



Reclaiming Authority in Investment Arbitration: Joint Interpretations in International Investment Agreements and Investor-State Dispute Settlement

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Introduction

The landscape of international investment law has undergone significant transformation over the past several decades. At its core, international investment agreements (IIAs), particularly through bilateral investment treaties (BITs) and free trade agreements (FTAs), were designed to attract foreign investment by offering legal protection and a neutral, depoliticized mechanism for resolving disputes. These treaties sought to balance the interests of host States in receiving foreign investments and the needs of investors to have predictable and secure dispute resolution mechanisms.¹ Initially, these treaties included broadly framed provisions, offering flexibility and adaptability to address a wide range of investor-State disputes.

The Investor-State Dispute Settlement (ISDS) mechanism, which permits investors to bring claims directly against host States through international arbitration, emerged as a crucial part of this system. Over the years, ISDS became the dominant method for resolving investment disputes.² Because of the system's success in addressing claims by foreign investors, it soon faced significant criticism, primarily from States. The growing concern was that arbitral tribunals, composed of ad hoc panels of international experts, increasingly interpreted treaty provisions in ways that were perceived as overly favorable to investors.³ This trend raised alarm over the scope of the tribunals' interpretative authority and their potential to undermine the regulatory space of States, increasingly highlighting the tension between sovereign States' right to regulate in the public interest and the protection of foreign investors' legitimate expectations.⁴

In this context, the broad and often vague provisions in IIAs, while offering flexibility, also led to inconsistencies in their application by arbitral tribunals. As tribunals have taken on the task of interpreting treaties, their interpretative role has at times arguably exceeded their

¹ Margie-Lys Jaime, "Relying upon Parties' Interpretation in Treaty-Based Investor-State Dispute Settlement: Filling the Gaps in International Investment Agreements", *Georgetown Journal of International Law*, vol. 46 (2014), p. 261.

² Catharine Titi, "Non-Adjudicatory State-State Mechanisms in Investment Dispute Prevention and Dispute Settlement: Joint Interpretations, Filters and Focal Points", *Brazilian Journal of International Law*, vol. 14 (2017), p. 37.

³ Eleni Methymaki and Antonios Tzanakopoulos, "Masters of Puppets? Reassertion of Control Through Joint Investment Treaty Interpretation", SSRN (2016). Available from <https://ssrn.com/abstract=2740127> (accessed 21 April 2024).

⁴ David Gaukrodger, "The legal framework applicable to joint interpretive agreements of investment treaties", OECD Working Papers on International Investment, No. 2016/01 (Paris, OECD Publishing, 2016), p. 8.

legitimate mandate to resolve disputes, resulting in conflicting decisions.⁵ The diminished role left for contracting parties with the interpretations from arbitral tribunals and their inconsistencies created a legitimacy crisis, calling into question the rightful interpreter of IIAs.⁶ Tribunals, relying heavily on past arbitral awards and academic interpretations,⁷ often neglected the practices and views of the treaty parties themselves, leading to concerns about the legitimacy of the entire arbitration process.⁸

In response to the growing discontent with the ISDS system, particularly the perceived excesses of arbitral tribunals, States have sought to reclaim control over the interpretation and application of their investment treaties,⁹ granting States leverage over the ownership of the treaties.¹⁰ This shift is not merely a reaction to the perceived illegitimacy of the tribunals' interpretations but also an effort to safeguard States' sovereignty and public policy objectives within the evolving framework of international investment law.¹¹ Over recent years, a growing number of States have incorporated joint interpretation mechanisms into their treaties, allowing contracting parties to issue binding joint interpretative statements.¹²

Joint interpretative mechanisms provide States with a tool to collaboratively clarify the meaning of ambiguous treaty provisions, thereby reducing the scope for inconsistent interpretations by arbitral tribunals. These mechanisms represent a significant shift from the traditional approach to dispute resolution, as they enable States to assert their authority over the interpretation of the very treaties they have negotiated. By embedding joint interpretation

⁵ Margie-Lys Jaime, "Relying upon Parties' Interpretation in Treaty-Based Investor-State Dispute Settlement: Filling the Gaps in International Investment Agreements", *Georgetown Journal of International Law*, vol. 46 (2014) p. 261.

⁶ Xinglong Yang, "Implementation of the Joint Interpretation Mechanism under the ASEAN Comprehensive Investment Agreement: Obstacles and Pragmatic Steps for the ASEAN", *Contemporary Asia Arbitration Journal*, vol. 11, No. 1 (2018), p. 117.

⁷ Niccolo Ridi and Thomas Schultz, "Empirically Mapping Investment Arbitration Scholarship: Networks, Authorities, and the Research Front", in *Private Actors in International Investment Law*, Katia Fach Gómez, ed., European Yearbook of International Economic Law (Cham, Springer, 2021), p. 210.

⁸ Anthea Roberts, "Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States", *American Journal of International Law*, vol. 104, No. 2 (2010), p. 179.

⁹ Lucas Clover Alcolea, "States as Masters of (Investment) Treaties: The Rise of Joint Interpretative Statements", *Chinese Journal of International Law*, vol. 22 (2023). Available from <https://doi.org/10.1093/chinesejil/jmad030>; Roberto Echandi, "Bilateral Investment Treaties and FTAs: Recent Developments in Investment Rulemaking" in *Arbitration Under International Investment Agreements. A Guide to Key Issues*, 2nd ed., Katia Yannaca-Small, ed. (Oxford, Oxford University Press, 2018), p. 20.

¹⁰ Loris Marotti, "The Proliferation of Joint Interpretation Clauses in New International Investment Agreements: A Mixed Blessing?", *ICSID Review - Foreign Investment Law Journal*, vol. 35, Nos. 1-2 (2020), p. 63.

