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The legal framework applicable to joint interpretive agreements of investment treaties

David Gaukrodger

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The legal framework applicable to joint interpretive agreements of investment treaties

by
David Gaukrodger

ABSTRACT

Governments have been examining the potential role of joint government interpretations of investment treaties at OECD-hosted intergovernmental investment roundtables. Now well-established in the model BITs and treaty practice of the NAFTA governments, express provisions for such joint interpretations have recently been included in an increasing range of treaties and investment policies around the world. But while a significant number of major recent treaties contain such express provisions, most investment treaties do not expressly address joint interpretations and thus leave the issue to more general rules.

This paper addresses the general legal framework applicable to joint agreements by treaty parties about the interpretation of treaties. It outlines some key concepts and distinctions in treaty interpretation, and then considers the effects of treaty interpretations and amendments on third parties and in particular on investors covered by a treaty. Joint government interpretation can be binding or non-binding on investment arbitration tribunals. The paper concludes with brief consideration of possible criteria that could affect the persuasiveness of non-binding guidance.

Authorised for publication by Pierre Poret, Deputy Director, OECD Directorate for Financial and Enterprise Affairs

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I. INTRODUCTION[1]

The role of joint government action in the interpretive process in investor-state dispute settlement (ISDS) is attracting increasing attention from governments and commentators. Provisions expressly contemplating the subsequent agreement of treaty parties on binding interpretations were initially introduced into the 1994 NAFTA Agreement. Now well-established in the model BITs and treaty practice of the NAFTA governments[2], they have recently been included in an increasing range of treaties and investment policies around the world. The ASEAN Comprehensive Investment Agreement (ACIA) contains an express provision for binding interpretations by governments, as do the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR) and treaties in Latin America.[3] More recently, the European Commission has indicated that it will seek to include express provisions for binding government interpretations in future EU treaties as a matter of general policy.[4]

While a significant number of major recent treaties contain such express provisions, they are by no means generally included even in recent treaties.[5] The provisions are also rare in the many older treaties. The vast bulk of investment treaties do not address joint government interpretive action. They are thus subject to more general principles of treaty interpretation.

Article 31(3)(a) of the Vienna Convention on the Law of Treaties (VCLT) expressly requires that interpreters of a treaty "take[] into account ... any subsequent agreement ... [between the treaty parties] regarding the interpretation of the treaty or the application of its provisions". The UN International Law Commission (ILC) is currently addressing the issue of "subsequent agreements and subsequent practice in relation to treaty interpretation".[6]

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1 This paper does not necessarily reflect the views of the OECD or of the governments that participate in the OECD-hosted Freedom of Investment (FOI) Roundtable, and it should not be construed as prejudging ongoing or future negotiations or disputes pertaining to international investment agreements. The research assistance on earlier drafts of Marie Bouchard, an intern at the OECD, is gratefully acknowledged.

2 2012 US Model BIT, art. 30(3); 2004 Model Canadian FIPA, art. 40(2). See, e.g., People's Republic of China (China)-Mexico, art. 19(2). For convenience, treaties are referred to using the short form of country names in alphabetical order. Annex 1 contains the full names and links to cited treaties.

3 ACIA, art. 40(3) ("A joint decision of the Member States, declaring their interpretation of a provision of this Agreement shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with the joint decision"); CAFTA-DR, art. 10.22(3). See, e.g., Chile-Peru, art. 11.22(2).

4 See European Commission, EU-Canada CETA: Main Achievements (December 2013), p. 3 (CETA provides for binding interpretations by treaty parties). European Commission, Fact Sheet on Investment Protection and Investor-to-State Dispute Settlement in EU Agreements (November 2013), p. 2 (noting that EU intends to "[i]ntroduce **safeguards for Parties** (this will allow states to maintain control over how the investment provisions are being interpreted) ... **The Commission has already introduced these improvements in the EU free trade agreement with Canada and is negotiating or will negotiate similar improvements in its agreements with other countries**") (bold in original).

5 See, e.g., China-Japan-Korea, art. 24(1)-(2) (joint committee to review operation and make recommendations for improvement to the contracting parties as appropriate, but no express power of interpretation).

