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State-to-State dispute settlement and the interpretation of investment treaties

David Gaukrodger

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State-to-State dispute settlement and the interpretation of investment treaties

by
David Gaukrodger

ABSTRACT

Many governments have expressed concerns about the uncertainty linked to the perceived inconsistency of treaty interpretation in Investor-State dispute settlement (ISDS). An OECD-hosted intergovernmental investment roundtable has been considering a range of tools through which governments can take action to improve the interpretation of investment treaties and some participants suggested consideration of the potential role of State-to-State dispute settlement (SSDS) in this area.

This paper responds to this interest. The first part sets forth a rough typology of possible SSDS claims under investment treaties. The second part outlines policy issues relating to a possible type of SSDS claim which would be most relevant to the question of interpretation, for so-called "pure" interpretation of an investment treaty. The analysis seeks to identify policy reasons why governments might wish to provide for or exclude the power to obtain pure interpretations of investment treaties from SSDS tribunals or to make it broad or narrow. The final section examines SSDS cases under investment treaties addressing claims for interpretation.

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EXECUTIVE SUMMARY

Many governments have expressed concerns about the uncertainty linked to the perceived inconsistency of treaty interpretation in Investor-State dispute settlement (ISDS). An OECD-hosted intergovernmental investment Roundtable has been considering a range of tools through which governments can take action to improve the interpretation of investment treaties. This paper examines the potential role of State-to-State dispute settlement (SSDS) in this area.

The first part sets forth a rough typology of possible SSDS claims under investment treaties. These include (i) claims seeking a "pure" interpretation of a provision of the treaty unrelated to a particular claim of breach; (ii) claims of breach by another State party including diplomatic protection claims; and (iii) claims for a declaratory judgment relating to a particular measure or fact situation.

The second part further addresses claims for pure interpretation, the type of SSDS claim most relevant to the question of treaty interpretation. The analysis seeks to identify policy reasons why governments might wish to provide for or exclude the power to obtain pure interpretations of investment treaties from SSDS tribunals or to make it broad or narrow. The issues are loosely grouped into three categories. Solely for purposes of organisation, arguments for a role or a broader role for SSDS in interpretation are generally presented first followed by those that contest or would limit that role.

With regard to the practical uses and risks of SSDS on interpretive issues, the potential issues identified are the capacity of SSDS to resolve uncertainties about interpretation and improve predictability; the impact of the availability of SSDS on the likelihood of joint interpretive agreements between the treaty parties to clarify treaty interpretation; the disruption and uncertainty for investor claims and investor-state awards; and the exposure of respondent states to State-to-State interpretation claims.

With regard to the impact of SSDS and the balance of interests in investment treaties, the potential issues identified are “rebalancing” between investors and states by providing incentives for “balanced” government interpretations from both treaty parties; “rebalancing” between strong and weak states; addressing criticism about Investor-State arbitrators’ economic incentives; the concern about politicising Investor-State disputes; and fairness to investors.

With regard to institutional aspects, the potential issues identified are the expansion of the role of courts and tribunals, the complexities of SSDS claims for pure interpretation in the context of multilateral treaties, and the question of unwelcome SSDS interpretations.

The final section of the paper looks at the three known SSDS cases under investment treaties addressing claims for interpretation including the arguments of the parties and experts to the extent available.

I. INTRODUCTION

Many governments have expressed concerns about the uncertainty linked to the perceived inconsistency of treaty interpretation in Investor-State dispute settlement (ISDS). The OECD-hosted Freedom of Investment (FOI) Roundtable has been considering a range of tools through which governments can take action to improve the interpretation of investment treaties.[1] Various proposals to address the issue have been advanced or included in treaties, including contemplation of possible future appellate bodies under a number of treaties.

In the context of the discussions about the interpretation of investment treaties in March 2014, a number of Roundtable participants suggested consideration of the potential role of State-to-State dispute settlement (SSDS) as a potential method to improve the interpretation of investment treaties. Academic research in this area is also growing as part of the broad wave of interest in the role of states under investment treaties.[2] SSDS has been advanced by some as a possible way to address inconsistencies and provide greater certainty and predictability to governments, investors and others. Others consider that use of SSDS for this purpose would be disruptive of the current ISDS system.

This paper provides some preliminary analysis.[3] Overall, it is clear that governments have been very reluctant to seek to use SSDS under investment treaties. There are very few cases where governments have sought to invoke SSDS provisions. This sharply contrasts with the expanding use of

1. The following economies are invited to participate in the Roundtable: Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, People's Republic of China, Colombia, Costa Rica, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Korea, Latvia, Lithuania, Luxembourg, Malaysia, Mexico, Morocco, Netherlands, New Zealand, Norway, Peru, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Tunisia, Turkey, United Kingdom, United States and the European Union. Participation typically varies somewhat depending on the issues being discussed.

2. Anthea Roberts, "State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority", 55 *Harvard International Law Journal* 1 (2014) [hereinafter, Roberts, State-to-State Dispute Settlement]; Michele Potestà, State-to-State Dispute Settlement Pursuant to Bilateral Investment Treaties: Is there Potential?, in *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (Nerina Boschiero et al. eds., 2013) [hereinafter, Potesta, State-to-State Dispute Settlement]; Christoph H. Schreuer, Investment Protection and International Relations, in A. Reinisch & U. Kriebaum (eds.), The Law of International Relations – Liber Amicorum Hanspeter Neuhold (2007), pp. 345-358. The publicly-available arguments and experts reports in the *Ecuador v. United States* case have sparked much of this interest. See Jarrod Hepburn, Luke Eric Peterson, "US-Ecuador Inter-State Investment Treaty Award Released to Parties; Tribunal Members Part Ways on Key Issues", *Investment Arbitration Reporter*, 30 October 2012 [hereinafter, Hepburn, Peterson, US-Ecuador Inter-State Investment Treaty Award Released to Parties]. The case is discussed in section IV.A.

3. Some empirical and policy questions were raised for possible consideration by governments in the context of the Roundtable discussion. The questions can suggest potential new areas for fact-finding, identify policy issues, or raise questions relating to the text of the paper. They are included for reference in Annex 1.

ISDS by investors. It appears that SSDS could offer possibilities for the resolution of interpretation questions if it were carefully designed and issues of its interaction with ISDS were addressed. There are a number of successful models outside of the field of investment treaty law in which interpretive decisions are rendered in certain circumstances. However, the current stock of investment treaties generally only very lightly regulates SSDS and rarely specifically addresses its interaction with ISDS. Under these conditions, working out the many issues in SSDS and ISDS case law would likely be a lengthy and uncertain process. Academics have begun contributing models for more carefully-specified regimes for the co-existence of SSDS and ISDS. Unless there is agreement between treaty parties to particular treaties about how SSDS should operate, governments interested in SSDS as a tool for resolving interpretive issues under investment treaties may want to address the issues as a matter of treaty drafting.[4]

The analysis in the balance of the paper is structured as follows. The first part sets forth a rough typology of possible SSDS claims under investment treaties. The second part outlines policy issues relating to a possible type of SSDS claim which would be most relevant to the question of interpretation, for so-called "pure" interpretation of an investment treaty. The analysis seeks to identify policy reasons why governments might wish to provide for or exclude the power to obtain pure interpretations from SSDS tribunals or to make it broad or narrow. The final section examines case law addressing claims for interpretation.

Some governments have agreed to investment treaties that exclude ISDS. They contain only SSDS clauses for enforcement of investment provisions including investor protection. In some cases, this approach based only on SSDS responds to controversy about the inclusion of ISDS.[5] Brazil has recently developed a model Cooperation and Investment Facilitation Agreement that provides for SSDS; ISDS is excluded. It has signed a number of treaties with other countries.[6] However, these types of treaties remain relatively rare. The analysis here focuses primarily on issues raised by the co-existence of SSDS and ISDS provisions in an investment treaty.

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4. Remedies can also be an important consideration for governments in considering and evaluating the relative roles of ISDS and SSDS. Final remedies (at the conclusion of the case) in ISDS are almost exclusively monetary (pecuniary) in nature. In SSDS, pecuniary remedies often play a more limited role, but much depends on the type of case. Diplomatic protection claims may frequently seek monetary remedies. In contrast, SSDS at the WTO relies exclusively on non-pecuniary remedies. The Roundtable has discussed the contrast between the remedies available to investors under domestic law and to covered foreign investors in ISDS. See OECD, Government Perspectives on Investor-State Dispute Settlement: A Progress Report, December 2012, pp. 9-11; Gaukrodger, D. and K. Gordon (2012), "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", *OECD Working Papers on International Investment*, No. 2012/03, OECD Publishing, Paris. http://dx.doi.org/10.1787/5k46b1r85j6f-en, pp. 24-27 & 79-87.

5. Review of recent agreements of this type suggests some possible purposes. The most obvious impact is to limit claims to those brought by the other government. Experience with the 2004 Australia-United States Free Trade Agreement suggests that such claims will be rarer than under ISDS provisions. The 2014 Agreement between Australia and Japan for an Economic Partnership using an SSDS-only approach including for investment claims suggests some additional characteristics of note. These include a strong focus on primary (non-pecuniary) remedies rather than damages, flexibility with regard to implementation of "suggested measures", and modified and accelerated arbitration procedures with tight time lines akin to those at the WTO.

6. See Erivaldo Alfredo Gomes (Ministry of Finance, Brazil), Brazilian Investment Agreement Policy: Building a New Path (presentation to FOI Roundtable on 17 March 2015). Brazil has signed agreements based on its new model including with Mozambique, Angola, Mexico, Malawi, Colombia and Chile. For an example in English, see the Brazil-Malawi Investment Cooperation and Facilitation Agreement (2015).