¹¹ Andreas Kulick, "Investment Arbitration and Democracy", *Cambridge Journal of International and Comparative Law*, vol. 4, No. 2 (2015), pp. 441–460.

¹² Xinglong Yang, "The Binding Joint Interpretation Mechanism under the Chinese International Investment Law Framework: Recent Developments, Obstacles and Suggestions for Reform", *China: An International Journal*, vol. 18, No. 4 (2020), p. 102, at p. 118.

clauses (JICs) in investment agreements, States effectively position themselves as the “masters” of their treaties, reasserting their sovereignty and influence over the interpretation of investment protection standards.¹³ This move is particularly significant given the increasing tension between the roles of arbitrators and States in shaping the legal and regulatory landscape of international investment law.¹⁴

The inclusion of joint interpretative statements in IIAs marks a clear departure from the past, when tribunals wielded considerable discretion in determining the meaning of treaty provisions. States, recognizing the potential for arbitral overreach, have adopted joint interpretations as a tool for both protecting their regulatory authority and ensuring that the original intent of the treaty parties is upheld.¹⁵ The use of joint interpretations also reflects a broader effort by States to adapt to changing circumstances and emerging concerns within the ISDS framework, ensuring that the treaties remain relevant and balanced as international investment law continues to evolve. Despite the greater control allowed for contracting States, the inclusion of such a mechanism is only a relatively recent experience. With the North American Free Trade Agreement (NAFTA) experience under the Free Trade Commission (FTC) Notes of Interpretation in 2001, IIAs containing JICs became more popular after 2004, with their inclusion in investment chapters of regional and mega-regional FTAs, such as the Comprehensive Economic and Trade Agreement (CETA), the Comprehensive and Progressive Agreement for the Trans-Pacific Partnership (CPTPP) and the United States-Mexico-Canada Agreement (USMCA).¹⁶

Joint interpretations offer a novel and effective solution to some of the most pressing issues in international investment law. By allowing States to issue authoritative clarifications of treaty provisions, joint interpretations help mitigate the vagueness and ambiguity that often leads to costly litigation and inconsistent awards in arbitration.¹⁷ These interpretations are

¹³ Eleni Methymaki and Antonios Tzanakopoulos, “Masters of Puppets? Reassertion of Control Through Joint Investment Treaty Interpretation”, SSRN (2016). Available from <https://ssrn.com/abstract=2740127> (accessed 27 April 2024).

¹⁴ Chen Yu, “The “Externalities” of Joint Interpretations in Investment Arbitration: Learning from the Past”, *Law and Practice of International Courts and Tribunals*, vol. 22 (2023), p. 194.

¹⁵ Heng Wang, “The RCEP Investment Rules and China: Learning from the Malleability of Chinese FTAs”, in *China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy*, Julien Chaisse, ed., (Oxford, Oxford University Press, 2019), pp. 243-257.

¹⁶ Lucas Clover Alcolea, “States as Masters of (Investment) Treaties: The Rise of Joint Interpretative Statements”, *Chinese Journal of International Law*, vol. 22 (2023), p. 479. Available from <https://doi.org/10.1093/chinesejil/jmad030>.

¹⁷ Margie-Lys Jaime, “Relying upon Parties' Interpretation in Treaty-Based Investor-State Dispute Settlement: Filling the Gaps in International Investment Agreements”, *Georgetown Journal of International Law*, vol. 46 (2014), p. 261.

typically considered binding on arbitral tribunals, providing a much-needed sense of coherence and consistency in the application of IIAs. Joint interpretations serve as a form of subsequent agreement between treaty parties, clarifying the meaning and application of treaty provisions from the outset of the treaty's existence.¹⁸

While the primary function of joint interpretations is to clarify substantive obligations and reduce the scope for differing interpretations, they also play a crucial role in promoting transparency and predictability within the investment dispute resolution system. By fostering greater cooperation and dialogue among treaty parties, joint interpretations help to align the interests of States and investors, thereby enhancing the legitimacy of the ISDS system.¹⁹ Moreover, joint interpretations are often a more practical and cost-effective means of resolving ambiguities than resorting to full treaty renegotiations, which can be complex and time-consuming.²⁰

In practice, joint interpretations can take several forms, including binding provisions embedded within treaty texts, subsequent agreements between treaty parties, and informal interpretive statements made by States.²¹ These statements can be issued through diplomatic channels or formal mechanisms such as periodic treaty reviews. While some critics argue that joint interpretations may reduce transparency by causing uncertainty about the finality of treaty terms, they ultimately serve as an important tool for ensuring that treaty provisions reflect the evolving priorities and concerns of the States involved.²²

Aside from States' own treaty practice, discussions on the joint interpretations by treaty parties have also commenced under the auspices of the United Nations Commission on International Trade Law Working Group III (UNCITRAL WG III) on ISDS reform. The discussions under UNCITRAL WG III focus on the efforts of States to improve the safeguards

¹⁸ Lucas Clover Alcolea, "States as Masters of (Investment) Treaties: The Rise of Joint Interpretative Statements", *Chinese Journal of International Law*, vol. 22 (2023), p. 479. Available from <https://doi.org/10.1093/chinesejil/jmad030>.

¹⁹ Gabrielle Kaufmann-Kohler, "Interpretive Powers of the Free Trade Commission and the Rule of Law", in *Fifteen Years of NAFTA Chapter 11 Arbitration*, Emmanuel Gaillard and Frédéric Bachand, eds. (Huntington, New York, JurisNet, 2011), pp. 175–196 at p. 179.

