Maffezini v. the Kingdom of Spain*, 2000). Despite the significant investment, the project stopped because a State public entity advised wrongly *Maffezini* over the costs, being higher than the original amount estimated, moreover, this public entity completed an irregular banking transfer from the personal account of *Maffezini* (*Emilio Agustín Maffezini v. the Kingdom of Spain*, 2000). As a result, the foreign investor brought a claim against Spain. Nevertheless, the State noted that under the Argentina-Spain BIT the request for arbitration was not possible because the exhaustion of local remedies was mandatory before any international arbitration (*Emilio Agustín Maffezini v. the Kingdom of Spain*, 2000). Relying on the MFN disposition set in the Argentina-Spain BIT, *Maffezini* stated that the matters of the dispute settlement were extended, allowing him to use a more favorable arrangement as the contained one in the Spain-Chile BIT (*Emilio Agustín Maffezini v. the Kingdom of Spain*, 2000). The tribunal concluded that the latest treaty excluded the exhaustion of local remedies, and based on its interpretation, added that the MFN scope under the Argentina-Spain BIT referred to substantive and procedural issues, the reason why the request of ar-

bitration was permitted (*Emilio Agustín Maffezini v. the Kingdom of Spain*, 2000).

A Cyprus firm, *Plama Consortium Limited*, acquired Nova Plama AD, an oil refinery company privatized in 1996, and commencing its operations, the company faced the re-opened insolvency proceedings that were initiated before its acquisition (*Plama Consortium Limited v. the Republic of Bulgaria*, 2008). Once liquidated, Plama Consortium Limited sustained that legislative and judicial authorities created numerous problems to the Nova Plama AD, and due to these acts and omissions, the acquired company suffered material damages in its refinery operations, having a direct and negative impact on the reputation and market value of *Plama Consortium Limited (Plama Consortium Limited v. the Republic of Bulgaria*, 2008). Alleging breaches related to creating a stable, transparent, and favorable investment environment under the Energy Charter Treaty (ECT), the company invoking the MFN set in the Cyprus-Bulgaria BIT, imported the ISDS clause of the Bulgaria-Finland BIT to initiate ICSID arbitration against Bulgaria (*Plama Consortium Limited v. the Republic of Bulgaria*, 2008). The State argued violations of its law because *Plama Consortium Limited induced* Bulgarian authorities to transfer shares of a non-profitable company, and therefore, the Nova Plama AD acquisition was fraudulent (*Plama Consortium Limited v. the Republic of Bulgaria*, 2008). The tribunal denied the company's claim, adding that the importation of one or more provisions from one treaty to another is a chaotic practice, the reason why the MFN disposition of the Cyprus-Bulgaria BIT cannot be interpreted as permission to submit disputes under different Bulgarian treaties.

Moreover, in the cases of *TECO* and *Iberdrola* inconsistencies were evident despite similar facts. In 1998, due to the conditions and fiscal incentives, a consortium of foreign investors, *among them the mentioned companies*, acquired shares from a State-owned electricity distribution company of Guatemala, named Empresa Eléctrica de Guatemala (EEGSA) (*Iberdrola Energía S.A. v. Republic of Guatemala*, 2012; *TECO Guatemala Holdings LLC v. the Republic of Guatemala*, 2013). Its privatization increased the energy prices that the government of Guatemala gave subsidies to low-income consumers, and as a consequence, incremented the tariff schedule for the energy field (*Iberdrola Energía S.A. v. Republic of Guatemala*, 2012; *TECO Guatemala Holdings LLC v. the Republic of Guatemala*, 2013). Seeing that these administrative actions were backed by the Constitutional Court of Guatemala, *TECO* and *Iberdrola* initiated ISDS proceedings based on expropriation, FET, and FPS dispositions. However, each foreign investor presented its claim under a different treaty. *Iberdrola* used the Spain-Guatemala BIT, while *TECO* used the Central America-Dominican Republic Free Trade Agreement (CAFTA-DR). Despite the same background, tribunals concluded very differently concerning the State liability. In the case of Iberdrola, Guatemala acted invoking their constitutional, legal, and regulatory powers, and due to them, the tribunal alleged that they did not have the competence to judge the case (*Iberdrola Energía S.A. v. Republic of Guatemala.*, 2012). Contrarily, in the case of TECO, the tribunal was more receptive and stated that Guatemala failed at providing reasons for the tariff increase when it had a duty to provide additional justifications. For this reason, Guatemala violated its obligations under the CAFTA-DR (*TECO Guatemala Holdings LLC v. the Republic of Guatemala*, 2013).

In all the cases, there were actions that limited tribunals decisions, each of them with a valid point. However, this diversity guided States to set expressly that the MFN disposition does not apply to procedural matters, like the referred to initiate ISDS proceedings. Meaning that these facts served to establish boundaries to the MFN interpretation and application.

Even if all of those interpretative concerns are endemic to legal systems,[13] some academics attributed it to the fragmented[14] nature of the ISDS. Firstly, because its tribunals are ad-hoc, meaning that they are established exclusively for a particular controversy, and secondly because ISDS tribunals are not bound to follow other tribunals awards or decisions (Brown et al., 2020; Chase, 2015). Therefore, its interpretation of a single or plural IIA provision will differ from one ISDS tribunal to another. In other words, ISDS tribunals interpret a treaty provision based on their knowledge, displacing the intention of the States parties to the treaty (Brown

13 Any legal system is not completely perfect because the law itself needs to be interpreted by human beings. Therefore, the desire for consistency or coherence is a matter of moral duty (Brown et al., 2020).

14 In the ISDS, some alternatives to filter, facilitate, or even avoid arbitration proceedings are consultations, negotiations, mediations, as well as the establishment of State-State instance for treaty interpretation (Titi, 2018). These are contemplated in traditional IIAs, demonstrating that the ISDS is composed of different mechanisms for dispute settlement. And it is clear evidence of the system fragmentation.

et al., 2020). Consequently, similar claims obtain different decisions, even if it is a similarly-worded provision.[15]

To end, the lack of consistency and coherence not only affects foreign investors and States parties to the treaty but, also to arbitral proceedings by the duration and costs increase (Brown et al., 2020). Nevertheless, in the end, States parties to the treaty can clarify any disposition of the relevant IIA. For instance, a profound reform of the ISDS system is not completely necessary but, that does not mean that inconsistency and incoherence should not be treated, on the contrary, they shall be addressed even if not eradicated (Chase, 2015).

15 The Russian Federation sustained that problems arise from different sets of standards in investment treaties or the negotiation process (Roberts & Bouraoui, 2018). However, the European Union mentioned that differences should not be exaggerated because many countries have negotiated over the same investment treaty model, so there would be a high percentage of similarity (Roberts & Bouraoui, 2018).

Chapter II: International investment agreements interpretation inside the investor-state dispute settlement system

The treaty interpretation is complex because when trying to determine the meaning of a provision to prevent these from being vague, broad, obscure, or ambiguous, apply different rules and means of interpretation. Therefore, this chapter will address the details of the treaty interpretation and how these are used in the ISDS.

