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Joint Interpretative Statements of Investment Agreements: An Overview of The Practice

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Abstract: This article examines the role and practice of joint interpretative statements in investor state arbitration practices through a normative and comparative juridical analysis of arbitration cases, including NAFTA, EU, and other Cases. These joint interpretative statements clarify treaty ambiguities, align tribunal decisions with state intent, and offer cost-efficient alternatives to treaty renegotiation. However, their effectiveness is hindered by debates over whether they constitute genuine interpretations or disguised amendments, particularly when applied retroactively. Tribunals exhibit inconsistent acceptance, as seen in *Pope & Talbot v. Canada*, which resisted mid-dispute interpretations, and *Methanex v. United States*, which deferred to state intent under the VCLT. Regional shifts, such as the EU's termination of intra-EU BITs, further complicate their application. The study argues that joint interpretations are still possible at helping state achieve interpretation in line with the treaty intent but require explicit treaty provisions on retroactivity, binding authority, and procedural triggers to enhance predictability. Balancing state sovereignty with investor protections remains critical, as tribunals must respect VCLT-guided state interpretations while safeguarding against arbitrary state overreach. The findings advocate hybrid mechanisms, such as multilateral advisory bodies, to harmonize interpretive practices and align ISDS with evolving global investment norms, emphasizing clarity in drafting and sustained dialogue between states and tribunals.

Keyword: Joint Interpretative Statement, Investment Arbitration, Foreign Direct Investment

INTRODUCTION

With the proliferation of international trade, Bilateral Investment Treaties (BITs) have gradually become the main instrument that countries rely on to invite foreign investment into their countries (Schill, 2009). Dispute resolution in foreign investment has significant economic, social and political implications for both investors and host governments. From an economic perspective, effective foreign investment dispute resolution is a key factor in maintaining investment stability and increasing investor confidence. When investors are confident that their rights are protected and disputes are fairly resolved, they are more likely to invest in long-term projects (Sornarajah, 2020).

As investment arbitration has become the norm for dispute resolution between states and investors regarding their investments, the development of the practice has always been an ever-changing and BITs are regularly changed (Amalia & Makmun, 2021). However, the main instrument for the protection of many investments is still under the basis of International Investment Agreements, either signed by 2 countries (bilateral) or by more (multilateral). The main issue we will focus on derives from the fact that in the realm of investment treaties there is an imbalance of power between treaty parties and courts in terms of the capacity to interpret investment treaties (Roberts, 2009). Treaty parties are supreme when making the law, and tribunals are paramount when enforcing it in specific circumstances. In practice, the separation is never total. The interpretation and application of the law by treaty parties impacts the outcome of specific instances before tribunals. Tribunal awards play an informal role in interpreting and shaping the law. Treaty parties and tribunals have some interpretive balance, but none has final authority in all cases.

Investment treaties, which define broad principles rather than particular norms, must be interpreted before they can be implemented. Investor-state tribunals have thus played an important role in interpreting and developing investment treaty law. However, their jurisprudence is mostly based on other tribunal rulings and scholarly opinions, with little regard for the beliefs and practices of governments in general, and treaty parties in particular (Fauchald, 2008). This separation alienates treaty parties from the interpretive process, increasing the likelihood of dissonance between states and tribunals concerning interpretation and adding fuel to the developing fire about the validity of investment treaty arbitration.

In general, one may claim that Investor State Dispute Settlement ("ISDS") is experiencing an issue on, especially on its legitimacy (Franck, 2005), with authors specifying that this crisis might culminate in a regulatory chill where states are unwilling to regulate sectors of interest that might affect investments directly as it could spark a lawsuit or a claim on ISDS (Berge & Berger, 2021). A particularly good example of this concern in terms of climate change regulation is the multilateral investment treaty of Energy Charter Treaty ("ECT"), the proposed ECT reforms have sparked several States to threaten withdrawing from the ECT in its entirety, as to meet climate change goals. As a result of this "crisis", it can be surmised that this was the cause of the increase in explicit provisions in investment treaties that allow for joint interpretative statements by the parties. These are usually classified as 'subsequent agreement or agreements between the parties on the interpretation of a treaty or the application of its provisions as per Article 31 of the Vienna Convention on the Law of Treaties ("VCLT"). This is quite different from the usual treaty termination as joint interpretative statements apply retroactively to the treaty from the entry into force of the binding agreement (Gaukrodger, 2016).

In investment treaty practice, the interpretation of the treaty may take the form of joint interpretative statements, as can be seen in Article 22 of the Indonesia-Switzerland BIT and Article 1131 of the North America Free Trade Agreement ("NAFTA"). To mitigate the risks associated with overly broad and ambiguous BIT provisions, drafters can also incorporate such joint interpretation mechanisms into recent arbitration agreements.

