

Submission from the European Union and its Member States

A/CN.9/WG.III/WP.246 – Draft multilateral instrument on ISDS

1. The European Union and its Member States are pleased to submit the present suggestion concerning the addition of a provision on joint interpretation in the draft multilateral instrument on ISDS reform, based on the latest working papers prepared by the Secretariat (A/CN.9/WG.III/WP.246 and A/CN.9/WG.III/WP.248). The goal of this submission is to further assist in the discussions on the multilateral instrument. It is the hope of the European Union and its Member States that this paper will serve as a useful support to such discussions and reflections. The European Union and its Member States take no position in this paper on the question of whether there should be institutional provisions in the multilateral instrument and if so which form they should take.
2. This submission paper is without prejudice to the position that the European Union and its Member States may take in subsequent discussions of Working Group III.
3. The European Union and its Member States suggest to add the following provision in the draft multilateral instrument (referred to as “the Convention”):

Article [x] – Joint interpretation¹

1. Parties to a treaty may issue an interpretation jointly agreed by the parties with regard to any provision of the treaty (the “joint interpretation”), including through a body established for such a purpose under the treaty or this Convention. The parties may decide that an interpretation shall have binding effect from a specific date.
2. Upon a request by a party to the treaty to issue a joint interpretation, the other party or parties to the treaty shall give due consideration to that request. The [Parties to the Convention] may decide to establish a sub-group to examine such a request and to open such a group to entities which are not party to this Convention.
3. The Tribunal may, at the request of a disputing party or on its own initiative, request a joint interpretation of any provision of the treaty that is the subject of the dispute. It shall address such a request to both of the parties to the treaty pursuant to which the dispute is taking place.
4. A joint interpretation pursuant to paragraph 3 shall be issued within 90 days from the date the Tribunal seeks the joint interpretation, unless the parties to the treaty concerned jointly request an extension of that period. If the joint interpretation is not issued within the time period, the Tribunal shall decide the issue.
5. A joint interpretation issued pursuant to paragraphs 1 and 3 shall be binding on the Tribunals with jurisdiction under the relevant treaty. Tribunals shall ensure that their decisions and awards are consistent with the joint interpretation.
6. A joint interpretation issued pursuant to paragraphs 1 and 3 shall be circulated, at the request of a party agreeing to such an interpretation, to the Parties to the Convention and made known to relevant entities not party to this Convention. Any Party to the Convention or other entity which wishes to accept and apply such a

¹ This text is based on Draft provision 21 on joint interpretation as prepared by the Secretariat in A/CN.9/WG.III/WP.248. Differences with Draft provision 21 as prepared by the Secretariat are highlighted in the Annex to this submission.

joint interpretation to its own treaties shall submit a notification to that effect to the secretariat.

7. The secretariat shall maintain a list of joint interpretations including which Parties to the Convention have also accepted them. The secretariat shall ensure that the list is kept up to date and is publicly available.

Commentary

4. The Working Group III is currently discussing a draft multilateral instrument on ISDS reform (A/CN.9/WG.III/WP.246). This draft includes a framework convention establishing key principles for the implementation of the reforms to be adopted by the Working Group, which will be attached as “protocols” to the multilateral instrument. The European Union and its Member States note that the Working Group has not yet completed its review of WP.246, but that the general framework and principles in WP.246 are a good basis for providing the present comments.
5. It is the view of the European Union and its Member States that a provision on joint interpretation should be part of the multilateral instrument and be part of its main body. This reflection stems from the conviction that a system of binding interpretations needs to be available as regards the standing mechanism and rather than relying on draft treaty provisions it needs to be foreseen in the architecture creating the standing mechanism. On further reflection, such clauses would appear to in fact fit better in the multilateral instrument (it is foreseen that all parties to the standing mechanism are party to the multilateral instrument) and inclusion in the multilateral instrument gives the greatest number of options in terms of involvement.
6. The draft multilateral instrument includes articles setting up mechanisms for the application of the reforms to existing investment treaties. As noted during the first review of the draft multilateral instrument, such a framework will require institutional support (either from new or existing institutions).² This text proposal is made without prejudice to the question of the organisation of such support and how the mechanisms and processes foreseen here would fit into any such structure.
7. The European Union and its Member States suggest to include a provision on joint interpretation that would create a structure in the multilateral instrument for binding interpretations to be developed there and then optionally applied or utilised both by Parties to the Convention that are parties to the relevant treaty but also other parties (whether Parties to the multilateral instrument or not). This would have the benefit of providing a multilateral structure for such discussions and then the application of such binding interpretations and a central repository of such binding interpretations. Having these in one place, easily identifiable and utilisable by all actors, including tribunals and standing mechanism, would be a potential means to have more efficient development of such binding interpretations. A State could decide whether such interpretations would apply to all of its treaties or a subset thereof.
8. The suggested text on joint interpretation and its commentary are based on the assumptions that a secretariat, preferably from an existing institution such as UNCITRAL, would provide institutional support.³ It is shared at this stage without prejudice to the question of the possible creation of a Conference of the Parties which will be examined later in the work of the Working Group. The basis of the text comes from Draft provision 21 on joint interpretation prepared by the Secretariat in A/CN.9/WG.III/WP.248. The references to “Tribunal” in the text covers *ad hoc* tribunals but also the first instance tribunal and appeals tribunal foreseen in the discussions on the standing mechanism.

