



JOINT INTERPRETATION OF INVESTMENT TREATIES: A STUDY ON EXISTING PRACTICE, LEGAL CHARACTER AND STRATEGIES FOR IMPLEMENTATION

Version:

Final

Date:

23 April 2020

Client:

Government of the Kingdom of Thailand

Prepared by:

Joel Sherard Chow

Nadine Quah

Zhao Jingtong

National University of Singapore
Faculty of Law

ACKNOWLEDGEMENTS

The team would like to thank Associate Professor Jansen Calamita, Dr Ayelet Berman, Dr Neha Mishra, Dr Charalampos Giannakopoulos and Ms Charis Tan for their advice and guidance in the preparation of this memorandum.

All errors remain solely those of the authors.

EXECUTIVE SUMMARY

A joint interpretation is an agreement between State parties to an international investment agreement (“**IIA**”) on a common interpretation of a provision in the IIA. Joint interpretations can be seen as a way for States to retain control over the interpretation of IIAs, as and when disputes arise under these IIAs. This memorandum addresses three main areas concerning joint interpretation in IIAs: (1) how it has been used in existing treaties; (2) its legal effect on Investor State Dispute Settlement (ISDS) tribunals; and (3) how it can be implemented in future treaties. For the purposes of legal analysis, we classify IIAs into three main categories: (1) where treaties are silent on joint interpretations; (2A) where treaties state that joint interpretations are expressly binding on ISDS tribunals; and (2B) where treaties provide for joint interpretation but are silent as to its legal effect.

Joint interpretations issued under situations (1) and (2B) are governed by Art 31(3)(a) of the Vienna Convention on the Law of Treaties (“**VCLT**”). This is because joint interpretations constitute “subsequent agreements” under Art 31(3)(a) of the VCLT and, thus, ISDS tribunals are required to “tak[e] [them] into account” in the interpretation of IIAs. However, while joint interpretations constitute an authentic means of interpretation, they form only one part of the holistic exercise of treaty interpretation (which includes, *inter alia*, the ordinary meaning, context and object and purpose).

By contrast, under situation (2A), the joint interpretation issued by the IIA parties will supersede Art 31(3)(a) of the VCLT and will be binding on the ISDS tribunals, pursuant to the *lex specialis* principle. This is most evident from the decisions of tribunals in several NAFTA cases, which applied the 2001 Free Trade Commission Interpretive Note on Art 1105 (“**FTC Note**”). Most tribunals accepted that the FTC Note was binding and applied it. However, as the FTC Note referred to the customary international law standard of treatment, some tribunals have adopted an evolutive approach.

It is also unclear at present how joint interpretations could affect investor rights. The ability to do so turns on the provisions of each IIA, and must therefore be assessed on a case-by-case basis. A survey of such provisions falls beyond the scope of this study. Further, a claim for estoppel, legitimate expectations and/or Fair and Equitable Treatment will likely only succeed if the State had made a sufficiently clear representation prior to the interpretation being issued.

To implement joint interpretation provisions in existing and future IIAs, States have the option of amending existing IIAs on a bilateral basis. This process is likely to be slow and resource-intensive. Other options include the adoption of procedural rules, a multilateral opt-in convention (much like the Mauritius Convention on Transparency) and model treaty provisions. Although getting States to ratify such an opt-in convention is politically challenging, it is likely to be the most efficient option for incorporating joint interpretation mechanisms in IIAs.

This study also recommends that when implementing joint interpretation provisions into treaties, States should include language that such interpretations are binding on the tribunal. Based on our survey of existing IIAs, one possible model provision that can be adopted is:

Any interpretation jointly agreed to by the Parties shall be binding on the tribunal established under these provisions, and any decision or award issued by such a tribunal must be consistent with that interpretation.

TABLE OF CONTENTS

1.	INTRODUCTION	1
2.	PRELIMINARY CONSIDERATIONS	2
2.1	Definition of joint interpretation	2
2.2	Types of joint interpretation provisions in IIAs	2
2.2.1	Provisions expressly stating that joint interpretations are binding on the tribunal	3
2.2.2	Provisions that reference joint interpretations or consultations, but are silent as to its legally binding effect on tribunals.....	3
2.2.3	Provisions creating a treaty body that can issue joint interpretations	4
2.2.4	Provisions allowing tribunals to refer questions of interpretation to States (<i>renvoi</i> provisions).....	4
3.	SITUATION 1: WHERE AN IIA DOES NOT INCLUDE ANY LANGUAGE ON JOINT INTERPRETATION	6
3.1	Requirements of a “subsequent agreement” under Art 31(3)(a) of the VCLT	6
3.1.1	Subsequent	7
3.1.2	Agreement.....	7
3.1.3	Between the parties	9
3.1.4	Regarding the interpretation.....	9
3.1.5	Of the treaty	11
3.2	Legal effect of joint interpretations under Article 31(3)(a) VCLT	11
3.2.1	Joint interpretations are to be “taken into account” where a treaty is silent as to its legal effect	12
3.2.2	Tribunals are likely to place more weight on joint interpretations that are clear, specific and formally agreed to	13

3.2.3	Timing Matters: Tribunals are likely to accord more weight to joint interpretations issued earlier	14
3.3	Conclusion.....	15
4.	SITUATION 2: WHERE AN IIA INCLUDES A PROVISION ON JOINT INTERPRETATION.....	16
4.1	Situation 2A: Where the IIA expressly states that the joint interpretation is binding on the ISDS Tribunal	17
4.1.1	The express treaty provision takes precedence over the customary international law rules under the VCLT pursuant to the <i>lex specialis</i> rule	17
4.1.2	ISDS Tribunals have generally been deferential to joint interpretations.....	18
4.1.3	Tribunals may adopt an evolutive interpretation if the joint interpretation allows it to do so.....	19
4.1.4	Timing matters: The persuasiveness of the joint interpretation will also depend on its timing	20
4.2	Situation 2B: Where the IIA is silent as to the legal effect of the joint interpretation	21
4.2.1	The VCLT will apply and the tribunals will have to take the joint interpretations “into account”	22
4.2.2	Timing Matters.....	22
4.3	Implications on investor rights.....	22
4.3.1	The rights of third States under the VCLT	23
4.3.2	Could investors raise claims under IIAs?	23
5.	STRATEGIES FOR ADOPTING JOINT INTERPRETATION MECHANISMS INTO EXISTING AND FUTURE IIAs	26
5.1	Amending existing treaties to include joint interpretation mechanisms	26
5.2	Adoption of procedural rules	27

5.3	Implementing joint interpretation provisions through an opt-in convention	27
5.4	Adopting joint interpretation provisions in model treaties	30
6.	CONCLUSION AND RECOMMENDATIONS	32
6.1	Recommendations for drafting joint interpretations provisions in treaties.	32
6.2	Recommendations for drafting joint interpretations	33
6.3	Recommendations for implementing joint interpretations into existing and future treaties.....	33

INDEX OF ABBREVIATIONS

VCLT	Vienna Convention on the Law of Treaties
NAFTA	North American Free Trade Agreement
IIA	International Investment Agreement
ISDS	Investor-State Dispute Settlement
BIT	Bilateral Investment Treaty
FTA	Free Trade Agreement
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
ACIA	ASEAN Comprehensive Investment Agreement
ICJ	International Court of Justice
ILC	International Law Commission
FTC Note	Note of Interpretation issued by the Free Trade Commission of the North American Free Trade Agreement
UNCTAD	United Nations Conference on Trade and Development
UNCITRAL	United Nations Commission on International Trade Law
Transparency Rules	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration
Mauritius Convention	Mauritius Convention on Transparency
BEPS Multilateral Instrument	Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting
FET	Fair and Equitable Treatment

1. INTRODUCTION

1. Joint interpretation mechanisms in international investment agreements (“IIAs”) allow contracting States to issue interpretations of treaty provisions, thereby increasing the control that States exercise over the interpretation of IIAs when disputes arise. However, these provisions are found only in a handful of IIAs. As of April 2020, only 186 of the 2660 IIAs in force contain joint interpretation mechanisms, amounting to a 11% of IIAs.¹
2. While the number of IIAs containing joint interpretation provisions remains small, recent years have seen a significant increase in IIAs containing such mechanisms. The increased usage of joint interpretation mechanisms in IIAs has given rise to several practical and legal questions, including how to best draft joint interpretation provisions; how such mechanisms can be implemented into existing IIAs; and how much weight should be accorded to these interpretations by investor-State dispute settlement (“ISDS”) tribunals.
3. Accordingly, this memorandum will address three main research questions: (1) how joint interpretations and their corresponding IIA provisions have been drafted by States; (2) whether joint interpretations have a legal effect in ISDS proceedings; and (3) how States can implement joint interpretation mechanisms at the bilateral and multilateral level.
4. Section 2 of this memorandum will set out the definition of joint interpretation and present our survey of existing practices in IIAs on joint interpretation mechanisms. Section 3 will examine the legal effect of joint interpretations in the case of IIAs not containing any mechanisms concerning joint interpretations, while section 4 will evaluate the legal effect of joint interpretations where IIAs contain express provisions on joint interpretation. Section 5 will evaluate various options available to incorporate joint interpretation mechanisms into existing and future IIAs. Lastly, section 6 will conclude the memorandum and provide recommendations on how to best provide for joint interpretation mechanisms in IIAs.

¹ See **Annex 1 – Master List of Treaties** for the full list of treaties with joint interpretation provisions.

2. PRELIMINARY CONSIDERATIONS

5. This section outlines the key preliminary considerations involved in the discussion of joint interpretation mechanisms in IIAs such as the definition of a joint interpretation (section 2.1) and the various types of joint interpretation provisions in IIAs (section 2.2).

2.1 Definition of joint interpretation

6. No authoritative definition of joint interpretation exists, although there is a shared consensus that a joint interpretation is a common position or agreement between all the treaty parties as to the interpretation of treaty provisions.² In other words, a joint interpretation is a commonly shared position or agreement among the treaty parties to clarify the meaning of the terms of the treaty as originally agreed upon by the parties. Therefore, a joint interpretation must be distinguished from an agreement between the parties regarding the amendment of the treaty, which constitutes a prospective change to the terms of the treaty, as addressed below in section 3.1.4.