II. TYPOLOGY OF POSSIBLE CLAIMS UNDER STATE-TO-STATE DISPUTE SETTLEMENT CLAUSES IN INVESTMENT TREATIES

SSDS clauses could conceivably be used for three broad types of claims, as Anthea Roberts has pointed out in a recent article addressing SSDS under investment treaties.[7] These include (i) claims seeking a "pure" interpretation of a provision of the treaty unrelated to a particular claim of breach; (ii) claims of breach by another State party including diplomatic protection claims; and (iii) claims for a declaratory judgment relating to a particular measure or fact situation.[8]

A. Claims for pure interpretation

A pure question of interpretation is one that is unconnected to a particular factual dispute or to a claim for breach. For example, without regard to a particular dispute, a tribunal could be asked to determine if a treaty provision providing for a mandatory six month cooling-off period between a notice of claim and the filing of an actual claim is jurisdictional in nature so that a failure to comply bars claims.

Courts or tribunals can be expressly given advisory or reference jurisdiction to address interpretive issues. Article 96 of the U.N. Charter, for example, provides that the General Assembly or the Security Council may request the International Court of Justice (ICJ) to give an advisory opinion on any legal question. However, the conditions, if any, under which pure interpretive disputes can be brought under other formulations of dispute resolution clauses are disputed.

A few claims for pure interpretation have arisen under investment treaties. The best-known example is a claim by Ecuador against the United States seeking interpretation of a treaty clause about the required standards of treatment of covered investors in domestic courts. The United States challenged the jurisdiction of the SSDS tribunal, which dismissed the claims in a 2-1 decision. The decision is not public. Peru brought an earlier claim against Chile seeking the interpretation of the scope of application of an investment treaty which did not give rise to a decision. Recently, on 23 September 2014, Kyrgyzstan obtained a ruling from the Economic Court of the Commonwealth of Independent States about the interpretation of the 1997 Convention on the Protection of the Rights of the Investor.[9] These cases are addressed in section IV.

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7. See Roberts, State-to-State Dispute Settlement.

8. No view is expressed about whether any of these types of claims are available under any particular treaty.

9. Commonwealth of Independent States Investor Rights Convention, signed 28 March 1997 (Russian). An unofficial translation in English is available on a Republic of Belarus website.

B. Claims of breach of a treaty

Two types of SSDS claims for breach can conceivably be distinguished: (i) diplomatic protection of an investor; or (ii) a claim based on direct injury to a state's rights.

1. Diplomatic protection claims of breach

Home states could use SSDS proceedings to bring diplomatic protection claims for injury to their nationals. They could for example claim against host states for failure to comply with an ISDS award. The exercise of diplomatic protection for this purpose is contemplated in article 27 of the ICSID Convention. Home states could also bring claims on behalf of a group of smaller investors affected by particular measures. In 2003, for example, Italy brought a claim under the SSDS provision of the Cuba-Italy BIT alleging violations of the treaty relating to a group of sixteen Italian companies as a result of a series of acts attributable to Cuba. The companies operated in different sectors.

The Cuba-Italy BIT contains somewhat unusual arbitration provisions with overlap between the procedures for ISDS and SSDS. In particular, tribunals for both types of cases are composed using the SSDS procedures which call for the tribunal being constituted primarily by the treaty parties. Investors thus have no formal role in constituting an ISDS tribunal under the treaty.[10] (Of course, the home state government may consult with the investor(s) about, inter alia, the government's choice of arbitrator.) In the event, Italy nominated an arbitrator as did Cuba. The president was chosen jointly by the co-arbitrators.[11]

Cuba objected to the use of the SSDS provision for diplomatic protection claims, but the tribunal rejected Cuba's argument and addressed the claims.[12] The parties also disputed whether the diplomatic protection claims should be subject to the requirement of exhaustion of local remedies. Italy argued that the ISDS provisions giving investors a direct alternative to local courts was in effect a waiver of the exhaustion requirement for SSDS. The tribunal rejected this

10. The SSDS provisions in the BIT call for each treaty party selecting one arbitrator and the two co-arbitrators choosing a president for the tribunal. See Accord between Italy and Cuba on the promotion and protection of investments (1993), art. 10. If the co-arbitrators cannot agree on a president within three months, a treaty party can request the President of the Permanent Court of Arbitration to appoint a president. Thus, the treaty parties select co-arbitrators. They may also have input into the selection of the president. See Gaukrodger, D. and K. Gordon (2012), "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", *OECD Working Papers on International Investment*, No. 2012/03, OECD Publishing, Paris. http://dx.doi.org/10.1787/5k46b1r85j6f-en, pp. 89-90.

11. *Italian Republic v. Republic of Cuba*, Interim Award, 15 March 2005, para. 4.

12. Id., paras. 47 and 62 *et seq*. The tribunal found that the presence of an ISDS provision did not bar diplomatic protection claims. Although the ICSID Convention was not applicable (Cuba is not a member), the tribunal applied its article 27 rules on diplomatic protection by analogy. (Article 27 bars concurrent diplomatic protection in ICSID cases once an ISDS claim is filed). Thus, it considered that diplomatic protection was possible as long as the investor has not consented to arbitration, but would be barred if an investor brought an ISDS claim for the duration of that claim. See id., para. 65.

argument and found that the diplomatic protection claims were subject to an exhaustion requirement.[13]

These uses of SSDS to bring diplomatic protection claims would not significantly interfere with ISDS. However, there may also be some cases where home state interests, such as those relating to national security, may diverge from those of its investors. A government might wish to resolve certain claims itself. This type of use would raise issues relating to the protection of the interests or rights of investors. The possible co-existence or overlapping scope of diplomatic protection and ISDS claims raises many issues including about the nature of investor rights or interests under investment treaties. Given the limited relevance of diplomatic protection claims to interpretation issues, those issues are not explored here.

2. State-to-State claims for direct injury

Most claims by governments arising out of particular cases will likely be based on alleged injury to investors. In the *Italy v. Cuba* case, Italy maintained that, in pursuing its claim, it was invoking "double standing". It claimed to be acting both as a direct claimant and as a diplomatic protection claimant on behalf of its nationals. It sought the losses allegedly incurred by its nationals plus a dollar for its direct injury. The tribunal rejected Italy's direct claims on the basis that all of its diplomatic protection claims were rejected.[14]

C. Claims for a declaratory judgment relating to a particular measure or fact situation

Anthea Roberts has identified a third potential group of claims under SSDS provisions in investment treaties.[15] Like claims of breach, this type of claim relates to a particular factual situation or measure. However, rather than seek complete resolution of an investor case, it seeks a declaration about certain factual or legal issues in the case. It may leave open future individual ISDS claims.

Home state claims of this type could for example seek a declaration that a broadly applicable measure, such as legislation, does not comply with the treaty. For example, Mexico brought a state-to-state claim under Chapter 20 of NAFTA seeking a declaration that the United States had breached its national treatment (NT) and most-favoured-nation (MFN) treatment obligations with respect to Mexico and potential Mexican investors.[16] The claim challenged a US moratorium on investments by Mexican investors in US trucking firms. The United States objected that no potential investors were identified who had sought to invest. However, the panel upheld Mexico's claim and found that the moratorium

13. Id. para. 89. Italy discontinued ten of the claims following the preliminary decision finding in part that the exhaustion of remedies requirement would apply to its claims; the remaining six were rejected on the merits. See generally Michele Potestà, Republic of Italy v. Republic of Cuba, 106 Amer. J. Int'l L. 341 (2012) (case comment).

14. *Italian Republic v. Republic of Cuba*, Final Award, 15 January 2008, paras. 222-252.

15. See Roberts, State-to-State Dispute Settlement, pp. 66-68.

16. See In re Cross-Border Trucking Services (Mex. v. U.S.), Case No. USA-MEX-98-2008-01, NAFTA Ch. 20 Arbitration, Final Report (6 Feb. 2001).

breached the investment chapter provisions on NT and MFN. The panel recommended that the United States take appropriate steps to bring its practices into compliance with its NAFTA obligations.[17]

This type of claim could also resolve key common issues of law or fact in possible or expected future investor cases, particularly by smaller investors. If the SSDS outcome was binding or highly persuasive in the subsequent investor cases, those investors could benefit from key issues being already or largely determined.[18] Alternatively, a home state claim brought promptly in response to a measure affecting many investors could limit damages and lead to agreed primary remedies rather than large damages payments.[19]

17. *Id*., para. 299. The primary focus of the case was on cross-border services rather than investment. Many Mexican trucking companies were interested in providing cross-border trucking services in the United States and the moratorium also blocked them. The claim relating to investment also involved a pre-establishment, market access issue.

18. In 2009, Canacar, a Mexican trucking trade association, sent the United States a Notice of arbitration relating to the trucking industry. Canacar alleged that United States measures affecting Mexican investment in trucking services in the United States violated NAFTA and had caused billions of dollars in losses. The Notice claimed that the issue of breach had been definitively determined by the SSDS tribunal. See *Canacar v. United States*, Notice of Arbitration, 2 April 2009, pp. 3-4 ("The United States has violated Articles 1102 and 1103 by, inter alia, prohibiting the Claimants from making investments in United States enterprises to provide [trucking] services. [...] The United States' breaches of its NAFTA obligations have already been definitely determined by the unanimous opinion in *Cross-Border Trucking*").

    In February 2014, press reports indicated that Canacar stated that it had filed a claim for USD 30 billion with the support of 30,000 trucking firms; other reports refer to it reinstating its 2009 claim. See, for instance, "Mexican truckers commence arbitration action against U.S.", EFE Newswire - Americas in Focus (15 February 2014); Sandra Dibble, "Long-Haul Trucking a Continued Blind Spot in NAFTA Vision", San Diego Union-Tribune (11 May 2014). The US State Department reportedly indicated in April 2014 that it had not received an actual claim following the Notice, but did not provide further information. If the potential ISDS claims are litigated, the issue of the impact of the SSDS findings on the ISDS case could arise.