In international investment arbitration precedent, tribunals would start by invoking an interpretation under Article 31 of the VCLT or other means to treaty interpretation under Article 32 of the VCLT (VCLT, Art 31 & 32). Tribunals regard the importance of treaty interpretation enshrined in the VCLT as a piece in customary international law (Methanex v. United States, 2005; Churchill Mining v Indonesia, 2014; Malaysian Historical Salvors v. Malaysia, 2009). The state on the other hand has noted to have a dual role in interpretation. The disparity in interpretation of investment treaties can be attributed to states dual status as both treaty parties and possible respondents in investor-state disputes, with the latter seeking to avoid liability. The Vienna Convention's approach emphasizes the former, whereas

investment tribunals frequently focus on the latter. Investment tribunals play a dual role, representing both the treaty parties in interpreting and creating investment treaty law and the contesting parties in arbitrating investor-state disputes. Investment treaties grant tribunals the authority to handle investor-state disputes, but treaty parties have limited interpretation power (implied and partial).

The frequent use of treaty interpretation occurs because concluding and renegotiating new investment treaties is costly and time-consuming, so treaty interpretation has been frequently used among states because it is lower cost, faster, and more likely to avoid unpredictable arbitral awards (Johnson & Razbaevea, 2014). Even if an investment treaty has been ratified and entered into force, states retain the status to reach interpretations of ambiguous provisions through subsequent treaties or practices. In recent years, a number of such treaties have begun to include mutual interpretation provisions that authorize states parties or designated organs to issue binding interpretations of treaty provisions. Arbitrators are strictly bound to make decisions on treaty interpretation in accordance with the applicable joint interpretation statement.

Investment agreements inevitably contain ambiguous provisions and words that are easily misinterpreted, leaving the arbitral tribunal with substantial discretion to determine the interpretation of the agreement. This discretion means that arbitral awards are unpredictable, as different groups of arbitrators may draw different conclusions from the same set of facts (Gertz & John, 2015). The existence of interpretive powers empowers the state party's designated body to interpret the body of law (Gaillard, et. al., 2011) which increases predictability because a common statement regarding the interpretation of the treaty can serve as a guide for the arbitrators. In addition, arbitral awards issued based on joint interpretation have precedent value to guide subsequent arbitrations. This body provides predictability and consistency from any state or international organization that has an investment treaty.

Furthermore, a binding joint interpretation issued by all contracting states binds tribunals and disputing parties, in contrast to an interpretation rendered by an arbitral tribunal. Before deciding how to interpret a treaty, arbitrators should consider all pertinent joint decisions issued by the states. Therefore, such a mechanism may limit unforeseen or inaccurate interpretations. Thus, it will be encouraged that investment awards be consistent (Rasilla & Cai, 2024). As previously mentioned, a joint interpretation mechanism can be thought of as a quicker and less expensive way to prevent erratic arbitral decisions. Both states will be compelled to participate in the reconstruction of their investment agreement following necessary reciprocal discussions between a home state and a host state. More significantly, this mechanism could have a major influence on the development and reform of the international investment law system, particularly the investor-state dispute settlement system.

However, some questions still arise. There is still a lack of clarity on a number of important issues, such as the difference and significance between a joint interpretation of a treaty and a joint amendment, despite the growing use of joint interpretative statements. Additional tribunals and experts on whether and to what degree joint interpretative statements ought to have the power to influence ongoing proceedings, as well as whether or not their retroactive nature would allow them to influence previous proceedings. These questions will be discussed on this article.

METHOD

In this research, the author uses normative juridical and comparative juridical research. By definition, normative juridical research is understood as library legal research conducted by examining or reviewing available secondary data, while comparative juridical research is understood as legal research conducted based on legal comparisons (Soekanto & Mamudji, 2006). In this paper, normative juridical research will analyze arbitral awards related to the

interpretation of arbitration agreements using joint interpretation statements and comparative juridical research will compare Indonesian and other arbitration agreements in the context of the interpretation of arbitration agreements. The scope of this research will focus on the use of joint interpretation statements, the various reactions of arbitral tribunals in response to them, and the steps that can be taken in view of the practicalities and reactions of arbitral tribunals.

The specification of this research will firstly review the joint interpretation statement mechanism from historical usages from the usage of states and the reaction of the tribunals. The nature of the joint interpretation mechanism on the basis of subsequent agreement under Article 31 VCLT. Discussion on investment arbitration precedent will also be taken into account as the arbitrator's reaction to the joint interpretation statement will be the basis of implementation of the statement on the party's dispute. The cases which will be taken are from the infamous Federal Trade Commission ("FTC") ruling on joint interpretative statements as the practical and theoretical challenges arise from the conflict between seeing states primarily as respondents in investment arbitration disputes and parties to the interpretated treaty. The landmark cases which case which will be analysed here follows the FTC on the joint interpretative statement on NAFTA as a response to what the FTC sees as a too 'expansive' interpretation adopted by the tribunals on investment protected under NAFTA.