2.1 Treaty interpretation

Law has to be understandable because it regulates certain conduct. Besides, they have to have a prospective sense to control futures actions, not retrospect. That means that legal documents need to have congruence between their formulation and application because the lack of both will cause less predictability and clarity (Kaufmann-Kohler & Potesta, 2019).

The latest scenario leads to interpretation, a hermeneutical tool for the explanation, elucidation, or unders-

tanding of one or more meanings (Chang-fa, 2017; Sherard Chow et al., 2020; United Nations Conference on Trade and Development, 2011).

When interpreting, lawmakers have to bear in mind the possible conduct of States and non-States actors because interpretation is evolutive in time and can affect legal rules and standards (Corten, 2009; McRae, 2017). The reason why legal documents as treaties, constitutions, legislation, and contracts have been written in a broader and vaguer sense. In theory, this should not occur, but in practice, those legal documents have hidden meanings (Chang-fa, 2017).

In that sense, legal interpretation will clarify the vagueness of a provision and will help to determine the rights and obligations, in this case, of the parties under a relevant IIA (Chang-fa, 2017; Roberts, 2010). According to articles 31 and 32 of the Vienna Convention of the Law of the Treaties of 1969 (VCLT), instruments for treaty interpretation –subsequent agreements and practices– are ideal means to reflect the States' intention (Johnson & Razbaeva, 2014). That means that States parties to the treaty will guide tribunals in their IIAs interpretation (Corten, 2009).

Nevertheless, it is important to bear in mind that under international law, treaty interpretation must deal with an objectivist and voluntarist approach (Corten, 2009). On the one hand, the first one focuses on objective elements as the treaty context without taking care of subjectivism as the treaty parties' intention (Corten, 2009). On the other hand, sustained by article 31.4 of the VCLT, the second approach is founded in the *volonté des États* –in the States' will– the reason why, the his-

torical background will be indispensable for discovering the States' intention (Corten, 2009).

2.1.1 General rules of interpretation: The Vienna Convention of the Law of Treaties of 1969

The International Law Commission (ILC) stated that treaty interpretation, in general, is governed by the general rules of interpretation codified in the VCLT. Establishing that subsequent agreements and practices shall be taken into account by tribunals to interpret one or more treaty provisions, the VCLT allowed States parties to the treaty, the elucidation of its recorded intention, whether in a BIT or FTA (Titi, 2018; United Nations, 2020). For this reason, articles 31 and 32 of the VCLT will be main focus.

On the one hand, article 31 on its paragraphs 1 and 2, mention that treaty interpretation has to be done in *bona fide* and according to the ordinary meaning of the treaty terms, paying attention to its context, object, and purpose, which ones, are detailed in the treaty preamble and annexes (Gardiner, 2015; United Nations, 1969). The same article in its paragraph 3 section (a) refers that ulterior agreement may be used for interpretation by States parties to the treaty after its celebration, while in its section (b) mention that ulterior practice shall take into account the current terms and context of the treaty (Lee, 2020; United Nations, 1969). On the other hand, article 32 allows supplementary means of interpretation that has to be applied to confirm the meaning resulting from the application of article 31 or to determine the meaning when the interpretation is ambiguous and obscure

or lead to a result that is absurd or unreasonable[16] (Dörr & Schmalenbach, 2012; United Nations, 1969).

In that sense, subsequent agreement and practice constitute an authentic interpretation, they are the purest form of mutual understanding between the treaty parties, and if not, they almost function as an interpretative platform (Johnson & Razbaeva, 2014; Roberts, 2010; Sherard Chow et al., 2020). The difference between them is the following. A subsequent agreement is a common understanding between the treaty parties reached after the treaty celebration to clarify one or more of its dispositions, while a subsequent practice refers to a conduct in the treaty application that occurs after the treaty celebration (Johnson & Razbaeva, 2014). Such conduct includes those from States authorities and organs and even non-State actors (Johnson & Razbaeva, 2014).

Interpretation is a single operation of multiples steps (Johnson & Razbaeva, 2014). And must be bear in mind that they are evolutive.

16 *Travaux préparatoires are an* example of a supplementary mean of interpretation. They discover the real meaning of a treaty disposition when there is an ambiguous and obscure meaning that leads to an absurd or unreasonable result, the reason why, only objective materials and processes serve (Corten, 2009; Dörr & Schmalenbach, 2012; United Nations Conference on Trade and Development, 2011). To its labor, all the documents that are relevant from the negotiation stage to the treaty conclusion –drafts, memoranda, commentaries, oral statements, government's observations, diplomatic exchanges between the negotiating parties, etc.– will be reviewed (Dörr & Schmalenbach, 2012; Roberts, 2010).

2.2 Treaty interpretation in the Investor-State Dispute Settlement System

Unlike other sub-fields of international law, the law on investments is heavily decentralized (Douglas et al., 2014). There is not a single institution or organization that is in charge of IIAs regulation, in its lieu, there is a great variety of instances in charge of supervising the treaties guidelines according to global trends and even of resolving controversies.[17] This broad sense is also due to the ISDS nature composed of bilateral, regional, or multilateral treaties (Douglas et al., 2014).

Usually, States parties to the treaty delegate interpretive and applicative powers to ISDS tribunals and they re-delegate to arbitrators to solve a controversy under a relevant IIA.[18] However, this interpretative and applicative power is not absolute, is shared with States because they are the treaty drafters (Roberts, 2010). Moreover, States through subsequent agreements and practi-

17 Some examples are the ICSID, UNCITRAL, International Chamber of Commerce (ICC), Stockholm Chamber of Commerce (SCC), and the London Court of International Arbitration (LCIA).

18 Some academics are concern about the nature of investment and the constant involvement of States in this field because, despite the giant and expensive claims, States continue limiting their sovereignty to being more attractive for foreign investors (Douglas et al., 2014). What is more, they also questioned the direct channel for disputes –—SDS– where international law is put together with domestic law (Douglas et al., 2014).

ces can limit the discretion of the conferred powers to ISDS tribunals[19] (Roberts, 2010).

In other words, the vaguer is a treaty, the most important is an interpretation to enhance legal certainty, and who better than lawmakers to address those concerns (Van Aaken, 2014).

Therefore, in the interpretation of an IIA, it will be imperative to analyze the treaty terms, preamble –in this section is written the treaty purpose and objective–, applicable law, if there is or not an interpretive mechanism – bodies, committees, commissions authorized by the States parties to the treaty to interpret and apply its IIA – and if third-party submissions are permitted (United Nations Conference on Trade and Development, 2011).

2.2.1 Interpretative powers: attribution and delegation

As lawmakers, States parties to the treaty have an intrinsic right to regulate on behalf of the public interest.[20] Nevertheless, this attribution was decisively affected by the State-State arbitration replacement in the investment field because, States provided to foreign investors a direct channel to litigate, the ISDS. The desire of creating

19 It is worth mentioning that, according to the VCLT, subsequent agreements and practices shall be used if the relevant IIA does not contain a provision over interpretation by the States parties to the treaty (Van Aaken, 2014).