19. Roberts, State-to-State Dispute Settlement, p. 67.

    Anthea Roberts has suggested that in addition to home state claims, a host state could conceivably seek to have certain legal and/or factual issues relating to a particular fact situation resolved in a SSDS proceeding. While recognising the novelty of this type of claim and the many issues it would raise, Roberts has suggested it could be used to ensure consistency for a host state facing a large number of claims about the same measure. She notes the high degree of inconsistency and costs associated with the many cases arising out of the Argentine financial crisis in 2000-2001. There is no known example of this type of case under an investment treaty. This type of claim would have a very high degree of potential interference with ISDS. Host States could have a strong incentive to seek SSDS resolution of potential or pending ISDS claims. This type of claim would in effect compel the home state to decide whether to engage in at least partial diplomatic protection of its nationals; it would resemble the mirror image of a diplomatic protection claim.

III. POLICY ISSUES RAISED BY STATE-TO-STATE CLAIMS FOR PURE INTERPRETATION

This section provides preliminary analysis of policy issues raised by claims for pure interpretation. They are the most relevant type for government input into interpretation. Governments also advance interpretations in the other types of claims, but that would not normally be the primary rationale for the claim.

The analysis here is forward-looking and general: it seeks to identify policy issues. For ease of presentation, the issues are loosely grouped into three categories; (i) practical uses and risks; (ii) aspects relating to the balance of interests in investment treaties; and (iii) institutional aspects. Solely for purposes of organisation, arguments for a role or a broader role for SSDS in interpretation are generally presented first in each category followed by those that contest or would limit that role.

A. Practical uses and risks of State-to-State dispute settlement on interpretive issues

1. Resolving uncertainties about interpretation and improving predictability

A substantial number of Roundtable participants have expressed serious concerns about consistency in ISDS.[20] There appear to be few operating mechanisms at present for the resolution of uncertain issues. SSDS claims for interpretation could be used to resolve conflicting government interpretations or conflicting ISDS case law. Assuming the result is binding or highly persuasive at least for future ISDS tribunals, interpretive claims could be used to resolve definitively issues that are subject to continuing uncertainty. An SSDS tribunal could be asked for example to decide on whether an MFN clause in a treaty allows incorporation of procedural provisions from other treaties. SSDS tribunals could perform some of the functions of an appellate court in clarifying and resolving legal issues so that they are not continuously relitigated.

2. Impact on the likelihood of joint interpretive agreements

A number of Roundtable participants have suggested that SSDS consultation provisions in investment treaties could serve as a conduit for joint interpretive agreements. Joint interpretive agreements allows governments to interpret the treaty and can be either binding or non-binding on ISDS tribunals.[21] In contrast, an SSDS adjudication decision is a third party decision rather than government voice.

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20. See OECD, Government Perspectives on Investor-State Dispute Settlement: A Progress Report, December 2012, p. 18.

21. See Gaukrodger, D. (2016), "The legal framework applicable to joint interpretive agreements of investment treaties", *OECD Working Papers on International Investment*, No. 2016/01, OECD Publishing, Paris. http://dx.doi.org/10.1787/5jm3xgt6f29w-en.

An important policy question is whether the availability of SSDS interpretive decisions through compulsory arbitration would encourage more joint treaty party agreements on interpretive issues. The current level of diplomatic dialogue about existing treaties (not under negotiation) is unknown, but appears likely to be modest. There have been few interpretive agreements.

Supporters of SSDS have argued that a state's ability to compel the other state to arbitrate together with the uncertainty with regard to an SSDS decision would increase both governments interest in an agreed solution over which they have more control. They thus see the availability of SSDS leading to more joint agreements because the backstop of litigation would encourage settlement.

Others have suggested that the ability of one treaty party to compel an interpretive decision would chill diplomatic dialogue about the meaning of the treaty, making it harder to achieve agreement. They have suggested that it would judicialise diplomatic discussions between treaty parties about the meaning of the treaty.[22]

3. Disruption and uncertainty for investor claims and investor-state awards

Opponents of claims for interpretation in SSDS contend that they would create a high degree of uncertainty about the final and binding nature of ISDS awards. They suggest for example that SSDS claims could "undermine the finality of investor-State awards by allowing States to re-litigate the meaning and effect of treaty provision at issue in the underlying dispute. States could then seek to use the 'authoritative interpretation' as a collateral attack on a final investor-State award in annulment, set-aside or enforcement proceedings".[23]

As noted above, one sensitive situation would be an SSDS interpretive decision that occurs in the interim period following an award, but before review proceedings are complete. Host states could have an interest in attempting to undermine an unfavourable award during this phase. They could commence SSDS interpretive proceedings to obtain a decision in this interim period. Because awards can often be annulled if it is determined that the ISDS tribunal exceeded its jurisdiction, host states could seek jurisdictional rulings from SSDS tribunals to seek to undermine an award.

The issues in this area are different in ICSID and non-ICSID cases. The ICSID system is self-contained. Once an award has survived an ICSID annulment proceeding (or the time to seek annulment has passed), an ICSID award is no longer subject to any review. National courts of ICSID members must enforce it as a national judgment. ICSID awards would thus only be open to potential collateral attack based on an SSDS interpretation on jurisdiction during the pendency of annulment proceedings. In contrast, the enforcement of a non-ICSID award can be contested each time the award creditor seeks to enforce it in a national court under the New York Convention. This can occur years after the award if it remains unsatisfied.

Concerns have also been raised about the possible use of SSDS cases to delay and complicate ongoing or expected ISDS cases. Christoph Schreuer has noted that the negotiating history of the ICSID

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22. *The Republic of Ecuador v. The United States of America*, PCA Case No. 2012-5, Memorial of Respondent United States of America on Objections to Jurisdiction, 25 April 2012, pp. 6 and 59-67 [hereinafter, *Ecuador v. United States*, Memorial of Respondent].

23. *The Republic of Ecuador v. The United States of America*, PCA Case No. 2012-5, Statement of Defense of Respondent United States of America, 29 March 2012, pp. 12-13 [hereinafter *Ecuador v. United States*, Statement of Defense of Respondent]; see also *Ecuador v. United States*, Memorial of Respondent, pp. 59-67.

reflects agreement that article 64 of the Convention, which gives the ICJ competence to resolve issues about its interpretation and application, should not enable a state to frustrate arbitration proceedings.[24] However, the ICJ retains the general power to resolve disputes about the interpretation and application of the Convention.[25]

Roberts considers that concerns in this area can be largely resolved by appropriate rules and principles to govern the effect of SSDS proceedings on ISDS under different circumstances. For example, she contends that rules or practices making clear that SSDS interpretive decisions would not affect already-rendered ISDS awards would eliminate many of the problems. She recognises that rules would be needed to govern the relationships between concurrent proceedings.[26]

A key issue with SSDS interpretive decisions would be to determine their degree of influence on ISDS tribunals. A significant number of treaties provide that SSDS decisions are binding. However, they rarely expressly clarify or address the effect of a SSDS award on ISDS tribunals.[27] In the absence of definitive decisions or agreement between the treaty parties on the meaning of language in existing treaties, the process of working out the issues could be lengthy and uncertain.

Roberts has developed a proposed framework for this interaction. It is based on her view that more government "voice" would be beneficial to the system. She suggests that an SSDS decision reached in a concurrent proceeding should be considered to be highly persuasive for ISDS tribunals in pending cases: there should be a rebuttable presumption that the SSDS interpretation applies in the ISDS case. In a hierarchy of influence, she would place SSDS outcomes below interpretive agreements by the treaty parties, but above previous ISDS decisions. She recognises that ISDS arbitrators may not welcome the influence of SSDS tribunals, but considers that ISDS tribunals should recognise that under a sustainable investment treaty dispute settlement system they must share interpretive power with the treaty parties and with SSDS tribunals.[28]

Other commentators have suggested that at least some ISDS tribunals are likely to perceive an SSDS case as an improper intrusion on their domain of authority.[29] W. Michael Reisman, a frequent ISDS and international law arbitrator, has argued that SSDS cases interpreting the substantive investor protections of an investment treaty would have no effect on the interpretive powers of ISDS arbitrators.[30]

Where the rules for interaction are unclear, even governments that might wish to file a SSDS claim may hesitate to file one because it could antagonise an ISDS tribunal with power to decide a major case. The government may consider it prudent to request implicit ISDS tribunal consent to file an SSDS case, by for example requesting a suspension of the ISDS proceedings. However, some may consider that an ISDS tribunal is unlikely to welcome recourse to an SSDS tribunal. (See discussion of the *Peru v. Chile* case in section IV.A).

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24. See Christoph H. Schreuer et al, The ICSID Convention: A Commentary (2d ed. 2009), pp. 1261-62.

25. Id.

26. Roberts, State-to-State Dispute Settlement, pp. 65-66.

27. *Id.*, pp. 59-60.

28. *Id.*, pp. 61-63.

29. See, for instance, Potesta, State-to-State Dispute Settlement, p. 763.

30. Michael Reisman, Expert Opinion delivered in the *Republic of Ecuador v. United States of America* case, 24 April 2012, paras. 52 and 58 [hereinafter Reisman Opinion].

4. Exposure of respondent states to State-to-State interpretation claims

Concerns have been expressed about possibly excessive exposure of states to interpretive claims by other states particularly if such claims are made easily available. There is concern that allowing access to interpretive claims could give rise to many SSDS claims. Some well-known judges have expressed concerns that, in general international law, claims unconnected to claims of breach could potentially expose states to "unnecessary, premature, inadequately motivated or merely specious claims".[31]

Respondent states in SSDS could be required to make submissions on issues on which they do not have settled views. It may be costly and burdensome for a government to generate such views particularly if broad consultations are required within the government and beyond.[32] The lengthy internal negotiations required to achieve a model treaty, or even the inability to achieve such a treaty in some cases, suggests that it could be difficult to reach a consensus view in some cases.

At the same time, respondent governments in ISDS cases are required to present interpretive theories once an investor files a claim. Governments that are the frequent respondents in ISDS in a treaty relationship may feel that the burden of responding to interpretive claims is significantly less than the one they face as respondents in investor claims.

