
THE TIMING OF TREATY PARTY INTERPRETATIONS

A TREATY-DESIGN PERSPECTIVE

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OUTLINE

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 - During a dispute
 - After the dispute
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PRELIMINARY REMARKS



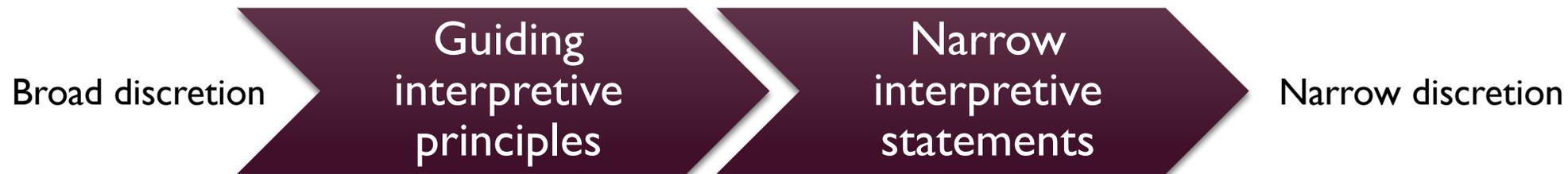
PRELIMINARY REMARKS

❖ ...on treaty Party interpretations

- Concrete treaty language is not necessary for treaty Parties to issue interpretive statements.
- Customary international law, the Vienna Convention on the Law of Treaties (1969), provides that the decision-makers must take into account the Parties' subsequent agreement on interpretation, but it does not provide for *binding* effect of such interpretations.
- IIAs can and increasingly do digress from customary international law and provide for *binding* joint interpretations.

PRELIMINARY REMARKS

- Interpretive statements guide interpretation differently depending on whether they are:
 - broad guiding principles that must be concretised by the decision-maker (such as those typically found in preambles, e.g. ‘the Parties reaffirm their right to regulate’), or;
 - narrow interpretive statements (e.g. ‘full protection and security refers to obligations relating to the physical security of investors and covered investments’).



- Interpretive statements may require further interpretation.

PRELIMINARY REMARKS

- The distinction between treaty interpretation and treaty amendment must be kept in mind.
- ‘Retroactive’ interpretations have sometimes been perceived as disguised amendments.
 - E.g. *Pope & Talbot v. Canada*, Award in respect of Damages (31 May 2002), para. 47.
- Filter mechanisms are not interpretations but *applications* of the treaty.



INTERPRETIVE STATEMENTS
OUTSIDE TREATY NEGOTIATIONS



OUTSIDE TREATY NEGOTIATIONS

- ❖ Art. 31 (1) and (4), and Art. 32 of the Vienna Convention on the Law of Treaties (1969)
- Interpretive statements, model BITs, official statements, commentaries, parliamentary debates, constitutional court decisions, etc.
- E.g., when Brazil started negotiating new IIAs it made public statements to the effect that its IIAs do not cover *indirect* expropriation.
 - This could guide interpretation of some of its IIAs that make an unqualified reference to ‘expropriation’.



INTERPRETIVE STATEMENTS DURING TREATY NEGOTIATIONS



DURING TREATY NEGOTIATIONS

- ❖ Art. 31(1), (2) and (4) and Art. 32 of the Vienna Convention on the Law of Treaties (1969)
 - There are two ways to capture the desired ‘terms’ or ‘interpretation’:
 - *In* the treaty text, or
 - *Outside* the treaty text

DURING TREATY NEGOTIATIONS

❖ *In the treaty text*

- Negotiations should aim to incorporate **precise and clear** treaty language. This is **the most appropriate moment** to capture the desired meaning.
- If there is no agreement during the negotiations, can there be agreement later?
 - Question of the crucial moment of agreement. Should an interpretive statement reflect the original meaning or can it reflect meaning agreed to later? If the latter, is it an amendment? Fine line between evolutive interpretation and amendment.