As the NAFTA tribunals had varied views on joint interpretative statements. NAFTA tribunals responded in a variety of ways to the FTC's interpretation. At one extreme, the Pope & Talbot panel saw the interpretation as an unlawful attempt to meddle with an existing case by retrospectively amending the treaty. The tribunal raised serious concerns regarding the appropriateness of Canada's involvement in the FTC's discussions as a party to a dispute and how it might be reconciled with due process. Conversely, the ADF Group tribunal agreed with the interpretation. The interpretation by the FTCs allowed room for debate and the question whatever it was legitimate or not (Matiation, 2003). Issues on the retroactive and prospective nature of the joint interpretative statements will also be addressed as they are closely tied to the timing of the joint interpretative statements.

The primary legal sources used in this article are institutional investment arbitration cases, specifically on NAFTA which has had a lot of discourse in the past few years. As NAFTA tribunals are very distinct on key legal issues, not just joint interpretative statements (Belaputri, et. al., 2023). Furthermore, the secondary sources are books and journal articles written by jurists and arbitrators who have handled investment arbitration cases. These secondary sources explain doctrines or questions related to the primary legal sources mentioned above. This article uses qualitative data analysis, the author will use a descriptive-analytical method that relates the issues discussed with the relevant literature and the opinions of legal experts based on the applicable laws and regulations.

Finally, this study employs qualitative data analysis, a descriptive-analytical data analysis method that links a problem to relevant literature or legal experts' opinions while adhering to applicable laws and regulations with consideration from case law on the issue. The data will be analysed thoroughly and carefully to obtain answers and conclusions to the problems presented.

RESULTS AND DISCUSSION

Beginning on an overview of how joint interpretative statements started, According to VCLT Art. 31(3)(a), "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." This includes joint interpretative statements. First, the text covers later agreements regarding interpretation as well as later agreements regarding the treaty's application, or, for that matter, later agreements that do both. This contrasts with the Draft Articles, which only referred to later agreements regarding interpretation, even in the ILC

Commentary (ILC, 1966). The VCLT's preparatory notes don't explain why or when this change was made, and it doesn't even appear that the topic was brought up. Additionally, there discussion matter is noted in a notable jurisprudence. The dissenting opinion of Judge Ehrlich in the Case Concerning the Factory at Chorzow where interpretation and application refers to processes in determining the meaning of a rule, while application refers to determining the consequences which the rule attaches to the occurrence of a given fact (Chorzow, 1927). The proper differentiation was noted in the Harvard Draft Convention on the Law of Treaties, an early attempt to codify interpretation of international treaties (Gardiner, 2015).

The fact still stands with modern treaty application involves correctly identifying the precise source of relevant law and applying it to a set of circumstances, treaty interpretation involves determining the correct meanings of treaty phrases using a variety of interpretative techniques (Gourgourinis, 2011). However as per the commentary by the ILC, The ILC goes on to say in its commentary that a provision's interpretation agreement reached after the treaty's completion is a genuine interpretation by the parties that must be incorporated into the treaty for interpretational reasons. This would seem to give such agreements a special weight and status, which is reinforced by the ILC's comparison of them to agreements regarding the interpretation of a provision that were made prior to or at the time of the treaty's conclusion and are thought to be a part of it. (ILC, 1966). The ILC gets things even more complicated since it doesn't rule out the possibility that the parties to a treaty might, if they so choose, come to a legally binding agreement on how to interpret it. According to this, the ILC maintains its superiority over alternative interpretations and equates a "authentic" interpretation by the parties with a "authoritative" view in the context of joint interpretive statements. The preponderance of the VCLT as a general view of customary international on interpretation of text has been noted and continued by the International Court of Justice (“ICJ”), for example on the Sipadan-Ligitan dispute (Sovereignity, 2002).

With the comments above, it is safe to say that there are few circumstances in which an investment tribunal correctly applying the VCLT could legitimately ignore or refuse to apply a joint interpretation of an international investment agreement, given that the entire goal of many joint interpretations of investment treaties is to ensure that investment tribunals interpret their text in the way that the State parties intend them to, would be frustrated if they were not binding, and that their binding nature is frequently explicitly spelled out. However, there are still 2 ways in which a party could bring a VCLT argument to address the joint interpretation treaty made by the party to the international investment agreement, which are that the alleged joint interpretation statements is an amendment rather than an interpretation and the statements made by the parties to the international investment agreement does not qualify as a joint interpretation (Alcolea, 2023).