2.2 Types of joint interpretation provisions in IIAs

7. An overwhelming majority of IIAs do not contain any provision on joint interpretations. Among those IIAs that contain a provision on joint interpretation, we have identified four main types: (1) Provisions expressly stating that all joint interpretations are binding on the tribunal; (2) Provisions that reference joint interpretations or consultations, but are silent as to its legally binding effect on tribunals; (3) Provisions creating a treaty body that can issue joint interpretations; and (4) Provisions allowing tribunals to refer questions of treaty interpretation to States (*renvoi* provisions). We address each of these types below.
8. While we draw the above analytical distinction between different types of joint interpretation provisions in IIAs, some IIAs provide for joint interpretation mechanisms that combine features of more than one type of joint interpretation provision. For example, a provision establishing a treaty body that can issue joint interpretations binding on the

² International Law Commission, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in relation to Interpretation of Treaties, with commentaries' (2018); Dörr, O and Schmalenbach, K (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Oxford University Press 2018), 15, [10].

tribunal falls under two of the above discussed categories.³ A complete list of all treaties with joint interpretation provisions can be found in **Annex 1** of this memorandum. A list of treaties that Thailand is party to containing joint interpretation provisions can be found in **Annex 2** of this memorandum.

2.2.1 Provisions expressly stating that joint interpretations are binding on the tribunal

9. Certain IIAs contain provisions that allow for joint interpretations and expressly state that such interpretations are binding on the tribunal. An example of such a provision is Art 12.7 of the Canada-Venezuela Bilateral Investment Treaty (“**BIT**”) (1998):⁴

A tribunal established under this Article shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law. An interpretation of this Agreement to which both Contracting Parties have agreed shall be binding upon the tribunal.

10. Treaties in this category include express language stating that the interpretation is binding on the ISDS tribunal. Most provisions also require that the award issued by the ISDS tribunal must be “consistent” with the joint interpretation.⁵

2.2.2 Provisions that reference joint interpretations or consultations, but are silent as to its legally binding effect on tribunals

11. Several IIAs contain provisions allowing parties to issue joint interpretations but are silent as to the legal effect of such interpretations. An example of such a provision is Art 14.1 of the Comprehensive Economic Partnership Agreement between India-Republic of Korea BIT (2010):⁶

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 any matter that might affect its operation.

³ For this reason, percentages may not add up to 100% in the following analysis. For a full list, refer to **Annex 1 – Master List of Treaties**.

⁴ Art 12.7, Canada-Venezuela BIT (1998).

⁵ See also Art 10.21 Chile-United States of America FTA (2004); Art 32 Canada-Mali BIT (2016); Art 33(1) Canada-Senegal BIT (2016); Art 10.14 India-Malaysia FTA (2011).

⁶ Art 14.1, India-Republic of Korea Comprehensive Economic Partnership Agreement between (2010).

12. These provisions typically acknowledge the need for amicable settlement of disputes on the interpretation through consultations between State parties.⁷ However, these provisions do not expressly state whether such interpretations will be binding on the tribunal.

2.2.3 Provisions creating a treaty body that can issue joint interpretations

13. In certain IIAs, parties create bodies, such as commissions or ministerial-level committees (referred to as “treaty body” in this memorandum) that may issue joint interpretations of the treaty. Such provisions are relatively rare and are more commonly found in multilateral treaties, largely due to the need for more efficient coordination between the various parties to the agreement.⁸

14. An example of such a provision is Art 9.25 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“CPTPP”) (2018):⁹

3. A decision of the Commission on the interpretation of a provision of this Agreement under Article 27.2.2(f) (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.

15. Treaties of this nature often include the option to issue interpretations in the mandate of the committee or treaty body.¹⁰

2.2.4 Provisions allowing tribunals to refer questions of interpretation to States (*renvoi* provisions)

16. Some IIAs contain provisions that grant discretion to the tribunal to refer a question of interpretation of the IIA to the contracting States (or a *renvoi* provision). An example of a

⁷ For example, Art 54 Chile-Turkey FTA (2011); Art 10 Denmark-Philippines BIT (1998); Art 150 Japan-Philippines EPA (2008); Art 10 Mexico-Netherlands BIT (1999).

⁸ For example, Art 1131 NAFTA (1994); Art 19.3 Central America-Dominican Republic-United States Free Trade Agreement (CAFTA-DR) (2006); Art 11.26 Central America-Mexico FTA (2013). Some BITs also contain provisions that create a treaty body that can issue joint interpretations. For example, Art 76 Chile-China FTA (2006); Art 9.24 Korea-Vietnam FTA (2015); Art 10.22 Peru-USA FTA (2009).

⁹ Art 9.25, Comprehensive and Progressive Agreement for Trans-Pacific Partnership (2018).

¹⁰ Examples include Art 14 Japan-Peru Economic Partnership Agreement (2012); Art 76 China-Pakistan FTA (2007); Art 54 Chile-Turkey FTA (2011). These treaty bodies operate with consensus and representation of all the treaty parties. For example, NAFTA Free Trade Commission decisions are taken by consensus between all representatives of state parties (Art 2001(4)). A similar example is found in Art 27.3 of the CPTPP.

renvoi provision is Art 40 of the ASEAN Comprehensive Investment Agreement (“ACIA”) (2012):¹¹

2. 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 Member States shall submit in writing any joint decision declaring their interpretation to the tribunal within 60 days of the delivery of the request. Without prejudice to paragraph 3, if the Member States fail to issue such a decision within 60 days, any interpretation submitted by a Member State shall be forwarded to the disputing parties and the tribunal, which shall decide the issue on its own account.

17. These *renvoi* provisions may be general, or specific to certain areas (such as taxation or non-conforming measures).¹² Some *renvoi* provisions provide that the tribunal may refer questions of treaty interpretation to the treaty body (see section 2.2.3, *supra*), while others permit for such reference to the contracting States themselves. *Renvoi* provisions also generally include language that such interpretations are expressly binding on the tribunal.¹³
18. In addition, these provisions may also include time limits for the State parties to respond to a request from the ISDS tribunal (such as Art 40 of the ACIA, *supra*). This feature is most commonly found in *renvoi* provisions as such interpretations are likely to be critical for the swift resolution of disputes.

¹¹ Art 40, ACIA (2012).

¹² An example of a general *renvoi* provision is Art 40(2) ACIA; other such categories include *renvoi* on non-conforming measures – see Art 832.2 Canada-Colombia FTA (2011); Art 9.32(2) Canada-Panama FTA (2013); *renvoi* on taxation measures, for example, Art 13.18 Canada-Honduras FTA (2013) or on general financial measures – see Art 84 Mexico-Netherlands FTA (1999).

¹³ Rodrigo Polanco, *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?* (CUP 2019), 105.

3. **SITUATION 1: WHERE AN IIA DOES NOT INCLUDE ANY LANGUAGE ON JOINT INTERPRETATION**

19. The majority of the IIAs in force do not contain any language concerning joint interpretation.¹⁴ However, as will be argued in this section, joint interpretations still have legal effect as they may constitute “subsequent agreements” and, thus, ISDS tribunals are bound to take such interpretations “into account” pursuant to Article 31(3)(a) of the VCLT.¹⁵ Further, this section will argue that an ISDS tribunal is likely to place more weight on a joint interpretation that is clear, specific and formally agreed to by the parties, but this does not mean that the interpretation is binding on the tribunal.
20. Section 3.1 will discuss the requirements for a “subsequent agreement” under Art 31(3)(a) of the VCLT, while section 3.2 will explain the legal effect of joint interpretations on an ISDS tribunal.
21. As a preliminary point, it should be noted that Art 31 of the VCLT reflects customary international law, as confirmed by the International Court of Justice (“ICJ”) and thus applies to all treaties, including IIAs.¹⁶

3.1 **Requirements of a “subsequent agreement” under Art 31(3)(a) of the VCLT**

22. Art 31(3)(a) of the VCLT reads:

There shall be taken into account, together with the context:

- (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.

23. Below we examine each of the criteria under Article 31(3)(a) of the VCLT: (1) subsequent (2) agreement (3) between the parties (4) regarding the interpretation (5) of the treaty or the application of its provisions.

¹⁴ See **Annex 1** for the full list of treaties.

¹⁵ Art 31(3)(a), Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331.

¹⁶ *Arbitral Award of 31 July 1989 (Guinea-Bissau/Senegal)* [1991] (Merits) ICJ Rep. 53, [48]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina/Serbia and Montenegro)* [2007] (Merits) ICJ Rep. 43, [160]; *Immunities and Criminal Proceedings (Equatorial Guinea/France)* [2018] (Merits) ICJ Rep. 292, [91].

3.1.1 Subsequent

24. Under Art 31(3) of the VCLT, an agreement must be “subsequent” to the conclusion of the treaty.¹⁷ As such, any joint interpretation between the parties must be concluded after the IIA itself has been concluded.

3.1.2 Agreement

25. The VCLT does not define the term “agreement”. However, based on the text of Art 31(3)(a) of the VCLT as well as juridical decisions, a joint interpretation will amount to a subsequent agreement if it demonstrates that the parties had intended their common understanding to be the basis for an agreed interpretation.¹⁸

26. In its Draft Conclusions on Subsequent Agreements, the International Law Commission (“ILC”) draws out two requirements for an “agreement” under Art 31(3) of the VCLT: (1) that the parties are aware of the common understanding regarding the interpretation of a treaty; and (2) they accept the interpretation therein.¹⁹ The ILC argues that it is this “common understanding” element that distinguishes subsequent agreements as an “authentic means of interpretation” under Art 31 of the VCLT.²⁰

27. Joint interpretations issued through formal mechanisms, such as communique or diplomatic notes are likely to meet the threshold of a “common understanding”, particularly where they expressly reference a “joint interpretation”. However, tribunals are likely to face greater difficulty when dealing with less “formal” mechanisms, such as where States draft similar submissions in an ISDS dispute or issue unilateral notes taking a position on treaty interpretation.²¹

28. Such a situation arose in *Canadian Cattlemen v United States*, where the Respondent argued that the submissions of Mexico and Canada in other disputes as well as in their implementation statements of NAFTA constituted a subsequent agreement regarding

¹⁷ Conclusion 4(1), ILC Draft Conclusions with commentaries (n 2).

¹⁸ Dörr (n 2) 594.