6 See Analytical Guide to the Work of the International Law Commission, Treaties over time/Subsequent agreements and subsequent practice in relation to interpretation of treaties. A first report by Georg Nolte, the Special Rapporteur, was issued in March 2013, and the ILC adopted five draft conclusions in August 2013. International Law Commission, *First Report on Subsequent Agreements and Subsequent Practice in relation to Treaty Interpretation*, (19 March 2013) (Georg Nolte, Special Rapporteur) (hereinafter First Special Rapporteur Report); International Law Commission, *Report of the International Law Commission*

The original proposal for work on subsequent agreements and subsequent practice underlined that they have an important function with regard to the interpretation of treaties over time:

> As their context evolves, treaties face the danger of either being "frozen" into a state in which they are less capable of fulfilling their object and purpose, or of losing their foundation in the agreement of the parties. The parties to a treaty normally wish to preserve their agreement, albeit in a manner which conforms to present-day exigencies. Subsequent agreement and subsequent practice aim at finding a flexible approach to treaty application and interpretation, one that is at the same time rational and predictable.[7]

Academic and practitioner interest in government participation in the interpretation process in Investor-State Dispute Settlement (ISDS) is also increasing. In a 2010 article, Anthea Roberts considered the "options available for treaty parties and investment tribunals to engage in a constructive dialogue about interpretation, which would promote evolutionary and sustainable treaty interpretations without requiring legal amendments (recontracting strategies) or political attacks (delegitimizing strategies)".[8] In a recent on-line trade publication on "Reform of Investor-State Dispute Settlement: In Search of a Roadmap", the largest chapter (21 contributions) was focused on "Strengthening the Role of States" and its sub-chapter on "Treaty Interpretation" included seven contributions.[9]

This paper addresses the legal framework applicable to subsequent agreements by treaty parties about the interpretation of treaties.[10] It outlines some key concepts and distinctions in treaty interpretation, and then considers the effects of treaty interpretations and amendments on third parties and in particular investors. Joint government interpretation can be binding or non-binding on investment arbitration tribunals. The paper concludes with brief consideration of possible criteria that could affect the persuasiveness of non-binding guidance. This paper has been discussed by governments participating in the OECD-hosted intergovernmental Freedom of Investment (FOI) Roundtable.[11] Annex 2 provides information about treaties cited in the paper.

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on the work of its sixty-fifth session, chapter IV, 6 May - 7 June and 8 July - 9 August 2013 (hereinafter 2013 ILC Report). Subsequent ILC work is available on the ILC website, but is not reflected herein.

7 First Special Rapporteur Report, § 4 (citing ILC programme of work at its sixtieth session (2008), A/63/10, annex A, §§ 11ff). The project on subsequent agreements and practice is a continuation, under a reformulated mandate, of earlier work which focused on treaties over time.

8 Anthea Roberts, Power and Persuasion in Investment Treaty Arbitration: The Dual Role of States, 104 A.J.I.L. 179 (2010).

9 Reform of Investor-State Dispute Settlement: In Search of a Roadmap, TDM 1 (2014) (Jean Kalicki and Anna Joubin-Bret (eds.)).

10 The paper addresses issues of treaty interpretation which reach beyond the domain of ISDS and investment law. The preliminary analysis here focuses principally on the characteristics of the general regime for joint action in the absence of specific treaty intent on the issue. As preliminary analysis, it does not seek to be exhaustive and additional legal doctrines not addressed here may affect preliminary conclusions set forth below. The analysis may also be adjusted, further refined or expanded through additional analysis or expert input.

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

II. KEY CONCEPTS

A. Subsequent agreement and supplementary means of interpretation

Article 31(3)(a) of the VCLT expressly requires consideration of subsequent agreements between treaty parties about interpretation of the treaty or the application of its provisions.[12] Interpreters of treaties are required to "take into account" such subsequent agreements in interpreting the treaty.[13] No particular formality is required for a subsequent agreement under VCLT 31(3)(a). Later interpretive agreements do not need to take the same form as the initial treaty.[14]

Kingdom, United States and the European Union. Participation typically varies somewhat depending on the issues being discussed.

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

[12] The text of arts. 31 and 32 of the VCLT on treaty interpretation is as follows:

Art. 31 – General Rule of Interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. 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;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Art. 32 – Supplementary Means of Interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

[13] They are also required to take into account any "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". VCLT art. 31(3)(b). This paper focuses primarily on subsequent agreements.

[14] As outlined by Mustafa Yasseen, chairman of the Drafting Committee for the VCLT, « Il n'est surtout pas nécessaire qu'un accord interprétatif revête la même forme que celle du traité qu'il concerne, si solennel et si important que soit ce traité. L'accord interprétatif peut être en forme simplifiée, peut se réaliser par un

Accordingly, it would appear that a document agreed by consensus could be considered to constitute an agreement. In order to qualify as a subsequent agreement within the meaning of VCLT art. 31(3)(a), it would also need to meet other criteria, including whether it concerns the interpretation of the treaty at issue.[15]

Where an agreement does not satisfy the standards of VCLT art. 31(3)(a), it may under certain conditions be considered as a supplementary means of interpretation under art. 32 of the VCLT. This could include cases, for example, where an interpretive agreement is between less than all of the parties to a treaty.[16] Recourse by interpreters of the treaty to supplementary means of interpretation is not required, in contrast to subsequent agreements that must be "taken into account" if they satisfy the requirements of art. 31(3)(a). However, supplementary means can be persuasive.