Interpretation or Amendment of a Treaty

One may assume that the distinction between interpretation and amendment is simple: interpretation establishes the meaning and extent of a standard, whereas amendment modifies the standard completely, expanding or contracting its meaning and extent (Kulick, 2017). Rather, in reality, it has been said that it is inherently challenging, if not impossible, to draw a clear distinction between correctly interpreted and modified under the guise of interpretation (Sinclair 1973). This is due to the fact, the parties may later decide to change the treaty, they may also later agree on a binding interpretation of its provisions, which may effectively be an amendment (Aust, 2013). In general, states and international tribunals are willing to provide parties a very broad interpretation of a treaty through a follow-up agreement. This idea could even extend beyond what the treaty's wording typically indicates. States' and judges' unwillingness to acknowledge that an agreement pertaining to the application of a treaty truly has the effect of altering or modifying the treaty goes hand in hand with their acknowledgment

of this scope for interpretation. With thi idea in mind, then only the most unprecedented situations would a supposedly interpretation of a treaty may be considered an amendment. The ramifications of such a result are examined is rare, however, the argument has been made repeatedly, most notably in relation to the NAFTA cases that is discussed immediately below.

The NAFTA case referred to came from the FTC's interpretation, yet it was a disguised modification of Art. 1105(1) of NAFTA which in this case was the Fair and Equitable Treatment ("FET") and Full Protection and Security ("FPS") standard of investments protected under NAFTA as per international law. It is the responsibility of the FTC to interpret the provision as per the drafter's intent. There are three ways to interpret this clause, the FET and FPS standard add to the minimum standard of treatment accorded to investment, the FET and FPS is incorporated under international law and not its own standard of treatment, and lastly the FET and FPS standard is a part of customary international law can only be invoked by that standard.

Tribunals would generally surmise the idea of FET and FPS under the first interpretation which expanded the protection provided under investment agreement. However, In the interpretation of the standard under NAFTA, the treaty parties used Article 1131(2), which states that the FTC may issue an interpretation of a provision of NAFTA and that interpretation shall be enforceable on a Tribunal constituted under the agreement. Among other things, the FTC's interpretation also surmises that Article 1105(1) of NAFTA accords the minimal level of treatment for foreign nationals under customary international law and FET and FPS as concepts does not oblige the host state of the investment to go above the standard for treatment under customary international law for treatment of foreigners (FTC, 2001). The interpretation by the FTC simply put the reasoning of the tribunal to be false as FET and FPS under NAFTA would only amount to minimal level of treatment under customary international law. The protection was neither subsumed or an addition to customary international law.

In reaction to the interpretation by the FTC, some scholars and even tribunals have sounded their objection to the interpretation by FTC. As contested, in interpreting that the standard if international law in Art. 1105(1) NAFTA to equate to the standard of customary international law was an amendment because doing so would give international law a special meaning, and there was inherent evidence or suggestion by the parties that the word 'international law' had a special meaning. As maintained, the basic principles of law are included in the conventional and historically recognized concept of "international law," and that any attempt to remove any such principles that were not customary international law amounted to an amendment rather than an interpretation (Brower, 2006). However, Art. 31(3)(a) of the VCLT addresses this issue of interpretation or application of the agreement coming from subsequent agreement of the parties. This is followed by the tribunal in *Pope & Talbot v. Canada* ("Pope & Talbot") where it agreed with this line of reasoning. The Tribunal concluded that the documents of interpretation by the FTC were not admitted as it did not support the reading of Art. 1105 provided by the notes. As a result, the Tribunal on Pope & Talbot referred to the notes of the FTC and their own line of reasoning, the tribunal disregarded the FTC notes as an interpretation, rather an amendment of NAFTA (Pope & Talbot, 1999). The tribunal relied on preparatory documents of NAFTA rather than the interpretation of the FTC as it was stated to be 'ambiguous'.

However, as to be explained, this line of reasoning is inaccurate as while Art. 32 of the VCLT allows for the interoperation of the document to be from supplementary sources, such as the preparatory documents on the negotiation of NAFTA, it still could not only exclusively rely on preparatory without the intention of the parties as per Art. 32 which the FTC relied on. While a concern of the tribunal was to exclude FTC interpretation due to fear of ending with an unenforceable award with unprecedented outcomes of equating FTE and FPS standards to customary international law standards. Furthermore, the tribunal would need to show that a

treaty interpreter might reject a later agreement between two States interpreting a treaty on the grounds that it produced an irrational outcome in order for this reasoning to be valid. Naturally, this is a difficult case to make, and it is hard to see how it might be reconciled with the conventional wisdom that holds that joint interpretive declarations are official interpretations of the pertinent treaty articles. Since the tribunal never raised this point, it never addressed why the FTC's remarks shouldn't be regarded as an authorized interpretation of Art. 1105 and how the supplantation of Art. 31 & 32 of the VCLT is achieved with the reasoning of the tribunal.