¹⁹ ILC Draft Conclusions with commentaries (n 2) 75, [1].

²⁰ *Ibid.*, 75, [2].

²¹ *Ibid.*, 75, [1].

the territorial scope of Chapter Eleven obligations.²² The Tribunal held that this was “certainly suggestive of something approaching an agreement” but that it could not amount to a subsequent agreement under the meaning of the VCLT.²³

29. Thus, submissions by State parties to courts or ISDS tribunals or general notes of interpretation, even when similar, are unlikely to amount to a subsequent agreement under Art 31(3)(a) of the VCLT.
30. If State parties to a treaty desire that a common interpretation be adopted, it may be more appropriate for them to conclude an official document signed by the parties. An example in this regard is *CME v Czech Republic*, where the Dutch and Czech governments reached a “common position” during their consultations on three issues of treaty interpretation arising in the partial award of the tribunal. These common positions were recorded in Agreed Minutes which were formally signed and exchanged between the two parties.²⁴ The tribunal treated these Agreed Minutes as if it were a subsequent agreement and accepted the common positions reached by both the parties, and used it to support its findings in the final award.²⁵
31. However, the VCLT does not prescribe any specific requirements as to the form of a “subsequent agreement”.²⁶ The agreement simply needs to reflect an agreement between the parties.²⁷ In fact, academics such as Gardiner argue that subsequent agreements can very well be made informally, as long as the parties demonstrate their common understanding in the agreement.²⁸ However, Dörr caveats that such informal understandings are likely to go toward establishing “subsequent practice” under Art 31(3), sub-paragraph (b) of the VCLT instead, based on the distinction drawn by the ICJ in the *Kasikili/ Sedudu Island*.²⁹

²² *Canadian Cattlemen for Fair Trade v. United States of America* [2008] (Award on Jurisdiction), [176]-[179].

²³ *Ibid.*, [187].

²⁴ *CME Czech Republic B.V. v. The Czech Republic* [2003] (Final Award).

²⁵ *Ibid.*, [400].

²⁶ ILC Draft Conclusions (n 2) 28.

²⁷ *Ibid.*, 75, [1].

²⁸ Richard Gardiner, *Treaty Interpretation*, (2nd edn, OUP 2008) 245.

²⁹ Dörr (n 2) 594; *Kasikili/Sedudu Island (Botswana/Namibia)* [1999] (Merits) ICJ Rep 1045, [63].

3.1.3 Between the parties

32. A subsequent agreement under the VCLT must also be agreed to by all the State parties to the treaty. This means that agreements between only some of the States in a multilateral treaty will not amount to a subsequent agreement under Article 31(3)(a) of the VCLT.
33. This was made clear by the ICJ in its *Whaling* judgement, where it held that the Resolutions of the International Whaling Conference were not a “subsequent agreement” as they were adopted “without the support of all States parties to the Convention” and were “recommendatory in nature”.³⁰ Similarly, in *HICEE v Slovakia*, the Tribunal held that an Explanatory Note produced by the Netherlands was not an agreement between the parties as there was “no record of it having been contested by the Czechoslovakian side”.³¹ In effect, the Explanatory Note was akin to a unilateral declaration by the Netherlands. A similar position was taken in *Aguas del Tunari SA v Bolivia*, where the tribunal found that a coincidence of statements between treaty parties does not make them a joint statement.³²

3.1.4 Regarding the interpretation

34. A subsequent agreement must also interpret the treaty in question. Further, an amendment of the treaty does not constitute an authentic means of interpretation under Art 31(3) of the VCLT. While an interpretation and an amendment appear to be similar, a distinction must be drawn between the two based on the facts of each case. The following factors may be most relevant in delineating an interpretation: (1) form; (2) subject-matter; and (3) timing.

Form of the Agreement

35. Agreements that comply with the formal requirements for amendments are more likely to be construed as such. Art 40 of the VCLT provides that a treaty may only be amended following notification, negotiations and a decision on the part of all the contracting States to the treaty.³³ Further, many treaties also have their own mechanisms for amendment.³⁴ In

³⁰ *Whaling in the Antarctic (Australia/Japan; New Zealand intervening)* [2014] (Merits) ICJ Rep. 226, [83].

³¹ *HICEE v the Slovak Republic*, [2011] (Award) PCA Case No. 2009-11, [134].

³² *Aguas del Tunari SA v Bolivia* [2005] (Decision on Jurisdiction) ICSID Case No. ARB/02/3, [251].

³³ Arts 39 and 40, VCLT.

³⁴ ILC Draft Conclusions with commentaries (n 2) 58, [22].

contrast, such formal requirements do not apply to a joint interpretation; an agreement between the parties is sufficient to constitute a joint interpretation.

36. The ILC, after surveying the jurisprudence of international courts and tribunals, found that “amendment procedures that are provided for in a treaty are not to be circumvented by informal means”.³⁵ On this basis, the ILC drafted Conclusion 7(3) of the Draft Conclusions on Subsequent Agreements and Subsequent Practice, which presumes that “parties to a treaty, by an agreement...., intend to interpret the treaty, not to amend or to modify it”.³⁶ This effectively means that most interpretive agreements will be presumed *not* to be modifications to the treaty. The reason for this, as rightly noted by the ILC, is that if subsequent agreements or practice could effectively modify a treaty, it would render the formal amendment procedures of a treaty otiose.³⁷

Subject-Matter of the Agreement

37. Agreements that depart from the treaty text are also more likely to constitute an amendment as compared to those that clarify the obligations thereunder. Authors such as Johnson and Razbaeva argue that several IIAs contain obligations with broad standards such on fair and equitable treatment, thereby necessitating that parties adopt specific rules to provide guidance to ISDS tribunals. If such specific rules are set out in a joint understanding between the IIA parties, they are less likely to constitute an amendment.³⁸

Timing of the Agreement

38. On certain occasions, the timing of the agreement may also be indicative in differentiating an amendment from an interpretation. In *Pope & Talbot*, which we will discuss later in section 4.1.4, the Tribunal held that the joint interpretative note issued by the treaty body after it had rendered its award on the merits of the case must be viewed as a disguised amendment of the IIA rather than a genuine interpretation.³⁹ However, it should be emphasized that a joint interpretation issued after ISDS proceedings have commenced may

³⁵ ILC Draft Conclusions with commentaries (n 2) 63, [37].

³⁶ Conclusion 7(3), ILC Draft Conclusions with commentaries (n 2).

³⁷ ILC Draft Conclusions with commentaries (n 2) 63, [37].

³⁸ Lise Johnson and Merim Razbaeva ‘State Control over Interpretation of Investment Treaties’ (2014) available at http://ccsi.columbia.edu/files/2014/04/State_control_over_treaty_interpretation_FINAL-April-5_2014.pdf

³⁹ *Pope & Talbot Inc. v Canada* [2001] (Award on Damages) 40 ILM 258, [47].

not always constitute an amendment. States may issue such interpretations at a later stage as a result of consultations between IIA parties in good faith (see section 4.2.2). Accordingly, this factor must be considered with the abovementioned others as part of a holistic analysis.

3.1.5 Of the treaty

39. A subsequent agreement must also interpret the treaty in question. This is most clearly achieved through direct reference to the treaty itself, as noted by the ICJ in its *Jan Mayen* judgment.⁴⁰

40. However, direct reference may not be sufficient in all cases. For example, the British and Chinese delegations published a booklet on immigration matters and referenced the Sino-British Joint Declaration concerning the handover of Hong Kong. However, the Court of Final Appeal of Hong Kong held that the booklet did not “interpret” or “apply” the Sino-British Joint Declaration.⁴¹

41. In the case of investment disputes, an ISDS tribunal may also find that a joint interpretation does not constitute a subsequent agreement to an IIA if it does not directly refer to that IIA. For example, in *Rockhopper v Italy*,⁴² the question before the tribunal was the relevance of the declaration by the EU Member States following the Court of Justice of the European Union’s judgement in the *Achmea* case. The Tribunal found that it was not a joint interpretation as there was no reference to the IIA in dispute, i.e., the Energy Charter Treaty. Rather, it viewed the declaration as a “general expression of certain views”, which was “conveying of a position” without specific legal effect.⁴³

3.2 Legal effect of joint interpretations under Article 31(3)(a) VCLT

⁴⁰ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark/ Norway)* [1993] (Merits) ICJ Rep. 38, [28]. See also *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* [2009] (Declaration of Judge ad hoc Guillaume) ICJ Rep. 209, [28].

⁴¹ *Ng Ka Ling and others v Director of Immigration* [1999] 1 HKLRD 315, 354.

⁴² *Rockhopper Italia S.p.A. v Italian Republic* [2019] (Award on Jurisdiction) ICSID Case No. ARB/17/14, [186].

⁴³ See also, the decisions in *Eskosol S.p.A. in liquidazione v. Italian Republic* [2019] (Decision on Termination Request and Intra-EU Objection) ICSID Case No. ARB/15/50; *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain* [2019] (Decision on Jurisdiction) ICSID Case No. ARB/14/34; *Belenergia S.A. v. Italian Republic* [2019] (Award) ICSID Case No. ARB/15/40.

42. Under Article 31(3)(a) of the VCLT, tribunals are required to take joint interpretations “into account” in the interpretation of provisions in IIAs when such interpretations qualify as “subsequent agreements”. However, such interpretations are not expressly binding, and ISDS tribunals have considered several “factors” in determining their interpretative weight, such as clarity, specificity or timing.

3.2.1 Joint interpretations are to be “taken into account” where a treaty is silent as to its legal effect

43. Where an IIA is silent regarding the legal effect of joint interpretations issued thereunder (and, therefore, the VCLT applies), the joint interpretation (as a subsequent agreement) will not be binding on the tribunal, even if the text of the joint interpretation describes it as such. This is because the ordinary meaning of “taken into account” in the chapeau of Art 31(3) of the VCLT implies that tribunals are required to only consider subsequent agreements in interpreting the terms of a treaty.⁴⁴

44. The ILC has stressed that subsequent agreements under Art 31(3)(a) of the VCLT are one facet of the “single combined operation” in the interpretation of the treaty, involving Arts 31 and 32 of the VCLT.⁴⁵ It described subsequent agreements as an “authentic means of interpretation”, thereby recognizing their authoritative value, but stopped short of rendering them binding.⁴⁶ Thus, the effect of a joint interpretation will be one of the several considerations that a tribunal will rely on when interpreting the treaty pursuant to Art 31 of the VCLT.⁴⁷

45. On occasion, courts and tribunals may even find against the joint interpretation arrived at by the parties to an IIA. A recent example is the judgement of the Singapore Court of Appeal in *Laos v Sanum Investment*.⁴⁸ Exercising its supervisory jurisdiction as the seat of the arbitration, the Court held that a Macau-based investor could avail himself of the benefits under the Laos-China BIT (1993). This was based on the rules of state succession under international law as Macau was handed over to China in 1999. The Singapore Court

⁴⁴ Art 31(3), VCLT.

