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The United States' Non-Disputing Party Practice

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Non-disputing Party submissions ("NDPs") have been a prominent part of the U.S. investor-State dispute settlement ("ISDS") practice over the last twenty-five years, with an uptick in the number of recent filings.

With almost a hundred NDPs filed in investment arbitrations to date (not including oral submissions, which have become a more regular practice), NDPs have been central to U.S. ISDS practice in several respects. For instance, NDPs constitute State practice, which is one component, along with *opinio juris*, in establishing customary international law. In determining whether there is sufficient State practice to evidence customary international law, NDPs and other documents in which States establish their positions can be considered. Those positions can include, for example, a State's expression of its persistent objection to a purported obligation under customary international law. Where the parties to a given treaty agree in their submissions – including NDPs – those interpretations also can be considered a common understanding subject to Article 31(3) of the Vienna Convention on the Law of Treaties ("VCLT"). The following two parts summarize the United States' recent NDP practice and describe the role of NDPs under international law.

Recent NDP Practice

Over the past two years, the United States has filed twenty-three written NDPs in investment treaty arbitrations, addressing interpretations of provisions under the USMCA, the NAFTA, the CAFTA-DR, the U.S.-Colombia TPA, the U.S-Peru TPA, and the U.S.-Kyrgyz Republic BIT. The subject matter of U.S. submissions has included a wide range of topics addressed in the jurisdictional, merits and damages phases of investment arbitrations.

In large part, the U.S. submissions confirmed interpretations of previous years. For example, on the issue of jurisdiction, recent NDPs covered (i) the definition of "investment" in the relevant treaty, (ii) application of the limitations period found in certain agreements, (iii) the burden of proof as it relates to certain treaty provisions, (iv) the waiver of any right to pursue other dispute settlement procedures with respect to the challenged measures, (v) preliminary requirements for the submission of a claim to arbitration, and (vi) non-retroactivity.

Several new topics were also addressed. In the *Foster Wheeler* submission, for example, the United States addressed preliminary objections based on the conduct of the arbitration. In its submission, the United States explained that Article 10.20.4 of the U.S.-Colombia TPA provides a

further ground for dismissal of a case that is independent from any objection with respect to a tribunal's competence. In *Sargeant Petroleum*, the United States confirmed a long-standing policy to include denial of benefits provisions in investment agreements and noted that shell companies could be denied benefits under the CAFTA-DR.

On issues related to substantive protections under a treaty, the United States submitted interpretations on (i) the minimum standard of treatment ("MST") under customary international law, (ii) expropriation, (iii) national treatment ("NT"), and (iv) the most-favored-nation treatment ("MFN"). Except for three NDPs (*Foster Wheeler*, *Seda*, *Sea Search*), all U.S. submissions addressed MST. Those NDPs confirmed the U.S. view that customary international law has crystallized to establish a minimum standard of treatment in only a few areas, including fair and equitable treatment and full protection and security. These submissions further confirm that an arbitral tribunal's formulation of a purported rule of customary international law that is not based on an examination of State practice and *opinio juris* cannot be relied upon as evidence a rule of customary international law.

The *B-Mex* submission also clarifies that the MST standard does not require the same level of due process rights in administrative decision-making as in adjudicatory proceedings. And in the *Freeport McMoRan* case, the United States confirmed that Article 22.3.1 of the U.S.-Peru TPA generally excludes taxation measures from the treaty's provisions, and that a "taxation measure" is defined broadly to include "any law, regulation, procedure, requirement or practice."

With respect to damages and compensation, the United States provided interpretations on (i) the limitations on loss or damage when bringing a claim for arbitration, (ii) reflective loss, and (iii) contributory fault. In *Koch Industries* and *Legacy Vulcan*, for example, the United States affirmed its view that the NAFTA did not displace the general rule, recognized in Article 39 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts, that a claimant may not be awarded reparation for losses to the extent of its contribution to such losses. And in *Riverside Coffee*, the United States explained that proximate causation is an applicable rule of international law that under the CAFTA-DR must be applied in fixing any amount of monetary damages.