Rather, the tribunal of Pope & Talbot simply cited Art. 1131(2) which was that FTC interpretation had binding effect toward any tribunal constituted under it and concluded that, because it was necessary to decide the issue based on international law, it still had the authority to decide whether or not such remarks were an interpretation. Another interesting point ot bring out is that the tribunal made no reference to Art. 46 of the VCLT regulates circumstances in which a State enters into or amends a treaty incorrectly because its representatives lack the necessary authorization. The final decision of the tribunal was to still to apply the FTC interpretation as binding and enforceable toward the tribunal as it was required and retroactive, applied them to the dispute, and concluded that nothing was changed by the notes because the minimum standard of treatment had come to be synonymous with what it had interpreted FET. The tribunal stated it was not mandatory to decide whether the notes were an interpretation or a modification because of this (Pope & Talbot, 1999).

Following tribunals have distanced from the reasoning of Pope & Talbot, where interpretation by the parties were question, rather it was to be the most authentic and genuine way to interpret the treaty. In *ADF Group Inc v United States of America* ("ADF"), the tribunal took the conventional way under the VCLT where the provision of NAFTA as per intended by the parties are conveyed through the FTC interpretation and constituted a genuine interpretation of the treaty. The tribunal in ADF referred to the Pope & Talbot case and affirmed their position where in the event the tribunal had to defer the FTC notes as interpretation or amendment, it would look into the circumstance. In most situations, an amendment of the treaty would require the parties under the respective national law to amend it, however NAFTA had no such system and only referred to the FTC (ADF, 2003).

The tribunal in *Methanex Corporation v United States of America* ("Methanex") also reached a similar conclusion, It also put forward that the FTC's interpretation of NAFTA was an implementation of Art. 31(3)(a) which was a subsequent agreement by the parties to interpret the treaty (Methanex, 2005). The NAFTA dispute shows how reluctant arbitrators are to rule that a specific interpretation of a treaty is, in reality, a modification of it. Furthermore, even in cases when tribunals are prepared to take this action, as in Pope & Talbot, they may avoid reaching a decision by concluding that the facts of the case exclude them from rendering a legally enforceable decision.

Retroactivity of a Joint Interpretation

As previously said, it is often the case that treaty interpretations made by states or by individuals authorized by states to do so on their behalf take force retroactively. This implies that, if the parties so want, such interpretations will impact existing or upcoming ISDS procedures and bind those tribunals, as was the case in the NAFTA context. There are several exceptions to this rule, though, as is frequently the case. For instance, joint interpretative statements under the model Netherlands BIT does not allow for the interpretation to apply retroactively to cases which are already ongoing or have their acclaims already submitted and addressed. Some authors also suggest that these 'late' interpretations will only have prospective effects (Roberts, 2010; Douglas, 2004). It is debatable if this is counterintuitive as states would more often than not, create joint interpretation statements in response to a tribunal as parties to a treaty would not want tribunals to state to be liable for a misinterpretation by the tribunal. If

this were not the case, the States would not have to come to a joint interpretation throughout the course of the case and submit it as evidence to the tribunal.

In the document in which they record their joint interpretation, states can, indeed confirm that the interpretation given is prospective for the future. Paradoxically, if the joint interpretation does not intend to affect the ongoing arbitration, it is not unfair for the state to adopt the joint interpretation in the first place.

The protection afforded to the investors under the investment agreement is always subject to amendment and any form of change by treaty makers based on the general law of treaty interpretations. Thus, if the interpretation is considered retrospective, it does not technically breach any treaty protections, such as legitimate expectation (Alcolea, 2023). As a result, investors cannot reasonably assume that a joint treaty interpretation will never impact them or grant them a right that is immune to such an interpretation. This would imply that, an investor protected under the investment agreement that brings a claim before a tribunal before an amendment, would be affected by the amendment (Dörr & Schmalenbach, 2018). This is pursuant to Art. 28 of The VCLT where the terms of the treaty do not bind a party with respect to any act, event, or circumstance that occurred or that ceased to exist prior to the date the treaty entered into effect with respect to that party, unless a different purpose is made clear by the treaty or is shown in another way (VCLT, Art. 39).

The only way to circumvent this for states is Art. 28 of the VLCT which retroactivity of the treaty when there is a 'different intention appears from the treaty' or 'is otherwise established'. Therefore, states would almost have free reign to give treaty a retroactivity effect in case of amendment of a treaty. Consequently, unless the parties have stipulated otherwise, it might be argued that a joint interpretive declaration that is determined to constitute a treaty modification would inevitably have a character that suggests its retroactive application. Additionally, a tribunal must use Articles 31–32 of the VCLT when determining whether a treaty is retroactive.

