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Masters of Their (Investment) Treaties? States Mutual Treaty Actions between the Law of Treaties and the Integrity of Arbitration

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State parties' "mutual actions" over a treaty – including interventions such as interpretation, modification and termination – have flourished in recent investment treaty practice. This trend brings to the fore the question of whether there are any limits to such actions, particularly due to the involvement of non-State entities, such as investors and arbitral tribunals. In answering this question, this post analyses the proliferation of joint interpretation clauses (**JICs**) and their impact on the rights of investors and the integrity of arbitral tribunals, drawing upon a recent article I wrote on these issues (here).

Joint Interpretations and Their Alleged Limits

Aimed at regulating the "authentic" interpretation of the treaty, several JICs provide that contracting States can issue joint interpretations (**JIs**) that are binding upon investment tribunals, even in relation to pending proceedings. Recent examples can be found in Article 8.31(3) of the Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA), in Article 30(3) of the 2012 US Model BIT, as well as in many other investment agreements (for a survey see here and here).

Although JICs are still scarcely invoked by States in treaty practice, their recent proliferation in investment treaties testifies to the importance that States are increasingly attaching to them. Indeed, the purpose of JICs is to control the interpretative process carried out by investment tribunals. Their effect is to facilitate an automatic prevalence of JIs in the interpretative process. Thus, contrary to subsequent agreements under the general rule of interpretation contained in Article 31(3)(a) of the 1969 Vienna Convention on the Law of Treaties (**VCLT**) – which do not "necessarily possess a conclusive effect" (see here, para 4 of the commentary to Conclusion 7) – JIs rendered under JICs are, in and of themselves, conclusive as to the meaning of the treaty. Indeed, when JICs are so formulated, tribunals are expressly required to consider JIs as decisive in the interpretative process, even where the interpretation interferes with ongoing proceedings.

Investment tribunals and legal scholars have approached the question of judicial review of alleged "pathological" JIs in various ways (for a survey see here and here). In my view, the most appropriate solution has been provided by the investment tribunal in *ADF Group*, where it

excluded the admissibility of a judicial power to control the limits of the interpretative powers of States. In the tribunal's opinion:

"[W]e have the Parties themselves—all the Parties—speaking to the Tribunal. No more authentic and authoritative source of instruction on what the Parties intended to convey in a particular provision of NAFTA, is possible".

Thus, States remain "masters" of their treaties and tribunals are not able to question whether they have overstepped the limitations on the interpretative powers provided by international law. As the tribunal made clear in *ADF Group*: "Nothing in NAFTA suggests that a Chapter 11 tribunal may determine for itself whether a document submitted to it as an interpretation by the Parties acting through the FTC is, in fact, an 'amendment'" (para 177).

This notwithstanding, the need to safeguard the position of non-State parties directly involved in the proceedings – the investors – has prompted scholars to insist on further alleged limitations on States' interpretative powers in investment arbitration. According to some authors, there is room to extend to investors the principle expressed in Article 37(2) VCLT. In light of this provision, a right that has arisen for a third State 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". Should the irrevocability of those rights be demonstrated, it would therefore be possible to identify limits on the freedom of States to interpret (*rectius* modify) and terminate treaties. However, a similar reading of Article 37(2) VCLT is based on an analogy between third States and investors, which seems to be misplaced (p. 128-129) when applied to investors and would set an excessive limit to States' power to make and unmake treaties "that goes far beyond the confines of jus cogens" (p. 216). In any event, it appears that, to date, apart from some isolated pronouncements (Magyar Farming v. Hungary, para 222), States and international judicial practice have not adopted this approach.

A further limitation would derive from a general principle according to which investors' legitimate expectations on the rights they "acquired" under the treaty deserve legal protection. Such legitimate expectations would impose, at least, that the authentic interpretation aimed at modifying the treaty (that is an *ultra vires* JI) cannot have retroactive effects. However, even though the doctrine of legitimate expectations has been frequently invoked and applied in investment arbitration, it is doubtful that investors can claim legitimate expectations when it comes to States' prerogatives, as masters of their treaties, to jointly modify (or even terminate) them.