²⁰ Margie-Lys Jaime, "Relying upon Parties' Interpretation in Treaty-Based Investor-State Dispute Settlement: Filling the Gaps in International Investment Agreements", *Georgetown Journal of International Law*, vol. 46 (2014), p. 261.

²¹ Catharine Titi, "Non-Adjudicatory State-State Mechanisms in Investment Dispute Prevention and Dispute Settlement: Joint Interpretations, Filters and Focal Points", *Brazilian Journal of International Law*, vol. 14, No. 2, p. 37.

²² Aaron Cosbey, "The Road to Hell? Investor Protections in NAFTA's Chapter 11", in *International Investment for Sustainable Development: Balancing Rights and Rewards*, Lyuba Zarsky, ed. (London, Earthscan, 2005), pp. 158–169; Gabrielle Kaufmann-Kohler, "Interpretive Powers of the Free Trade Commission and the Rule of Law", in *Fifteen Years of NAFTA Chapter 11 Arbitration*, Emmanuel Gaillard and Frédéric Bachand, eds. (Huntington, New York, JurisNet, 2011), pp. 175–196 at p. 179.

against the unintended interpretations of the treaty by tribunals. One such effort took place during the 50th Session of the meeting with the suggested inclusion of an article on joint interpretations in the draft multilateral instrument on ISDS reform.²³

In order to analyze to what extent joint interpretations of IIAs influence the decision-making of arbitration tribunals in ISDS, this report will explore the evolving role of joint interpretations in international investment law and their impact on the balance of power between States and arbitral tribunals. The first section examines the shift towards joint interpretations and State control, highlighting key developments in treaty design and the increasing use of JICs and how they potentially reshape investment tribunals' decision-making. The second section delves into the characteristics and benefits of joint interpretations, discussing their effectiveness in addressing ambiguities in investment treaties and their potential outcomes to investment arbitrations. Finally, the report will conclude by offering recommendations for enhancing the role of joint interpretations in the investment arbitration framework. The recommendations will address the challenges States face in ensuring the effective use of these mechanisms, proposing ways to integrate JICs into the broader reform efforts of international investment law.

²³ United Nations Commission on International Trade Law (UNCITRAL), "Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its fifty-first session, first part (New York, 17–19 February 2025)", document A/CN.9/1196.

1. Legal effects of Joint Interpretations

When contracting States incorporate JICs into IIAs, the treaty practice tends to either be silent or to explicitly suggest the binding nature of the joint statements. While in the first case the IIA is silent on the legal effect of the joint interpretation, in the second the agreement expressly states its binding nature. The distinction whether a joint interpretation is considered binding or not relates to if such an interpretation is to be accepted as such, or one that is to be merely taken into account.

1.1 Silent on the legal effect of Joint Interpretations

The general rule of interpretation under Article 31(3) of the Vienna Convention on the Law of Treaties (VCLT) states that “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” shall be taken into account in the interpretation of the treaty.²⁴ Different views have been proposed under VCLT. As concluded by the International Law Commission (ILC), subsequent agreements, such as joint interpretations of the treaty parties, would constitute “authentic means of interpretation” and would not necessarily possess a conclusive effect. Alternatively, joint interpretations would constitute “authentic interpretations.” ILC’s standing, therefore, suggests that subsequent agreements are to be merely taken into account, as part of the single combined operation in the interpretation of a treaty, and not bind a tribunal.²⁵ On the other hand, it has been argued that ILC’s position with regard to the authoritative power of the joint interpretation challenges the model of “States as drivers of change processes of international law,” decreasing the legitimacy of States, as independent entities, to interpret the same treaties they agreed to be bound to in the first place.²⁶

An example of a provision that references the treaty parties’ power to issue a joint interpretation, but does not expressly state its legal effect, can be found in Article 14.1 of the India – Korea Comprehensive Economic Partnership Agreement (CEPA).²⁷ This article,

²⁴ Vienna Convention on the Law of Treaties (1969), adopted on 23 May 1969.

²⁵ International Law Commission (ILC), Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties with Commentaries (adopted on 2018), pp. 24-26.

²⁶ Fuad Zarbiyev, “A Quiet Revolution in the Making? The Changing State Authority in Treaty Interpretation”, in *The Many Paths of Change in International Law*, Nico Krisch and Ezgi Yildiz, eds.(Oxford, Oxford University Press, 2023) pp. 293–310.

²⁷ “The Parties shall at all times endeavour to agree on the interpretation and application of this Agreement, and shall make every attempt through cooperation and consultations to arrive at a mutually satisfactory resolution of

located in the dispute settlement section of the agreement, does not expressly detail the procedures for the adoption of a joint interpretation, but recognizes the treaty parties' ability to "agree on the interpretation" of the agreement. It also does not further elaborate on the treatment of said interpretation by a tribunal. Another case, with a provision similarly placed in the dispute settlement section of the agreement, may be found in the Denmark - Philippines BIT.²⁸

It should be noted that the two provisions above, and various others of their kind,²⁹ are not usually found in Investment Chapters or in the dispute resolution section of Free Trade Agreements or BITs. This reflects the potentially non-binding nature of the joint interpretations as they do not seem to be intended to be an instrument to be used by a tribunal in an investment dispute. Furthermore, the language used in the above examples employs softer commitments for State parties to agree on an interpretation. The Türkiye - Chile BIT obliges the treaty parties to "endeavour" to resolve differences regarding the interpretation of the treaty by "friendly negotiations."³⁰ These formulations imply the treaty parties' less active role in the interpretation of their agreement.