B. Interpretations and amendments

In theory, there is a sharp distinction between an interpretation and an amendment. An interpretation clarifies the meaning of the original text. Its effect reaches back to the entry into force of the original text.[17] This retroactive impact of an interpretation routinely occurs as a result of a judicial or arbitral

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échange de notes ou même par des déclarations orales concordantes » Mustafa Yasseen, *L'interprétation des traités d'après la Convention de Vienne*, 151 Recueil des Cours 1, 45 (1976 III) (internal footnotes omitted). [It is above all not necessary that an interpretive agreement be clothed with the same form as that of the treaty it concerns, however solemn and important this treaty may be. The interpretive agreement may be in simplified form, may be realized by an exchange of notes or even by concordant oral declarations]. See also *Methanex Corp. v. United States*, Post-Hearing Submission of Respondent United States, 20 July 2001, p. 4 (quoting Prof. Yasseen in translation).

15 Further legal criteria would also need to be satisfied. For example, for interpretive actions to be attributable to a State, it normally requires action by a person with the authority to bind the State. Draft Conclusion 5 of the 2013 ILC Report addresses the question of attribution to states of subsequent practice relating to interpretation. While the commentary addresses subsequent practice, it could also be relevant to subsequent agreements. The commentary to the conclusion states, after a review of case law, that "[i]t thus appears that the practice of lower and local officials may be subsequent practice 'in the application of a treaty' if this practice is sufficiently unequivocal and if the government can be expected to be aware of this practice and has not contradicted it within a reasonable time". 2013 ILC Report, p. 43.

16 See generally 2013 ILC Report, Draft Conclusion 4 and commentary. In 2006, UNCITRAL (composed of representatives of 60 States) considered its competence to issue a non-binding interpretation with regard to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which has over 140 State parties. The Commission determined that it had competence to address the interpretation of the Convention in light of its mandate to promote a uniform interpretation of treaties in international trade. See UNCITRAL, *Report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session*, 19 June-7 July 2006, § 178 (citing General Assembly resolution 2205 (XXI), section II, paragraph 8 (d)). It expressly noted that its action did not "interfere[] with the competence of the State parties to the New York Convention to issue binding declarations regarding the interpretation of that treaty". Id., § 179.

The VCLT contains a provision addressing agreements to modify multilateral treaties between certain of the parties only. VCLT art. 41.

17 See Yasseen, § 11 ("Il est de règle que l'interprétation fasse corps avec le texte interprété ; l'effet d'un accord interprétatif remonte donc au jour de l'entrée en vigueur du traité initial. Cet accord interprétatif s'applique rétroactivement sous réserve du respect de l'autorité de la chose jugée et cette rétroactivité se justifie par la nature même de l'interprétation : opération déclarative"). [It is a rule that the interpretation is part of the interpreted text: the effect of an interpretive agreement starts as of the day when the initial treaty entered into force. The interpretive agreement applies retroactively except for matters that are res judicata and the retroactivity is justified by the very nature of interpretation: a declaratory operation].

interpretation of a legal text (to the extent, if any, that the interpretation has precedential value). Thus, if an ISDS tribunal finds in a case decided 10 years after the entry into force of a treaty that the MFN clause of the treaty allows recourse to the procedural provisions of other treaties, all investors covered under the treaty from its entry into force can benefit from that interpretation (and the governments will be subject to it), to the extent that the decision is given precedential weight. This may of course affect the expectations of parties -- private parties or governments -- that expected or relied on a different interpretation of the provision at issue. In contrast to an interpretation, an amendment changes the meaning of the original text. It normally applies only to the future.[18]

In practice, the distinction may frequently be less clear and the line between an interpretation and an amendment may be difficult to draw in some cases. The flexibility of the general VCLT regime for amendments is a factor explaining why interpretations and amendments may not always be easy to distinguish. States can generally amend treaties by "any means if agreed" pursuant to art. 39 and 11 VCLT.[19] Particularly in cases where the treaty applies only to the treaty parties (and not to third parties), the line may easily be crossed.[20] Some international law regimes established by treaty have been amended through subsequent State practice.[21]

C. Influence of subsequent agreements on interpretation

A subsequent agreement or subsequent practice establishing an agreed interpretation by the treaty parties is often referred to as an "authentic interpretation". According to the ICJ, a subsequent agreement "represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation."[22] The exact meaning of "authentic interpretation" is unclear. Some conclude that such interpretations are binding, while others treat them as highly persuasive or persuasive. The issues can be delicate because, among other things, they go to the distribution of interpretive power between treaty parties and adjudicators.