20 Designed to allow conducts that may be considered excessive, an IIA leaves space for State to regulate and guarantee protection to the public interest as the moral, health, environment, among others (Chase, 2015).

a stable and favorable environment for foreign investors to improve their credibility and legal certainty, led to States parties to the treaty to share certain powers with ISDS tribunals (Tienhaara, 2017). That means that States reduced their involvement in the interpretation and application of their IIAs.

States parties to the treaty and ISDS tribunals. Each of them has a particular role. The first ones provide powers to the second ones to resolve disputes that might arise under a relevant IIA, which occurs among a State party to the treaty and a foreign investor from another State party to the treaty. This power was given to ISDS tribunals with a discretional space to determine the meaning of treaty provisions, and according to a conferral jurisdiction[21] to apply the rule of law (Endicott, 2020; United Nations Conference on Trade and Development, 2011). However, this concession has moved from determining the treaty breach or violation to determining who deserves more or less protection (Tienhaara, 2017).

Generating susceptibility and conditioning the ISDS tribunals authority, States parties to the treaty conscious that they can be more proactive in interpreting and applying their IIAs highlighted that the given powers were not absolute (Roberts, 2010; United Nations Conference on Trade and Development, 2011). That means that States parties to the treaty retain an important portion of interpretative and applicative powers that can be exercised through authentic interpretation to guide ISDS tribunals to obtain a proper and predictable rea-

21 Investments are subject to the law of the land in which their activities proceed (Chase, 2015).

ding of IIA provisions (United Nations Conference on Trade and Development, 2011).

Under the VCLT, States parties to the treaty through subsequent agreements or practices –authentic interpretation– are capable of amending, interpreting, and applying IIA dispositions (Gazzini, 2020). In several cases, this intrinsic right is blurred, the reason why States included specific provisions over these matters, self-giving interpretative instruments that can be binding or not as unilateral and joint interpretation, diplomatic exchange notes, official statements, brief-submissions by non-disputing parties, and others (Johnson & Razbaeva, 2014; Lee, 2020).

2.2.2 Interpretative techniques and instruments

Under international law, subsequent agreements or practices are evidence of the mutual understanding of the treaty parties (Roberts, 2010). They are the purest form of authentic interpretation according to the VCLT and are unique due to their *potestas interpretandi* nature (International Law Commission, 2018; Roberts, 2010; Virally, 1968)".

On the one hand, a subsequent agreement is a mean of interpretation after the conclusion of a treaty, constituting a direct interpretive tool because it allows a dialogue between the States parties to the treaty and the tribunals, encouraging the States interpretive and applicative powers, the reason why they do not need to be set by a formal agreement (Chang-fa, 2017; International Law Commission, 2018; Roberts, 2010) (Chang-fa, 2017; International Law Commission, 2018; Roberts, 2010. On the other hand, a subsequent practice is an in-

terpretative complement that through conduct clarifies the existing relationship of the treaty parties, even after the treaty conclusion (Douglas et al., 2014; International Law Commission, 2018). Any conduct by States and non-States actor will count, as long as the last ones do so under the authority of States (International Law Commission, 2018). That means that they are common, consistent, and discernible acts or pronouncements in the treaty application (Chang-fa, 2017).

Those authentic means imply a joint interpretation of the relevant treaty (Sherard Chow et al., 2020). It is worth mentioning that, States parties to the treaty are capable of submitting joint or unilateral statements,[22] but this latest will not have the same weight as the joint ones (United Nations Conference on Trade and Development, 2011). Unilateral statements are only advisory and lack the binding effect over tribunals. Of course, the binding effect in joint interpretations will depend on the treaty itself, some of them can be silent on this effect (Sherard Chow et al., 2020).

In that sense, some treaties as the NAFTA and the Comprehensive and Progressive Agreement for Trans-

22 States parties to the treaty can indicate its position on interpretation by various means as treaty models –is an evolutionary guide because its periodically adjusted to new States policies and priorities–, parliament debates, governmental letters, commentaries, official declarations in the States web-page, voice notes, and others (United Nations Conference on Trade and Development, 2011). Another form of unilateral interpretation is those done in on-going disputes (Johnson & Razbaeva, 2014). Regardless of the interpretative means, unilateral statements will be a step in establishing a joint interpretation (United Nations Conference on Trade and Development, 2011).

Pacific Partnership (CPTPP) –among others–, additionally to the ad-hoc mechanism, create provisions to establish interpretive bodies. They are rare and are more typical in multilateral agreements. According to the Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, interpretative bodies, hereinafter institutionalized mechanisms, are established under the relevant treaty for its interpretation and application (International Law Commission, 2018).

Though subsequent agreements and practices States guide the treaty interpretation, tribunals tend to undervalue and ignore their interpretations (Roberts, 2010). In a certain way, tribunals must feel threatened by States due to the reduction of their interpretive discretion. But as some academics point out, it is better to have a little power than nothing (Roberts, 2010).

2.2.3 It is an interpretation or an amendment?

States as masters of the treaties retain several powers over the interpretation and application of their IIAs (Gazzini, 2020). Nevertheless, interpretation is debated constantly by ISDS tribunals that have been considering and applying the authentic interpretation of States in ISDS claims. There are several cases where the interpretive scope and effect have been questioned since many of them, according to ISDS tribunals, go from clarifying an IIA disposition to making a substantial modification to the relevant treaty (Kaufmann-Kohler, 2011; Roberts, 2010). In other words, the interpretive power has been confused with the State's amendment capability (Virally, 1968).

For example, under NAFTA, the tribunal of *Pope & Talbot v. The Government of Canada* was concerned by the Free Trade Commission (FTC) interpretation. According to the tribunal, the Note of Interpretation was a disguised and a de facto amendment of NAFTA. Another main issue was Canada's roles as a State party to the treaty and a respondent. However, in the view of States parties to the treaty, the FTC interpretation was not an amendment because it followed the requirements of article 1105 of the NAFTA (*Pope & Talbot v. the Government of Canada*, 2002). This provision set firstly that Notes of Interpretation must be in light of article 102 paragraph 1 and 2 of NAFTA, and secondly, they must follow the applicable rules of international law (*Pope & Talbot v. the Government of Canada*, 2002). Moreover, the NAFTA settled in article 1131.2 that FTC interpretations were binding and applied prospective (*Pope & Talbot v. the Government of Canada*, 2002). As a result, the tribunal could not decide over the validity of the Note of Interpretation.

In that sense, it is important to distinguish an interpretation from an amendment. Both imply distinct actions and effects. On the one hand, interpretation clarifies and reaffirms IIA dispositions (Kaufmann-Kohler, 2011; Roberts, 2010). Through subsequent agreements and practices, States parties to the treaty can submit authentic interpretations to ISDS tribunals as a manner to guide them. Usually, its binding effect depends on the relevant IIA. It is worth mentioning that sections (a) and (b) of article 31 of the VCLT allow States' interpretation. On the other hand, an amendment changes IIA dispositions, for this reason, they must be notified, negotiated, and ratified by the States parties to the treaty (Parra, 2020; Sherard Chow et al., 2020; United Nations, 1969).