Considering the treatment given to joint interpretations as stated above, the control that contracting States have over the intended interpretation by tribunals may be limited. In the case where tribunals would consider joint interpretations only to "take them into account" along with the context, such as ILC's interpretation, this would potentially result in inconsistent or unintended interpretations of IIAs. In addressing this concern, modern agreements include specific provisions which expressly state the binding effect of joint interpretations.

1.2 Expressly stating the legal effect of Joint Interpretations

IIAs which expressly state the binding nature of an interpretation provide definitive clarity as to how a tribunal must treat a joint interpretation. In this sense, JICs of this nature

any matter that might affect its operation." India – Korea Comprehensive Economic Partnership Agreement (2009), art. 14.1.

²⁸ "If any dispute arises between the Contracting Parties concerning the interpretation and application of this Agreement, the Contracting Party shall, as far as possible, try to settle any such dispute through negotiations." Denmark - Philippines BIT (1998).

²⁹ See Türkiye-Chile BIT (1998), art. 12; Mexico-Netherlands BIT (1999), art. 10; and Japan-Philippines Economic Partnership Agreement (EPA) (2008), art. 150, among others.

³⁰ "1. The Contracting Parties shall endeavour to resolve any difference between them regarding the interpretation or application of the provisions of this Agreement by friendly negotiations." Agreement Between the Republic of Chile and the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments (1998), adopted on 21 August 1998, art. 12.

provide a blanket binding effect for the interpretation to be binding on tribunals. Furthermore, they may also add provisions to limit the applicability of joint interpretations to ongoing disputes. Lastly, the provisions can also grant discretion to tribunals or disputing parties to refer a question of interpretation to the contracting States.

In most cases, when an IIA expressly states that a joint interpretation made by the contracting States is binding on a tribunal, such legal effect is given in a broad and general manner. Such a legal formulation makes it clear that a joint interpretation is binding on the tribunals but does not elaborate further on the limitations placed regarding the interpretation's effectiveness, giving the interpretation broad applicability. A clear, and arguably the most famous example can be found in NAFTA Article 1131.³¹

Under NAFTA, no further limitations or clarification on the legal effect of the joint interpretation, aside from its binding effect on a tribunal, is mentioned. As an evolution from NAFTA's drafting style, the USMCA provides further clarity on the legal effects of the joint interpretation. Under USMCA Article 14.D.9,³² any award issued must be consistent with the Contracting Parties' interpretation. To further clarify this, the binding nature of the interpretation is also repeated in a footnote under Article 30.³³

The language requiring a tribunal award to be consistent with the joint interpretation is also one that is found in various other agreements which expressly mention the binding effect of a joint interpretation.³⁴ These provisions ensure that such joint interpretations are binding both for future disputes as well as pending disputes if issued in the course of an ISDS proceeding. Nonetheless, challenges may be made, either by the disputing investor or the tribunal, on the legality of the interpretation and on the effects the interpretation may have on fairness and due process.

One way to address the concerns on the fairness of issuing a joint interpretation during an ongoing case is done by excluding its applicability altogether. The 2019 Dutch Model BIT takes this approach in its Article 24, which stipulates that while the joint interpretation of the

³¹ "2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section." North American Free Trade Agreement, adopted 17 December 1992, art. 1131.

³² "2. A decision of the Commission on the interpretation of a provision of this Agreement under Article 30.2 (Functions of the Commission) shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision." Agreement between the United States of America, the United Mexican States, and Canada (USMCA), adopted on 30 November 2018, art. 14.D.9.

³³ "2. For greater certainty, interpretations issued by the Commission are binding for tribunals and panels established under Chapter 14 (Investment) and Chapter 31 (Dispute Settlement)." USMCA, art. 30.

³⁴ See art. 9.24 of the Korea - Vietnam FTA (2015), art. 9.25 of the CPTPP (2018), or art. 9.18(2) of the Australia - China FTA (2015), among others.

contracting parties is binding on an ISDS tribunal, it is not so in situations where a claim has already been raised, and thus effectively removes the retroactive effect.³⁵ Such a provision, which limits the binding powers of an interpretation in such a way, is rarely found.

Another way in which the binding nature of a joint interpretation may be limited is through an agreement by the contracting states on when the interpretation shall have its binding effect. Article 8.31 of the Canada-European Union CETA uses this method by adopting a language that provides additional clarity to the legal effect of interpretations.³⁶ While its binding effect on a tribunal is recognized, the contracting parties have control over when it shall have this effect.

Nevertheless, in both of the above examples, when the joint interpretation is not applicable (under the Dutch Model BIT) or decided to not have a binding effect (under the CETA), tribunals still have the ability to take into consideration the interpretation as a reference. The treatment of the interpretation in this case would then be similar to that of previously mentioned JICs which are not explicitly made binding, making it one element to be taken into account in the combined operation of the interpretation of a treaty, in line with the customary rules of interpretation under Article 31(3) of the VCLT.

Additionally, it should be noted that under the above provisions, the impetus to issue a joint interpretation is something that purely lies within the contracting States. If initially, the trigger for the issuance of a joint interpretation comes from the contracting States, other experiences display initiatives either from the tribunal itself or from a disputing investor. This type of JIC still allows for contracting States to exercise control over the interpretation of the treaty, but balances said control with the rights of the investor by allowing a request to be made to the treaty parties to issue a joint interpretation of a provision that is in issue during a dispute.

An example of this type of provision may be found in the Investment Chapter of the Association of South East Asian Nations (ASEAN)-Australia-New Zealand FTA (AANZFTA) in Article 28(2).³⁷ While this provision does not stop the treaty parties from formulating and

³⁵ “2. A joint interpretative declaration adopted as result of consultations by the Contracting Parties shall be binding on a Tribunal established under Section 5 of this Agreement. Such joint interpretative declaration is not applicable in cases where a claim has been submitted by an investor under Section 5 of this Agreement.” Netherlands Model BIT (2019), art. 24.