⁴⁵ Conclusion 2(5), ILC Draft Conclusions with commentaries (n 2).

⁴⁶ ILC Draft Conclusions with commentaries (n 2), 26, 75[1].

⁴⁷ Dörr (n 2) 566.

⁴⁸ *Sanum Investments Ltd v Government of the Lao People’s Democratic Republic* [2016] 5 SLR 536.

of Appeal disregarded an exchange of diplomatic notes between China and Laos that expressly stated that the BIT did not apply to the territory of Macau.⁴⁹ In coming to its decision, the Singapore Court of Appeal implicitly affirmed that such interpretative agreements would not trump general rules of international law and merely be “taken into account”.⁵⁰

3.2.2 Tribunals are likely to place more weight on joint interpretations that are clear, specific and formally agreed to

46. The weight that ISDS tribunals accord to a joint interpretation will turn on a number of factors, including its clarity and specificity. The ILC has clarified this in Conclusion 9(1) of its Draft Conclusions on Subsequent Agreements:⁵¹

The weight of a subsequent agreement or subsequent practice as a means of interpretation under article 31, paragraph 3, depends, *inter alia*, on its clarity and specificity.

47. The ILC has clarified that the inclusion of “*inter alia*” recognizes that these criteria “should not be seen as exhaustive” and may include other relevant factors such as the time when the agreement occurred.⁵²

48. First, tribunals may accord more weight to joint interpretations that are clear. For instance, the Tribunal in *Gruslin v Malaysia* placed little weight on the intergovernmental agreement between Belgium and Malaysia as it was a “source of confusion rather than clarity with respect to the application of the terms to an investment made”.⁵³ It found that the literal meaning of Malaysia’s response would be a “radical departure and derogation of the entire BIT” and chose instead to adopt the ordinary meaning of the term in its interpretation.⁵⁴

49. Second, tribunals have accorded more weight to joint interpretations that are worded more specifically. Here, specificity does not mean reference to the treaty (as discussed in section 3.1.4, *supra*), but rather the subject-matter of the dispute. For instance, in *Plama*

⁴⁹ *Ibid.*, [116].

⁵⁰ *Ibid.*, [116].

⁵¹ Conclusion 9(1), ILC Draft Conclusions with commentaries (n 2).

⁵² ILC Draft Conclusions with commentaries (n 2) 71.

⁵³ *Philippe Gruslin v Malaysia* [2000] (Award) ICSID Case No. ARB/99/3, [23.16].

⁵⁴ *Ibid.*, [23.11].

Consortium Limited v Bulgaria, the Tribunal noted that Bulgaria had concluded investment treaties with more liberal dispute resolution provisions in the 1990s. However, it held that these agreements were “not particularly relevant” to the interpretation of the BIT due to the subsequent negotiations between Bulgaria and Cyprus that were more reflective of the intention of the parties.⁵⁵

3.2.3 Timing Matters: Tribunals are likely to accord more weight to joint interpretations issued earlier

50. The timing of the joint interpretation has also been pertinent to the legal weight that ISDS tribunals have accorded to joint interpretations. One of the preconditions for a joint interpretation to satisfy Art 31(3)(a) of the VCLT is that it must be “subsequent” to the conclusion of the IIA.⁵⁶ It should also be issued prior to the alleged breach as, in general, the law applicable to disputes will be those from the time of the breach.⁵⁷ Authors like Roberts argue that reasonable interpretations, such as those that are clarificatory in nature, are likely to be more persuasive if they are issued prior to the initiation of a dispute.⁵⁸ This is because such interpretations are abstract and, therefore, more likely to be non-arbitrary and consistent with the expectations of the investors.⁵⁹ Additionally, she argues that tribunals are more likely to construe such interpretations as constituting legitimate actions of State parties to adopt a regulatory balance or preserve legitimate public interests, rather than as interested respondents in a claim.⁶⁰

51. However, timing is but one factor in the holistic analysis that a tribunal will likely adopt in interpreting a treaty. As noted by Roberts, a late interpretation may still be persuasive if it endorses a reasonable interpretation that an investor could have predicted as possible.⁶¹

⁵⁵ *Plama Consortium Limited v Republic of Bulgaria* [2005] (Decision on Jurisdiction) ICSID Case No. ARB/03/24, [195].

⁵⁶ Art 31(3), VCLT. See discussion in section 3.1, *supra*, on the requirements of a subsequent agreement.

⁵⁷ Rudolf Dozler and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 38-45; Zachary Douglas, *The International Law of Investment Claims* (CUP, 2009) 328-43.

⁵⁸ Anthea Roberts, ‘Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States’ (2010) 104(2) *American Journal of International Law* 179, 212.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

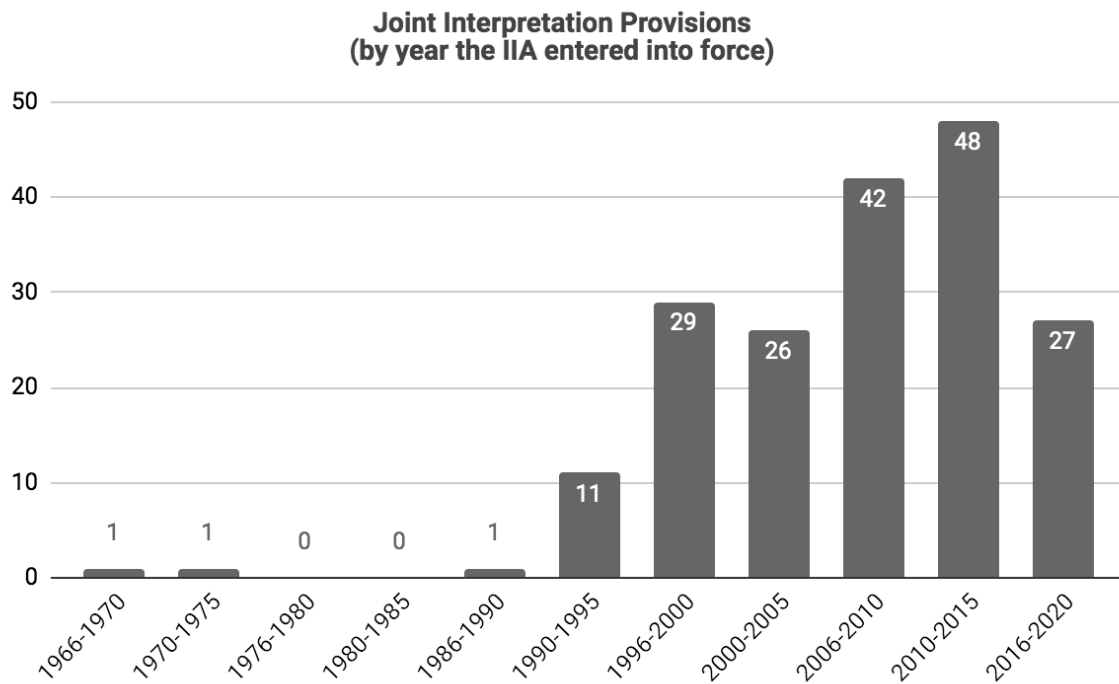
⁶¹ *Ibid.*, 213.

3.3 Conclusion

52. The analysis in this chapter shows that a joint interpretation must fulfill certain requirements to constitute a subsequent agreement under the meaning of Art 31(3)(a) of the VCLT. However, when joint interpretations fall within the scope of subsequent agreements under Art 31(3)(a), tribunals are only required to take them into account in the holistic process of treaty interpretation under the VCLT.

4. SITUATION 2: WHERE AN IIA INCLUDES A PROVISION ON JOINT INTERPRETATION

53. Our survey of IIAs finds that a small but increasing number of treaties include language on joint interpretation. The graph below shows the growth in the number of treaties with joint interpretation provisions over the years.



Graph 1: Joint interpretation provisions, sorted by year the IIA entered into force⁶²

54. As of April 2020, 186 IIAs contain such provisions. These provisions may be categorized into two groups: (i) where the IIA expressly states that a joint interpretation issued by the treaty parties or the relevant treaty body is binding on the ISDS tribunal; and (ii) where the IIA is silent as to the legal effect of the interpretation.

55. An example of the first “expressly binding” category is Art 15 of the Mexico-Portugal BIT (2000) which reads:⁶³

⁶² For a full list of treaties, refer to **Annex 1 – Master List of Treaties**. This information was compiled based on the data provided from the United Nations Conference on Trade and Development (UNCTAD) IIA database as well as other secondary literature.

⁶³ Art 15, Mexico-Portugal BIT (2000).

2. An interpretation jointly formulated and agreed by the Contracting Parties of a provision of this Agreement shall be binding on any tribunal established under this Dispute Settlement Mechanism. If the Contracting Parties fail to submit an interpretation within 60 days from the date of the request of either Contracting Party, the tribunal shall decide the issue.

Such “expressly binding” treaty provisions are quite rare and present in only 67 IIAs.⁶⁴

56. The second group comprises treaty provisions that reference joint interpretations but are silent as to the legal effect of such interpretations on an ISDS tribunal. Such provisions are found in 119 IIAs. An example of such a provision can be found in Art 10 of the Mexico-Netherlands BIT (1999), which reads:⁶⁵

On the request of either Party, the Parties shall consult promptly to discuss any matters relating to the interpretation or application of this Treaty or to the realization of the objectives of this Treaty.

4.1 **Situation 2A: Where the IIA expressly states that the joint interpretation is binding on the ISDS Tribunal**

57. This section will discuss the first situation where the treaty expressly states that the joint interpretation is binding on the tribunal, including how the *lex specialis* rule applies vis-à-vis the VCLT (section 4.1.1), its legal effect (sections 4.1.2 and 4.1.3) and the impact of timing on the persuasiveness of an interpretation (section 4.1.4).

