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Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues
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No. 386 June 24, 2024

The growing interest for joint interpretations of investment treaties by state parties

by

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In the ongoing discussion on investor-state dispute-settlement (ISDS) reform, there is a growing interest for joint interpretations (JIs) of international investment agreements (IIAs) by state parties. "JIs" refer to agreements adopted in a single document by parties to a treaty on the interpretation of its provisions. Firmly rooted in the law of treaties, a practice of adopting JIs or including special clauses on JIs in IIAs is emerging and developing certain specific features.

The inclusion of JI clauses in IIAs has gained momentum since their introduction in NAFTA (Article 1131.2) in 1994. Initially predominant in the treaty practice of NAFTA parties, the proliferation of JI clauses expanded in Central and South America in the 2000s, and the Pacific region in the 2010s. JI clauses are now a common feature of regional agreements like CPTPP (Article 9.25.3) or CETA (Article 8.31.3), and their inclusion is championed by intergovernmental and non-governmental organizations. This suggests that JI clauses represent the state of the art of current investment treaty-making, despite the fact that less than 5% of treaties in force include one.

The first use of a JI clause was by the NAFTA Free Trade Commission JI in 2001, to clarify the interpretation of the fair-and-equitable-treatment clause. Most NAFTA tribunals complied with this JI, some even stating that they were not empowered to review its legality.[1] However, in *Pope & Talbot v Canada*, the tribunal found itself competent to review the JI and considered that it cannot be binding when adopted during a pending case, even suggesting that it was a disguised amendment. The tribunal in *Methanex v United States* alluded to its power to review the JI "as a matter of international constitutional law" and diluted its bindingness. In *Merrill & Ring Forestry v Canada* and *Windstream Energy v Canada (I)*, the tribunals also tried to circumvent the JI, while in *S.D. Myers v Canada*, the tribunal ignored it. Canada adopted other

JIs subsequent to the conclusion of treaties under similar special clauses with Chile in 2002 and 2010, as well as Colombia in 2017. *Eco Oro v Colombia* is a rare case of a tribunal considering other such JIs, but the majority did not apply the JI it in its reasoning.

States now adopt JIs whether or not a special JI clause is included in their IIAs. These JIs are adopted after ratification of a treaty, like the India-Bangladesh JI of 2017 and the India-Mauritius JI of 2022, or at the time of its conclusion, like the CETA JI adopted in 2016 by Canada and the EU, the Colombia-France JIs of 2017 and 2020 and the Colombia-Israel JI of 2020.

The Vienna Convention on the Law of Treaties (VCLT) provides the general legal framework for JIs. According to Article 31(3)(a), a "subsequent agreement" by state parties is an authentic means of interpretation of a treaty, that "shall be taken into account" together with its context. Article 31(2)(a) distinguishes such subsequent agreement from an agreement made by all state parties at the time of the conclusion of a treaty, as forming part of the context in which Article 31(1) requires that the terms of the treaty "shall be interpreted". In contrast, special JI clauses of IIAs explicitly state that JIs are binding on tribunals. Thus, the binding use or conclusiveness of JIs depends on whether they are regulated by the *lex generalis* codified by the VCLT, or by the *lex specialis* of the applicable IIA. Correct legal characterization of JIs is critical to their proper use by tribunals in interpreting IIAs.

A key legal challenge with JIs is that the main beneficiaries of IIAs—i.e., foreign investors—have no comparable measure to influence the interpretation process and the outcome of ISDS cases. This entails a number of questions, notably with respect to limits and control of the adoption of JIs by state parties. Nevertheless, JIs appear to be a readily available and pragmatic answer to many current problems with ISDS, including the lack of coherence among awards. State parties should not hesitate to use JIs and should consider including carefully worded special clauses on JIs in their IIAs. The following points merit particular attention:

- Temporal scope of JIs: the application of JIs to pending cases should be explicitly addressed by state parties, for instance to consider their adoption in advance of disputes or to clarify their prospective or retrospective scope.

- Control of JIs: the authority to control the use of JI clauses should be explicitly contemplated, as well as the legal consequences of ignoring JIs.

- Publicity of JIs: JIs should be made easily retrievable considering their systemic impact.

A streamlined approach to JIs will encourage states to use them. It will also contribute to the coherence of international investment law. Adoption of a JI model clause by UNCITRAL Working Group III would constitute a milestone in this direction.

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[1] *ADF v United States*, at para 177; *Mesa Power v Canada*, at para 479.

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