In other words, an amendment process is complex due to formalities. Amendment's framework is in articles 39 and 40 of the VCLT.

In sum, interpretations consolidate the meaning of an IIA disposition by elucidating it; they can be achieved through formal or informal means. While amendments modify the treaty itself, creating new dispositions; they need to be addressed only through formal means. If these boundaries are breached by the States parties to the treaty, to promote the rule of law, ISDS tribunals may disregard the interpretation (Kaufmann-Kohler, 2011).

2.2.4 The timing, retroactive and binding effect in treaty interpretation

Through articles 31 and 32 of the VCLT, subsequent agreements and practices are permitted, reaffirming States' power to interpret their IIAs. However, the regulatory spaces that these articles leave at the discretion of the States parties to the treaty are important to determine the effectiveness and scope of an interpretation (Johnson & Razbaeva, 2014). In other words, when interpreting, States have to be careful of timing, retroactivity, and binding effect because they will play a substantial role by establishing if the State is acting on its behalf or is acting as a treaty party (United Nations Conference on Trade and Development, 2011).

Firstly, timing. The life of a treaty is composed of various stages (United Nations Conference on Trade and Development, 2011). So, interpretations can take place

outside or during treaty negotiations,[23] at the time of signature and until its force,[24] after a treaty conclusion,[25] and even during and post-dispute[26] (Titi, 2020). This versatility is conflictive because interpretations depending on the stage will have a distinct effect and scope. In consequence, States parties to the treaty can manipulate interpretative statements. That is to say, that States can alter an interpretation – amendment – or use it to avoid liability. For this reason, timing is essential. At setting the applicable law and the interpretative boundaries, timing controls the prospective and retro-prospective sense of interpretations (Roberts, 2010).

23 An interpretation achieved in the negotiation stage will guide ISDS tribunals (Titi, 2020).

24 Interpretations realized when States are celebrating the relevant treaty will be a declaration or an interpretative agreement to clarify the States' intentions (Titi, 2020).

25 At the treaty conclusion, interpretations shall be realized through subsequent agreements and practices (Titi, 2020). States can also submit unilateral statements at this stage, but its effect will be different (Titi, 2020).

26 On the one hand, when States submit interpretations in on-going disputes, those may be seen as achieved based on the moment interest. This scenario led tribunals to believe that States are acting as public entities and not as treaty parties. On the other hand, in the post-dispute stage, interpretations can be unilateral or joint and will provide future guidance to ISDS tribunals (Titi, 2020; United Nations Conference on Trade and Development, 2011).

Several academics pointed that interpretations must be achieved in the negotiation[27] stage because, States are more conscious of their role as potential claim defendants (Roberts, 2010; Sherard Chow et al., 2020).

However, due to the many IIAs concluded, some of them have set time limits for interpretative submissions to ensure that States parties to the treaty correctly apply their interpretative powers (Roberts, 2010). For example, the Japan-Mexico Economic Partnership Agreement (EPA) in its article 89.1 establishes that interpretations by its joint committee will be binding if they are submitted in 60 days of being requested, and if this is not possible, the ISDS tribunal will have the faculty to determine the effect of the interpretation (*Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership*, 2004).

Secondly, retroactive interpretations by the States parties to the treaty are seen as improper ways to affect and dimmish substantial rights and obligations of foreign investors under the relevant IIA (Johnson & Razbaeva, 2014). That means that retroactive interpretations are considered disguised amendments (Titi, 2020).

And finally, the lack of binding effect, which means that ISDS tribunals are obliged to respect and apply the States' interpretations for the elucidation of one or more treaty provisions, has been one reason to reform the ISDS system (Lee, 2020). Some academics believe that this effect compromises the ISDS tribunals' inde-

27 ISDS tribunals are more sensitive to interpretations achieved in the dispute stage because treaty breaches or violations can influence the interpretative sense.

pendence because it affects their ability to adjudicate disputes (Lee, 2020).

In that sense, the VCLT allows subsequent agreements on interpretation but does not specify if it will be binding or not for tribunals, in its lieu, leaves this decision in the hands of the States parties to the treaty. The reason why, the binding effect depends on the relevant treaty and on what the parties agree on it.[28] Although this effect gives greater consistency and coherence, it has to be expressed in the treaty –removing any doubt about its interpretation force– because its silence will allow tribunals will have the discretion to use it or not according to its interpretative weight, clarity, specificity, and timing (Sherard Chow et al., 2020).

For example, some provisions on binding inter-pretations with a different scope are the following. On the one hand, those that express that interpretations by joint commissions or committees are binding are article 1131.2 of the NAFTA, article 24.2 of the Netherlands Model BIT –which add that even if they are binding, they cannot be applied to already established tribunals–, article 8.31 (3) of the CETA –retaining decision over the entry into force date, that means if this one shall be binding and from what date–, and article 24.2 of the Dutch Model BIT –expressing that interpretations are also binding in on-going disputes. On the other hand, IIAs that have provisions that are silent on the binding effect are

28 Binding interpretations were found in almost 67 IIAs, while those silent on the binding effect were at 119 IIAs (Sherard Chow et al., 2020). This effect is important because it contributes to consistent interpretations (Titi, 2020). Nevertheless, they are often difficult to achieve (Titi, 2020).

the United States-Korea FTA, the India-Kyrgyzstan BIT, and the India-Republic of Korea BIT.

2.3 Why authentic interpretation it is important?

In general, interpretation has always been a debatable issue for those who must emit opinions and decisions in respect of a controversy (Castro de Figueiredo, 2014). Due to the creation of links between incidents, and the applicable laws, the interpretation has gained a double function when determining the effect of a norm over a particular situation (Endicott, 2020).

Historically, the interpretation goes back to the early 17th century, a time when different theories emerged about how the interpretation must be done (Endicott, 2020). One of the most questionable approaches sustained that the interpretive power should be separated from legislative bodies, having to allocate the interpretation to an independent court (Endicott, 2020). However, it was established that the legal interpretation was something exclusive and reserved for those who made the laws, including emperors and kings[29] (Endicott, 2020). Eventually, this action was recognized as an interpretation by the lawmaker, and with time, it became known as authentic interpretation (Endicott, 2020).

So, an authentic interpretation emanates from its author or authors because they know all the aspects of the relevant text, whether positive and negative (Virally, 1968). That means that they have the *potestas interpretandi*

29 The authentic interpretation was commonly among Justinian, Henry de Bracton, Thomas Aquinas, King James I of England, Thomas Hobbes, Jeremy Bentham, and others (Endicott, 2020).

due to its creator condition, and consequently, its interpretation contains an especial legal force (Virally, 1968). It must be said that, under this assumption, authors are the mind, body, and spirit of the text because they are the ones who know why exists a determined disposition, in other words, the idea, design, and development of a text comes from its perception.

