

How States Manage Their Obligations Under Bilateral Investment Treaties: Opportunistically Changing The Rules of The Game or Legitimately Exercising Their Sovereign Rights? (Part II)

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These two-parts blog posts look into the ways that states can control the exercise of tribunals' discretion and their implications. Of course, states can prevent unintended results from happening by simply adding more specific language to their new BITs. But what can they do with the existing treaties?

Due process concerns

Joint interpretative statements, as explained in the first part of this post, can be used by states to protect their "regulatory sovereignty" and to "reassert control"

over their BIT frameworks. “Joint Interpretative Notes” (JIN) recently agreed by India and Bangladesh have substantially affected their BIT and this regulatory technique puts to the fore the question how to distinguish treaty interpretation from treaty amendment.

Why is the interpretation/amendment distinction important? As observed by Gabrielle Kaufmann-Kohler, whereas to treaty amendment principle of non-retroactivity applies as the amendment creates a new norm, it does not apply to treaty interpretation because a true interpretation merely clarifies the content of an existing norm. (Id., at p. 189) Thus, if the JIN were in fact a disguised amendment of India-Bangladesh BIT, the guarantees of due process would require their inapplicability to pending disputes. Not to mention that if the JIN were to be applicable to pending disputes, the respondent state would have unduly benefitted from new meanings of India-Bangladesh BIT provisions which it directly formulated in the course of the proceedings. While it does not seem that there are any pending disputes under India-Bangladesh BIT at the moment, these due process concerns may gain more practical relevance when India concludes further interpretative notes with respect to its other 24 BITs.

Binding or persuasive?

Such joint interpretative statements like the JIN or the FTC Notes constitute a special form of “subsequent agreements” within the meaning of Article 31(3)(a) VCLT that “shall be taken into account” by an arbitral tribunal interpreting a particular treaty at issue. It is clear that tribunals are “bound” to take into account joint interpretative statements. It is not clear, though, whether their content is binding on tribunals. Literal interpretation would suggest that joint interpretative statements as a type of subsequent agreements are not binding but have the same rank as the other elements of the general rule of interpretation under Article 31 VCLT. However, a 2013 report of the International Law Commission on “Subsequent agreements and subsequent practice in relation to interpretation of treaties” (A68/10) recognizes that treaty parties can give their subsequent agreements binding force, stating that “subsequent agreements and subsequent practice establishing the agreement of the parties regarding the interpretation of a treaty must be conclusive regarding such interpretation when ‘the parties consider the interpretations to be binding upon them’”. (Commentary to Conclusion 2, p. 22)

As mentioned above, NAFTA parties indicated in Article 1131(2) that interpretative notes issued by the FTC are binding on Chapter 11 arbitral tribunals. To recall, India-Bangladesh BIT does not provide for a mechanism of state parties interpretation and the JIN has not been made public. In the “model” Joint Interpretative Statement (JIS) circulated by India, though, we can find a reference to “the requirement under customary international law and Article 31 (3) (a) & (b) of Vienna Convention of [sic] Law of Treaties, that any interpretation of the Agreement take into account the Contracting Parties’ subsequent statements and practice reflecting their shared understanding of the meaning of that Agreement”. Furthermore, the JIS “shall be read together with the Agreement and shall form an integral part of the Agreement”. This could be read as manifesting India’s intent to make the JIS binding.

In the end, states are “masters of treaties”. Even if they have delegated a lot of power to arbitral tribunals, they can always regain it. As observed by James Crawford, “[i]n the context of investment treaty arbitration there is a certain tendency to believe that investors own bilateral investment treaties, not the States parties to them [...] That is not what international law says. International law says that the parties to a treaty own the treaty and can interpret it.” (J. Crawford, ‘A Consensualist Interpretation of Article 31(3) of the Vienna Convention on the Law of Treaties’ in G. Nolte (ed.), *Treaties and Subsequent Practice* (OUP 2013), p. 31)

Conclusion

Joint interpretative statements can be very useful for states and investors as their clarifications can contribute to a better understanding of a particular treaty provision and hence increase predictability. However, they can go beyond their clarifying function and be used to correct the arbitral practice by imposing certain understandings. This technique is part of the trend of rebalancing the international investment regime towards greater rights for states. In fact, some joint interpretative statements, if given a binding nature by state parties, can lead to effective treaty amendment without a need to satisfy formal procedural requirements. Although it seems not to pose serious difficulties under international law, it may be problematic at the domestic level if a particular constitutional order prohibits a government concluding a treaty without following certain procedure. The India-Bangladesh JIN, if it reflects the content of the JIS, is definitely designed to move the international investment protection standards into fresh directions. However, the question is whether joint interpretative statements are the right

instrument for such a profound re-examination of investment protection framework.

Some useful links:

JIN: <http://pib.nic.in/newsite/PrintRelease.aspx?relid=167345>

JIS:

http://indiainbusiness.nic.in/newdesign/upload/Consolidated_Interpretive-Statement.pdf