DURING TREATY NEGOTIATIONS

❖ *In the treaty text*

- Numerous examples of new IIAs, including precise drafting of substantive and procedural standards, clarifications, mentions of the right to regulate, exceptions, carve-outs, interpretive annexes on expropriation, ‘for greater certainty’ statements, etc.
 - E.g., CPTPP’s investment chapter contains 42 ‘for greater certainty’ statements

DURING TREATY NEGOTIATIONS

❖ *Outside the treaty text*

- Example of the ‘disappearing *Maffezini* footnote’
- CAFTA-DR Art. 10.4 footnote 1 (28 January 2004 draft):

‘The Parties agree that the following footnote is to be included in the negotiating history as a reflection of the Parties’ shared understanding of the Most-Favored-Nation Treatment Article and the *Maffezini* case. This footnote would be deleted in the final text of the Agreement. ... The Parties share the understanding and intent that [the MFN] clause does not encompass international dispute resolution mechanisms ... and therefore could not reasonably lead to a conclusion similar to that of the *Maffezini* case.’



INTERPRETIVE STATEMENTS AT THE TIME OF SIGNATURE



AT THE TIME OF SIGNATURE

- ❖ **... and until entry into force**
- ❖ Art. 31 (1), (2) and (4), and Art. 32 of the Vienna Convention on the Law of Treaties (1969)
- Interpretive statements, declarations, side-instruments, protocols, exchanges of letters, official statements, commentaries, recitals to national laws approving the IIA, parliamentary debates, constitutional court decisions, etc.

AT THE TIME OF SIGNATURE

- Examples
 - CPTPP Joint Declaration on Investor State Dispute Settlement
 - CETA Joint Interpretative Instrument
 - Joint interpretive statements subsequent to the Colombian Constitutional Court 2019 judgments concerning the Colombia-France and Colombia-Israel IIAs?
 - Statement 36 by the Commission and the Council on investment protection and the Investment Court System ('ICS') (27 October 2016) (*unilateral*)



INTERPRETIVE STATEMENTS AFTER TREATY CONCLUSION



AFTER TREATY CONCLUSION

❖ Outside a dispute

❖ Art. 31(3) of the Vienna Convention on the Law of Treaties (1969)

- After the treaty is concluded, the Parties can clarify the meaning of their treaty text and guide interpretation through **subsequent agreement or practice**, or in accordance with the principle of systemic integration.
- Concretely, the Parties can issue joint interpretive statements.
- They can also issue unilateral statements, although their effect is different.
- Some, especially new, IIAs make provision for joint interpretive statements *binding* on (future) tribunals.



INTERPRETIVE STATEMENTS DURING A DISPUTE



DURING A DISPUTE

❖ Joint interpretive statements

- IIAs that provide for joint interpretive statements binding on a tribunal tend to not explicitly address the impact of such statements on pending disputes.
 - E.g. the Korea-Vietnam FTA (2015) provides in Art. 9.24 that an interpretation issued by the treaty's Joint Committee 'shall be binding on a Tribunal ... and an award ... shall be consistent with that interpretation'.
- Other IIAs specify that the Parties' joint interpretation shall be binding on 'any' tribunal.
- The general assumption is that such joint interpretive statements, if issued in the course of a dispute, are binding on the tribunal hearing it.
- This is **the most controverted use of joint interpretive statements.**

DURING A DISPUTE

❖ **Joint interpretive statements**

- Joint interpretive statements issued in the course of a dispute involve the respondent State, i.e. one of the disputing parties.
- In this respect, concerns have been voiced about
 - The parties' equality of arms and due process;
 - Participation of the executive or political organs in dispute settlement.

DURING A DISPUTE

❖ Joint interpretive statements

- Recently some criticism was expressed in a regional context.
 - CETA is silent on the time effect factor of interpretations issued by the CETA Joint Committee.
 - Opinion I/17 of the Court of Justice of the European Union reasoned that the **requirement of independence** of the CETA Tribunal and Appellate Tribunal means that interpretations issued by the CETA Joint Committee can ‘have no effect on the handling of disputes that have been resolved or brought prior to those interpretations. If it were otherwise, the CETA Joint Committee could have **an influence on the handling of specific disputes and therefore participate in the ISDS mechanism.**’
 - Consequently, the Court held that CETA’s provision on binding interpretations must be interpreted in such a way that prevents them from producing ‘effects on the handling of disputes that have been dealt with or are pending’ (paras 236-237).

DURING A DISPUTE

❖ Joint interpretive statements

- The above **does not mean that a joint interpretation will not be taken into account by the tribunal.**
- According to Art. 31(3) of the Vienna Convention on the Law of Treaties, the decision-maker must still take into account a subsequent agreement on interpretation.
- What the above does mean is only that the tribunal is not *obliged* to follow it.
- The Dutch Model BIT of 22 March 2019 expressly prevents application of a joint interpretive statement to a pending dispute, Art. 24(2).