Therefore, this type of interpretation does not alter the content of a treaty, instead, clarifies its meaning, increasing the consistency, coherence, and predictability of the treaty, eliminating ambiguities, and correcting misinterpretations done by tribunals (Gazzini, 2020). As stated by Friedrich Schleiermacher, Wilhelm Dilthey, and Hans Georg Gadamer, the disposition itself and its context are subject of constant revision so, interpreters shall understand its content better than its proper author because when interpreting, they are deciphering the spirit of the lawmaker[30] (Fayad-Sandoval, 2013). In other words, an authentic interpretation is an old-fashioned tool of interpretation carried by the lawmakers, that would establish the true intention, in this case, of the treaty parties. This type of interpretation must imply an agreement between the treaty parties to facilitate the treaty understanding, whether bilateral or multilateral (Titi, 2020).

30 These Germans philosophers established that the legal hermeneutic –interpretation and argumentation– must be perceived as an activity destined to find a solution for a particular legal problem, which has been submitted to an interpreter to determine the application and justification or not of a norm (Fayad-Sandoval, 2013).

In that sense, under international law, States parties to the treaty have the power to interfere in their treaties to amend, modify, and interpret (Gazzini, 2020; Zarra, 2020). For example, backed by the VCLT, States parties to the treaty can submit to an ISDS tribunal its interpretation over a treaty provision, which shall be taken into account, and in most cases be binding if the relevant treaty sets it[31] (Zarra, 2020). Therefore, if there is a treaty provision that determines the binding effect of the States authentic interpretation, ISDS tribunals must follow it instead of any general rule of interpretation under the *lex specialis* principle (Sherard Chow et al., 2020; Zarra, 2020).

Evidentially, it is assumed that, when a State seeks an authentic interpretation is because, there is a broad provision in its IIA with various meanings or vague terms.[32] Traditionally, this scenario will allow an ISDS tribunal to decide on it but, the purpose of the authentic interpretation is to limit the tribunals freedom of choice over those meanings (Zarra, 2020).

31 In a study of the Queen Mary University of London, 48% of the surveyed believe that binding decisions would undermine their confidence, while 33% consider that their confidence in the system will improve (School of International Arbitration et al., 2020).

32 The establishment of broad or vague provisions is due to the lack of consensus of treaty details by the States parties to the treaty or the lack of intention to regulate possible scenarios because they would be inefficient (Brown et al., 2020).

2.3.1 The duality of States as treaty parties and respondents.

As mentioned previously, due to the debt crisis States promoted economic incentives and legal instruments to attract foreign investments (Tienhaara, 2017). But those offers were in the air because there was not any guarantee of its execution. In that sense, States developed the ISDS system. That means that this vehicle emerged as a lifeguard for States because through the ISDS they ensured that offers, protecting foreign investors. At the bottom, the ISDS was created by States for States economic development (Roberts, 2010).

However, the increased number of ISDS cases mostly initiated by foreign investors against States raised the duality veil. To say, States have a dual role in investment arbitration. From one side, they are treaty parties, and from another, they are respondents[33] (Roberts, 2010).

So, in an ISDS claim,[34] States are the treaty drafters and those who give it legitimacy but, under the relevant IIA, they are those who promote a sector that is potentially profit-making for foreign investors, while the latest are those who put capital to develop one or more activi-

33 In investment arbitration, the State acts as a private party. Therefore, they can act as claimants or respondents but, the first figure is quite unusual in the ISDS (Toral & Schultz, 2010). Generally, States submit counterclaimants.

34 An IIA gives rights and obligations to States and non-State actors –foreign investors– making them able to bring claims to ISDS tribunals for treaty breaches or violations. (Roberts, 2010). Nevertheless, States as masters of the treaties have the faculty to modify foreign investors rights through different instruments, in other words, those rights are not absolutes and irrevocable (Roberts, 2010).

ties in the suggested field. In that sense, ISDS tribunals have to act simultaneously because they have to act on behalf of the treaty parties and disputing parties in interpreting and applying the relevant IIA (McRae, 2017; Roberts, 2010). Of course, in this context, the States parties to the treaty can use its interpretive and applicative powers through State-State[35] subsequent agreements and practices, influencing the claim on its behalf and avoiding liability (Roberts, 2010).

For this reason, States parties to the treaty delegated powers to ISDS tribunals as an act of *bona fide* in favor of foreign investors. Even so, concerns of the non-State actors were strong over the control and independence of ISDS tribunals because State creates laws and tribunals, in general, apply it (Roberts, 2010).

2.3.2 Advantages and disadvantages of States authentic interpretation.

As previously stated, the ISDS system is facing a crucial reform, and there are several options to address the expressed concerns. Some of them are the creation of an ICS or MIC and the establishment of appellate bodies (Bernardini, 2017; Chase, 2015; Parra, 2020). Nevertheless, those alternatives undervalue the ISDS nature, which was developed to provide a direct channel for investment disputes –avoiding domestic courts– and enhance the relationship between States and foreign in-

35 A claim in itself does not imply that the State of which the investor is national agrees with it (Roberts, 2010). This is a procedure between the foreign investor and the host State, constituting a direct channel to resolve any controversy under the relevant IIA.

vestors. In that sense, another option for improving the ISDS is the States' involvement in the interpretation and application of their IIAs (United Nations, 2020).

On the one hand, through the subsequent agreements and practices established in the VCLT, States parties to the treaty can submit interpretive notes, whether unilateral, joint or even by a joint commission or committee under the relevant treaty for guide ISDS tribunals in the interpretation, that as stated above, has been one of the biggest problems in the current system (Brown et al., 2020; International Law Commission, 2018) The vaguer and broader dispositions permitted ISDS tribunals to determine its meaning, but those do not always have the same logic as the States parties to the treaty, which means that they can differ in interpreting the treaty intention. The reason why there are justifiable and unjustifiable inconsistencies in the awards pronounced by those tribunals.

Considering that those inconsistencies can violate the given rights and obligations by the treaty, the States are the perfect interpreters. As treaty drafters, States know the details of the relevant treaty negotiation and celebration process, and those will reflect the real object and purpose of the treaty (Roberts, 2010). In such way, States parties to the treaty will exercise greater control over ISDS tribunals to avoid incoherence and inconsistencies, providing more legal certainty to States and foreign investors by enhancing the predictability of awards and clarifying the IIA scope (Gazzini, 2020). In other words, authentic interpretation is a dispute filter that is less complicated than the other reforms alternatives because it does not require the re-negotiation, modification, or denunciations of the treaty disposition, mutual agre-

ement is enough (United Nations Conference on Trade and Development, 2011).

On the other hand, an authentic interpretation can be a hidden treaty amendment. It is supposed that States interpretation must be used on behalf of the public interest, but the potential liability of States parties to the treaty under a relevant IIA can guide them to submit interpretations on its behalf, acting thus, within its sovereign character and not as a treaty party that may or may not be sue for the breach or violation of a treaty provision (Roberts, 2010; Sherard Chow et al., 2020). Affecting the rights of foreign investors.

Chapter III: Solving the lack of consistency and coherence in the investor-state dispute settlement system through an institutionalized mechanism

The States' involvement in the interpretation and application of their IIAs has been one of the alternatives for improving the ISDS system, and under them, there exist various interpretative instruments as the institutionalized mechanisms. Due to this, this chapter will analyze those mechanisms and will confirm if they are effective or not for being implemented in the ISDS.