In this context and considering the object and purpose of a treaty, treaty interpretation adjustments will all likely hint to retroactivity, it is likely that they will be deemed to be retroactive. In any case, states can explicitly indicate in the text itself whether their alleged interpretation is retroactive, avoiding the need to debate whether it is or is not retroactive if it is determined to be a treaty modification. The overall impact is that absent of any special provisions from the State parties on retroactivity of the joint interpretation statement given, it is doubtful that a treaty's interpretation or amendment would have any bearing on its retroactive effect.

Recent Joint Interpretation Statements & Tribunal Reactions

One of the most adverse and critical decisions on the investment scene is the termination of BITs between European Union ("EU") member states. This was in reasoning by the EU Commission that BIT between members states is incompatible with the idea of EU law where all states and nationality are equal in the union and are accorded the same rights and obligations (Wehland, 2007). The idea is that BITs could give different rights to different EU countries dependent on the provisions of the treaty agreed upon. To force the issue, the Court of Justice of the European Union ("CJEU") in 2018, concurring with the EU Commission that BIT between EU countries have an 'adverse' effect on EU law in the case of *Slovak Republic v. Achmea.* The ruling lead to a statement ("Achmea Declaration") and an agreement which terminated all BIT between EU member states, which we will focus on as it is considered by tribunals as a statement which interpreted EU BIT's (Achmea Declaration, 2019).

Regardless, the declaration in relation to the CJEU makes it clear that the declaration arguably satisfies the standards under Art. 31(3)(a). Since BITs between EU states were formally negotiated, the relevant treaty parties have clearly agreed on the implications of the

ISDS clauses, and there is little question that this agreement affects how these treaties are interpreted or used. It would seem to fall more comfortably inside the purview of an application if one must decide whether it amounted to an interpretation or an application of the treaties. This is due to the fact that it is more focused on whether the treaty applies than on the meaning of specific terms within the treaty.

However, ISDS tribunals have come to different conclusions, in *PNB Banka v Latvia*, the tribunal concluded that the Achmea Declaration to terminate the treaties are not an interpretation or application of the BITS concluded by the respective EU states, rather the tribunal focused on the lack of any reference to Art. 31 of the VCLT (PNB Banka, 2021). Concurring with this opinion, *Adamakopoulous v Cyprus* also rejected that the declaration was a subsequent agreement of interpretation of the BIT but just a mere 'understanding' that the parties to the BITs with their obligation under EU law and did not constitute a subsequent agreement and does not remove the parties consent to arbitrate investment disputes (Adamakopoulous, 2020).

The issue of subsequent interpretation became more convoluted as the tribunal is *Eskosol v Italy* had been constituted under a multilateral investment treaty, the Energy Charter Treaty ("ECT"). As a joint interpretative statement requires all the parties to interpret the treaty in the same way, not just a unilateral statement by a party (Eskosol, 2019). However, the tribunal then went on to state that it could only support the interpretation of the treaty through the interpretation by the tribunal itself, such as by virtue of Art. 31 and 32. The tribunal disregards the usage of subsequent agreements as a form of treaty interpretation which has been discussed above. The tribunal's opinion went to the fact that even if all the binding parties to the ECT were to create a binding joint interpretative statement, as it would be inconsistent with the rights already accorded under the investment agreement and 'undermining' tribunals jurisdiction.

The only tribunal applied the Achmea Declaration as a joint interpretative statement is the tribunal of *Green Power v Spain* where the tribunal concluded that the declaration is considered a subsequent agreement to interpret the ECT but would only be subject to the EU member states that signed the treaty (Green Power, 2022).

Moving away from EU case law, there is another recent case of joint interpretative statements in the High Court of Singapore. The Singapore High Court was sought to overturn an investment judgment in the *Sanum v. Laos* case on the grounds that, among other things, the tribunal lacked jurisdiction since the China-Laos BIT did not apply to Macau, where the investor was incorporated. The court's use of letters between the Chinese and Laotian governments confirming that Macau was not covered by the relevant BIT was the pertinent issue for our purposes (Sanum, 2015).

The exchange of letters was to clarify on how to carry out of the PRC-Laos BIT, especially on the issue of territorial integrity. It is important to note in this context that the letters address the question of the treaty's territorial reach. which said clearly elsewhere as a matter of application rather than interpretation. Alternatively, they may constitute a subsequent agreement about the interpretation of the China-Laos BIT, given the wide latitude granted to States regarding the structure and content of joint interpretative agreements. Regardless, it seems quite obvious that the letters are covered by Art. 31(3)(a) and can thus be used by any court or tribunal that is interpreting or enforcing the treaty.