The 2013 ILC Report addressed the issue.[23] It rejected the idea put forward by some commentators that subsequent agreements are necessarily binding. It favoured a view that the process of interpretation is a single combined operation in which subsequent agreements take their place alongside the other elements

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18 Yasseen, § 29.

19 Gabrielle Kaufmann-Kohler, Interpretive Powers of the Free Trade Commission and the Rule of Law, in Fifteen Years of NAFTA Chapter 11 Arbitration (Emmanuel Gaillard and Frédéric Bachard (eds.) 2011), p. 191.

20 Jean Combacau and Serge Sur, Droit international public, (4th ed. 1999), p. 171 ("le contenu de l'interprétation authentique est particulièrement libre, et peut, avec la réserve de l'effet rétroactif, se rapprocher fortement d'une modification substantielle des règles") ["the content of the authentic interpretation can vary within only loose constraints and, without prejudice to the issue of retroactive effect, can come very close to a substantial modification of the rules"]. See below section on the Effects of amendments and interpretations on third parties.

21 A classic example is the regime for voting in the UN Security Council where practice has led to the conclusion that abstention by a permanent member does not block the adoption of a resolution, notwithstanding the terms of art. 27 of the UN Charter. See Combacau and Sur, p .171.

22 *Kasikili/Sedudu Island (Botswana./Namibia)*, 1999 ICJ REP. 1045, § 49 (13 Dec. 1999) (quoting a 1966 ILC Report, Report of the International Law Commission on the Work of Its Eighteenth Session, § 33, [1966] 2 Y.B. Int'l L. Comm'n 172, 177, UN Doc. A/CN.4/SER.A/ 1966/Add.1) (1966 ILC Report).

23 2013 ILC Report, pp. 20-24. The discussion provides many citations of relevant authorities on the issues. The issues remain under consideration at the ILC and elsewhere.

in art. 31 of the VCLT.[24] Reflecting this view, it preferred to refer to subsequent agreements as "authentic means of interpretation" rather than as "authentic interpretation" because it noted that the later phrase is often associated with a view that such interpretations are binding.

The Commission considered that parties to a treaty, if they wish, may reach a binding agreement regarding the interpretation of the treaty. In an interesting reference to domestic law, the Commission expressed interest in the possible existence of domestic law constraints on the power of a government to agree to a binding interpretive agreement of a treaty:

> subsequent agreements ... establishing the agreement of the parties regarding the interpretation of a treaty must be conclusive regarding such interpretation when "the parties consider the interpretation to be binding upon them". It is, however, always possible that provisions of domestic law prohibit the government of a State from arriving at a binding agreement in such cases without satisfying certain — mostly procedural — requirements under its constitution.[25]

The Commission indicated that the question of such possible domestic law constraints on binding agreements will be addressed at a later stage of its work on subsequent agreements.[26]

The Commission noted that the possibility of arriving at a binding subsequent interpretive agreement is "particularly clear in cases in which the treaty itself so provides" and cited the NAFTA provision on binding agreements by the inter-governmental Free Trade Commission.[27]

Another issue is whether the parties can agree on a subsequent interpretation based on a common view about the treaty's meaning that they reach after the treaty is concluded. The question could arise for example with regard to a treaty concluded in 1995. Are the parties limited to agreeing subsequently about their intent in 1995, or are they able to agree on their joint interpretation based on their intent as of the date of the subsequent interpretation, such as 2016? The 2013 ILC Report suggests that the VCLT gives the treaty parties the flexibility to base their interpretive agreements on their current intent as of the date of the subsequent agreement.[28] In contrast, some ISDS tribunals, for example, have suggested that subsequent agreements are only relevant if they address original intent.[29] As elsewhere, individual treaties may address this issue.

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24 These include, inter alia, the provision that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". VCLT art. 31(1).

25 2013 ILC Report, p. 22.

26 Id., p. 22, n. 72.

27 Id., p. 22 (citing NAFTA art. 1131(2)).

28 2013 ILC Report, p. 21 (post-treaty agreed intent, which expresses the common will of the parties, possesses a specific authority regarding the identification of the meaning of the treaty, "even after the conclusion of the treaty". It considers that the VCLT "thereby accords the parties to a treaty a role which may be uncommon for the interpretation of legal instruments in some domestic legal systems").