4.1.1 **The express treaty provision takes precedence over the customary international law rules under the VCLT pursuant to the *lex specialis* rule**

58. As noted by the ICJ in its *Nicaragua* decision, where a treaty provision and customary international law conflict, the treaty provision prevails as it is the more specific provision, pursuant to the *lex specialis* rule.⁶⁶

59. In cases where the treaty expressly provides that joint interpretations are binding on ISDS tribunals, it effectively displaces the rule under Art 31(3)(a) of the VCLT, under which

⁶⁴ See **Annex 1** for a complete list of all treaty provisions.

⁶⁵ Art 10 Mexico-Netherlands BIT (1999).

⁶⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua/United States of America)* [1986] (Merits) ICJ Rep. 14, [274].

joint interpretations as “subsequent agreements” only need to be “taken into account” in interpreting treaty provisions, as discussed in section 3.2. Thus, the key issue that arises is how tribunals should give effect to these joint interpretations.

4.1.2 ISDS Tribunals have generally been deferential to joint interpretations

60. The most commonly cited joint interpretation is the 2001 Note of Interpretation issued by the Free Trade Commission of the North American Free Trade Agreement (“**FTC Note**”). The FTC Note referred to two issues: (i) access to documents; and (ii) minimum standard of treatment under NAFTA.⁶⁷ Under Art 1131(2) of the NAFTA, any interpretation of a provision issued by the FTC, including the NAFTA FTC Note, is binding on the ISDS tribunals.
61. To date, 15 arbitral awards have dealt with the 2001 FTC Note and its interpretation of the minimum standard of treatment under NAFTA.⁶⁸ The FTC Note clarifies that the minimum standard of treatment that must be afforded to investments of foreign investors under Art 1105(1) of the NAFTA is the “customary international law minimum standard of treatment”.⁶⁹ Further, under Art 1105 (1), the obligations on fair and equitable treatment and full protection and security do not entail “treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens”.⁷⁰ Finally, the FTC Note also clarifies that the breach of other provisions of the NAFTA or any other international agreement does not automatically imply the breach of the minimum standard of treatment under Art 1105(1) of the NAFTA.

⁶⁷ NAFTA Free Trade Commission, Note of Interpretation of Certain Chapter 11 Provisions (2001) [*‘NAFTA FTC Note (2001)’*].

⁶⁸ *Bilcon of Delaware v Canada* [2009] (Award) PCA Case No. 2009-04; *Methanex Corp. v United States of America* [2005] (Award) 44 ILM 1345; *ADF Group Inc. v United States of America* [2006] (Final Award) ICSID Case No ARB (AF)/00/1; *Pope & Talbot Inc. v Canada* [2001] (Award) 40 ILM 258; *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* [2003] (Award) ICSID Case No. ARB(AF)/98/3; *Glamis Gold, Ltd v United States of America* [2009] (Award) IIC 380; *United Parcel Service of America Inc. v Canada* [2002] (Award on Jurisdiction) ICSID Case No. UNCT/02/1; *Cargill, Incorporated v. United Mexican States* [2009] (Award) ICSID Case No. ARB(AF)/05/2; *Chemtura Corp. v Canada* [2010] (Award) PCA Case No. 2008-01; *Grand River Enterprises Six Nations, Ltd et al. v United States of America* [2011] (Award) ICSID Case No. ARB/10/5; *International Thunderbird Gaming Corp. v United Mexican States* [2006] (Award) IIC 136 (2006); *Waste Management, Inc v United Mexican States*, [2004] (Award) ICSID Case No. ARB (AF)/00/3; *Merrill & Ring Forestry L.P. v Canada* [2010] (Award) ICSID Case No. UNCT/07/1; *Mondev International Ltd v United States of America* [2002] (Award) ICSID Case No. ARB (AF)/99/2; *Mesa Power Group, LLC v Canada* [2016] (Award) PCA Case No. 2012-17.

⁶⁹ NAFTA FTC Note (2001) (n 67), [B].

⁷⁰ *Ibid.*, [B][2].

62. Some tribunals (such as in *Bilcon*, *Mesa Power*, *Methanex* and *ADF*) have sought to apply the above provision of the FTC Note directly, as the treaty provides that the Note is expressly binding. For example, the tribunal in *ADF* held that “no more authentic and authoritative source of instruction on what the Parties intended to convey in a particular provision of NAFTA is possible”.⁷¹ In a similar vein, the tribunal in *Mesa Power* stated that where an interpretation was issued by the NAFTA FTC, “the Tribunal must simply apply it”.⁷² The Tribunal in *Bilcon* even went to the extent of expressly stating that the VCLT did not apply.⁷³

4.1.3 Terminology matters: vague terms in joint interpretations open the door for different or evolving tribunal interpretations

63. As discussed in section 4.1.2, the FTC Note establishes that the ceiling for the minimum standard of treatment under Article 1105(1) of the NAFTA is the customary international law minimum standard of treatment. However, this reference to a relatively vague term has left the door open for NAFTA tribunals to evaluate what the precise standard is under customary international law.

64. For example, in *Waste Management*, the tribunal stated that the standard was “not static and that the minimum standard of treatment does evolve... and is constantly in a process of development”.⁷⁴ Similarly, in *Merrill & Ring*, the tribunal held that:⁷⁵

the binding character of the FTC Interpretation does not mean that that interpretation necessarily reflects the present state of customary and international law...The tribunal is also mindful of the evolutionary nature of customary international law... even in the light of the FTC’s 2001 interpretation.

⁷¹ *ADF Group* (n 68), [177].

⁷² *Mesa Power Group* (n 68), [479].

⁷³ *Bilcon* (n 68), [430].

⁷⁴ *Waste Management* (n 68), [92].

⁷⁵ *Merrill & Ring* (n 68), [192].

65. Similar positions have also been adopted in *Chemtura*, *Loewen*, *Glamis*, *UPS*, *Cargill*, *Mondev*, *Grand River* and *Thunderbird*.⁷⁶ For example, in *Grand River*, the tribunal noted that the Note was “providing guidance” but ultimately continued with its analysis of the minimum standard of treatment.⁷⁷ These decisions demonstrate that tribunals have continued to apply the FTC Note, but have recognized that the standard it mandated was not necessarily a static one.

66. The above decisions indicate that even if States issue a joint interpretation, the terminology used matters. Where joint interpretations include vague terms, or terms whose meaning might change over time, ISDS tribunals may still have latitude in interpreting such provisions in different or evolving manners. As such, States should endeavor to draft their joint interpretations specifically to narrow the scope of interpretation that a tribunal could adopt.

4.1.4 Timing matters: The persuasiveness of the joint interpretation also depends on its timing

67. The timing of the joint interpretation may also be critical for tribunals to determine the legal weight to be accorded to it. As a general rule, a reasonable interpretation issued earlier, that is, before the initiation of an ISDS dispute, is likely to be more persuasive.⁷⁸

68. In *Pope & Talbot*, the NAFTA tribunal faced a legal question regarding the timing of the joint interpretation because the 2001 FTC Note was issued after the tribunal had already rendered its award on liability in relation to the minimum standard of treatment under Art 1105. In its award, the tribunal criticized the Note as an unlawful amendment of Art 1105

⁷⁶ *Grand River* (n 68), [175], though the tribunal refers to the Note as “providing guidance”; *Chemtura* (n 68), [120], where the tribunal held that “it is not disputed that the tribunal must interpret the scope of article 1105 in accordance with the FTC Note”; *Loewen* (n 68) [126], where the tribunal stated that “an interpretation issued by the Commission is binding on the Tribunal by virtue of article 1131(2)”; *Glamis* (n 68), [599], where the tribunal held that “the FTC clearly states ... in its Note that article 1105 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party”; *United Parcel Service of America Inc. v Canada*, (n 68), [96], where the tribunal held that the Note is an “authentic interpretation” in terms of article 31(3) of the Vienna Convention, and in any event the FTC’s Interpretation is binding on chapter 11 tribunals; *Cargill, Incorporated v. United Mexican States* (n 68); *Chemtura Corp. v Canada* (n 68), [268]; *International Thunderbird Gaming* (n 68), [192], where the tribunal held that it should interpret article 1105 “in accordance with the NAFTA Note”.

⁷⁷ *Grand River* (n 68), [175]. The Tribunal’s decision on the customary international law minimum standard of treatment can be found at [208].

⁷⁸ For a full discussion, see section 3.2.3, *supra*.

and stated that it would be “unfair to seek to revisit this” at the time of issuing the award.⁷⁹ However, it should be noted that in its earlier award on the merits, the tribunal had adopted the same standard for Art 1105 and, thus, the outcome of the case would not have been any different if the tribunal had followed the FTC Note.

69. This case suggests that tribunals may view joint interpretations issued at a very late stage of the proceedings unfavorably. This can be attributed largely to considerations of legitimate expectations of investors and fairness to the parties.⁸⁰
70. Indeed, according to Roberts, the weight accorded to such an interpretation may be less than an interpretation issued earlier due to the legitimate expectations of investors and States acting in their capacity as respondents rather than as treaty parties.⁸¹ As noted in section 3.2.3, *supra*, a joint interpretation issued earlier is more likely to be perceived as being fair and shaping the expectations of investors. In addition, States will also be seen as acting legitimately as treaty parties in good faith and seeking a balance, rather than as a respondent in dispute resolution proceedings.⁸²
71. However, Roberts also notes that the “reasonableness of the interpretation” is also another factor in determining the weight to be accord to such an interpretation.⁸³ As such, an interpretation issued after a dispute has already arisen will be more persuasive if it proposes an interpretation that is reasonable.

4.2 Situation 2B: Where the IIA is silent as to the legal effect of the joint interpretation

72. This section will discuss treaties that are silent as to the legal effect of the joint interpretation, specifically, its legal effect under the VCLT regime (section 4.2.1) and the effect of timing (section 4.2.2). As noted in section 4.1.1, the *lex specialis* rule displaces the VCLT where a treaty expressly provides that the joint interpretation is binding. However, when the treaty is silent regarding the legal effect of joint interpretations, the

⁷⁹ *Pope & Talbot* (n 68), [50]

⁸⁰ Anthea Roberts, ‘Power and Persuasion’, (n 58) 212.

