



**C L I F F O R D
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PROPOSED PROTOCOL FOR COMMUNICATION WITH NON-DISPUTING STATES ON
ISSUES OF TREATY INTERPRETATION

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COMMENTS

- A welcome development investment treaty dispute procedure
- Potentially reduces the asymmetry in investor-State dispute treaty interpretation
- Drafting points:
 - Wording of Protocol should align with Article 31(3)(a) of the Vienna Convention on the Law of Treaties
 - What if the Protocol conflicts with provisions of the relevant treaty?
 - Request by a party to an arbitration for a Non-Disputing State to make submission on interpretation of treaty should be copied to tribunal and to other parties (see paragraph 2.4, and compare with paragraph 3.4)
- Survey of relevant cases

CASES WHERE NON-DISPUTING STATES HAVE PLAYED A ROLE

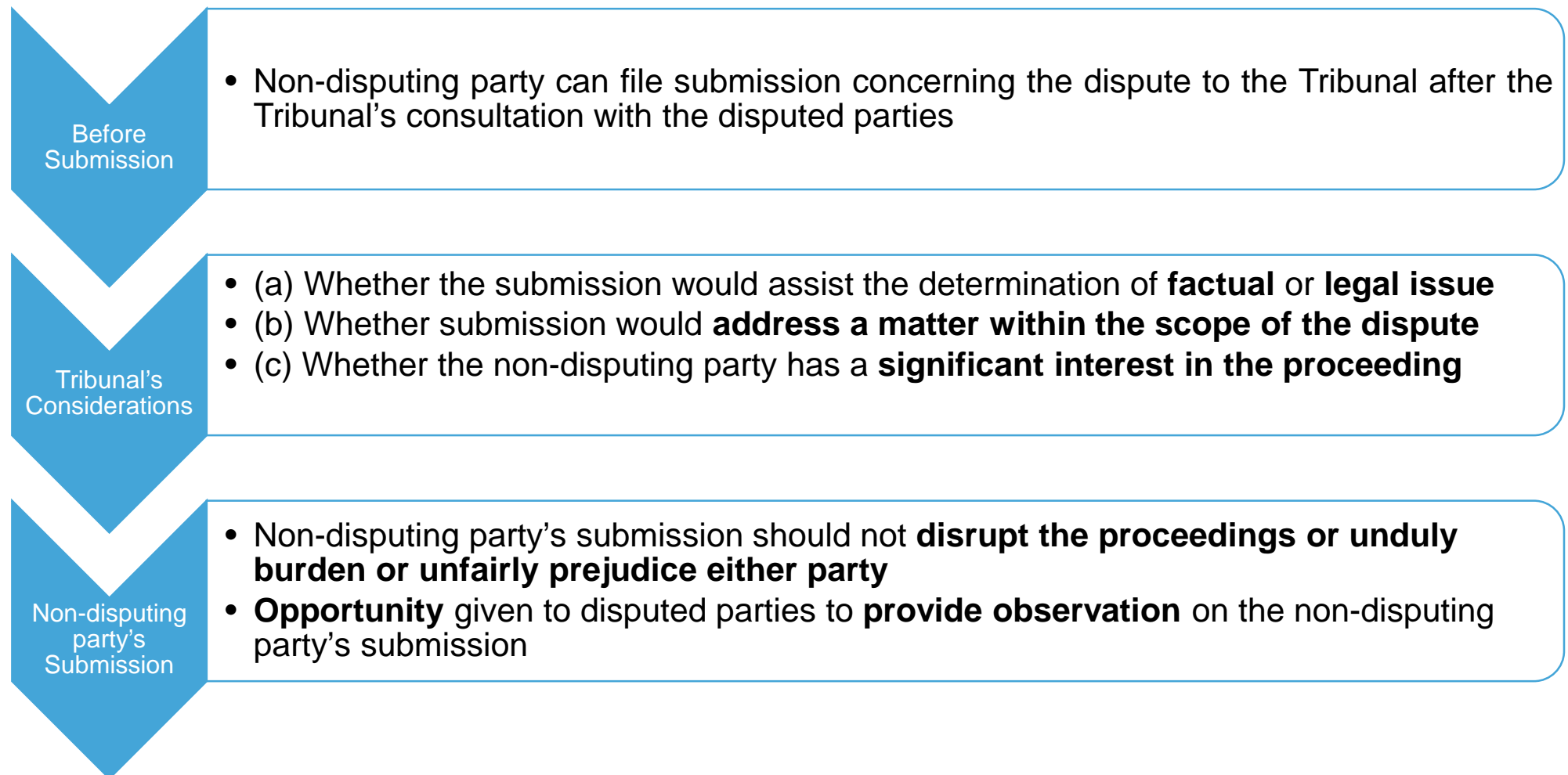
Case	Supported	Rejected	Post-award	No influence	Forum
Pope & Talbot v Canada (2000)		✓			UNCITRAL / NAFTA
Metalclad v Mexico (2000)				✓	ICSID / NAFTA
Marvin v Mexico (2000)		✓			ICSID / NAFTA
Loewen v USA (2001)		✓			ICSID / NAFTA
Pope v Canada (2001)		✓			UNCITRAL / NAFTA
Methanex v USA (2002)				✓	UNCITRAL/ NAFTA
Mondev v USA (2002)		✓			ICSID / NAFTA
United Parcel Services v Canada (2002)	✓				UNCITRAL / NAFTA
ADF v USA (2003)	✓	✓			ICSID / NAFTA
Gami v Mexico (2004)					UNCITRAL/ NAFTA
Bayview v Mexico (2007)	✓				ICSID / NAFTA
Archer v Mexico (2007)	✓				ICSID / NAFTA
Glamis v USA (2009)	✓				UNCITRAL / NAFTA
Commerce Group v El Salvador (2011)	✓				ICSID / CAFTA
SGS v Pakistan (2013)			✓		ICSID / Switzerland-Pakistan BIT
Sanum v Lao (2016)			✓		UNCITRAL/ PRC-Laos BIT

ICSID ARBITRATION RULES

RULE 37(2)

ICSID ARBITRATION (ADDITIONAL FACILITY RULES)

RULE 41(3)



UNCITRAL ARBITRATION RULES

ARTICLE 5

Each party may be represented or assisted by persons chosen by it

Communication of choice to all parties and tribunal, specifying whether the appointment is being made for (i) **representation** or (ii) **assistance**

If the person is to act as a **representative**, the arbitral tribunal may at any time **require proof of authority granted to the representative**

NORTH AMERICAN FREE TRADE TREATY (NAFTA)

ARTICLE 1128

On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of **interpretation of this Agreement**.

THE ASIAN COMPREHENSIVE INVESTMENT AGREEMENT

ARTICLE 40(2) & (3)

Member State's Joint Decision of Interpretation

- Joint interpretation of any provision of the Agreement shall be submitted within 60 days of the request by the tribunal

Status of the Joint Decision

- A **joint decision** of the Member States, declaring their interpretation of a provision of this Agreement shall be **binding** on a tribunal
- Any decision or award issued by a tribunal must be **consistent** with the decision

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