B. State-to-State dispute settlement on interpretive issues and the balance of interests in investment treaties

1. "Rebalancing" between investors and states by providing incentives for "balanced" government interpretations

Anthea Roberts has cited certain structural factors in ISDS in support of a greater role for SSDS proceedings, which she sees as a desirable way to re-balance investment treaties. She notes that investors will normally advance pro-investor interpretations of the relevant treaty. When advanced by investors, however, the pro-investor interpretations are not attributed to the home state.[33] If these positions were advanced in pleadings by the investors' home state rather than its investors (in a diplomatic protection context, for example), they could possibly be evidence of state practice.[34] As such, they could be cited in future cases against the home state as alleged evidence of its agreement with a pro-investor reading of the treaty. Awareness of this exposure could cause a government to adopt a more balanced position. Roberts thus suggests that SSDS interpretation cases would have the positive effect of driving the interpretation of treaties "towards the centre". She analogises to a perceived impact of the United States defending ISDS cases on the evolution of the United States Model BIT.[35]

It is also possible that similar incentives would apply to arbitrator selection in SSDS and that SSDS proceedings would take place in front of adjudicators generally more attuned to state interests than the

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31. *Ecuador v. United States*, Memorial of Respondent, p. 22 citing Joint Dissenting Opinion of Judges Spender and Fitzmaurice in *Ethiopia v. South Africa* and *Liberia v. South Africa*, Judgment on Preliminary Objections, 21 December 1962, 1962 I.C.J. 319, 563.

32. Roberts, State-to-State Dispute Settlement, p. 57.

33. Particular situations, such as where a state entity is subrogated to a claim, are not addressed here.

34. See, for instance, Ian Brownlie, Principles of Public International Law 24 (7th ed. 2008) ("Pleadings before the International Court contain valuable collations of material and, at the least, have value as comprehensive statements of the opinions of particular states on legal questions").

35. Roberts, State-to-State Dispute Settlement, pp. 57-58.

pool of arbitrators in ISDS cases. This would depend on both the applicable investment treaty provisions on SSDS dispute resolution, and also on the incentives of the state parties to SSDS cases. As elsewhere, the identity and practice of the default appointing authority in the absence of disputing party agreement on a tribunal president would likely be an important factor in the constitution of the tribunal.[36]

Some have suggested that investor interests could be improperly disregarded in SSDS proceedings.[37] Giving affected investors or investor representatives a right to be heard in SSDS interpretation cases – by analogy to the right of intervention of non-disputing treaty parties under some treaties – would allow a broader consideration of the interpretive issues.[38]

2. "Rebalancing" between states

Roberts has also argued that giving the power to weaker states to obtain interpretive decisions would, in her view, help rebalance investment treaties between states. She contends that powerful states are likely to dominate decisions about any agreed interpretations.[39] Under this view, SSDS is seen as giving weaker states additional negotiating power.

3. Addressing criticism about Investor-State arbitrators' economic incentives

Roundtable participants have discussed concerns about the existence of economic incentives for ISDS arbitrators.[40] Although their impact, if any, is difficult to determine, there is growing public criticism about this aspect of ISDS. The incentives are stronger with regard to decisions about the scope of application of a treaty because they can affect the duration of a case and the likely flow of cases in the future. Such decisions include jurisdictional questions. They also include matters that can definitively decide the outcome of many claims, such as the rules on recovery of reflective loss. A referral mechanism for interpretation in those areas to an SSDS adjudication body not subject to any apparent conflicts of interest could help address the public criticism about the alleged impact of economic incentives on the decisions of ISDS arbitrators.

4. The concern about politicising Investor-State disputes

One of the core advantages of ISDS for many governments is the depoliticisation of investment disputes. Home governments can respond to investor complaints about their treatment by host states by

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36. Compare, for instance, art. 9(2) of the 1997 Agreement Between the Republic of Chile and the Republic of Austria for the Promotion and Reciprocal Protection of Investment (hereinafter Austria-Chile BIT) (allowing claimant investor to choose among, *inter alia*, ICSID and UNCITRAL Rules with their differing appointing authorities for ISDS) with Article 10(4) of the same treaty (President of ICJ to choose president of SSDS tribunal in the event of inability of treaty parties to agree).

37. See Christoph H. Schreuer, Investment Protection and International Relations, in A. Reinisch & U. Kriebaum (eds.), The Law of International Relations – Liber Amicorum Hanspeter Neuhold (2007), pp. 345-358.

38. See Roberts, State-to-State Dispute Settlement, pp. 50-51 ("in order to help protect the interests of investors, directly affected investors should be treated as interested parties with a right to intervene in state-to-state cases").

39. *Id.*, pp. 57-58.

40. See OECD, Government Perspectives on Investor-State Dispute Settlement: A Progress Report, December 2012, p.16 (discussing issue of arbitrator incentives and finding that the possible impact of economic incentives on ISDS arbitrators should be considered).

referring investors to the ISDS system. They do not need to raise the issue with the host government themselves. Host governments have been generally protected from concurrent ISDS claims and diplomatic protection.

SSDS interpretive disputes could increase intergovernmental politicisation of ISDS. Some SSDS cases could be closely linked to ISDS cases that are highly politicised in the host state. The politicisation could spill over into the inter-state context. Other SSDS interpretation proceedings may be sufficiently technical that they are unlikely to draw significant interest. With no money directly at issue, they would appear less likely to attract attention than diplomatic protection cases seeking findings of liability and remedies.

Increased recourse to SSDS could perhaps help address other forms of politicisation of ISDS. As debate on ISDS expands, there is an increasing political element to ISDS cases, as the system and special rules for foreign investors are contested. The ISDS dispute resolution system in particular is increasingly challenged for "raising foreign investors to the same level as sovereign states".[41] In short, it appears that the very "depoliticised" structure of dispute resolution under investment treaties has itself become a growing political issue.

Increasing the role of states in the investment treaty dispute resolution system, increasing public government advocacy for "moderate" interpretations of treaties in cases, and demonstration of increasing influence of such arguments in ISDS cases could perhaps help to reduce these perceptions of ISDS and this form of politicisation.

5. Fairness to investors

Opponents of SSDS have argued that it would give respondent states a second forum for resolution of a dispute. A respondent state could decide whether it would prefer to address an issue in ISDS or SSDS, while the investor would be limited to ISDS. The investor would not be able to access a second forum (although it could be given standing to be heard in the SSDS case, as noted above). Moreover, the second forum open to the State would arguably be a more favourable SSDS forum, depending on the rules for its constitution and government incentives in choosing SSDS adjudicators.[42]

C. Institutional aspects

1. Defining the proper role of courts and tribunals

Opponents of SSDS interpretive decisions have expressed concerns about the scope of purely interpretive decisions and the proper role of courts and tribunals. Limiting courts or tribunals to the resolution of claims about breach constrains their powers. Their interpretive powers are generally limited

41. See Public Citizen, Obama-Merkel Summit Presents Perfect Opportunity to Drop Controversial Foreign 'Investor-State' Rights in U.S.-EU Trade Pact, 1 May 2014. Some strong supporters of free trade have gone so far as to suggest eliminating ISDS from trade negotiations because of their concerns that valuable trade negotiations could be stalled by negative public perceptions of ISDS. See Daniel J. Ikenson, A Compromise to Advance the Trade Agenda: Purge Investor-State Dispute Settlement, Cato Institute, 4 March 2014.

42. The issues are somewhat analogous to the issues of fairness raised by multiple overlapping shareholder claims against governments, as discussed by the Roundtable. But there are differences: in the shareholder context, the government must win each case, whereas the impact of a government win in SSDS on interpretation could be uncertain.

to addressing the issues presented by the case. In pure interpretation cases, SSDS tribunals could be asked to resolve open-ended or overly broad questions. There could be fears that they could respond broadly to a narrow question.[43]

Similar concerns have been expressed about an alleged tendency of some ISDS tribunals to set forth broad interpretations of treaties in resolving particular disputes. However, lawyers in subsequent cases can always argue that the broad earlier statements are not relevant because the facts in the two cases differ in relevant respects; this limiting argument is not available with regard to abstract interpretation. Legal cultures differ in the importance they place on the facts in evaluating an interpretation. Some systems, like European Union law, make frequent use of referral procedures on questions of interpretation.

2. Multilateral treaties

The increasing number of multilateral investment treaties would raise additional concerns. A party dissatisfied with an interpretive issue could in theory require all of the other parties to the treaty to respond to a request for interpretation.[44] The resolution of interpretive disputes under a multilateral treaty could require a standing court.[45] The recent Kyrgyzstan request to the Economic Court of the Commonwealth of Independent States for interpretation of a treaty on investor rights is a very recent example of such a proceeding. (See section IV.C)

3. Addressing unwelcome SSDS interpretations

Where the SSDS outcome is binding, it could place the governments in a difficult position. The governments could jointly agree on a different interpretation. However, following the binding SSDS interpretation, the different agreed interpretation might be considered to be an amendment. If so, it would normally only apply for the future. In addition, to give it effect, the governments might have to follow specific treaty procedures for amendments to achieve their agreed view.[46] This may be impractical. Governments could agree on some attenuation of a binding result to give themselves a degree of flexibility to react jointly following an unwelcome SSDS interpretive decision.[47]

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43. Tomuschat C., Expert Opinion delivered in the *Republic of Ecuador v. United States of America* case, 25 April 2012, para. 24 [hereinafter Tomuschat Opinion].

44. Tomuschat Opinion, para. 26.

45. See *id.*, para. 31.

46. This would notably depend on whether the treaty provisions on amendments are exclusive of other types of amendments.

47. The 2012 Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments [hereinafter, Canada-China BIT (2012)] contains some power for the parties to modify the effects of an SSDS decision, but principally with regard to its implementation. See Canada-China BIT (2012), article 15(8) ("The decision of the [SSDS] arbitral tribunal shall be final and binding on both Contracting Parties. The Contracting Parties shall, if necessary, within 60 days of the decision of an arbitral tribunal, meet and decide on the manner in which to resolve their dispute. That decision shall normally implement the decision of the arbitral tribunal. If the Contracting Parties fail to reach a decision, the Contracting Party bringing the dispute shall be entitled to receive compensation of equivalent value to the arbitral tribunal's award").