⁸¹ Anthea Roberts, ‘Power and Persuasion’, (n 58) 212.

⁸² Anthea Roberts, ‘Power and Persuasion’, (n 58) 213.

⁸³ *Ibid.*, 212.

VCLT arguably applies in the same way as it does when the treaty does not contain any express joint interpretation provisions (Situation 1, section 3, *supra*).

4.2.1 The VCLT will apply and the tribunals will have to take the joint interpretations “into account”

73. As noted in section 3, where the VCLT applies, tribunals will “take into account” such subsequent agreements as part of the “single combined operation” involved in the interpretation of a treaty. In this regard, there appears to be no difference in law between an IIA that contains a reference to joint interpretation but is silent as to its legal effect (Situation 2B) and a treaty that does not refer to joint interpretations at all (Situation 1).

4.2.2 Timing

74. In Situation 2B, most provisions concerning joint interpretation are embedded within the more general provisions relating to dispute settlement. These mechanisms involve negotiations between contracting States to facilitate an exchange of views and, occasionally, to prepare them for the dispute resolution process.⁸⁴ As such, it is likely that in this situation that a joint interpretation will be issued *after* the alleged breach has occurred in an effort to solve the dispute. In such situations, the timing considerations addressed in sections 3.2.3. and 4.1.4 – that a joint interpretation be issued before a dispute arises – would arguably not apply. Be that as it may, in line with Roberts’ approach mentioned above, an interpretation which is contrary to the legitimate expectations of the investor might possibly also be accorded less weight in such situations.

4.3 Implications on investor rights

75. Joint interpretations may also potentially affect the rights of investors. While a comprehensive discussion of the impact of joint interpretations on investor rights is outside the scope of this report, this section aims to flag possible legal approaches to this issue. In this section, we first address whether investors could raise claims under

⁸⁴ UNCTAD, “International Investment Agreements: Key Issues (Volume 1)” (2004) UNCTAD/ITE/IIT/2004/10(Vol.I) <https://unctad.org/en/Docs/iteiit200410_en.pdf> accessed 23 April 2020, 320.

the VCLT (section 4.3.1) and thereafter whether investors could raise claims under IIAs (section 4.3.2).

4.3.1 The rights of third States under the VCLT

76. Article 37(2) of the VCLT addresses the rights of third states in cases when that right has been revoked or modified by the treaty parties. It states:⁸⁵

When a right has arisen for a third state in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without consent of the third State.

77. Accordingly, parties to a treaty may revoke or modify the right of the third State, unless it is established that the treaty parties had intended otherwise. Thus, the third party would have to prove that there had been an intention to give it that power.⁸⁶ The VCLT thus grants the treaty states much flexibility to amend third state rights.

78. It must be noted, however, that the VCLT only covers third *State* rights and is silent as to affected private parties. It also covers amendments rather than interpretations. The VCLT, thus, does not apply as such to joint interpretations and private investors. Nonetheless, the spirit of the provision – which essentially gives States much flexibility in amending (let alone interpreting) their treaties – could possibly provide inspiration for the creative litigation arguments.

4.3.2 Could investors raise claims under IIAs?

79. At present, it is unclear whether investors could raise claims under IIAs for joint interpretations which adversely affect them. Their ability to do so hinges on the specific language in an IIA, which would need to be reviewed on a case by case basis. That said, provisions that expressly protect investors from treaty amendments are rare,⁸⁷ and we are

⁸⁵ Art 37, VCLT.

⁸⁶ David Gaukrodger, *The Legal Framework Applicable to Joint Interpretive Agreements of Investment Treaties* (OECD) p.11.

⁸⁷ David Gaukrodger, (n 86) p.12.

unaware of treaties which expressly protect investors from interpretations. However, there has been some academic literature on the topic, which we discuss below.

Reasonableness and Timing of the Joint Interpretation

80. Roberts proposes a framework for addressing investors affected by joint interpretations. She argues that the power of States to issue joint interpretations are bound by two factors: reasonableness and timing.⁸⁸ Reasonable interpretations, she argues, would be hard to challenge. Timing relates to when the joint interpretation was adopted: was it made before or after the investment was made, the violation occurred, or when the claim was filed. For example, if a joint interpretation takes a restrictive reading of the rights of the investors contained in the IIAs, an ISDS tribunal may not be willing to apply them blindly, especially if these interpretations are issued after the commencement of the dispute with an intention to interfere with the proceedings.⁸⁹
81. Others however, such as Karton, have rejected Roberts' reasonableness and timing thesis. He argues that there are no limits on the reasonableness or temporal scope of a joint interpretation unless explicitly provided for by the IIA.⁹⁰ He argues that there is no legitimate expectation that the legal environment will remain the same over a period of time, and that State parties have the right to clarify or change the meaning of treaty obligations.⁹¹ Methymaki and Tzanakopoulos similarly argue that a "structural perspective" of IIAs are premised on a "bilateralised approach to obligations... connected to the notion of reciprocity".⁹²
82. In short, States create such obligations and therefore should be allowed to interpret them. No "inherent rights of the investor are infringed" as the interpretation must lie within the scope of the provision of the IIA.⁹³ Ultimately, however, the manner in which such rights

⁸⁸ Anthea Roberts, 'Power and Persuasion', (n 58) 212.

⁸⁹ See also the decision *Pope & Talbot* (n 68), [50]. For a full discussion on the question of timing, refer to sections 4.1.4 and 4.2.2, *supra*.

⁹⁰ Joshua Karton, 'Choice of law and Interpretive Authority in Investor-State Arbitration' (2017) 3(1) Canadian Journal of Comparative and Contemporary Law 217, 252.

⁹¹ *Ibid.*, 252.

⁹² E. Methymaki and A. Tzanakopoulos, 'Masters of Puppets? Reassertion of Control through Joint Investment Treaty Interpretation' in A. Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (Cambridge: Cambridge University Press, 2017) 155, 173.

⁹³ *Ibid.*, 179.

are affected depends on how the ISDS tribunals construe the scope of the investor rights in the IIA.⁹⁴

Estoppel, Legitimate Expectations, and Fair and Equitable Treatment claims

83. Joint interpretations might potentially raise estoppel, legitimate expectations, and/or Fair and Equitable Treatment (“FET”) claims. Gaukrodger states that where there had been a clear and unambiguous representation and the investor relied on that representation in good faith, estoppel or legitimate expectation claims might possibly be raised.⁹⁵ Moreover, unreasonable or badly timed joint interpretations could arguably also give rise to such claims. Roberts argues that in principle, investors will not be able to raise estoppel claims, unless treaty parties had made very clear and unambiguous representations.⁹⁶ Moreover, she states that that it is unclear whether the legitimate expectations or FET claims – intended to protect investors from acts done by *one* treaty party – can apply to an interpretation agreed to by *all* treaty parties.⁹⁷

⁹⁴ *Ibid.*, 173.

⁹⁵ Gaukrodger, (n 86) p.13

⁹⁶ Anthea Roberts, ‘Power and Persuasion’, (n 58) 214.

⁹⁷ *Ibid.*

5. STRATEGIES FOR ADOPTING JOINT INTERPRETATION MECHANISMS INTO EXISTING AND FUTURE IIAS

84. The analysis in the preceding chapters has shown that most IIAs lack joint interpretation provisions, and that among the minority with such provisions, only some are binding upon tribunals. However, joint interpretations are helpful for treaty parties to clarify the meaning of the terms of the treaty, especially given the broad and ambiguously worded provisions in several IIAs. The question then arises as to how countries could amend their existing IIAs to include joint interpretation provisions or to ensure that their joint interpretations are binding on ISDS tribunals. On its face, countries could negotiate amendments to their IIAs with their respective treaty parties. Yet such negotiations and amendment procedures would consume significant time and bureaucratic resources and would require the parties to overcome several political hurdles. Similarly, in multilateral IIAs, the large number of signatories could give rise to coordination challenges.⁹⁸
85. Against this background, this section will first discuss the problems with amending the existing IIAs to include joint interpretation mechanisms (section 5.1). It will then consider alternative ways for including joint interpretation provisions into existing treaties: (1) adopting procedural rules (section 5.2); (2) adopting an opt-in convention (section 5.3); and (3) adopting a model treaty provision (section 5.4). These three mechanisms have been previously mooted and discussed extensively, for example in the UNCTAD Reform Package for the International Investment Regime⁹⁹ and in submissions before United Nations Commission on International Trade Law (UNCITRAL) Working Group III.¹⁰⁰

5.1 Amending existing treaties to include joint interpretation mechanisms

86. The VCLT provides that contracting States may amend treaties, subject to the agreement of other States.¹⁰¹ However, this may be difficult as not all States may be open to the

⁹⁸ Mark Feldman, 'Mega-Regional Investment Arbitration', (*Kluwer Arbitration Blog*, 9 December 2016) <<http://arbitrationblog.kluwerarbitration.com/2016/12/09/mega-regional-investment-arbitration>> accessed 23 April 2020.

⁹⁹ UNCTAD 'UNCTAD's Reform Package for the International Investment Regime' (2018) <https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf> accessed 23 April 2020.

¹⁰⁰ UNCITRAL, Submissions by the European Union (A/CN.9/WG.III/WP.159/Add.1, at para 26), Morocco (A/CN.9/WG.III/WP.161, at para 9), Thailand (A/CN.9/WG.III/WP.162, at paras 22-23), Costa Rica (A/CN.9/WG.III/WP.164, at p. 4; and A/CN.9/WG.III/WP.178, at p. 5); and the joint submission by Chile, Israel, and Japan (A/CN.9/WG.III/WP.163, at p. 8).

¹⁰¹ Arts 39 and 40, VCLT.

inclusion of a binding joint interpretation provision. Thus, complex and lengthy negotiations might ensue, which would be even more difficult to manage for megaregional treaties with many signatories. Additionally, such negotiations are likely to be very costly and resource-intensive. Since amendment would require ratification, domestic politics might pose further challenges.

87. According to the UNCTAD database, Thailand has concluded a total of 64 IIAs to date. Of these, only seven IIAs contain joint interpretation provisions, four of which are specific renvoi provisions.¹⁰² Thus, Thailand might be required to individually amend or replace 57 IIAs to incorporate joint interpretation provisions. Therefore, this option does not appear ideal for implementing joint interpretation mechanisms.