³⁶ “3. ... An interpretation adopted by the CETA Joint Committee shall be binding on the Tribunal established under this Section. The CETA Joint Committee may decide that an interpretation shall have binding effect from a specific date.” Comprehensive Economic and Trade Agreement between Canada and the European Union (2016), adopted on 30 October 2016, art 8.31.

³⁷ “The tribunal shall, on its own account or at the request of a disputing party, request a joint interpretation of any provision of this Agreement that is in issue in a dispute. The Parties shall submit in writing any joint decision declaring their interpretation to the tribunal within 60 days of the delivery of the request. Without

issuing a joint interpretation outside of an ongoing dispute or proceeding, it does allow third parties (either the tribunal or disputing party) to request for one to be made during an ongoing dispute. By giving the right for the third party to request for a joint interpretation to be made during a dispute, doubts over the legality and fairness of the joint interpretation due to the timing of its issuance may be settled. The AANZFTA provides greater rights to investors in this case, as the right for disputing investors to request a joint interpretation is not extended under all treaties.³⁸ A narrower form of this type of provision may be found in the Canada - China BIT, in which the request by the Tribunal for an interpretation of the contracting parties must itself stem from the request of the respondent contracting party in the dispute.³⁹

Furthermore, provisions stating the legal effect of joint interpretations usually add an additional procedural step to an ISDS proceeding. While this adds legitimacy to the joint interpretation issued, it does also add time to the arbitration, potentially leading to increased costs for all disputing parties. To counteract the potentially prolonged arbitration process, a time limit can be given to the State parties to issue a joint interpretation. Given that in some cases, joint interpretations could be requested and issued during an ongoing proceeding, a time limit is needed to ensure that such a process does not delay the settlement of the dispute for too long and ensure procedural efficiency of the arbitration. If the parties fail to reach an agreement on the interpretation, any party may submit its own interpretation to the tribunal. The tribunal shall accept such submissions but is not bound by it, treating the submissions as having the same weight and effect as a third-party submission. .

One thing to note regarding the time limit given for the contracting States to issue a joint interpretation is the feasibility of achieving an agreed interpretation by all parties to the IIA within the set amount of time. Usually, a 60-day period has been adopted for treaty parties to agree on a joint interpretation. However, this may prove to be more difficult to realize in

prejudice to Paragraph 3, if the Parties fail to issue such a decision within 60 days, any interpretation submitted by a Party shall be forwarded to the disputing parties and the tribunal, which shall decide the issue on its own account". Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, adopted on 27 February 2009, art. 28.

³⁸ A similar language to the AANZFTA can be found in the ASEAN Comprehensive Investment Agreement, adopted on 26 February 2009, art. 40.

³⁹ "2. Where a disputing Contracting Party asserts as a defence that the measure alleged to be a breach is within the scope of the reservations and exceptions set out in Article 8(1), (2) and (3), on request of the disputing Contracting Party, the Tribunal shall request the interpretation of the Contracting Parties on the issue. The Contracting Parties, within 60 days of delivery of the request, shall submit in writing their joint interpretation to the Tribunal. The interpretation shall be binding on the Tribunal. If the Contracting Parties fail to submit an interpretation within 60 days, the Tribunal shall decide the issue". Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments (2012), adopted on 9 September 2012, art. 31. Similar provisions may be found in the Mexico - Portugal BIT (2000), art. 15 or the United States - Korea FTA (2012), art. 11.23, among others.

multilateral or regional agreements, as opposed to a bilateral agreement. Such a 60-day period was adopted under the Mexico-Portugal BIT and the Investment Chapter of the United States – Korea FTA. Under these two agreements, an agreement would only need to be made between two States, while the above-mentioned AANZFTA would need the agreement of 12 different State parties within the same span of 60 days.

1.3. Remarks on treaty practice and Joint Interpretations

The treatment of JICs in IIAs reflects a dynamic interplay between State sovereignty and the need for predictability in investor-State dispute settlement (ISDS). When IIAs remain silent on the legal effect of joint interpretations, the treatment of the interpretation follows the general rule of interpretation under Article 31(3) of the VCLT, which considers it as one part to be taken into consideration in the whole operation of the interpretation. This approach, given the State parties' weaker control over the treatment of their interpretation, may risk inconsistent arbitral outcomes, as other contextual factors are taken into consideration. Conversely, more modern IIAs increasingly codify the binding force of joint interpretations to assert State control over the agreement's intended meaning. An issue which may arise under these provisions is that of the timing of the adopted joint interpretation. Without prejudice to the substance of the interpretation, an interpretation issued during the course of an ongoing claim may be considered by a tribunal as an unlawful or disguised amendment, as frustrating the legitimate expectations of investors, or an unfair act on behalf of the State.

2. Case Analysis: A matter of time?

When it comes to case analysis, the timing of joint interpretations raises an important issue for tribunals to analyze. Whether an interpretation is issued before a claim being filed or during the proceedings, tribunals have been facing the question whether the joint interpretation should be taken into account, as they must decide if they are legally forced to accept these interpretations with two potential effects - if accepted it might limit the tribunal's independence; if not, it could ignore the parties' right to interpret their own obligations under the agreement. This section illustrates the considerations made by tribunals when faced with joint interpretations issued under different chronologies, either before the filing of a claim or during the course of proceedings.