3.1 Institutionalized mechanism of interpretation, what is and how it works?

As stated previously, according to the VCLT, the States parties to the treaty can submit subsequent agreements to ISDS tribunals for the interpretation and application of their existing IIAs, and those can be done through joint instruments that must be taken into account by ISDS tribunals (International Law Commission, 2018; United Nations, 2020; United Nations Conference on Tra-

de and Development, 2011). It is worth mentioning that, unilateral interpretations cannot define the meaning of a treaty disposition because IIAs are created by two or more parties, in consequence, they are considered just as supplementary means of interpretation (United Nations Conference on Trade and Development, 2011). The joint ones suppose a reciprocal interaction between the treaty parties, and reflecting the States' intention, they must be treated as authoritative by the ISDS tribunals (United Nations Conference on Trade and Development, 2011).

Therefore, States parties to the treaty may clarify their IIAs more efficiently through joint interpretations. And under those, for interpreting existing IIAs, there are many instruments as the ad-hoc mechanisms, IIA institutions, and the *travaux préparatoires* (United Nations Conference on Trade and Development, 2011). However, parallel to ad-hoc instances, several States established institutionalized mechanisms for interpreting their IIAs, because it facilitates the exchange of views and the formulation of interpretations (United Nations Conference on Trade and Development, 2003).

An institutionalized mechanism is a consultative and supervisory body –commission or committee– composed of representatives from each State party to the treaty (United Nations, 2020; United Nations Conference on Trade and Development, 2003, 2011). Its main functions are the emission of interpretative declarations and the monitoring of the treaty implementation (United Nations, 2020; United Nations Conference on Trade and Development, 2003, 2011). Those interpretative bodies are established under the relevant treaty, that means that they are not organs of an international organization (United Nations Conference on Trade and Development, 2003).

Depending on the IIA, an institutionalized mechanism will be capable of promulging interpretative declarations by its initiative, by the petition of the States parties to the treaty, or by the petition of the relevant ISDS tribunal (United Nations, 2020). It is worth mentioning that an institutionalized mechanism always takes decisions by consensus (United Nations Conference on Trade and Development, 2003). And as they establish their own rules and procedures, they are capable to delegate their responsibilities to ad-hoc or standing committees, working or expert groups, and seek advice from non-governmental actors, to be more efficient (United Nations Conference on Trade and Development, 2003).

3.2 The establishment of an institutionalized mechanism

An interpretation will be helpful when vaguer, broader, and even ambiguous provisions exist (Sherard Chow et al., 2020). But as noted, there are many aspects to bear in mind about interpretation, as the timing, retroactivity, and binding effect.

Therefore, one form of establishing an institutionalized mechanism into an existing IIA will be through treaty amendment (Sherard Chow et al., 2020). In this case, it will be essential to consider the bureaucratic procedures because an amendment requires a negotiation process and the ratification by each State party to the treaty (Parra, 2020; Sherard Chow et al., 2020; United Nations, 1969). The implementation of this mechanism through an amendment can have some problems as the States' coordination because, each of them has and apply different policies according to their public interests and needs (Sherard Chow et al., 2020).

Another way to incorporate an institutionalized mechanism into existing IIAs will be by the adoption of procedural rules, conventions, or treaty models (Sherard Chow et al., 2020). In the first and second cases, those instruments will act as successive agreements, creating new obligations to the States parties to the treaty (Sherard Chow et al., 2020). It is worth mentioning that the biggest problem with the convention is that States may not sign it. While in the third case, the States are shaping rights and obligations, for this, the establishment of an institutionalized mechanism for the treaty interpretation and application will be easier (Sherard Chow et al., 2020).

It is worth noting that, the incorporation of an institutionalized mechanism into IIAs, should not be vaguer or broader, in contrast, they have to be specific, clear, and consistent to do not generate doubts over its implementation (Sherard Chow et al., 2020).

3.2.1 Would be easier to implement an institutionalized mechanism than an appellate body?

It is crucial to clarify that the incorporation of an institutionalized mechanism is complex because they involve the creation of a commission or committee; even though the participation and mutual agreement of the treaty parties is essential to achieve any interpretation, this mechanism has attributions and functions to administrate the relevant treaty, the reason why this mechanism cannot be informal (United Nations Conference on Trade and Development, 2003, 2011).

Although an institutionalized mechanism requires negotiation and ratification, its bureaucratic process is less

complex than the appellate body because this mechanism must rise between the States parties to the treaty, reducing the number of States to interact with. Contrary, an appellate body has to be installed in the institutions dedicated to administrate the dispute settlement which means that a substantial modification must be made in its base document (Hai Yen, 2014). Requiring the interaction of a large number of States. For example, in the ICSID, implementing an appellate body will require an amendment to the ICSID Convention, and any modification or addition in a multilateral context involves difficult negotiations (Hai Yen, 2014). While the institutionalized mechanism will be imposed on the ISDS tribunals by the mere fact of being under the relevant treaty, taking advantage of the fragmented essence of the ISDS system, because again, this mechanism belongs to a treaty and not to an institution.

Due to this, there are several, but not many IIAs that have implemented institutionalized mechanisms for their interpretation and application. An early example of an institutionalized mechanism is the FTC of NAFTA that was incorporated through a treaty provision (Kaufmann-Kohler, 2011). Other well-known examples are the CAFTA-DR and the CPTPP, treaties that added similar dispositions as the contemplated in the NAFTA.

3.2.2 Advantages and disadvantages of an institutionalized mechanism

Some advantages of institutionalized mechanisms are the following. First, it is not mandatory. The States parties to the treaty may or may not implement it, so an amendment is not necessary for the thousands and thousands of IIAs (Brown et al., 2020). Second, there is no single

way to approach an institutionalized mechanism, there are several as the treaty amendment, rules of procedure, multilateral conventions, and model treaty provisions (Johnson & Razbaeva, 2014; United Nations Conference on Trade and Development, 2011). Third, to submit joint interpretations through an institutionalized mechanism as guidance to ISDS tribunals it is enough to have the agreement of all the States parties to the treaty (Brown et al., 2020). Fourth, the interpretations made by this type of mechanism are a dispute filter, which means that they reduce the number of interpretative and applicative controversies under an IIA.

And finally, this type of mechanism is the purest form of authentic interpretation (United Nations Conference on Trade and Development, 2011). To say, is the best way to improve the coherence and consistency in the awards pronounced by ISDS tribunals. To the last point, it is vital to emphasize that by constituting interpretive statements which in many cases –according to the treaty– are binding, the declarations of the institutionalized mechanisms will provide a guideline in the interpretations (Roberts, 2010). So that at least, under the same treaty, the interpretations cannot be vaguer, broader or ambiguous, even more, if the controversy that arises is about the same provision.