IV. CASES ON CLAIMS FOR INTERPRETATION

The three known cases on requests for interpretation under investment treaties involve different circumstances: (i) concurrent SSDS and ISDS proceedings where the respondent government in the ISDS case requested but did not obtain a suspension of the ISDS proceedings to allow the SSDS tribunal to rule; (ii) SSDS proceedings commenced to seek an interpretation after an unfavourable ruling in an ISDS case, but where the SSDS tribunal declined jurisdiction; and (iii) an apparently unilateral request for interpretation to a standing court with advisory jurisdiction which resulted in a favourable interpretation for the requesting government. The cases illustrate a number of different issues.

A. Peru v. Chile

There is limited information about the *Peru v. Chile* SSDS case, but the available information about the circumstances may illustrate some of the questions faced by governments, investors and other participants in the context of concurrent ISDS and SSDS disputes.

The ISDS and SSDS cases both arose under the 2000 Convenio entre el Gobierno de la República del Perú y el Gobierno de la República de Chile para la Promoción y Protección Recíproca de las Inversiones [hereinafter Chile-Peru BIT].[48] The treaty expressly provided for both ISDS and SSDS. The SSDS provision applied to the resolution of disputes ("controversias") between the parties concerning the interpretation and application of the treaty. The ISDS provision referred generally to disputes between a state and an investor of the other state.

The Chile-Peru BIT was signed on 2 February 2000 and entered into force on 3 August 2001.[49] Prior the conclusion of the treaty, Empresas Lucchetti S.A., a Chilean investor, and certain Peruvian government authorities were in conflict including in domestic court cases in Peru. The conflicts notably related to the closure of a pasta factory located in an area designated by local Peruvian authorities as an environmental reserve. Article 2 of the treaty contained a provision on its application in time (*rationae temporae*). The treaty applied to pre-existing investments but not to pre-existing disputes.[50]

On 24 December 2002, Lucchetti submitted an ISDS claim against Peru to ICSID.[51] Peru's defence in the *Lucchetti* case included the argument that the dispute pre-dated the entry into force of the BIT. As soon as the ISDS tribunal was constituted, Peru requested it to suspend its proceedings on the ground that the ISDS request for arbitration was the subject of a concurrent SSDS dispute. The SSDS proceedings were also reportedly directed at the temporal scope of application of the treaty.

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48. Chile-Peru BIT (2000).

49. It was terminated on 1 March 2009 upon the entry into force of the Acuerdo de Libre Comercio Chile-Peru (Chile-Peru FTA). See Chile-Peru FTA, Annex 11-E.

50. *Id.*, art. 2.

51. *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. Republic of Peru* (ICSID Case No. ARB/03/4), Award, 7 February 2005, para. 7 [hereinafter *Lucchetti v. Peru*, Award].

There is scant information about the request for a suspension in the ISDS case. The submissions of the parties are not public and the arguments made are unknown. The procedural status of the SSDS case at the time is also unknown. Research so far has not disclosed if a tribunal had been constituted in the SSDS case. It is not known if the SSDS claim sought only a general determination of the meaning of the treaty or an application of it to some of the facts of the *Lucchetti* claim.

Five weeks after Peru's request for a suspension, the ISDS tribunal rejected it. No reasoning for the decision has been made public.[52]

Peru preferred that the SSDS tribunal interpret the issue. However, rather than simply proceed with a concurrent SSDS case, it asked the ISDS tribunal whether it would suspend its proceedings. The request for a suspension allowed the ISDS panel to decide if it was willing to at least largely defer to an SSDS decision which Peru preferred; if the ISDS tribunal suspended, a significant degree of deference could likely be expected to the SSDS result. However, once the rejection of the suspension signalled that the ISDS panel was not clearly willing to defer to the SSDS panel, prosecution of the SSDS case in the face of that decision could involve risks. It is possible that Peru did not want to antagonise an ISDS tribunal with considerable decision-making power.

Peru prevailed in the ISDS case on the issue of the application of the treaty in time.[53] This may have largely eliminated the incentive to complete an SSDS case on the same issue. The nature of Peru's interpretive question – the rules for determining whether a dispute arose before or after 3 August 2001 – was also one of fast-diminishing importance over time.

B. Ecuador v. United States

1. Background

The *Ecuador v. United States* case arose under the 1993 Ecuador-United States BIT.[54] Ecuador commenced the SSDS proceedings following an award in an ISDS case, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*.[55] The *Chevron* case involved allegations of excessive delay in the Ecuadorian courts in addressing Chevron's claims. It thus raised the question of the treaty standard for treatment of covered investors by domestic courts. Ecuador sought clarification of certain aspects of that standard.

The BIT provides for both ISDS and SSDS arbitration, but it has no express treaty provisions defining the relationship between the ISDS and SSDS provisions. The SSDS provision provides for

52. The decision is noted in the final ISDS award but no reasoning is provided. See *Lucchetti v. Peru*, Award, para. 9 (stating only that request was denied because "the conditions for a suspension were not met").

53. *Lucchetti v. Peru*, Award, paras. 50 *et seq.*

54. Treaty Between The United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment of 1993 [hereinafter, Ecuador-United States BIT (1993)].

55. *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, PCA Case No. 34877, Partial Award on the Merits, 30 March 2010, paras. 241-275 [hereinafter, *Chevron v. Ecuador*, Partial Award].

arbitration of "dispute[s] between the Parties concerning interpretation or application" of the BIT.[56] This is a widely used formulation in SSDS clauses in investment treaties. The ISDS provision applies to "investment disputes" between a covered investor and a treaty party; such disputes are defined to include an alleged breach of treaty rights with respect to an investment.

The treaty also does not expressly address or clarify the effect, if any, of awards of one type on the other. The SSDS provision provides for the tribunal rendering a "binding decision in accordance with the applicable rules of international law".[57] ISDS awards are "final and binding on the parties to the dispute" and "[e]ach Party undertakes to carry out without delay the provisions of awards and to provide in its territory for its enforcement".[58]

The BIT provides for different approaches to time limits for the two types of proceedings. SSDS proceedings must be completed with issuance of award within eight months of the selection of the third arbitrator (Chair) unless otherwise agreed.[59] However, there is no time limit for selection of the Chair. There are no time limits on ISDS proceedings set forth in the treaty.

In addition to the usual investor protection clauses, the treaty contains a so-called "effective means" provision in article VII. It requires each Party to provide "effective means of asserting claims and enforcing rights" with respect to investment, investment agreements, and investment authorizations. Because the provision addresses the standard of treatment of investor claims by the domestic legal system, it is of broad application in cases where investors seek domestic redress.[60]

The effective means provision was at the centre of the *Chevron* case. A key legal issue was the relationship between the effective means standard and the standard to establish a denial of justice under customary international law.[61] Ecuador argued that the effective means clause was an expression of the denial of justice standard and did not set a lower standard for violations. Chevron argued that the effective means clause provided for a lower standard (so that some government conduct could violate the effective means clause while not constituting a denial of justice).

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56. Ecuador-United States BIT (1993), article VII-1 ("Any dispute between the Parties concerning the interpretation or application of the Treaty which is not resolved through consultations or other diplomatic channels, shall be submitted, upon the request of either Party, to an arbitral tribunal for binding decision in accordance with the applicable rules of international law").

57. *Id.*, article VII-1.

58. *Id.*, article VI-6.

59. Ecuador-United States BIT (1993), article VII-3.

60. A similar provision appears in some other treaties including the Energy Charter Treaty (ECT). See ECT, article 10(12) ("Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investments, investment agreements, and investment authorizations"). Investors have also been successful in invoking effective means provisions from other treaties using MFN clauses. See *White Industries Australia Ltd v. Republic of India*, Final Award, 30 November 2011.

61. It is widely recognised that a "denial of justice" to a foreign national is a breach of customary international law. There is a considerable body of law about what constitutes a denial of justice. See, e.g., Jan Paulsson, Denial of Justice in International Law (2005).

In its partial award, the tribunal agreed with Chevron and found that the effective means provision sets a lower standard than the standard for a denial of justice under customary international law.[62] It also found, contrary to Ecuador's arguments, that the proper inquiry under the effective means clause extends not only to require a proper system of laws and institutions, but also to review of the system's performance in individual cases.[63] After evaluation of the facts, the tribunal concluded that Ecuador had breached the effective means provision and was liable for damages caused thereby; additional proceedings were contemplated to calculate the damages.[64]

The partial award in *Chevron* was rendered on 30 March 2010. On 8 June 2010, Ecuador sent the United States a diplomatic note expressing its disagreement with the *Chevron* interpretation of the effective means provision. Ecuador stated its view about the relationship of the provision to the denial of justice standard and whether it entailed review of particular cases. The note also stated that if the United States did not confirm these interpretations, an unresolved dispute between the two countries would be considered to exist as to the interpretation and application of the BIT.[65]

In parallel with its SSDS initiatives, Ecuador also pursued efforts to challenge the *Chevron* award. A month after its diplomatic note, Ecuador filed a request with a Dutch court to set aside the partial award.[66] After the *Chevron* tribunal issued its final award (awarding Chevron over USD 96 million), Ecuador filed a second set aside proceeding in the same court with regard to the final award in November 2011. The cases were consolidated and the Dutch court upheld the awards in a 2 May 2012 decision. (This was four months before the tribunal award in *Ecuador v. United States*.)