29 See Roberts, p. 221 (citing *Sempra Energy Int'l v. Argentina*, Award, 28 September 2007, §§ 385-86 ("What is relevant is the intention which both parties had in signing the Treaty"); *Enron v. Argentina*, Award, 22 May 2007, § 337).

III. THE EFFECTS OF AMENDMENTS AND INTERPRETATIONS ON THIRD PARTIES

The general regime under the VCLT leaves treaty party States with flexibility to modify or revoke the rights of third party States, including through amendments of the treaty. The VCLT does not address modifications or revocations of the rights or interests of private third parties.

A. The Vienna Convention regime for amendments that affect third party States

Article 37 of the VCLT addresses the situation of third party (non-party) States to treaties.[30] It addresses in particular the revocation or modification by the treaty parties of the rights of third party States. Generally, it appears that the VCLT allows treaty parties latitude to revoke or modify the rights of third party States through amendments. The basic rule is that third party rights can be revoked or modified unless it is established that the treaty parties intended otherwise. A third party seeking to block an amendment affecting its rights could find that it must establish that the treaty parties had the intent to give it that power.[31]

The VCLT regime gives the treaty parties flexibility to adjust the rights of third party States unless they have agreed otherwise. This leaves more flexibility to the treaty parties. In practice, treaty parties may generally consider the situation of third party States before making adjustments to treaty regimes that affect them.

B. The situation of covered investors

As noted, the VCLT addresses only the situation of third party States with regard to treaty amendments and does not address private third parties such as covered investors. The omission was deliberate.[32] The ILC project on subsequent agreements has not addressed to date the issue of their effect on third parties.

1. Roberts' analytical framework based on the reasonableness and timing of an agreed interpretation in investment law

Anthea Roberts has sought to fill the gap left by the VCLT with regard to private third parties and in particular covered investors.[33] She has proposed a framework for analysis of agreed investment treaty party interpretations and the degree to which covered investors should be protected from their effects. She points firstly to the reasonableness of the joint interpretation and secondly to its timing.

She distinguishes between four types of agreed treaty party interpretations of investment treaty provisions based on the degree of reasonableness of the interpretation: (i) the most reasonable interpretation of the treaty provision; (ii) one of a variety of reasonable interpretations; (iii) a reasonable

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30 Article 37(2) VCLT addresses the rights of third States and provides that "[w]hen 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 the consent of the third State".

31 See Mark E. Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties, 2009, p. 492 (Article 37(2) "stipulates a presumption in favour of revocation or modification without consent of the third State") (quoted by Roberts, p. 211, n. 151).

32 See 1966 ILC Report, § 33 (noting proposal to include and decision to exclude provision from draft in light of division of opinion, notably about whether such a provision would be beyond the scope of the law of treaties at that time).

33 Roberts, pp. 207-215.

interpretation but not the most reasonable; and (iv) an unreasonable interpretation, amounting to a de facto amendment of the treaty.[34] The timing component focuses primarily on the timing of an interpretation of a provision vis-a-vis a specific investment in which the interpreted provision is at issue. The key points relate to whether the treaty parties' interpretation was adopted before or after the investment was made, the alleged breach occurred, and the claim was filed.

She suggests that treaty party interpretation in the first two cases of reasonable interpretation is relatively unproblematic: covered investors would have difficulty demonstrating reliance on any interpretation as more reasonable than the selected one. In the third case, the timing of the interpretation takes on increased importance. Covered investors may have detrimentally relied on other, more reasonable interpretations if the governments have delayed in making their interpretation. The interpreting governments may want to take account of such investor reliance. In the fourth case, which in effect involves an amendment, she suggests that it should be interpreted using a presumption of only prospective effect.

2. Investment treaties rarely explicitly protect covered investors from the impact of treaty amendments

Investment treaties frequently expressly provide for lengthy period of coverage for existing investments after the termination of the treaty.[35] In contrast, only a few treaties, mostly involving Malaysia, include express transitional arrangements applicable to acquired rights at the time of an amendment.[36] Clauses that could provide legal protection of covered investors from the impact of treaty amendments are thus rare. While a growing number of treaties provide regimes for amendments, they generally do not address acquired rights or interests at the time of the amendment.

The lack of protection in most treaties may be explained by the fact that the requirement of treaty party agreement on any amendment provides a high degree of protection in practice. It has been suggested that where a treaty is between a capital-exporting country and a capital-importing country, amendments detrimental to covered investors are unlikely to be agreed. More generally, governments may consider that they will be able to consider and address the issues appropriately at the time they are considering a particular interpretation or amendment.