The letters were exchanged after the tribunal's determination that it had jurisdiction, which complicated the matter. As a result, there was a procedural concern about whether the letters could be accepted as evidence at all and if they might override the tribunal's determination that it had jurisdiction. Making the exchange of letter not amount to a retroactive agreement but a confirmation of the position already taken by both countries. The final result of the court surmise that the basis of subsequent by the exchange of letters was valid and the China-Laos BIT did not apply to Macau.

However, this decision is later reversed by Singapore Court of Appeal where it took the doctrine of 'critical date' as the evidence was produced on a date it had more significant impact than if it was produced before (Sanum SGCA, 2016). Another point noted is that the decision was inherently retroactive, a point which is still debated from the days of the FTC Interpretation of NAFTA and Singapore is not a party to the VCLT, but this issue is quite minor as VCLT is generally applied as customary international law (Hwang & Chang, 2015).

The issue is that, except from responding to an impending, continuing, or completed investment arbitration, it is hard to see why states would agree into non-binding common treaty interpretations. One must assume that the States concerned are acting irrationally in order to think that a joint treaty interpretation they engage into in such circumstances, which existed in Sanum, is non-binding, as such an interpretation would accomplish nothing if it were not binding. Therefore, it is debatable if there is a logical foundation for differentiating between joint interpretive statements provided in accordance with a clear provision in the investment agreement and those that are purely *ad hoc* but are still obviously meant to be binding on the tribunal (Wang, 2021).

The Future of Joint Interpretive Statements in Indonesia

Joint interpretative statements as controversial as it is, will still see much usage and many unused in this paper as cases are still ongoing, from the *Devas* cases which have issues on joint interpretative statement on the India-Mauritius BIT (Pathak, 2023). As seen by the precedents of NAFTA and the Achmea declarations between EU member states, the most troublesome future issue for joint interpretive statements is that it is unclear that they have fulfilled the goals of the states. As a result, one may argue that even while states are currently enthusiastic about joint interpretation mechanisms, it is probable that they will lose popularity over time.

It is important to distinguish between shared interpretative procedures that are expressly stated in a treaty and deemed legally binding, and those which states enter into on an as-needed basis. No tribunal has done so to far, and it is hard to see how a tribunal could overlook the former without risking having its award revoked, annulled, or denied enforcement for failing to apply the relevant statute. However, because they are not specifically mentioned in the pertinent treaties, the latter are far more open to tribunals' 'creative' interpretation.

States can reduce the flexibility of tribunals and increase the likelihood that their interpretive statements will be implemented by clearly stating whether or not their interpretative statements are obligatory, whether they are retroactive or prospective, and making specific reference to the clauses in Art. 31 of the VCLT.

A future practice that may demonstrate an agreement on interpretation can also be exemplified by the internal practices of the treaty parties. The hybrid nature of investment treaties which assigns private investors the primary role in enforcement, allows limited opportunity for later inter-state practice in their implementation. However, as demonstrated in the context of human rights, international law allows for the mention of intra-state practices, and internal practices are particularly significant when discussing treaties pertaining to how a state treats its own citizens (Mclachlan, 2008). Finding shared internal practices or proof that the other treaty parties accept one treaty party's internal practices is crucial since it is impossible to reach an agreement based just on that party's internal practices. Although few, several courts have used the internal activities of one or more treaty parties to demonstrate their individual or collective comprehension of certain treaty terms, such as remarks made during ratification or in court rulings.

As a further note and written in Indonesia, joint interpretative statements are increasingly getting more popular and usage in newer generation Indonesian BITs. Joint interpretative agreements are expected to become a more crucial tool as the number of investment treaties covering relationships where governments have more complex and overlapping interests rises.

This is because they help ensure that treaties are interpreted in a way that aligns with the goals and intentions of the parties. States are also responsible for the urgency since the next generation of investment treaties, like the recent BITs from Switzerland and Indonesia, may utilize joint interpretive declarations. In order to ensure that joint interpretative statements can be used without risking the arbitral award and to ensure the intention of the state as a party to the arbitration agreement by maintaining fairness in investment disputes with the state as a party, investment treaty makers can use this article to consider prior cases regarding the making of joint interpretative statements and their implications to arbitral tribunals.

Indonesia faces significant risks with joint interpretative statements in its newer Bilateral Investment Treaties (BITs), particularly in the context of investor-state dispute settlement (ISDS) mechanisms. These joint statements, which are agreements between treaty parties on how specific treaty provisions should be interpreted, can bind arbitral tribunals and affect ongoing disputes. This binding nature may retroactively alter the legal landscape for investors, potentially undermining their rights and creating uncertainty about treaty protections. Such risks are heightened in Indonesia's BITs, where joint interpretations could be used to limit investor claims or redefine treaty obligations in ways unfavorable to foreign investors (Wong, 2022).