5.2 Adoption of procedural rules

88. States may also consider implementing joint interpretation mechanisms through procedural rules. These rules would be comparable to the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the “Transparency Rules”). These rules apply in relation to disputes arising out of investment treaties concluded *on or after* 1 April 2014, when investor-State arbitration is initiated under the UNCITRAL Arbitration Rules, unless the Parties to the investment treaty have agreed otherwise.¹⁰³

89. However, the introduction of new procedural rules has a limited effect as it would only apply to subsequent IIAs, unless existing IIAs are proactively amended by their State parties to incorporate the new rules. All other IIAs would continue to be exempt from any new innovations implemented through the new rules.

5.3 Implementing joint interpretation provisions through an opt-in convention

90. An opt-in convention has been described as a “particularly efficient mechanism” to implement reforms.¹⁰⁴ States have already adopted several multilateral conventions in order

¹⁰² These seven treaties are: the ACIA (2014); ASEAN-Japan EPA (2008); Chile-Thailand FTA (2015); ASEAN-Australia-New Zealand FTA (2010); Thailand-New Zealand CEP (2005); Australia-Thailand FTA (2005); Thailand-United Arab Emirates BIT (2016).

¹⁰³ Art 1(1), UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

¹⁰⁴ Gabrielle Kaufmann-Kohler and Michele Potestà, ‘Can the Mauritius Convention serve as a model for the reform of a permanent investment tribunal or an appeal mechanism?’ CIDS 2016, <https://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf> accessed 23 April 2020.

to introduce common international rules and harmonize a network of bilateral treaties.¹⁰⁵ In the context of the joint interpretation of IIAs, the opt-in convention is an instrument by which parties to IIAs may express their consent for joint interpretation mechanisms to apply to all their pre-existing treaties. The opt-in convention, which will provide a new joint interpretation mechanism without replacing existing mechanisms, will constitute a successive treaty creating new obligations pursuant to Art 30 of the VCLT.¹⁰⁶

91. The above method was employed by the Mauritius Convention on Transparency (**the “Mauritius Convention”**). The Mauritius Convention facilitates the application of the Transparency Rules to the roughly 2,000 IIAs concluded before the entry into force of the Transparency Rules, thereby providing States with an efficient mechanism to apply these rules should they wish to do so.¹⁰⁷ It allows the Transparency Rules to be applied to all existing treaties, and in all available arbitral fora. In essence, the “Mauritius Convention approach” can be described as introducing the substantive transparency standards embodied in the Transparency Rules into the fragmented treaty-by-treaty regime by way of a single multilateral instrument.¹⁰⁸
92. Another example of a multilateral opt-in convention is the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (**“the BEPS Multilateral Instrument”**). This instrument was implemented to reform several deficiencies in the double taxation regime and is similar in architecture to the Mauritius Convention on Transparency. However, this instrument is more ambitious than the Mauritius Convention on Transparency containing substantive reforms on tax enforcement and introducing an optional arbitration mechanism for tax disputes.¹⁰⁹ The BEPS Multilateral Instrument has been signed by over 80 countries and is relatively successful in

¹⁰⁵ *Ibid.*, [223].

¹⁰⁶ Article 30(4) of the VCLT states: When the parties to the later treaty do not include all the parties to the earlier one: (a) As between States parties to both treaties the same rule applies as in paragraph 3; (b) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

¹⁰⁷ United Nations, ‘Report of the United Nations Commission on International Trade Law’ (2013) UN Doc. A/68/17, [127].

¹⁰⁸ United Nations, ‘Note by the Secretariat on the Settlement of Commercial Disputes’ (2013) UN Doc. A/CN.9/890, [8].

¹⁰⁹ Wolfgang Alschner, Squaring bilateralism with multilateralism: What investment law reformers can learn from the international tax regime (2020) <<http://ccsi.columbia.edu/files/2020/02/No-272-Alschner-FINAL.pdf>> accessed 23 April 2020.

updating thousands of old-generation double taxation treaties containing ambiguous and imprecise provisions.¹¹⁰ Experts have argued that IIAs can also be reformed using a model similar to the BEPS Multilateral Instrument.¹¹¹

93. By implementing a joint interpretation mechanism through an opt-in convention, States will be relieved of the burden of pursuing potentially complex and long amendment procedures set forth in their numerous existing IIAs. An opt-in convention would apply to all the existing BITs of participating States, thereby making the process far more efficient. Further, an opt-in convention could allow a reform project to begin as a plurilateral one, with the possibility that other States join at a later stage, whenever they consider it appropriate.¹¹² This strengthens the chances for the successful implementation of a joint interpretation mechanism.
94. However, issues may arise as to the applicability of the opt-in convention to third States. The principle of State sovereignty as per Art 34 of the VCLT mandates that treaties are only binding on the parties and not on third States not party to the treaty.¹¹³ Accordingly, the content of the opt-in convention would not be binding on third parties, and a party to the opt-in convention and a third party would continue to be bound by the provisions of any IIA concluded between themselves without the modifications set out in the opt-in convention. However, the Mauritius Convention provides a useful model in this circumstance: it “envisages a system where the transparency regime will penetrate into an investment treaty even if only one of the Contracting States to that treaty (the respondent State) accedes to the Mauritius Convention, as the investor-national of the other IIA contracting party will be able to accept the offer to use the Transparency Rules through the mechanism of Art 2(2) of the Convention.”¹¹⁴ Hence, the issue of applicability to third States may be overcome through introducing such a compatibility clause into the opt-in convention.

¹¹⁰ *Ibid.*

¹¹¹ UNCTAD, World Investment Report (2017) <https://unctad.org/en/PublicationsLibrary/wir2017_en.pdf> accessed 23 April 2020.

¹¹² *Ibid.*

¹¹³ Art 34, VCLT.

¹¹⁴ Kaufmann-Kohler and Potesta (n 104), [46].

95. A further challenge lies with the likelihood of a majority of States signing up to such a convention. For example, the Mauritius Convention has seen a slow uptake in ratifications while the BEPS Multilateral Instrument has seen greater success with 42 ratifications.¹¹⁵ Despite the convenience of this option, some States may be reluctant to ratify such a convention as the option of issuing joint interpretations under the VCLT regime (its uncertainty notwithstanding) remains open.
96. Despite the challenges, the benefits and simplicity of an opt-in convention outweigh them. Further, with UNCITRAL Working Group III exploring ISDS reform, including the issue of joint interpretations, it is now more likely that this issue could be packaged together with other issues surrounding dispute settlement in a single convention.

5.4 Adopting joint interpretation provisions in model treaties

97. Finally, a joint interpretation mechanism may be advanced through the inclusion of a joint interpretation provision in model treaty provisions. Suggestions have been raised by academics to develop model treaty provisions on joint interpretation along the following lines: ensuring joint interpretations by treaty Parties on some or all issues are binding on tribunals; encouraging (or requiring) treaty Parties to consult and cooperate to resolve ambiguities on questions of interpretation and/or application; and providing for the establishment of committees or commissions tasked with treaty interpretation.¹¹⁶ Such a provision could be incorporated when countries are negotiating new IIAs. The presence of a model provision on joint interpretation in a Model BIT could signal the readiness of the State to operationalize joint interpretations.
98. Based on our survey of treaties, an example of a model provision is as follows:

Any interpretation jointly agreed to by the Parties shall be binding on the tribunal established under these provisions, and any decision or award issued by such a tribunal must be consistent with that interpretation.

99. This concisely reflects that an interpretation is binding, and any award issued by an ISDS tribunal must be consistent with the interpretation.

¹¹⁵ OECD, BEPS Signatories and Parties <<http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf>> accessed 23 April 2020.

¹¹⁶ Kaufmann-Kohler and Potesta (n 104), [47].

100. A model treaty provision is also a flexible way of implementing joint interpretation mechanisms, allowing for a divergence of views. For example, some treaties explicitly foresee the non-applicability of a joint interpretation rendered after the establishment of the tribunal.¹¹⁷

101. However, a limitation of this approach is that States will ultimately have to negotiate their treaties on a bilateral (or multilateral) basis and obtain the agreement of the other States in order to incorporate such provisions. While some countries, such as Canada, have successfully incorporated joint interpretation provisions into most of their IIAs,¹¹⁸ this would depend on the negotiation with each State.

¹¹⁷ See, for example, Article 24(2) of the Netherlands Model BIT (2018).

¹¹⁸ For the complete list, refer to **Annex 1 – Master List of Treaties**.

6. CONCLUSION AND RECOMMENDATIONS

102. Joint interpretations are tools which could allow States to retain a degree of control over the interpretation of provisions within investment treaties by ISDS tribunals. However, the precise degree of influence of a state on the interpretation by the tribunal hinges on the wording of the IIA, such as whether it expressly states that joint interpretations are binding on ISDS tribunals or not.
103. Where treaties are silent on joint interpretations (Situation 1), Art 31(3)(a) of the VCLT will govern the legal effect of such interpretations as subsequent agreements. However, tribunals are required to only take these “into account” as part of the holistic process of interpretation. Where tribunals reference joint interpretations, but do not expressly state that they are binding (Situation 2B), the VCLT will also apply similarly.
104. Where treaties contain provisions stating that the joint interpretation shall be expressly binding (Situation 2A), this displaces the rules under the VCLT pursuant to the *lex specialis* principle. Accordingly, these interpretations will be binding on the ISDS tribunal. However, tribunals may adopt different or evolving interpretations if the terminology of the joint interpretation gives it latitude to do so.
105. The effect of joint interpretations on investor rights is presently unclear and would ultimately depend on the provisions of each specific IIA. Additionally, a claim for estoppel, legitimate expectations, and/or FET would only succeed if a sufficiently clear representation was made prior to the joint interpretation being issued.
106. When considering strategies for implementing joint interpretations into existing and future treaties, possible options include procedural rules, an opt-in convention as well as the inclusion of joint interpretation mechanisms in Model BITs. Procedural rules and model BITs have the limitation of only applying to future treaties of States. An opt-in convention may be the more efficient way to achieve this result, but it may prove difficult to obtain a sufficiently large number of States to sign up to such a convention for this mechanism to be sufficiently effective.