In August 2010, the United States sent a diplomatic note with a letter in reply to Ecuador stating that "the U.S. government is currently reviewing the views expressed in your letter and considering the concerns that you have raised," and that it "look[ed] forward to remaining in contact" on the matter.[67]

Subsequently, the Ecuadorian Ambassador to the United States met with the United States Legal Adviser and discussed Ecuador's diplomatic note among other issues. According to the United States, the Legal Adviser informed the Ambassador that it would be difficult to consider a request for an interpretation of the Treaty because Ecuador was in the process of terminating the agreement.[68] The parties disputed whether the United States Legal Adviser said at the meeting that his "Government will

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62. *Chevron v. Ecuador*, Partial Award, para. 244 ("the Tribunal agrees with the Claimants that a distinct and potentially less-demanding test is applicable under [the effective means provision] as compared to denial of justice under customary international law. […] [U]nder Article II(7), a failure of domestic courts to enforce rights "effectively" will constitute a violation of Article II(7), which may not always be sufficient to find a denial of justice under customary international law").

63. *Id.*, para. 247 ("the Tribunal does not share the Respondent's view. While [the effective means provision] clearly requires that a proper system of laws and institutions be put in place, the system's effects on individual cases may also be reviewed").

64. *Id.*, paras. 249-250.

65. *The Republic of Ecuador v. The United States of America*, PCA Case No. 2012-5, Request for Arbitration and Statement of Claim of the Republic of Ecuador, 28 June 2011, paras. 8-12 and Annex B [hereinafter *Ecuador v. United States*, Request for Arbitration of Ecuador].

66. The situs of the *Chevron* arbitration was in the Netherlands.

67. *Ecuador v. United States*, Statement of Defense of Respondent, p. 6.

68. *Id.*, p. 7.

not rule on this matter".[69] There were no further formal communications between the parties until Ecuador commenced the arbitration.[70]

On 28 June 2011, Ecuador initiated state-to-state arbitration proceedings. It sought an award determining that (i) the Parties' obligations under the effective means provision are "not greater than their obligations under pre-existing customary international law"; and (ii) the effective means provision "requires only that they Parties provide a framework or system under which claims may be asserted and rights enforced, but does not obligate the Parties to assure that the framework or system provided is effective in particular cases".[71] Ecuador did not allege that the United States had breached the treaty.

The United States Statement of Defence objected to the jurisdiction of the tribunal. Following submission of arguments and expert reports, the tribunal found in a 2-1 decision that it did not have jurisdiction and dismissed the claim. The tribunal's decision is not public. However, the parties' submissions and expert reports are publicly available. Those submissions are accordingly addressed before press reports on the tribunal decision are noted.

2. The parties' submissions and expert reports

There was only one round of submissions and expert reports from each side. The United States did not make written submissions addressing Ecuador's arguments or expert reports. The hearing transcript and the tribunal's evaluation of the arguments are not public. The submissions are lengthy and are only briefly summarised here for purposes of discussion.

The United States raised two principal and related arguments against jurisdiction. It contended that there was no dispute within the meaning of the SSDS provisions because (i) the SSDS provision applies only to claims for breach and does not permit abstract claims for pure interpretation; and (ii) there was no dispute between the parties even about pure interpretation because the United States had not expressed a contrary view to Ecuador's about the meaning of the effective means provision. It also raised a series of policy arguments.[72]

The parties submitted five expert reports from well-known international law scholars that expressed sharply different views on the issues.[73]

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69. *Ecuador v. United States*, Request for Arbitration of Ecuador, para. 13; *Ecuador v. United States*, Statement of Defense of Respondent, p. 7.

70. *Ecuador v. United States*, Statement of Defense of Respondent, p. 7.

71. It also sought a third interpretation relating to the method for determining compensation for breaches of the effective means provision. See *Ecuador v. United States*, Request for Arbitration of Ecuador, para. 15.

72. See *Ecuador v. United States*, Memorial of Respondent, 25 April 2012.

73. The United States submitted reports from W. Michael Reisman (Professor of International Law at Yale Law School, a member of the Institut de Droit International (IDI) and a frequent arbitrator and expert in ISDS cases) and Christian Tomuschat (Emeritus Professor of International Law at Humboldt University, a member of the IDI, and former member and chair of the ILC).

Ecuador submitted reports by Alain Pellet (Professor at the University Paris-Ouest, former chairman of the ILC and a member of the IDI); Chittharanjan F. Amerasinghe (Professor at the University of Ceylon, former judge of the U. N. Administrative Tribunal and member of the IDI); and Stephen C. McCaffrey (Professor at the University of the Pacific and former member and chair of the ILC).

a. Permissibility of questions of pure interpretation

The United States argued that the tribunal only had jurisdiction where there is a concrete dispute involving a claim of breach of the treaty. In its view, there must be an allegation of a failure to comply with treaty obligations:

> Ecuador cannot bring an international claim under [...] Article VII, because it cannot establish (and has not alleged) the existence of a 'dispute' concerning the United States' failure to comply with the Treaty. There must be, in other words, an *actual controversy* before the Tribunal concerning a Party's alleged breach of the Treaty.[74]

The United States argued that the only time courts or tribunals will resolve pure questions of interpretation is where they are expressly given advisory, appellate or referral jurisdiction. It noted that the BIT did not contain express provisions like those (i) in the statutes of the ICJ or the Inter-American Court of Human Rights, which expressly allow designated entities or States to seek advisory opinions of certain legal issues; (ii) which establish an appellate mechanism as at the WTO; or (iii) creating a referral procedure under European Union law allowing national courts to refer questions of European law to the Court of Justice of the European Union.[75] The United States contended that there was only one case that involved a similar type of claim to that of Ecuador and that the tribunal in that case had found it had no jurisdiction.

The expert reports submitted by the United States took a similar position although with some possible nuances. Professor Reisman took an arguably narrower position about the scope of the SSDS provision than did the United States. He considered any breach that could be resolved in ISDS could only be resolved in ISDS. In his view, the only role for SSDS is where the issue cannot be raised in ISDS, such as failure to comply with a final ISDS award.[76] SSDS has no role in interpretation of the investor protection provisions. Professor Tomuschat contended that the SSDS provision does not extend to coverage of abstract issues of interpretation.

Ecuador emphasised the breadth of the language of the SSDS provision referring to "any disputes [...] about interpretation or application" of the treaty. It emphasised the use of the conjunction 'or' between the words interpretation and application. It argued that the reference to disputes about application of the treaty covered claims of breach. But it considered that the separate express reference to interpretation gave the tribunal jurisdiction over disputes about interpretation as well.

Ecuador and its experts' reports pointed to a substantial number of international law cases which in their view involved resolution of questions of pure interpretation. Professor Pellet contended that international courts and tribunals regularly resolve issues of interpretation and that the language of the SSDS provision was broad:

> it is far from unusual to call arbitration tribunals to decide disputes bearing exclusively on matters of interpretation […] if interpretive disputes were not arbitrable, the expression 'dispute between the Parties concerning the interpretation *or* application of the Treaty' found in the [Ecuador-United States BIT] as well as in a great number of treaties

74. *Ecuador v. United States*, Memorial of Respondent, p. 21 (emphasis in original).

75. *Ecuador v. United States*, Statement of Defense of Respondent, pp. 11-12.

76. Reisman Opinion, paras. 23-32.

> concerning the peaceful settlement of disputes would be meaningless since the word 'or' inserted between 'interpretation' and 'application' would remain without significance [...][77]

b. The question of the existence of a dispute about interpretation

The principal issue here was how the United States' maintenance of silence in response to the Ecuadorian request for its views on the effective means provision should be interpreted in the circumstances. The question was framed in terms of whether there was a "dispute". The parties made extensive submissions on this point.

Citing a number of ICJ decisions on the definition of a dispute, the parties notably argued about (i) whether "positive opposition" between the parties is required in every case to establish a dispute, and whether such opposition existed on the facts; and (ii) under what circumstances "a dispute could be inferred from the failure of a State to respond to a claim [...] where a response is called for",[78] and whether those circumstances existed.

The United States and its experts' reports argued that positive opposition is always required. The United States contended that Ecuador had failed to establish the existence of a dispute because it had not shown that the United States gave a conflicting interpretation of the treaty. The United States argued that it had no obligation to answer or confirm Ecuador's interpretation.[79]

Ecuador and its experts' reports argued that positive opposition is not a pre-requisite for a dispute.[80] It argued that the existence of a dispute can be established by inference where a state fails to respond to a claim where a response is called for. Ecuador argued that the United States' opposition could be inferred from its attitude and, in particular, its refusal to respond to Ecuador's request for consultation when a response was called for by the circumstances and the principle of good faith.[81] The circumstances included Ecuador having incurred a loss due to an erroneous interpretation, uncertainty about its obligations and risks of future liability under erroneous interpretations.[82]

c. The purpose of the proceeding

The parties presented differing views about the purpose of the case. Ecuador contended that it was seeking to resolve the legal uncertainty existing with regards to its treaty commitments under Article II(7) of the BIT so that it would understand its obligations under the treaty. It contended that it found

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77. See, for instance, A. Pellet, Expert Opinion, delivered in the *Republic of Ecuador v. United States of America* case, 23 May 2012, paras. 14-15 [hereinafter, Pellet Opinion] and C. F. Amerasinghe, Expert Opinion delivered in the *Republic of Ecuador v. United States of America* case, 23 May 2012, para. 25 [hereinafter, Amerasinghe Opinion] ("because the provision refers to 'application' in addition to 'interpretation' it leaves room for disputes on interpretation […] to be adjudicated upon […]").

78. *Ecuador v. United States*, Counter-Memorial of Ecuador, 23 May 2012, para. 38.

79. *Ecuador v. United States*, Statement of Defense of Respondent; *Ecuador v. United States*, Memorial of Respondent, pp. 36-47.

80. Pellet para. 7 ("[t]here can […] be no doubt that a dispute can stem from a 'positive opposition'. But this has never been considered as a pre-requisite for the existence of a dispute whether by the International Court of Justice […] or by arbitral tribunals.");

81. *Ecuador v. United States*, Counter-Memorial of Ecuador, pp. 31-51.