The risks are compounded by Indonesia's broader strategy to revise and terminate many of its existing BITs due to concerns about disproportionate protections granted to investors at the expense of the host state's regulatory sovereignty (Price, 2017). Indonesia has been exposed to multiple ISDS claims, some considered frivolous, which have pressured the government to seek a better balance between protecting foreign investors and preserving its policy space. The joint interpretative statements in newer BITs reflect Indonesia's efforts to exert greater control over treaty interpretation, aiming to prevent expansive readings of investor protections that could lead to costly arbitration claims. However, this approach also introduces legal uncertainty that may deter investment if investors perceive the treaties as less predictable or stable.

Moreover, Indonesia's newer BITs incorporate procedural innovations such as requiring special agreements before investors can initiate arbitration and binding joint interpretations to limit the scope of disputes. While these measures aim to reduce Indonesia's legal exposure and promote dispute resolution through domestic or alternative means, they also carry risks. They may complicate dispute resolution processes and create ambiguities about the extent of investor protections. The evolving interpretative framework could thus lead to increased negotiation and litigation costs, as parties contest the meaning and application of joint statements. While Indonesia's use of joint interpretative statements in its BITs seeks to safeguard national interests, it simultaneously introduces risks related to treaty certainty and investor confidence, exacerbating risks already introducedin joint interpretative statements generally.

CONCLUSION

Joint interpretative statements have emerged as a critical mechanism for states to address legitimacy concerns in ISDS while balancing sovereign authority over treaty interpretation and tribunal autonomy. The role of joint interpretative statements are in clarifying ambiguous treaty provisions, mitigating inconsistent arbitral awards, and aligning tribunal decisions with state intentions. By virtue of Article 31(3)(a) of the VCLT, these statements provide authoritative interpretations that enhance predictability and reduce interpretive divergence. For instance, the NAFTA FTC's 2001 notes recalibrated tribunals' understanding of "fair and equitable treatment" to align with customary international law, demonstrating their potential to correct expansive tribunal interpretations. Such mechanisms offer a cost-effective alternative to treaty renegotiation.

However, challenges persist in distinguishing genuine interpretations from disguised amendments. Tribunals like *Pope & Talbot v. Canada* initially resisted FTC interpretations,

viewing them as retroactive treaty alterations, while others such as *ADF Group v. United States* deferred to state intent under the VCLT. This inconsistency highlights tensions between state sovereignty and tribunal authority, particularly when interpretations impact ongoing disputes. The retroactive application of joint statements further complicates matters, as seen in the *Achmea Declaration* and *Sanum v. Laos* cases, where tribunals grappled with whether post-dispute interpretations could invalidate prior consent to arbitration. The EU's termination of intra-EU BITs post-*Achmea* illustrates how regional shifts toward centralized frameworks may marginalize ad hoc joint interpretations, raising questions about their long-term viability.

Tribunal reactions to joint statements remain uneven. While some panels, like *Methanex v. United States*, accepted FTC interpretations as binding under the VCLT, others, such as *Eskosol v. Italy*, dismissed them as undermining tribunal jurisdiction. The Singapore High Court's reversal in *Sanum v. Laos* further underscores the procedural complexities of retroactivity, particularly when interpretations are introduced mid-dispute. These cases reveal a broader tension: states seek to correct perceived tribunal overreach, while arbitrators guard their interpretive autonomy.

Countries with joint interpretative statements in their BIT would have to exercise caution in creating joint interpretative statements, especially in situations where they are also a responding party to an arbitration dispute. As while states may uphold a certain view of an interpretation of a clause in a treaty, joint interpretative statements may jeopardize an award being rendered by a tribunal and could even be an overerach od state power on an otherwise fair dispute resoltuon process.

Moving forward, clarity in treaty drafting is paramount. States should explicitly define the binding nature, retroactive scope, and procedural triggers for joint interpretations to minimize disputes. Tribunals, in turn, must balance deference to state intent under the VCLT with protecting investors' legitimate expectations. Hybrid mechanisms, such as multilateral advisory bodies, could enhance transparency and harmonize interpretive practices. As global investment norms evolve, joint interpretative statements remain a pragmatic yet imperfect tool—their efficacy hinges on clearer procedural frameworks, sustained dialogue between states and tribunals, and alignment with emerging multilateral trends like the EU-Canada CETA. Ultimately, their success will depend on reconciling state sovereignty with the need for a stable, equitable ISDS system.

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