2.1. Joint Interpretations before a dispute

One instance in which joint interpretations can influence the decision-making of arbitration tribunals is when they are issued before a claim is filed under the relevant IIA. As a general rule, tribunals examine the joint interpretation to ensure it is a legitimate clarification, not a substantive amendment to the treaty. They assess the good faith of the interpretation and if it genuinely clarifies the intended meaning of the treaty text. Further, arbitration tribunals recognize that joint interpretations issued by treaty parties before a claim is filed are to be binding upon them. This is because joint interpretations are retroactive in effect,⁴⁰ that is, they are “read into the treaty for purposes of its interpretation.”⁴¹ The result is that their effect reaches back to the entry into force of the treaty’s original text for the purposes of treaty interpretation, except for previously settled cases.⁴²

A discernible pattern has emerged in the treatment of joint interpretations issued prior to the initiation of claims.⁴³ Tribunals have varied between acknowledging the binding nature

⁴⁰ Permanent Court of International Justice, *Access to German Minority Schools in Upper Silesia*, Advisory Opinion, 15 May 1931, PCIJ Series A/B No 40, p. 19.

⁴¹ Lucas Clover Alcolea, “States as Masters of (Investment) Treaties: The Rise of Joint Interpretative Statements”, *Chinese Journal of International Law*, vol. 22 (2023), p. 483. Available from <https://doi.org/10.1093/chinesejil/jmad030>.

⁴² David Gaukrodger, “The Legal Framework Applicable to Joint Interpretive Agreements of Investment Treaties”, OECD Working Papers on International Investment, No. 2016/01 (Paris, OECD Publishing, 2016), p. 8.

⁴³ Andreas Kulick, “Investment Arbitration and Democracy”, *Cambridge Journal of International and Comparative Law*, vol. 4, No. 2 (2015), p. 446.

of joint interpretations, provided they are adopted by the treaty parties in accordance with the treaty's mechanisms, regardless of the status of the joint interpretation as an amendment of the treaty. Alternatively, tribunals also employed VCLT to recognize the role of treaty parties as interpreters of their agreements, giving interpretative authority to subsequent agreements and practice between the parties.⁴⁴ Both approaches reinforce legal certainty, enhancing State control over the interpretation of their obligations, and guarding against interpretative fragmentation, often as a result of the absence of a doctrine of precedent or a centralised judicial system in investment law.⁴⁵

In *Mesa Power Group LLC v Canada*, the tribunal was confronted with arguments challenging the binding nature of the Free Trade Commission (FTC) Note, which clarified the scope of fair and equitable treatment (FET) and minimum standard of treatment (MST) for investors. Mesa contended that the FTC Note lacked binding force because it was adopted outside the arbitral context of the *Mesa* case and conflicted with broader understandings of FET. In response, the tribunal concluded that since the FTC Note was issued before the claim was filed, it was binding upon the tribunal. It also addressed the contention of whether the FTC Note was an interpretation or an amendment, concluding that it properly constituted a clarification to the treaty, not an amendment. It affirmed that the NAFTA Parties intended for Chapter 11 tribunals to interpret Article 1105 strictly in line with customary international law. As such, the tribunal held that ignoring the FTC Note would render it “inutile,” which could not be a correct reading of the treaty.⁴⁶

This position on pre-claim joint interpretations is echoed in subsequent tribunals. In *Mercer v Canada*, the tribunal avoided direct engagement with the classification of the FTC Notes, instead presuming their applicability alongside Article 1105. While *Mercer* did not center on the timing of the interpretation, the tribunal operated on the understanding that the FTC Note was binding upon it.⁴⁷ This reinforces the doctrinal understanding that once a joint interpretation has been issued pre-claim, it forms an authoritative part of the treaty regime and as such, it is read into the treaty for purposes of its interpretation.⁴⁸ More so, through this

⁴⁴ Vienna Convention on the Law of Treaties (1969), adopted on 23 May 1969, art. 31(3)(a) and (b).

⁴⁵ Lucas Clover Alcolea, “States as Masters of (Investment) Treaties: The Rise of Joint Interpretative Statements”, *Chinese Journal of International Law*, vol. 22 (2023), p. 483. Available from <https://doi.org/10.1093/chinesejil/jmad030>.

⁴⁶ *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, para. 477.

⁴⁷ *Mercer International, Inc. v. Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018, para. 7.50.

⁴⁸ Lucas Clover Alcolea, “States as Masters of (Investment) Treaties: The Rise of Joint Interpretative Statements”, *Chinese Journal of International Law*, vol. 22 (2023), p. 483. Available from <https://doi.org/10.1093/chinesejil/jmad030>.

pragmatic approach, it sidestepped the amendment-versus-interpretation debate and reflected a preference for integrated interpretation.⁴⁹

The *Clayton/Bilcon v. Canada* tribunal echoed this approach but added an important nuance. It distinguished between the general interpretive rule of Article 31(3)(a) of the VCLT, which requires interpreters to “take into account” subsequent agreements, and the *lex specialis* of NAFTA Article 1131(2), which renders FTC interpretations binding. The tribunal emphasized that this elevates FTC interpretations to a status beyond mere interpretive aids, therefore, conclusive. Nonetheless, it engaged in careful analysis of the Note’s substantive content and found the MST and FET to be autonomous treaty obligations, although fully subsumed under customary international law as interpreted by the FTC.⁵⁰

However, not all tribunals have been deferential. The *Windstream Energy v. Canada* tribunal, while acknowledging the binding character of the FTC Notes, emphasized that treaty interpretation remains a composite process and that the terms of Article 1105(1) still require consideration under general treaty interpretation rules. The tribunal concluded that the Notes do not displace the duty to interpret the treaty in good faith and in light of its object and purpose.⁵¹

In *Mondev v. USA*, the FTC’s clarification was accepted to acknowledge the customary international law standard under Article 1105, despite mentioning that the standard was not disconnected from evolving international practice.⁵² In *Merrill & Ring v. Canada*, this evolutionary approach was reaffirmed, interpreting the customary standard as a dynamic one shaped by contemporary State practice and case law.⁵³ Thus, even though these cases adhered to the FTC’s formal authority and the binding nature of their interpretations, tribunals in these cases use their jurisdiction to interpret the content of FTC’s guidance towards recognising the dynamic nature of customary international law. Finally, this line of reasoning also finds resonance in tribunals outside NAFTA. The *Azurix v. Argentina* tribunal considered the FTC Interpretation in the context of BIT obligations, and while it acknowledged the interpretive act as part of a significant State practice, it expressed skepticism about applying such an

⁴⁹ *Mercer International, Inc. v. Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018, para. 7.56.