82. *Id.*, para. 4.

itself in a very difficult position, "suffering loss due to an erroneous and unprecedented interpretation by an investor-State tribunal, at a loss regarding what it must do to be in compliance with its treaty obligations, and wishing quite reasonably to avoid future erroneous holdings of liability".[83]

Ecuador argued that resolution of the issues about the effective means provision would allow to identify if it is obligated to take additional steps to comply with the article. Ecuador contended that non-compliance with the article raised important issues of government liability:

> the Chevron tribunal's unexpected ruling has given rise to considerable uncertainty regarding the meaning of Article II(7), and the scope of Ecuador's obligations thereunder, in particular whether Ecuador is now obligated to take additional steps (and if so, what they might be) in order to satisfy the requirements of that Article. The erroneous interpretation of Article II(7) by the Chevron tribunal is also of grave concern, not only because of the compensation that Ecuador has been ordered to pay in that case, but because of the potential of future liability based upon Article II(7).[84]

The "effective means" provision was also reportedly at issue in a second pending claim by Chevron against Ecuador relating to the Lago Agrio dispute.

For the United States and its experts' reports, the purpose of Ecuador's claim was to attempt to undermine the ISDS award in *Chevron*.[85] They contended that Ecuador was in effect trying to use the SSDS proceeding to appeal the decision in that case. Ecuador responded that its interests were forward-looking and that the SSDS tribunal decision could not have an impact on the *Chevron* case because it was concluded.[86]

d. Policy arguments

The United States and its experts' reports focused to a significant degree on policy arguments. The United States argued that acceptance of Ecuador's claim would jeopardize ISDS by diminishing stability and predictability, undermining investor rights and politicising the process:

> Reading Article VII to serve these unintended purposes would have negative and destabilizing consequences for investment treaties, including for investor-State arbitration, contrary to the Treaty's object and purpose. In any investor-State case, the respondent State could demand at any time that the investor's State of nationality confirm the respondent's interpretation of the contested BIT provision or face parallel interstate arbitration, whereas the investor would have no such right. Similarly, if the investor's State disagreed with the respondent State's treaty interpretation in any investor-State case, it could too force the respondent State into parallel interstate arbitration. Compelling States to reach an agreed interpretation in the context of an

83. *Id.*, para. 4.

84. *Ecuador v. United States,* Counter-Memorial of Ecuador, para. 12. See also id. para 23 ("Ecuador's decision to begin this proceeding reflects the paramount importance that it places on clarifying the scope of its obligations under Article II(7). Ecuador is committed to complying with all of its international legal obligations, including those concerning the treatment of United States investors in regard to the administration of justice as set forth in Article II(7) of the Treaty").

85. See Reisman Opinion, paras. 47-51; *Ecuador v. United States,* Memorial of Respondent, pp. 51, 53.

86. *Ecuador v. United States,* Counter-Memorial of Ecuador, 23 May 2012, para. 105.

> investor-State dispute whenever demanded by the another State, at pain of arbitration if they fail, would eviscerate a principal rationale for investor-State dispute mechanism, which is to depoliticize investment disputes and permit neutral and binding arbitration between the State and the investor. Ecuador's reading of the Treaty would also undermine the finality of investor-State awards by allowing States to re-litigate the meaning and effect of treaty provision at issue in the underlying dispute. States could then seek to use the 'authoritative interpretation' as a collateral attack on a final investor-State award in annulment, set-aside or enforcement proceedings.[87]

In Ecuador's view, a tribunal's reasoning should be independent from non-legal policy considerations. However, it also made a number of policy arguments. It argued that the exercise of jurisdiction by the tribunal would improve rather than jeopardize the stability, predictability and integrity of ISDS. One of its experts, Professor Amerasinghe, expressed similar views:

> not only would recognizing the pre-eminence of arbitration procedures under [state-to-state arbitration] over procedures under [investor-state arbitration] resolve conflicts between decisions of [investor-state] tribunals […] but doing so would promote consistency, predictability and stability in the legal relations of the parties to the BIT".[88]

Ecuador argued that authoritative interpretations by SSDS tribunals would enhance uniformity and predictability and, hence, reduce the politicisation of future investment disputes under the BIT.

3. Outcome of the case

The tribunal declined jurisdiction in a non-public 2-1 decision on 29 September 2012. News reports have briefly described the decision and are relied on here.[89]

The majority reportedly dismissed Ecuador's claims for several reasons. News reports suggest that with regard to concreteness of the dispute, the majority held that, although the dispute between Ecuador and the United States may have had practical consequences, it did not affect the relationship between the two states. It found that, had there been a direct claim of breach of the treaty, there might have been a dispute eligible for arbitration.[90]

With regard to whether there was a dispute over interpretation, the majority considered that the United States' silence regarding Ecuador's request for consultation did not constitute "positive opposition" to Ecuador's proposed interpretation. For the majority, the United States' absence of answer was convincingly explained by their desire to avoid interfering with a prior decision of an Investor-State tribunal.[91]

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87. *Ecuador v. United States*, Statement of Defense of Respondent, pp. 12-13; see also *Ecuador v. United States*, Memorial of Respondent, pp. 59-67.

88. Amerasinghe Opinion, para. 29.

89. Hepburn, Peterson, US-Ecuador Inter-State Investment Treaty Award Released to Parties.

90. *Id.*

91. *Id.*

The dissenting arbitrator reportedly considered that the dispute had practical consequences for the parties in that the findings of the tribunal would have allowed clarifying their legal relationships. Besides, in his view, the United States' silence was equivalent to a disagreement to Ecuador's interpretation of the BIT and the parties were, hence, involved in an interpretive dispute.[92]

4. Consultations

Although not directly referred to by Ecuador in the case, Article V of the BIT provides for state-to-state consultation on interpretive matters. It reads as follows:

The Parties agree to consult promptly, on the request of either, to resolve any disputes in connection with the Treaty, or to discuss any matter relating to the interpretation or application of the Treaty.

Ecuador's diplomatic note did not refer to article V. The United States argued that Ecuador never formally engaged in consultations.

Professor Pellet's expert report, however, argued that the consultation provision should have been a key issue. In his view, it required the United States to respond to Ecuador's proffered interpretation and that the United States failure to do so was a breach of the treaty:

> [t]here is no doubt that this provision: […] imposes a binding obligation upon the Parties – it is an integral part of the Treaty which, […] is subject to the principle *pacta sunt servanda* as reflected in Article 26 of the 1969 Vienna Convention on the Law of Treaties. [As a consequence], the US is bound by its treaty commitment under Article V of the BIT: it may agree or disagree with the interpretation offered by Ecuador; what it cannot legally do is to refuse to discuss the matter and, in case of disagreement, to consult with the other Party in view to resolve the ensuing dispute. If it does, it is in breach of one [of] its binding treaty obligation […][93]

Consultation provisions could in some cases arguably have a bearing on whether there is a dispute over interpretation provisions where a party maintains silence.

C. Kyrgyzstan's recent request to a standing court for interpretation of an investment treaty

In April 2014, Kyrgyzstan filed an application for interpretation of a treaty, the Commonwealth of Independent States Investor Rights Convention ("Moscow Convention")[94], with a standing court, the Economic Court of the Commonwealth of Independent States ("CIS Economic Court").[95] The application followed several ISDS awards condemning Kyrgyzstan to pay compensation to investors based on the Moscow Convention.

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92. *Id.*

93. Pellet Opinion, paras. 18-19 and 22.

94. Commonwealth of Independent States Investor Rights Convention, signed 28 March 1997. An unofficial translation in English is available on a Republic of Belarus website.

95. Luke Eric Peterson, "Kyrgyz Republic seeks authoritative interpretation of obscure CIS treaty that multiple foreign investors are invoking", *Investment Arbitration Reporter*, 6 June 2014 [hereinafter, Peterson, Kyrgyz Republic seeks authoritative interpretation of obscure CIS treaty].

Investors had reportedly interpreted the Moscow Convention as (i) providing for the consent of CIS member states to ISDS arbitration; (ii) permitting investors to bring arbitration in any "court of arbitration" of a CIS member state or any "international court[] of arbitration" of their choosing; and (iii) allowing for arbitration claims against CIS countries by investors from around the world rather than just investors from other CIS member states.[96]

These arguments were based on article 11 of the Moscow Convention. It reads (in unofficial translation) as follows:

> Disputes as regards implementation of investments within the framework of this Convention shall be considered by courts of justice or courts of arbitration of the countries that are participants in disputes, the Economic Court of the Commonwealth of Independent States and/or other international courts of justice or international courts of arbitration.[97]

Both CIS and non-CIS investors had filed cases under the Convention in particular with the Arbitration Court of the Moscow Chamber of Commerce and Industry (Moscow Chamber), an apparently new player in investment arbitration.[98] One investor indicated that it selected this arbitration court because of its fast-track procedures for arbitration allowing for a complete arbitration in six months. In one case, the tribunal was reportedly constituted within weeks and the failure of Kyrgyzstan to nominate its arbitrator did not delay the proceedings because the Moscow Chamber made the appointment.[99]

The views of the investors about article 11 had apparently been accepted in ISDS cases at the Moscow Chamber.[100] At least three ISDS arbitration awards under the Moscow Convention had been rendered for CIS and non-CIS investors against Kyrgyzstan totalling around USD 150 million.[101] Acceptance of the investor interpretations would give investor claimants from around the world the

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96. See Luke Eric Peterson, Analysis: Does Moscow Chamber of Commerce offer effective alternative for arbitrating investment claims against Central Asian States", *Investment Arbitration Reporter,* 21 January 2014 [hereinafter Peterson, Analysis: Moscow Chamber of Commerce as an alternative arbitration centre for investment claims] and Sebastian Perry, "CIS court sides with Kyrgyzstan on treaty meaning", *Global Arbitration Review*, 24 September 2014.