In contrast, some disadvantages that these institutionalized mechanisms have are that they must undergo a process of negotiation and ratification for their incorporation into existing IIAs and that they must face political, economic, and social aspects because each State manages a particular policy that will vary depending on its public interest (Brown et al., 2020). Moreover, when States act as sovereigns, they may or may not leave the negotiations to incorporate a mechanism of this type,

which means that there is no complete certainty that this will work, because as we have already mentioned, all parties to the treaty must agree. Another disadvantage and perhaps one of the most controversial is that ISDS tribunals may perceive that these institutionalized mechanisms are being used to reduce their interpretive discretion, in other words, their power to give meaning to a specific provision. For this reason, it will be important that the States parties to the treaty establish in their IIAs that they have this interpretive and applicative power, also pointing out that this institutionalized mechanism is nothing more than an authentic means of interpretation because the representatives of these interpretative bodies are the States parties to the treaty (Roberts, 2010).

Also, the lack of binding effect of this interpretation would constitute a disadvantage because the essence of an institutionalized mechanism would fade away when letting the ISDS tribunals decide if interpretations are important or not and if they have the sufficient legal effect to be used in the treaty interpretation (Sherard Chow et al., 2020).

It is worth mentioning that current concerns about these mechanisms have been on whether their interpretations can be used as disguised amendments to the treaty, a situation that has already generated a great deal of susceptibility in the NAFTA tribunals (Kaufmann-Kohler, 2011).

3.3. Why an institutionalized mechanism is better than an ad-hoc instance?

An ad-hoc instance serves to solve a particular controversy regarding the interpretation of one or more treaty

provisions (Hai Yen, 2014). In other words, this instance is created just once and for a specific dispute.

Ad-hoc instances are highly specialized because they focus on a single case, as a result, its members are more involved at the bottom of the controversy. Usually, those are established once the dispute is latent (Parra, 2020). Several academics have criticized ad-hoc instances because those are not obliged to follow previous decisions of other cases due to the decentralized nature of the ISDS (Hai Yen, 2014).

In the current ISDS system, there are instruments to review the pronounced awards by ISDS tribunals, but not to solve problems of interpretation (Hai Yen, 2014). The reason why an institutionalized mechanism is a better option for improving the ISDS system.

An institutionalized mechanism is also specialized, but not like the ad-hoc instances. And established under the relevant treaty, these mechanisms can know one or more controversies or even all that arise around the IIA. Allowing some harmonization in the awards pronounced by the ISDS tribunals because the interpretation of these institutionalized mechanisms not only guide, they also provide coherence and consistency (United Nations Conference on Trade and Development, 2011).

3.3.1 Does an institutionalized mechanism reduce the interpretative authority of Investor-State Dispute Settlement tribunals?

Some academics believe that the obvious and cleanest solution for inconsistencies and incoherencies in the ISDS is the States interpretation because as masters of trea-

ties, they have interpretative powers to clarify the problematic provisions (Brown et al., 2020).

And as stated before, States parties to the treaty have delegated interpretive and applicative powers to ISDS tribunals, and they re-delegate to arbitrators. However, as there are interpretative problems in the ISDS due to the unjustifiable inconsistencies found in awards pronounced by ISDS tribunals, the States have been highlighting that although they conceded those powers, these are not absolute (Brown et al., 2020; Roberts, 2010). In that sense, States parties to the treaty are limiting the discretional scope of interpretation of the ISDS tribunals (Roberts, 2010).

This may be seen as a reduction of the interpretative authority of ISDS tribunals, which is not entirely true. Simply, the States parties to the treaty are recovering their power to avoid vaguer, broader, obscure, or ambiguous interpretations. The ISDS tribunals who have used these powers now must return them to the States parties to the treaty so that they can achieve coherent and consistent statements respecting the interpretation of a treaty provision.

3.4 The proliferation of institutionalized mechanisms

Institutionalized mechanisms are instruments –vehicles– for the joint interpretation of IIAs, and they are quite controversial. As interpretative and applicative committees or commissions, they control and administrate the relevant IIA, limiting the powers conferred to ISDS tribunals by the States parties to the treaty to improve the grade of coherence and consistency in awards pronou-

nced by ISDS tribunals (Roberts, 2010; United Nations Conference on Trade and Development, 2003).

Highlighting that any interpretation under those mechanisms is authentic, the concerns emerged, and the tension between ISDS tribunals and the States parties to treaty parties increased day by day due to the restricted powers of interpretation. Despite this, the proliferation of institutionalized mechanisms increased due to their efficiency, and even more with the three-phase mandate of Working Group III that have set the States' involvement in the interpretation and application of their treaties as an alternative to improve the ISDS system (United Nations, 2020). For this, institutionalized mechanisms have been put into the reform table.

Moreover, some States agreed on hybrid mechanisms. In those cases, the treaty has traditional provisions of the ISDS system but adds WTO notions as safeguard measures, amicus curiae submissions, time limits for the presentation of interpretative claims, trade retaliation, appellate body, among others (Mukiibi & Ngobi, 2016). An early example is the Trans-Pacific Partnership Agreement (TPP), where the treaty parties solve disputes through consultations and cooperation (Mukiibi & Ngobi, 2016).

Those institutionalized mechanisms have been established in well-known IIAs as NAFTA, CAFTA-DR, CETA, CPTPP, and others.[36] Nevertheless, its implementation is not limited to IIAs. Implemented on inter-

36 See the annex.

national organizations like the WTO[37] and the International Monetary Fund (IFM),[38] the institutionalized mechanism has been set in those to clarify the obligations of the treaty parties (Kaufmann-Kohler, 2011). Nevertheless, this mechanism has never been used in the WTO due to the large number of State members, while in the IMF it has been employed almost ten times (Kaufmann-Kohler, 2011).

37 Article IX paragraph 2 of the WTO agreement: "*The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X" (World Trade Organization, 1995).*

38 Article XXIX paragraph A of the IMF original articles: *"Any question of interpretation of the provisions of this Agreement arising between any member and the Fund or between any members of the Fund shall be submitted to the Executive Board for its decision. If the question particularly affects any member, it shall be entitled to representation in accordance with Article XII, Section 3 (j)" (International Monetary Fund, 1944).*

Conclusions and recommendations

As conclusions of this research, we have:

- Investment treaties are beneficial for the growth and economic development of States, and it has been shown through time that several topics can be addressed in them as environment, labor, intellectual property, among others. However, its application has generated various and expensive claims, in most cases, because the investment field does no set specific definitions on many provisions. Therefore, when there is a dispute, ISDS tribunals have greater discretion to provide meaning and scope to a treaty provision.
- The concession of interpretative and applicative powers to ISDS tribunals has in some way meant granting ample space for them, instead of the States, to hear and resolve disputes, ensuring that the States do not misuse them. However, nowadays, the pronounced awards by the ISDS tribunals have been vaguer, broader, obscure, and ambiguous, making them incompatible with each other. There was a time when there were no concerns about the fragmented nature of ISDS, but the interpretation of provisions as the MFN, FET, FPS

were so different that they could not be justified by ISDS tribunals.