⁵⁰ *William Ralph Clayton, William Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, paras. 430-32.

⁵¹ *Windstream Energy LLC v. The Government of Canada (I)*, PCA Case No. 2013-22, Award, 27 September 2016, para. 355.

⁵² *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 121.

⁵³ *Merrill & Ring Forestry L.P. v. The Government of Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010, paras. 190, 192-195.

interpretation to other treaties without textual basis. The tribunal noted that the FTC Note was a reaction to earlier arbitral decisions and was subsequently codified in other FTAs, illustrating divergent understandings of FET obligations across treaty frameworks.⁵⁴

2.2. Joint Interpretations and ongoing disputes

Joint interpretations issued by treaty parties in the context of IIAs, particularly when introduced during the pendency of an arbitration, pose significant challenges to the coherence and fairness of the arbitral process. This tension is especially evident under NAFTA, where the FTC exercised its interpretive authority in 2001 to restrict the application of Article 1105 to the customary international law minimum standard of treatment. The intervention occurred while several arbitrations were already underway, thereby raising fundamental issues related to retroactivity, legitimacy, and the division of interpretive authority between treaty Parties and arbitral tribunals.

While NAFTA's framework, with its explicit provision in Article 1131(2) binding tribunals to FTC interpretations, remains central to the discourse, other arbitral decisions, including those operating under different treaties and legal regimes, have contributed divergent perspectives and developments, underscoring the broader relevance of this issue. Accordingly, the arbitral response to such joint interpretations, particularly when they appear to alter the applicable law mid-proceedings, reveals a deep tension between State sovereignty and arbitral independence, as well as between dynamic treaty interpretation and the principle of legal certainty.

The *Pope & Talbot v. Canada* tribunal dealt directly with the disruptive impact of the 2001 FTC Notes, which were issued after the tribunal had already rendered its partial award finding Canada in breach of Article 1105. The tribunal acknowledged that were it required to determine whether the Commission's action was an interpretation or an amendment, it would opt for the latter. However, it decided to proceed on the basis that the Commission's act was an "interpretation" and emphasized that applying it would not overturn the previous finding of breach. Canada argued that since the FTC Notes clarified what Article 1105 had always meant, the tribunal had to reconsider its prior ruling. Conversely, the investor emphasized the international law presumption against retroactivity and due process concerns, arguing that the

⁵⁴ *Azurix Corp. v. The Argentine Republic (I)*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 363.

interpretation should not affect past findings. Although the tribunal accepted the binding nature of the FTC Notes under Article 1131(2), it adopted a cautious approach, stating that this provision was “better regarded as mandatory than prospective,” yet still assessed the interpretation’s impact on its prior findings without reversing them.⁵⁵ The tribunal was notably uneasy with the FTC’s act, referring to it as an amendment in disguise and expressing concern about Canada’s dual role as both a disputing party and author of the interpretation.⁵⁶

Other tribunals followed a different trajectory. The *ADF v. USA* tribunal expressly declined to examine the distinction between an interpretation and an amendment, stressing that all three NAFTA parties, speaking through the FTC, constituted the most authoritative source on treaty meaning. It found no basis in NAFTA to allow tribunals to reject an FTC-issued interpretation based on their own assessment of its nature. To do so, the tribunal argued, would “degrade and set at naught” the FTC’s binding interpretive authority and undermine systemic consistency.⁵⁷ The tribunal emphasized that the FTC interpretation must be accepted as binding unless it clearly purports to be an amendment, which it did not.

In *Methanex v. USA*, the tribunal highlighted procedural concerns, as the United States submitted the FTC Interpretation only after oral hearings had concluded, raising potential fairness issues despite the tribunal’s ultimate acceptance of the document as a clarification rather than a substantive amendment.⁵⁸ However, in *Loewen v. USA*, the Notes were accepted as authoritative even though the dispute had commenced before their issuance, reinforcing the principle that interpretive authority may influence ongoing cases, disregarding previous awards before the FTC Note.⁵⁹

This line of reasoning also finds resonance in tribunals outside NAFTA. In the *Daimler v. Argentina* case, the tribunal emphasized that an interpretive declaration issued after a dispute has arisen cannot be regarded as definitive evidence of a State’s original intent, especially when made with respect to a different treaty,⁶⁰ a similar stance found in *Cairn Energy v. India*.⁶¹ Similarly, the Court of Justice of the European Union (CJEU), when analyzing the possible

⁵⁵ *Pope & Talbot v. Government of Canada*, Award in Respect of Damages, 31 May 2002, paras. 47-51.

⁵⁶ *Pope & Talbot v. Government of Canada*, Award in Respect of Damages, 31 May 2002, paras. 71-72.

⁵⁷ *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, para. 177.

⁵⁸ *Methanex Corporation v. United States of America*, Partial Award, 7 August 2002, paras. 20-21.

⁵⁹ *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, para. 128.

⁶⁰ *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, para. 272.