More generally, in *Windstream II*, the United States confirmed, as it successfully argued in the *Apotex III* NAFTA case, that "applicable rules of international law" includes the concept of *res judicata*. This phrase also includes the concept of burden of proof, as noted in the U.S. NDP in *Sea Search-Armada* under the U.S.-Colombia TPA. Recent U.S. NDPs addressed other notable issues of treaty interpretation, including with respect to (i) environmental measures (*Renco II*, *Legacy Vulcan*), (ii) essential security interest exceptions (*Seda*), (iii) and attribution (*Worth Capital*).

Finally, the United States provided views on the scope of Annex 14-C of the USMCA. As explained in the *Coeur Mining* and *Legacy Vulcan* NDP submissions, the USMCA Parties did not consent in Annex 14-C to the submission of claims for alleged breaches of NAFTA obligations that occurred after the NAFTA terminated. Moreover, in the first ISDS case involving claims under both USMCA Annex 14-C and Annex 14-E, *Finley v. Mexico*, the United States provided views on delegation of authority to State enterprises (NAFTA Article 1503(2) and USMCA Article 22.3), consent and waiver (NAFTA Article 1121 and USMCA Annex 14-C(1), the limitations period (NAFTA Articles 1116(2)/1117(2) and USMCA Annex 14-E(4)(b), national treatment (NAFTA Article 1102 and USMCA Article 14.4), and MST (NAFTA Article 1105 and USMCA Article 14.6).

Role of NDPs

The role of NDPs under international law was discussed in six recent U.S. submissions (*B-Mex*, *Seda*, and the oral NDPs in *Alicia Grace, Vercara*, *Freeport McMoRan, and Sea Search-Armada*).

In these submissions, the United States points to Article 31 of the VCLT, which recognizes the important role that the States Parties play in the interpretation of their agreements. Although the United States is not a party to the VCLT, as a practice it considers that Article 31 reflects customary international law on treaty interpretation.

Article 31, Paragraph 3 states that in interpreting a treaty, "[t]here shall be taken into account, together with the context, (a) [a]ny subsequent agreement between the Parties regarding the interpretation of the Treaty or application of its provisions; [and] (b) [a]ny subsequent practice in the application of the Treaty which establishes the agreement of the Parties regarding its interpretation."

Article 31 is framed in mandatory terms – subsequent agreements between the Parties and subsequent practice of the Parties "*shall* be taken into account." Accordingly, where the submissions by parties to a particular treaty – including through NDPs – demonstrate a common understanding on the proper interpretation of a given provision, a tribunal must, in accordance with Article 31(3)(a), take this understanding into account.

States Parties are uniquely positioned to provide authentic interpretations of their treaties, including in proceedings before investor-State tribunals. The United States has consistently included provisions for NDPs in its investment agreements to reinforce the importance of these submissions for interpreting treaties. In the USMCA context, for example (as with Article 1128 of the now-terminated NAFTA) Article 14.D.7(2) was included so that the non-disputing Parties to a dispute under the USMCA can provide their views on the correct interpretation of the Agreement.

Investment tribunals have agreed, in the context of NDP submissions under the NAFTA, that submissions by the NAFTA Parties in arbitrations under Chapter Eleven constituted a common understanding under VCLT Article 31 (see, for example, the *Mobil v. Canada* Decision on Jurisdiction and Admissibility dated July 13, 2018, as well as the *Canadian Cattlemen for Fair Trade* Award on Jurisdiction dated January 28, 2008). Such views of the State may also be provided during the course of an arbitration – the International Law Commission has commented that subsequent practice under VCLT Article 31(3)(b) may include "statements in the course of a legal dispute" (International Law Commission, Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries, Conclusion 4, Commentary ¶ 18, UN Doc. A/73/10 (2018)).

Concluding Remarks

For a state navigating the landscape of international law, clarity and consistency in their positions is paramount. Given the important role of NDPs as markers of a state's practice and understanding of investment treaty law, it is important that these documents carefully and precisely express the state's position. As shown here, these positions can range a number of topics related to issues of

jurisdiction, the application of substantive protections, and the assessment of damages. And in light of the principles of treaty interpretation discussed above, tribunals must take into account the treaty Parties' common understanding of the provision of their Treaty, including as reflected in NDPs filed in the course of international arbitration.

The views expressed here are the author's own, and do not reflect those of the U.S. government.

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