97. Unofficial translation provided by the National Legal Internet Portal of the Republic of Belarus.

98. Peterson, Analysis: Moscow Chamber of Commerce as an alternative arbitration centre for investment claims ("The Moscow Chamber is not especially known in investment arbitration circles and should not be confused with the better-known International Commercial Arbitration Court operating under the auspices of the Russian Chamber of Commerce and Industry. It is a relatively new and seemingly inexperienced player on the investment arbitration landscape.").

99. *Id.* (reporting on interview with investor).

100. See *Id.* ("[An investor claimant] maintains that Article 11 of the Moscow Convention permits them to choose any arbitral venue for arbitrating with Kyrgyzstan. In an interview with *IA Reporter,* a company Vice President says that [the investor] chose the Moscow Chamber of Commerce due to the fast-track nature of its arbitration process").

101. The three ISDS cases are: *Lee John Beck and Central Asian Development Corporation v. Kyrgyz Republic*; *Stans Energy v. Kyrgyz Republic*; *OKKV (OKKB) and others v. Kyrgyz Republic.* See Jarrod Hepburn, "CIS Economic Court issues authoritative interpretation of investment treaty at root of series of investor-state arbitrations", *Investment Arbitration Reporter,* 23 September 2014 [hereinafter Hepburn, CIS Economic Court issues authoritative interpretation of investment treaty].

power to compel arbitration under the Moscow Convention and apparently to choose from among a wide range of arbitration courts of differing quality around the world.[102]

Kyrgyzstan sought interpretation of the Moscow Convention from the CIS Economic Court. The court was established in 1992. It has jurisdiction, inter alia, to resolve disputes arising in connection with the implementation of the economic obligations of CIS members as well as to interpret agreements and acts of the CIS and its institutions.[103] The court can exercise its interpretive powers either in the context of a specific case or by issuing abstract opinions at the request of member States or institutions of the Commonwealth.[104] Interpretive cases are dealt with by the full court.[105]

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102. Well-known arbitrators have criticised a proliferation of low-quality arbitration institutions. See, for instance, Jan Paulsson, "Moral Hazard in International Dispute Resolution", Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair, 29 April 2010 ("Only a few arbitral institutions can make credible claims to legitimacy. The naive boasting of a constant stream of new entrants fools no one acquainted with the field. It is easy for resourceful persons to come up with a lustrous governing board comprised of apparently eminent individuals happy to lend their names to what might be a useful venture (and will cost them little if it fails). My observations of the world of arbitration lead me to believe that many if not most arbitral institutions are empty edifices waiting for someone to bother to dismantle them. Others cannot get away from features of cronyism which were their raison d'etre in the first place").

103. Article 32 of the CIS Charter reads as follows: "The Economic Court shall function with the aim to ensure the observation of economic obligations within the framework of the Commonwealth. Under the jurisdiction of the Economic Court there shall be settlement of disputes, arising while the economic obligations are being executed. The Court may also settle other disputes, referred to its jurisdiction by the agreement of the member states. The Economic Court shall also have the right to interpret the provisions of agreements and of other acts of the Commonwealth on economic issues. The Economic Court shall exercise its activities in compliance with the Agreement on the Status of the Economic Court and with the Regulations on it, adopted by the Council of Heads of States". See "Commonwealth of Independent States: Charter", *International Legal Materials,* Vol. 34, No. 5, September 1995, pp. 1279-1297.

See Gennady M. Danilenko, "The Economic Court of the Commonwealth of Independent States", International Law and Politics, Vol. 31, 1999, p. 903 [hereinafter, Danilenko, The CIS Economic Court] ("In addition to its contentious jurisdiction, the Economic Court has also been granted advisory jurisdiction. Under Article 32 of the CIS Charter the Court may interpret the provisions of 'agreement and other acts of the Commonwealth on economic issues'. Under Article 5 of the 1992 Statute, the Court is authorised to rule on the 'interpretation' of the 'provisions of agreements and other acts of the Commonwealth and its institutions,' as well as of 'the legislative acts of the former Union of SSR which apply within the tie limits defined by the mutual agreement [of the parties]'").

104. See CIS Economic Court website, Scope of Jurisdiction of the Court webpage: "The interpretation may be given by rendering judgments in specific cases as well as by issuing abstract opinions at the request of the highest authorities of member states, their highest economic and commercial courts, or CIS institutions". See also CIS Economic Court website, Application to the CIS Economic Court for requests for interpretation webpage: "Requests for interpretation may be filed to the CIS Economic Court by the member-states of the Commonwealth of Independent States represented by their competent authorities or by supreme economic (arbitration) courts or other supreme authorities settling economic disputes in these States, or by the bodies and institutions of the Commonwealth") and Danilenko, The CIS Economic Court, p. 903 ("Article 5 of the 1992 Statute makes it clear that decisions on 'interpretation' may be given not only by rendering judgments in specific cases but also by issuing abstract opinions at the request of the highest legislative and executive organs of member states, their highest economic and commercial courts, or CIS institutions. The 1992 Statute does not make any distinction between opinions on a dispute and abstract opinions regarding such interpretation").

105. Danilenko, The CIS Economic Court, p. 896 ("All contentious cases in the first instance are heard by the chambers of the Economic Court. In contrast, advisory opinions are rendered by the full Court"). See

Kyrgyzstan based its application to the CIS Economic Court on article 28 of the Moscow Convention which provides (in an unofficial translation) that "disputable issues connected with interpretation of the [Moscow Convention] shall be settled by way of consultations of the Parties or by applying to the [CIS Economic Court]".[106]

Kyrgyzstan requested that the CIS Economic Court interpret article 11 in accordance with its reading of that clause, i.e. that it is not an arbitration provision but only a framework provision that states that arbitration is, in principle, available if the parties so agree. It contended that its investment treaties and domestic legislation contained only limited arbitration options and that the absence of any reference to specific options in article 11 confirmed that it does not constitute a standing offer to arbitrate.[107]

On 23 September 2014, the CIS Economic Court rendered a summary judgment on the interpretation issue. The court reportedly ruled that article 11 does not include a standing offer to arbitrate. A separate government consent to arbitration is required.[108] The court specified that its judgment is final and not subject to appeal.[109] Investors had reportedly unsuccessfully sought to be joined as third parties in the case before the court.[110]

News reports suggest that the CIS Economic Court might have released its summary judgment on 23 September, in advance of its full decision, because of an imminent hearing or decision in parallel proceedings in which Kyrgyzstan was seeking to set aside the ISDS awards.[111]

In earlier parts of those parallel proceedings, the Moscow Commercial Court had reportedly (i) rejected Kyrgyzstan's request to suspend two of the set aside proceedings pending the decision by the CIS Economic Court; and (ii) subsequently found it had no jurisdiction.[112] Kyrgyzstan was challenging those decisions.

In the event, on 24 September 2014, the day after the CIS Economic Court released its decision, Russia's Court of Cassation reportedly quashed (annulled) the decisions of the Commercial Court. It ruled that Kyrgyzstan's applications to set aside the awards in two of the Investor-State cases should be remanded to the Moscow Commercial Court for reconsideration.[113]

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also Zhenis Kembayev, *Legal Aspects of the Regional Integration Processes in the Post-Soviet Area*", Springer, 2009, p. 59.

106. Unofficial translation provided by the National Legal Internet Portal of the Republic of Belarus.

107. Peterson, Kyrgyz Republic seeks authoritative interpretation of obscure CIS treaty.

108. See Sebastian Perry, "CIS court sides with Kyrgyzstan on treaty meaning", *Global Arbitration Review*, 24 September 2014 ("the full bench of the court found that the provisions in article 11 are 'of a general nature and are limited to setting out possible types of institutions that may consider disputes arising out of investments within the framework of the Convention' […] Article 11 'cannot be considered to constitute an arbitration agreement'").

109. Hepburn, CIS Economic Court issues authoritative interpretation of investment treaty.

110. *Id.*

111. *Id.*

112. *Id.* See also Peterson, Kyrgyz Republic seeks authoritative interpretation of obscure CIS treaty.

113. Sebastian Perry, "CIS court sides with Kyrgyzstan on treaty meaning", *Global Arbitration Review*, 24 September 2014.

ANNEX 1: EMPIRICAL AND POLICY ISSUES

- Advocates for the availability of pure interpretation claims in SSDS recognise that they cannot simply be available on demand merely because a government raises an issue of interpretation. They contend, however, that sufficient concrete interest in an interpretation can exist based on factors such as the existence of uncertainty, past and future damages exposure relating to the issue, and the likelihood of future ISDS disputes relating to the issue. In your view, would factors such as these provide a reasonable and workable basis to define the scope of availability of claims for interpretation in SSDS?

- In your view, would the availability of SSDS arbitration over interpretation encourage joint agreements about interpretation? If so, would that be a positive development?

- Why in your view have there been few SSDS cases under investment treaties to date? Would the undisputed availability of claims for interpretation lead to a large number of SSDS cases in your view? If yes, of what types?

- Are examples of existing courts with advisory or similar express jurisdiction over questions of pure interpretation a useful barometer for estimating the likely frequency of SSDS cases under investment treaties?

- What are your views about the potential for SSDS cases to create uncertainty and interfere with the process of resolving ISDS cases?

- How do you evaluate the burden of responding to interpretation claims under investment treaties? Is it meaningful to compare it with the burden of respondent states in ISDS cases?

- What in your view is the role, if any, of interpretive claims in SSDS in rebalancing investment treaties?

- Would respondent government views in SSDS cases likely differ from investor interpretations in your view?

- In your view, could SSDS play a role in addressing public concerns about ISDS arbitrators' incentives on key questions?

- Are interpretation cases in SSDS likely to cause intergovernmental politicisation of investment disputes in your view?

- Governments have limited ability to eliminate frivolous investor claims under many investment treaties. Is the situation of a government faced with unwelcome claims for interpretation comparable to one faced with frivolous investor suits?

- What are your views on the institutional capacity of courts to resolve pure interpretation questions? Do your views differ for ad hoc tribunals and, if so, why?

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