⁶¹ *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India*, PCA Case No. 2016-07, Final Award, 21 December 2020.

retroactive effect of a joint interpretation from the CETA Joint Committee in its Opinion 1/17, stressed the importance of independence of the CETA tribunal and how interpretations issued within the course of a pending case may adversely affect this independence. It concluded that the European Union (EU) cannot consent to interpretations which would retroactively affect pending cases.⁶²

2.3. Remarks on the effects of Joint Interpretations in case law

The prevalent understanding of tribunals is that when a joint interpretation is issued, it shall be followed, regardless of its binding nature or of its temporality. Across this varied jurisprudence, a clear tension emerges between the sovereign right of states to interpret their treaties and the principle of legal certainty for investors. The 2001 FTC Notes have demonstrated the ability of joint interpretations to recalibrate the boundaries of treaty protection, particularly within frameworks where such authority is expressly granted. However, as several tribunals have shown, both within and beyond NAFTA, this interpretive power is not absolute. Tribunals have accepted the binding force of joint interpretations, but many have also insisted that interpretation remains a multifaceted process, guided by broader principles such as those under the VCLT, the evolving nature of customary international law, and the context of the treaty itself.

When joint interpretations are issued before an investment claim is filed, the cases discussed show that tribunals generally accept them as binding, provided they genuinely clarify rather than amend the treaty. However, tribunal practice has also shown that they find that even these binding interpretations must be read in light of broader interpretive principles under the VCLT, including good faith, and the evolving character of customary international law. While this approach promotes legal certainty and preserves State sovereignty over the meaning of the treaty text, it also highlights the ongoing need for tribunals to balance deference to joint interpretations with the independent and dynamic application of international law norms. As such, the acceptance of pre-claim joint interpretations is not mechanical but operates within an evolving interpretive legal system. Moreover, the deployment of joint interpretations during active arbitrations raises due process concerns and has led some tribunals to treat such acts with

⁶² “... Accordingly, Article 8.31.3 of the CETA cannot be interpreted ... as permitting the Union to consent to decisions on interpretation of the CETA Joint Committee that would produce effects on the handling of disputes that have been dealt with or are pending.” In CJEU Opinion 1/17 para. 237.

caution or skepticism. As investment treaty practice evolves, the role of joint interpretations will likely remain contested, situated at the intersection of treaty-making, treaty interpretation, and the adjudicative independence of investment tribunals.

Recommendations

When deciding on the interpretative weight of a joint interpretation, whether or not said interpretation is given a greater role depends on its binding nature to the tribunal. The language employed by JICs and their following statements may drastically change a tribunal's perception over the issue. As discussed above, when a treaty explicitly states that they will legally bind the tribunal, the tribunal considers them as such, even when it may question the legality of the interpretation itself.

A strong language, with the use of "shall" instead of "should," is recommended for States with the intention to gather more authority of JICs over the outcome of a dispute. In the case where the agreement does not explicitly bind the tribunal to a joint interpretation, the interpretation does not necessarily possess a conclusive effect and is thus taken into account in light of the agreement's context, resorting to VCLT. Examples such as the *Turkiye - Chile BIT* indicate a softer commitment, hence joint interpretations may not hold a strong authoritative weight under the scrutiny of an investment tribunal. Notwithstanding, with the use of a stronger language, tribunals tend to comply with the joint interpretation more easily. The *NAFTA JIC* and the requirement for its interpretation to "be binding on a Tribunal" clearly illustrates this, even in light of previous conflicting decisions.

Closer attention should be given in multilateral settings, such as multilateral or plurilateral agreements, as the binding effect of a joint interpretation is contingent upon the agreement of all treaty signatories. In this setting, the case law shows that awards tend to disregard statements not issued jointly by all treaty parties.

Beyond providing clarity on the binding nature of joint interpretations on tribunals, States could also expressly clarify the temporal effect of joint interpretations in their treaties, specifying whether interpretations apply only to future disputes, or also to pending proceedings. This would reduce ambiguity and safeguard both State control and procedural fairness. *CETA's* experience specifies the need to fix a date for the effects of a binding interpretation. Despite this evolutionary approach, it's still unclear whether a joint interpretation should be interpreted in a retroactive manner, as it may affect legitimate expectations, or be considered from a specific date from the issuance of a particular joint statement.

Clarity on temporality would not only reinforce the authority of joint interpretations but also minimize challenges based on their retroactive effect, common in joint interpretations issued during the course of proceedings. However, States ought to note that, even with such

clarity, tribunals may still assess joint interpretations in light of the dynamic and evolving character of international law, rather than treating them as static codifications.

When a joint interpretation is chosen to affect ongoing disputes, then the interpretation may be included as an additional procedural step in the proceedings in order to create more predictability and consistency. By doing this, it is expected to provide a certain balance between the treaty parties' right to interpret the treaty and the investors' expectations. However, it should be taken into account the period provided to the treaty parties, such as in the case of AANZFTA. While an extended period may be needed to ensure that an interpretation is agreed upon by all treaty parties, it should not unduly prolong the proceedings.

Based on the discussed examples, States navigating IIAs negotiations or amendments are invited to take into consideration the following recommendations:

- a) Specify the binding nature, or not, of a joint statement and its status within the IIA;
- b) Provide clarity on when joint interpretations start to produce effects, fixing a specific date;
- c) Clarify on whether the joint statement may apply to ongoing disputes or not;
- d) Define eventual retroactive interpretations arising out of joint statements and their relationship with already existing investment covered by an IIA;
- e) Promptly communicate to stakeholders of any new joint interpretations, to alleviate any concerns on the effects to investors' expectations;
- f) Set out the scope of potential future joint interpretations arising out of the IIA.



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