In fact, even assuming the justiciability of reviewing JIs allegedly modifying the treaty, it is hard to accept that international law imposes limitations on States' interpretative powers with a view to protecting the substantive position of investors under the treaty.

Joint Interpretations and the Integrity of Arbitration

When an interpretation results in a (retroactive) amendment of the treaty that is supposedly binding on a tribunal in a pending case, the JI may be, in fact, disguising an amendment of the applicable treaty and, therefore, amount to an "abusive" interference. This question of "abusive" JIs may be particularly problematic when observed from the perspective of due process guarantees. As Schreuer (p. 148) has put it, "a mechanism whereby a party to a dispute is able to influence the outcome of judicial proceedings, by issuing official interpretation to the detriment of the other

party, is incompatible with principles of a fair procedure and is hence undesirable".

On the contrary, other scholars do not consider this as an obstacle for issuing binding interpretations pending an arbitral proceeding. It is said (p. 479-480) that the protection of investors' procedural position from political interferences in the proceedings should, at best, be deferred to the State of the investor's nationality.

In my view, even admitting that arbitrators may assess that an authentic interpretation actually modifies the treaty, it is highly questionable that a tribunal could review JIs in light of principles and values that do not have a cogent impact on States' interpretative or amending powers – for instance, those principles embodying due process (although in the EU context, where primary law includes the fundamental rights to an effective remedy, such issue has not gone unnoticed by the European Court of Justice (ECJ) with respect to the CETA's JIC: see here, paras 232-237).

Therefore, the alleged substantial and procedural limitations on States' interpretative powers of investment treaties, provided that they actually exist, simply cannot prevail over States' power to control their treaties.

That being said, in the circumstances where JIs patently amend rather than interpret the treaty – or indicate that their purpose is to unduly interfere with the outcome of a specific case – tribunals may be inclined to react by disregarding them. A joint interpretative action may be perceived by tribunals as an action *affecting their judicial nature*, to the extent that it affects aspects of the fundamental tenets of the judicial function, such as the independence of the tribunal and the principle of equality of parties. In such extreme cases, arbitral tribunals might invoke the "inherent limitations" to the judicial function. The concept, which has been developed by the International Court of Justice (p. 29), may be intended either as a limit preventing tribunals to exercise non-judicial functions and requiring tribunals to act consistently with their judicial nature. Such limitations may prompt tribunals to disregard "abusive" JIs in case they are perceived as seriously affecting the fundamental characters of any litigation process, and, ultimately, the integrity of arbitration.

In more general terms, the issues at stake show that the law of treaties, based on the idea the States are masters of their treaties, is not equipped to face cases of mutual treaty actions that adversely affect the position of individuals and tribunals involved in treaty proceedings. On the other hand, the need to preserve the integrity of the judicial function may provide a tool for arbitral tribunals to react against retroactive and patently "abusive" JIs. In such a scenario, a tension may arise between the law of treaties and the principles assisting the judicial function, in the context of which the beneficiaries of the treaties – i.e. the investors – are primarily affected. Such controversy may be intensified when it comes to States' mutual actions leading to the modification or termination of investment treaties. The 2020 Agreement for the Termination of all Intra-EU Bilateral Investment Treaties is one such example (see here and my take in *Rivista di diritto internazionale privato e processuale*, 4/2020, p. 843).

Conclusion

In answer to the general question raised in this post, in my view, the involvement of non-State entities in a treaty should not affect the capacity of State parties to jointly act as "masters of their treaties". However, although States may freely "manage" their treaties, even by retroactively

impinging upon the rights conferred within them, this may rightly sound controversial under a rule-of-law perspective and particularly for the integrity of arbitration (see here and here).

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This entry was posted on Saturday, March 5th, 2022 at 8:00 am and is filed under Arbitration, Arbitration Proceedings, BIT, International arbitration, Intra-EU BITs, Investment Arbitration, Joint Interpretation Clauses, NAFTA, Vienna Convention on the Law of Treaties
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