There are strong policy interests weighing against retroactive changes to the investment law rules applicable to government measures. Governments could agree that an interpretation will only apply prospectively if they consider it appropriate in light of the circumstances including the reliance of covered investors.

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34 Categories are used for analytical purposes, but Roberts recognises that the issues are ones of degree.

35 Kathryn Gordon and Joachim Pohl, Investment Treaties over Time: Treaty Practice and Interpretation in a Changing World, OECD Investment Working Paper 2015/02, http://dx.doi.org/10.1787/5js7rhd8sq7h-en.

36 See Malaysia-Ethiopia, art. 1(2)(b) ("Any alteration or modification of this agreement shall be done without prejudice to the rights and obligations arising from this Agreement prior to the date of such alteration or modification until such rights and obligations are fully implemented"); Malaysia-Ghana; Malaysia-Kazakhstan. Article 12 (3) of Poland-Mongolia reads: "This agreement may be revised by mutual consent. Any revision or termination of this Agreement shall be effected without prejudice to any right or obligation accruing or incurred under this Agreement prior to the effective date of such revision or termination".

Application of such provisions to covered investors could depend on whether or to what extent they are considered to have rights under investment treaties, a controversial issue. See Roberts, p. 184 (summarising three different views). This paper expresses no view on the issue.

3. Doctrines potentially protecting covered investor reliance or expectations with regard to agreed interpretations of a treaty

As noted above, an unreasonable interpretation of a treaty provision could constitute a de facto amendment. Commentators have considered the question of whether and how covered investors would be protected if the treaty parties expressly agree that such an interpretation should apply retroactively. There are a number of doctrines that could be considered. They include estoppel and legitimate expectations among others. The doctrines are complex and often uncertain. They are hard to capture in brief terms. The power of an ISDS tribunal to apply them in the context of agreed treaty interpretations may also be at issue.

For purposes of the present discussion, it can perhaps usefully be noted that they usually revolve around a number of recurring factors (among many others):

- A statement of fact or a representation which is clear and unambiguous.
- Reliance on the statement in good faith to the detriment of the party.[37]

Roberts suggests that estoppel will not be available as a general matter with regard to agreed treaty amendments or interpretations. In her view, treaty parties have not made the necessary clear and unambiguous representations:

> Treaty parties have not represented that investor rights will never be revoked, amended, or interpreted -- indeed, as sovereigns instead of private parties, the treaty parties presumptively retain these powers -- so that detrimental reliance based on these rights alone cannot establish an estoppel.

As noted above, a few investment treaties contain provisions protecting those with acquired rights from treaty amendments.

Roberts considers that estoppel could arguably be applicable in narrower circumstances:

> Arguably, however, the treaty parties have represented that the law at the time of breach and filing should be the applicable law, which prevents them from then seeking to rely on later, unreasonable interpretations. Any more specific or narrowly focused representations should also be considered, as they may present a better basis for estoppel than a general change in the treaty parties' interpretations.

Proposed consideration of legitimate expectations in this context would also likely revolve around similar concepts of clear and unambiguous representations and detrimental reliance (among many other issues and factors).[38] Legitimate expectations are not an established principle of general international law and are not recognised in all domestic legal systems. However, they have been an important component of investment law in addressing the relation between a treaty party State and a regulated entity under some treaties. Roberts suggests that "it is not clear whether a substantive treaty doctrine intended to protect

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37 These factors are taken from the essentials of estoppel as described by Prof. Bowett. See Ian Brownlie, Principles of Public International Law (7th ed. 2008), pp. 643-644. Prof. Bowett also includes a requirement that the statement must be voluntary, unconditional and authorised. Brownlie considers that the estoppel "'principle' has no particular coherence in international law, its incidence and effects not being uniform". He further notes that estoppel in domestic law is regarded with "great caution". Id., p. 644.

38 Cf. Paul Craig, Administrative Law (7th ed. 2012), § 22-013 (addressing UK and EU law).

against domestic acts by one treaty party can be used to protect against unreasonable interpretations of the treaty itself agreed by all treaty parties."

IV. GENERAL CRITERIA FOR PERSUASIVENESS OF INTERPRETATIONS

Interpretations which are not binding depend on their persuasiveness for their effectiveness. The persuasive power of an interpretation can depend on many factors. Domestic administrative law provides some factors that would likely be of relevance:

- The reasonableness of the interpretation
- The quality of the process by which the interpretation is generated
- The clarity of the interpretation
- The thoroughness and quality of the reasoning for the interpretation
- Consistency with earlier and later pronouncements
- The expertise and the experience of the interpreting body
- The degree of technical complexity of the issues
- The timing of the interpretation

Beyond these criteria (and others), key factors would also include the nature and breadth of the group of participants in an interpretation.