6.1 Recommendations for drafting joint interpretations provisions in treaties

1. Include provisions that expressly state that joint interpretations issued by States will be “binding on the tribunal” and that any award issued by the tribunal “must be consistent with such an interpretation” if the State desires greater control over the interpretation of the treaty. The presence of the latter statement is an additional failsafe to ensure that the tribunals do not issue awards that may alter the interpretation in any manner.
2. Accordingly, the provision that we recommend adopting into future BITs is:

Any interpretation jointly agreed to by the Parties shall be binding on the tribunal established under these provisions, and any decision or award issued by such a tribunal must be consistent with that interpretation.

6.2 Recommendations for drafting joint interpretations

3. A joint interpretation should directly and specifically reference the treaty in question. It should not be crafted in vague or general terms.
4. It must involve all the parties to treaty such that a common understanding regarding the interpretation of the treaty is reached.
5. The wording of the joint interpretation should make it clear that it is interpreting the treaty in question.
6. It should be issued as early as possible, ideally prior to the initiation of an ISDS dispute.
7. Where a joint interpretation is to be issued as part of a consultation between States after a dispute has arisen, the contracting States should endeavor to adopt an interpretation of the treaty provision that would not be contrary to the legitimate expectations of the investors.

6.3 Recommendations for implementing joint interpretations into existing and future treaties

8. Include expressly binding joint interpretation provisions in the State’s model BIT.
9. Consider an opt-in convention that allows the implementation of joint interpretations on a multilateral basis.

10. Consider a mechanism that allows an investor from a non-signatory State of the opt-in convention to consent to the use of the joint interpretations (similar to Art 2(2) of the Mauritius Convention).
11. Amending existing treaties to include joint interpretation mechanisms may be time-consuming and inefficient. However, several States have been receptive to the inclusion of joint interpretation provisions, including Canada, India, the Netherlands, Peru and the United States of America.

BIBLIOGRAPHYTreaties

Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331

International Investment Agreements

ASEAN Comprehensive Investment Agreement (2005)

ASEAN-Australia-New Zealand FTA (2010)

ASEAN- Japan EPA (2008)

Australia-Thailand FTA (2005)

Canada-Colombia FTA (2011)

Canada-Honduras FTA (2013)

Canada-Mali BIT (2016)

Canada-Panama FTA (2013)

Canada-Senegal BIT (2016)

Canada-Venezuela BIT (1998)

Central America- Dominican Republic- United States Free Trade Agreement (2006)

Central America- Mexico FTA (2013)

Chile-China FTA (2006)

Chile- Thailand FTA (2015)

Chile-Turkey FTA (2011)

Chile-United States of America FTA (2004)

China- Pakistan FTA (2007)

Comprehensive and Progressive Agreement for Trans-Pacific Partnership (2018)

Denmark-Philippines BIT (1998)

India-Malaysia FTA (2011)

India - Korea, Republic of CEPA (2009)

Japan-Philippines EPA (2008)

Japan- Peru Economic Partnership Agreement (2012)

Korea-Vietnam FTA (2015)

Mexico-Netherlands FTA (1999)
 Mexico-Portugal BIT (2000)
 North American Free Trade Agreement (1994)
 Peru-USA FTA (2009)
 Thailand-New Zealand CEP (2005)
 Thailand-United Arab Emirates BIT (2016)

Model BIT Provisions

Netherlands Model BIT (2018)

International Cases

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina/Serbia and Montenegro) [2007] (Merits) ICJ Rep. 43

Arbitral Award of 31 July 1989 (Guinea-Bissau/Senegal) [1991] (Merits) ICJ Rep. 53

Dispute regarding Navigational and Related Rights (Costa Rica/Nicaragua) [2009] (Declaration of Judge ad hoc Guillaume) ICJ Rep. 209

Immunities and Criminal Proceedings (Equatorial Guinea/France) [2018] (Merits) ICJ Rep. 292

Kasikili/ Sedudu Island (Botswana/Namibia) [1999] (Merits) ICJ Rep 1045

Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark/Norway) [1993] (Merits) ICJ Rep. 38

Military and Paramilitary Activities in and against Nicaragua (Nicaragua/United States of America) [1986] (Merits) ICJ Rep. 14

Whaling in the Antarctic (Australia/Japan; New Zealand intervening) [2014] (Merits) ICJ Rep. 226

National Cases

Ng Ka Ling and others v Director of Immigration [1999] 2 HKCFAR 4

Sanum Investments Ltd v Government of the Lao People's Democratic Republic [2016] 5 SLR 536

Arbitral Awards

ADF Group Inc. v United States of America [2006] (Final Award) ICSID Case No ARB (AF)/00/1

Aguas del Tunari SA v Bolivia [2005] (Decision on Jurisdiction) ICSID Case No. ARB/02/3

Belenergia S.A. v. Italian Republic [2019] (Award) ICSID Case No. ARB/15/40

Bilcon of Delaware v Canada [2009] (Award) PCA Case No. 2009-04

Canadian Cattlemen for Fair Trade v. United States of America [2008] (Award on Jurisdiction)

Cargill, Incorporated v. United Mexican States [2009] (Award) ICSID Case No. ARB(AF)/05/2

Chemtura Corp. v Canada [2010] (Award) PCA Case No. 2008-01

CME Czech Republic B.V. v. The Czech Republic [2003] (Final Award)

Glamis Gold, Ltd v United States of America [2009] (Award) IIC 380

Grand River Enterprises Six Nations, Ltd et al. v United States of America [2011] (Award) ICSID Case No. ARB/10/5

HICEE v the Slovak Republic [2011] (Award) PCA Case No. 2009-11

Eskosol S.p.A. in liquidazione v. Italian Republic [2019] (Decision on Termination Request and Intra-EU Objection) ICSID Case No. ARB/15/50

International Thunderbird Gaming Corp. v United Mexican States [2006] (Award) IIC 136 (2006)

Loewen Group, Inc. and Raymond L. Loewen v. United States of America [2003] (Award) ICSID Case No. ARB(AF)/98/3

Merrill & Ring Forestry L.P. v Canada [2010] (Award) ICSID Case No. UNCT/07/1

Mesa Power Group, LLC v Canada [2016] (Award) PCA Case No. 2012-17

Methanex Corp. v United States of America [2005] (Award) 44 ILM 1345

Mondev International Ltd v United States of America [2002] (Award) ICSID Case No. ARB (AF)/99/2

Philippe Gruslin v Malaysia [2000] (Award) ICSID Case No. ARB/99/3

Plama Consortium Limited v Republic of Bulgaria [2005] (Decision on Jurisdiction) ICSID Case No. ARB/03/24

Pope & Talbot Inc. v Canada [2001] (Award on Damages) 40 ILM 258

Rockhopper Italia S.p.A. v Italian Republic [2019] (Award on Jurisdiction) ICSID Case No. ARB/17/14

RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain [2019] (Decision on Jurisdiction) ICSID Case No. ARB/14/34

United Parcel Service of America Inc. v Canada [2002] (Award on Jurisdiction) ICSID Case No. UNCT/02/1

Waste Management, Inc v United Mexican States [2004] (Award) ICSID Case No. ARB (AF)/00/3

Books

Rodrigo Polanco, *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?* (CUP 2019)

Dörr, O and Schmalenbach, K (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, OUP 2018)

Richard Gardiner, *Treaty Interpretation*, (2nd edn, OUP 2008)

Rudolf Dozler and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012)

Zachary Douglas, *The International Law of Investment Claims* (CUP 2009)

A. Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (CUP 2017)

Articles

Anthea Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104(2) *American Journal of International Law* 179

David Gaukrodger, *The Legal Framework Applicable to Joint Interpretive Agreements of Investment Treaties* (OECD)

Gabrielle Kaufmann-Kohler and Michele Potestà, 'Can the Mauritius Convention serve as a model for the reform of a permanent investment tribunal or an appeal mechanism?' CIDS 2016, https://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf

Joshua Karton, 'Choice of law and Interpretive Authority in Investor-State Arbitration', (2017) 3(1) *Canadian Journal of Comparative and Contemporary Law* 217

Lise Johnson and Merim Razbaeva 'State Control over Interpretation of Investment Treaties' (2014), http://ccsi.columbia.edu/files/2014/04/State_control_over_treaty_interpretation_FINAL-April-5_2014.pdf

Mark Feldman, 'Mega-Regional Investment Arbitration', (Kluwer Arbitration Blog, 9 December 2016), <http://arbitrationblog.kluwerarbitration.com/2016/12/09/mega-regional-investment-arbitration/>

Wolfgang Alschner, ‘Squaring bilateralism with multilateralism: what investment law reformers can learn from the international tax regime’, (Columbia FDI Perspectives, No. 272 February 24, 2020), <http://ccsi.columbia.edu/files/2020/02/No-272-Alschner-FINAL.pdf>

United Nations Documents

International Law Commission, ‘Draft Conclusions on Subsequent Agreements and Subsequent Practice in relation to Interpretation of Treaties, with commentaries’ (2018)

UNCTAD, “International Investment Agreements: Key Issues (Volume 1)” (2004) UNCTAD/ITE/IIT/2004/10(Vol.I), https://unctad.org/en/Docs/iteiit200410_en.pdf

UNCTAD ‘UNCTAD’s Reform Package for the International Investment Regime’ (2018) https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf

UNCTAD, World Investment Report (2017)

UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014)

United Nations, ‘Report of the United Nations Commission on International Trade Law’ (2013) UN Doc. A/68/17

United Nations, ‘Note by the Secretariat on the Settlement of Commercial Disputes’ (2013) UN Doc. A/CN.9/890

UNCITRAL Working Group III Submissions

UNCITRAL, Joint Submission by Chile, Israel, and Japan (A/CN.9/WG.III/WP.163)

UNCITRAL, Submissions by Costa Rica (A/CN.9/WG.III/WP.164; and A/CN.9/WG.III/WP.178)

UNCITRAL, Submissions by the European Union (A/CN.9/WG.III/WP.159/Add.1)

UNCITRAL, Submissions by Morocco (A/CN.9/WG.III/WP.161)

UNCITRAL, Submissions by Thailand (A/CN.9/WG.III/WP.162)

Other Documents

OCED, BEPS Signatories and Parties <<http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf>>