- To grant certainty to States and foreign investors, the UNCITRAL's Working Group III analyzed different options to reform the ISDS. Among them are the ICS or MIC creation and the establishment of an appellate body. Another alternative, not so popular and perhaps more efficient, is the States' involvement in the interpretation and application of their IIAs. The latter proposed that the States exercise greater control over their treaties and the ISDS tribunals since their interpretative statements as treaty masters had much more weight and legal force.
- The treaty interpretation involves extremely meticulous work because various aspects must be reviewed as the context, the preamble, the annexes, and even the treaty parties conduct before, during, and after the entry into force of the treaty. Although it is complex, the interpretation of the States parties to the treaty is authentic because it clarifies treaty provisions as well as the scope of the given treaty rights and obligations. Of course, when interpreting, the timing, retroactivity, and binding effect will place a crucial role.
- Following the VCLT, States to jointly interpret their IIAs may submit to ISDS tribunals, subsequent agreements and practices. And there are several ways to approach them. Within the subsequent agreements, joint interpretations can be realized through an institutionalized mechanism that has been quite useful in IIAs and international organizations. Those mechanisms are commit-

tees or commissions formed by representatives of each party to the treaty that will be in charge of resolving any conflict regarding the interpretation and application of the relevant treaty. Those are IIA institutions.

- Although these institutionalized mechanisms are not very common and can lead to great doubts, they give rise to authentic interpretations by clarifying one or more provisions and establishing its scope, at least guaranteeing that disputes under the relevant treaty will be coherent and consistent between them. Their interpretive statements guide ISDS tribunals because they have greater weight and legal force.

As recommendation of this research, we have:

- There are many alternatives to address the States and non-States actors' concerns over the ISDS system. However, it must be understood that at the bottom, the ISDS was developed to provide quick and direct access for the dispute settlement between States and foreign investors. The reason why the current alternatives are not the most suitable.

  Moreover, the implementation of an ICS, or MIC, and an appellate body, which are the most popular solutions, require a negotiation and ratification process, and the agreement of all the States parties, of course at the multilateral level because these modifications must occur in arbitration centers as ICSID, ICC, and others.

In other words, this reform process could stall, first because there is already certain distrust in the ISDS, and secondly because the States may not agree on the modi-

fication, with the result that this transformation would not be achieved at all.

Regardless of the alternative that will be chosen, it is crucial to have those points in mind.

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ANNEXES

Some IIAs that have used institutionalized mechanisms are the following:

	IIA	*DATE*	*CHAPTER / ARTICLE*	*INTERPRETATIVE BODY*
1	*Canada-Chile FTA (CCFTA)*	*July 5, 1997 * Into force*	*Chapter N Article N-01.2 (c)*	*Free Trade Commission*
2	*Canada-Colombia FTA*	*August 15, 2011 * Into force*	*Chapter 20 Article 2001.3 (a)*	*Joint Commission*

3	*Canada-Costa Rica FTA (CCRFTA)*	*November 1, 2002* ** Into force*	*Chapter XIII* *Article XIII.1 (3)(a)*	*Free Trade Commission*
4	*Canada-European Union Comprehensive Economic and Trade Agreement (CETA)*	*September 21, 2017* ** Provisionally force*	*Chapter 26* *Article 26.1 (3)*	*CETA Joint Committee*
5	*Canada-Israel FTA (CIFTA)*	*January 1, 1997* ** Into force*	*Chapter 18* *Article 18.1 (3) (a)*	*Joint Commission*
6	*Canada-Jordan FTA*	*October 1, 2012* ** Into force*	*Chapter 13* *Article 13-1.3 (a)*	*Joint Commission*
7	*Canada-Peru FTA*	*August 1, 2009* ** Into force*	*Chapter 20* *Article 2001.3 (a)*	*Joint Commission*

8	*Central America-Dominican Republic Free Trade Agreement (CAFTA)*	*2006: United States, El Salvador, Guatemala, Honduras, and Nicaragua* *2007: Dominican Republic* *2009: Costa Rica* ** Into force*	*Chapter 19* *Article 19.1 (3)(c)*	*Free Trade Commission*
9	*Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)*	*March 8, 2018* ** Signed*	*Chapter 27* *Article 27.2 (2)(e) and (f)*	*Trans-Pacific Partnership Commission*
10	*Mexico-EFTA States FTA*	*July 1, 2001* ** Into force*	*Chapter VII* *Article 70.2 (e)*	*Joint Committee*
11	*Mexico-Israel FTA*	*July 1, 2000* ** Into force*	*Chapter X* *Article 10-01.2 (c)*	*Free Trade Commission*

12	*North American Free Trade Agreement (NAFTA)*	*January 1, 1994* ** Into force*	*Chapter XX* *Article 2001.2 (c)*	*Free Trade Commission*
13	*United States-Australia FTA*	*January 1, 2005* ** Into force*	*Chapter 21* *Article 21.1 (2)(e)*	*Joint Committee*
14	*United States-Chile FTA*	*January 1, 2004* ** Into force*	*Chapter 21* *Article 21.1 (2)(c)*	*Free Trade Commission*
15	*United States-Colombia TPA*	*May 15, 2012* ** Into force*	*Chapter 20* *Article 20.1 (2)(c) and (3)(c)*	*Free Trade Commission*
16	*United States-Israel FTA*	*April 22, 1985* ** Signed*	*Article 17*	*Joint Committee*
17	*United States-Korea FTA*	*March 15, 2012* ** Into force*	*Chapter 22* *Article 22.2 (2)(d) and (3)(d)*	*Joint Committee*
18	*United States-Morocco FTA*	*June 15, 2004* ** Into force*	*Chapter 19* *Article 19.2 (2)(e)*	*Joint Committee*
19	*United States-Oman FTA*	*January 1, 2009* ** Into force*	*Chapter 19* *Article 19.2 (3)(b)*	*Joint Committee*

20	*United States-Panama TPA*	*October 31, 2012* ** Into force*	*Chapter 19* *Article 19.1 (2)(c) and (3)(c)*	*Free Trade Commission*
21	*United States-Peru TPA*	*February 1, 2009* ** Into force*	*Chapter 20* *Article 20.1 (2)(c) and (3)(c)*	*Free Trade Commission*
22	*United States-Singapore FTA*	*January 1, 2004* ** Into force*	*Chapter 20* *Article 20.1 (2)(e)*	*Joint Committee*
23	*United States-Mexico-Canada Agreement (USMCA)*	*July 1, 2020* ** Into force*	*Chapter 30* *Article 30.2 (2)(e) and (f)*	*Free Trade Commission*

The research of Cindy Joseline Oroza Amurrio addresses the authentic interpretation of states international investment agreements, focusing on its potential to optimize the dispute resolution system between States and investors. The study explores how institutionalized mechanisms for the interpretation of investment treaties can strengthen the investor-state dispute settlement system, proposing ways to improve relations and legal clarity in this essential area of international law.

Professor Oroza Amurrio has a distinguished academic career in the field of international law, with a Master's Degree in International Law (LL.M.int.) from the University of Heidelberg, Germany, and a Master's Degree in International Investment, Trade and Arbitration Law from the University of Chile. In addition, she has an Interuniversity Master's Degree in Diplomacy and International Relations from the Diplomatic School of Spain, Ministry of Foreign Affairs, European Union and Cooperation. She is a professor and researcher at the INEJ Master's Program in International Law.

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