Commentators have also suggested that, as a practical matter, arbitrators' incentives and the balance between exit and voice may also be relevant to the likely impact of agreed government input into interpretation. Roundtable discussions have identified a possible economic incentive for arbitrators to preserve ISDS.[39] It has been suggested that this interest may be a factor in their degree of openness to agreed government input into interpretation.[40]

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39 OECD, Government perspectives on investor-state dispute settlement: a progress report (2012), p. 16. See also David Gaukrodger and Kathryn Gordon, Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community, OECD Working Papers on International Investment 2012/03, pp. 47-48 http://dx.doi.org/10.1787/5k46b1r85j6f-en.

40 Roberts, p. 198 (suggesting that "where there is a credible threat that treaty parties will exit the system (threatening existence), tribunals will have a greater incentive to accommodate them by offering enhanced voice (compromising interpretive power) and vice versa").

V. CONCLUSION

With an increasing number of investment treaties covering relationships where governments have more complex and more overlapping interests, joint interpretive agreements are likely to be an increasingly important tool for ensuring that treaties are interpreted in accordance with the treaty parties' intent and achieve their purposes. This paper analyses the legal framework applicable to those agreements. Providing they can agree, governments have considerable flexibility in this area. They can provide, as in a growing number of treaties, for an express mechanism allowing them to agree on interpretations over time as the treaty is interpreted in ISDS cases.

Where governments have not set out an express regime for joint interpretive agreements in their investment treaty, such agreements are governed by more general principles of international law. An understanding of these principles and their application to the specific characteristics of investment treaties should help governments to use joint agreements effectively where they are appropriate. In some cases, governments may wish to consider explicitly addressing the temporal application of binding interpretations that would otherwise apply retroactively.

Some key principles of importance to investment treaties are the subject of on-going debate and analysis at the ILC and elsewhere. These general international law debates increasingly consider and address investment law and can affect its development. Joining up investment law experts with more general public international law expertise may help governments to contribute to the clarification and evolution of law in this area.

ANNEX 1: EMPIRICAL AND POLICY ISSUES

- How frequently have governments considered requesting another government for a joint interpretation of an investment treaty? How frequently have requests been made? In what contexts?

- How have governments treated and responded to requests for a joint interpretation of investment treaties?

- Are joint interpretation agreements a useful tool? If so, why have they been so rare with regard to investment treaties?

- For investment treaties, should joint interpretive agreements be binding or non-binding on ISDS tribunals?

- How do investors and others know that a joint interpretation exists? How should such agreements be made public? Would a general registry of some kind be helpful?

- The VCLT provides rules for the application of treaty amendments to third party states, but does not address private third parties such as covered investors. Are the rules for third party states suitable for investors as well? Why or why not?

- Are covered investors exposed to risks from joint interpretive agreements? If yes, how could they be protected from those risks? Does the requirement of agreement by all governments provide a sufficient safeguard?

- Are there domestic law constraints on some governments' ability jointly to interpret a treaty? What would they be and how could they be addressed? Would they affect the time needed for governments to act? If domestic law constraints place major obstacles to joint agreements, would that leave interpretive power solely with ISDS arbitration panels?

- Should the government parties to a particular interpretive agreement expressly address its application rationae temporae (e.g., to pending claims)? If they do not, are the general rules sufficiently clear?

ANNEX 2: INFORMATION ON CITED TREATIES

This annex provides the full name in English (unless unavailable), the year of signature and, where available, a link to the text of the treaties cited in the paper. The list includes treaties that have yet to enter into force or are not currently in force.

ACIA: ASEAN Comprehensive Investment Agreement (2009)

CAFTA-DR: Dominican Republic-Central America-United States Free Trade Agreement (2004)

Canada 2004 Model FIPA: Agreement between Canada and [...] for the Promotion and Protection of Investments

Chile-Peru FTA: Acuerdo de Libre Comercio Perú-Chile (2006)

China-Japan-Korea: Agreement among the Government of Japan, the Government of the Republic of Korea and the Government of the People's Republic of China for the Promotion, Facilitation and Protection of Investment (2012)

China-Mexico: Agreement between the Government of the United Mexican States and the Government of the People´s Republic of China on the Promotion and Reciprocal Protection of Investments (2008)