² See para. 108 of the report of the 49th session of Working Group III, A/CN.9/1194.

³ See para. 108 of the report of the 49th session of Working Group III, A/CN.9/1194.

9. On paragraph 1, it is suggested to provide for the possibility for the parties to a treaty to issue an interpretation including through the establishment of a body under the treaty or a body under the multilateral instrument (referred to as “the Convention”, in line with WP.246). It is also suggested to add the possibility for the treaty parties to set a specific date from which an interpretation shall have binding effect, in order to leave the choice to the treaty parties to decide whether to apply an interpretation to closed or pending proceedings or not.
10. On paragraph 2, when a party makes a request to issue a joint interpretation, it is suggested to provide for the possibility to establish a sub-group to examine such a request (in line with the possibility to issue a joint interpretation through a body of the Convention as stated in paragraph 1). This is to cover situations where the underlying treaty does not establish a body for such purpose, and therefore allowing a more institutionalised setting for the parties to the treaty to issue a joint interpretation. This group could be open to other Parties to the multilateral instrument which are also interested in the joint interpretation, for example because they have similar provisions in their treaties. It is also suggested to give the power to the Parties to the Convention to decide whether to open such group to entities which are not parties to the multilateral instrument, but have an interest in the suggested interpretation.
11. On paragraph 3, it is suggested to clarify that when the Tribunal requests a joint interpretation, it shall address such request to both of the parties to the treaty pursuant to which the dispute is taking place, and not only to the party to the treaty involved in the dispute.
12. On paragraph 4, it is suggested to provide flexibility on the timing to issue a joint interpretation, as 90 days may be too short depending on a State or REIO internal processes. Therefore, the parties to the treaty should have the power to jointly request an extension to issue such a joint interpretation.
13. On paragraph 5, it is suggested to clarify that the joint interpretation is binding on a Tribunal “with jurisdiction under the relevant treaty” to more clearly cover a first-instance and appeals Tribunals as currently discussed in the draft statute of a standing mechanism (A/CN.9/WG.III/WP.240).
14. On paragraph 6, it is suggested to add a paragraph giving the possibility to Contracting Parties to the multilateral instrument to accept a joint interpretation made pursuant to paragraphs 1 and 3 and apply it for their own treaties. This could be the case where the joint interpretation concerns a provision that is identically or similarly drafted in many treaties. Where a Contracting Party to the Convention accepts a joint interpretation made on a treaty to which it is not party, but wishing to apply it to its own treaties, it would only become binding on a Tribunal where the other relevant treaty partner also accepts it. Where a Party to the Convention wishes to accept a joint interpretation, it would have to notify its consent to a secretariat (draft Article 6 of WP.246 refers to the possibility of having a “secretariat”). It is suggested to extend this possibility to “relevant entities” not party to the multilateral instrument, so as to cover relevant treaty partners that are not parties to the multilateral instrument.
15. On paragraph 7, it is suggested to add a paragraph providing for the secretariat to maintain a list of joint interpretations, including which Parties to the Convention have also accepted them for their own treaties. This list should also be public. Draft Article 6 of WP.246 similarly provides for a secretariat maintaining the list of investment treaties notified by Parties to the Convention and making it public.

ANNEX

Changes made to Draft provision 21 as prepared by the Secretariat in A/CN.9/WG.III/WP.248

Article [x] – Joint interpretation

1. Parties to ~~a treaty~~ ~~the Agreement~~ may issue an interpretation jointly agreed by the ~~P~~parties with regard to any provision of the ~~treaty Agreement~~ (the “joint interpretation”), including through a body established for such a purpose under the ~~treaty or this Convention~~ ~~Agreement~~. *The parties may decide that an interpretation shall have binding effect from a specific date.*
2. Upon a request by a ~~P~~party to the ~~treaty Agreement~~ to issue a joint interpretation, the other ~~P~~party or ~~P~~parties to the ~~treaty Agreement~~ shall give due consideration to that request. *[The Parties to the Convention] may decide to establish a sub-group to examine such a request and open such a group to entities which are not party to this Convention.*
3. The Tribunal may, at the request of a disputing party or on its own initiative, ~~seek~~ *request* a joint interpretation of any provision of the ~~treaty Agreement~~ that is the subject of the dispute. *It shall address such a request to both of the parties to the treaty pursuant to which the dispute is taking place.*
4. A joint interpretation pursuant to paragraph 3 shall be issued within 90 days from the date the Tribunal seeks the joint interpretation, *unless the parties to the treaty concerned jointly request an extension of that period.* If the joint interpretation is not issued within the time period, the Tribunal shall decide the issue.
5. A joint interpretation issued pursuant to paragraphs 1 and 3 shall be binding on ~~the~~ Tribunals *with jurisdiction under the relevant treaty* ~~established in accordance with the Agreement~~. Tribunals shall ensure that their decisions and awards are consistent with the joint interpretation.
6. *A joint interpretation issued pursuant to paragraphs 1 and 3 shall be circulated, at the request to a party agreeing to such an interpretation, to the Parties to the Convention and made known to relevant entities not party to this Convention. Any Party to the Convention or other entity which wishes to accept and apply such a joint interpretation to its own treaties shall submit a notification to that effect to the secretariat.*
7. *The secretariat shall maintain a list of joint interpretations including which Parties to the Convention have also accepted them. The secretariat shall ensure that the list is kept up to date and is publicly available.*