DURING A DISPUTE

❖ Joint interpretive statements

- States could consider introducing safeguards in their provision on treaty interpretation to preclude them from producing binding effects on pending cases.
- A way of allowing joint interpretations to bind a tribunal hearing an ongoing dispute while shielding the process from the identified concerns, would be to encourage the tribunal or either of the disputing parties, *if both parties agree*, to seek a binding interpretation from the treaty Parties.
- The Agreement establishing the ASEAN-Australia-New Zealand Free Trade Area comes close to this example but agreement of the disputing parties is not necessary, Art. 27(2) of Chapter II:
 - ‘The tribunal shall, on its own account or at the request of a disputing party, request a joint interpretation of any provision of this Agreement that is in issue in a dispute.’

DURING A DISPUTE

❖ Non-disputing party submissions

■ Non-disputing party intervention

- Expressly provided for in the IIA
- De facto acceptance of intervention by tribunals
- In the UNCITRAL Transparency Rules, Art. 5

- The Colombia-Peru BIT (2007), Art. 25(14), offers an example of a treaty encouraging non-disputing party submissions on interpretation. Accordingly, on the request of either disputing party, the tribunal shall communicate its proposed decision or award, prior to issuing it, to the disputing parties and to the non-disputing State party. **This option is unavailable if the parties have access to an appellate mechanism.**

DURING A DISPUTE

❖ **Non-disputing party submissions**

- Non-disputing party submissions can also be encouraged if the treaty requires notification to non-disputing State parties of disputes brought under the IIA.
- **Submissions by non-disputing parties and by the respondent State on issues of treaty interpretation may be used *later* in other disputes to establish subsequent agreement on interpretation.**

DURING A DISPUTE

- When the non-disputing party submission coincides with the interpretation of the respondent State  evidence of agreement that the tribunal shall take into account (Art. 31 of the VCLT)
- In *Bilcon v. Canada*, the tribunal quoted the *Merrill & Ring v. Canada* decision finding that the international minimum standard of treatment ‘protects against all such acts or behavior that might infringe a sense of fairness, equity, and reasonableness’. Mexico made the following non-disputing party submission: ‘Mexico concurs with Canada’s submission that decisions of arbitral tribunals are not themselves a source of customary international law and that the *Bilcon* tribunal’s reliance on *Merrill & Ring* was misplaced.’



INTERPRETIVE STATEMENTS AFTER THE DISPUTE



AFTER THE DISPUTE

- After a dispute has been concluded, the treaty Parties can react and comment on the interpretation in order to offer future guidance.
- In *SGS v Pakistan* : Note on the Interpretation of the Switzerland-Pakistan BIT: Swiss authorities ‘alarmed’ by ‘very narrow interpretation’ of umbrella clause; clause intended to apply to ‘commitments that a host State has entered into with regard to specific investments of an investor’.
- Decisions that are *res iudicata* could *not* be reopened. **No retroactive effect.**



FURTHER ISSUES



FURTHER ISSUES

- Binding treaty interpretations contribute to establishing consistent interpretations but they are often difficult to achieve. Unsurprisingly, there are few such interpretations.
- Obtaining agreement on a common interpretation may prove challenging. It may represent a further negotiation on language that States may have already had difficulty landing on.
- The level of precision – or vagueness – reflected in the treaty text may be all that the Parties are able to agree upon.

FURTHER ISSUES

- Question of how to deal with interpretive statements in a multilateral standing mechanism, e.g. a multilateral investment court, including whether and how to allow State Parties to the multilateral mechanism to intervene, when interpretation concerns common drafting of standards and other provisions found in a third-Party IIA.
- Interesting proposal in the UNCITRAL Secretariat's Note on 'Interpretation of investment treaties by treaty Parties' concerning multilateral consensus building **outside concrete treaty negotiations** e.g. to clarify 'core obligations in investment treaties or [to shed] light on the relationship between such treaties and other fields of international law such as climate change' (paras 55-56).



CONCLUSIONS



SOME CONCLUSIONS

- The best moment to accurately shape treaty content is during negotiations.
- Treaty content can also be clarified later but ideally outside the context of a dispute.
- Under customary international law, States' subsequent agreements on interpretation must be taken into account.
- If States want these agreements to have *binding* effect, this should be made clear in the treaty text.
- States could consider safeguarding the dispute settlement process by precluding interpretive statements from producing binding effects on ongoing disputes.

THANK YOU



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