Malaysia-Ethiopia: Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of Malaysia for the Promotion and Protection of Investments (1998)

Malaysia-Ghana: Agreement between the Government of the Republic of Ghana and the Government of Malaysia for the Promotion and Protection of Investments (1996)

Malaysia-Kazakhstan: Agreement between the Government of the Republic of Kazakhstan and the Government of Malaysia for the Promotion and Protection of Investments (1996)

Mongolia-Poland: Agreement between the Government of Mongolia and the Government of the Republic of Poland concerning the encouragement and reciprocal protection of investments (1995)

North American Free Trade Agreement (NAFTA), chapter 11 (1992)

United States 2012 Model BIT: Treaty between the Government of the United States of America and the Government of [country] Concerning the Encouragement and Reciprocal Protection of Investment

OECD Working Papers on International Investment

http://www.oecd.org/daf/inv/investment-policy/working-papers.htm

2015

2015/3 Currency-based measures targeting banks - Balancing national regulation of risk and financial openness

2015/2 Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World

2015/1 The Policy Landscape for International Investment by Government-controlled Investors: A Fact Finding Survey

2014

2014/3 Investment Treaties and Shareholder Claims: Analysis of Treaty Practice

2014/2 Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law

2014/1 Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey

2013

2013/4 Temporal validity of international investment agreements: a large sample survey of treaty provisions

2013/3 Investment treaties as corporate law: Shareholder claims and issues of consistency

2013/2 Lessons from Investment Policy Reform in Korea

2013/1 China Investment Policy: an Update

2012

2012/3 Investor-state dispute settlement: A scoping paper for the investment policy community

2012/2 Dispute settlement provisions in international investment agreements: A large sample survey

2012/1 Corporate greenhouse gas emission reporting: A stocktaking of government schemes

2011

2011/2 Defining and measuring green FDI: An exploratory review of existing work and evidence

2011/1 Environmental concerns in international investment agreements: a survey

2010

2010/3 OECD's FDI Restrictiveness Index: 2010 Update

2010/2 Foreign state immunity and foreign government controlled investors

2010/1 Intellectual property rights in international investment agreements

2006

2006/4 OECD's FDI regulatory restrictiveness index: Revision and extension to more economies

2006/3 Interpretation of the Umbrella Clause in Investment Agreements

2006/2 Investor-State Dispute Settlement in Infrastructure Projects

2006/1 Improving the System of Investor-State Dispute Settlement: An Overview

2005

2005/3 Corporate Responsibility Practices of Emerging Market Companies - A Fact-Finding Study

2005/2 Multilateral Influences on the OECD Guidelines for Multinational Enterprises

2005/1 Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures

2004

2004/6 Mobilising Investment for Development: Role of ODA - The 1993-2003 Experience in Vietnam
2004/5 ODA and Investment for Development: What Guidance can be drawn from Investment Climate Scoreboards?
2004/4 Indirect Expropriation and the Right to Regulate in International Investment Law
2004/3 Fair and Equitable Treatment Standard in International Investment Law
2004/2 Most-Favoured-Nation Treatment in International Investment Law
2004/1 Relationships between International Investment Agreements

2003

2003/2 Business Approaches to Combating Corrupt Practices
2003/1 Incentives-based Competition for Foreign Direct Investment: The Case of Brazil

2002

2002/2 Managing Working Conditions in the Supply Chain: A Fact-Finding Study of Corporate Practices
2002/1 Multinational Enterprises in Situations of Violent Conflict and Widespread Human Rights Abuses

2001

2001/6 Codes of Corporate Conduct: Expanded review of their contents
2001/5 The OECD Guidelines for Multinational Enterprises and other corporate responsibility instruments
2001/4 Public policy and voluntary initiatives: What roles have governments played?
2001/3 Making codes of corporate conduct work: Management control systems and corporate responsibility
2001/2 Corporate Responsibility: Results of a fact-finding mission on private initiatives
2001/1 Private Initiatives for Corporate Responsibility: An Analysis

2000

2000/5 Recent trends, policies and challenges in South East European countries
2000/4 Main determinants and impacts of FDI on China's economy
2000/3 Lithuania: Foreign Direct Investment Impact and Policy Analysis
2000/2 Investment Patterns in a Longer-Term Perspective
2000/1 Bribery and the business sector: Managing the relationship

1999

1999/3 Rules for the Global Economy: Synergies between Voluntary and Binding Approaches
1999/2 Deciphering Codes of Corporate Conduct: A Review of their Contents
1999/1 Southeast Asia: the Role of FDI Policies in Development

1998

1998/1 Survey of OECD work on international investment