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Joint Decisions by State Parties: Fair Control of Tribunal Interpretations?

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Investment treaty provisions that allow joint decisions by States Parties to override or control arbitral tribunals' interpretations of investment treaty standards scarcely appear in international investment agreements. The recently released 2012 United States Model BIT is a rare example. The 2012 version carried over Article 30(3) of the 2004 United States Model BIT, enabling States to collectively issue their own interpretations of investment treaty provisions that would fully control and bind arbitral tribunals even in pending proceedings. Article 30(3) of the 2012 US Model BIT states:

> "3. A joint decision of the Parties, each acting through its representative designated for the purpose of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision."

The above provision has an identical counterpart in Article 30(3) of the 2005 United States-Uruguay BIT. It is, however, absent from the rest of the United States' current bilateral investment treaties.

Narrower versions of the above joint decision device exist in a few treaties. Article X(6) of the 2009 Canada-Czech Republic BIT provides that an interpretation of the treaty by the States concerned is "binding on a Tribunal established under this Article", without stating its effect on any tribunal decision or award. The 2007 India-Mexico BIT limits the joint interpretation of States Parties to the issue of expropriation, likewise without specifying the effect of the joint decision on the interpretations of arbitral tribunals. Article 29(2) of the 2007 India-Mexico BIT provides that both States "agree to consult each other on having a joint interpretation on Article 7 (Expropriation) in accordance with paragraph 2 of Article 18 of this Agreement at any time after the entry into force of this Agreement". Article 12 of the Ghana-Netherlands BIT merely entitles a State to consult with its counterpart on matters concerning treaty interpretation or application, with the counterpart State only obliged to "accord sympathetic consideration" and "afford adequate opportunity for such consultation."

A more similar iteration of the joint decision device in Article 30(3) of 2012 and 2004 US Model

BIT can be seen from Article 27 of Chapter 11 of the 2010 Association of Southeast Asian Nations (ASEAN)-Australia-New Zealand Free Trade Agreement (FTA). Article 27(3) of this Agreement provides that "a joint decision of the Parties, declaring their interpretation of a provision of this Agreement shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision." However, unlike the US Model BIT provisions on joint decisions, Article 27(2) of the ASEAN-Australia-New Zealand FTA enumerates three entities that can request a joint interpretation from Parties to the FTA: 1) the arbitral tribunal, acting on its own; 2) a State Party to the FTA who is also a party to a dispute; or 3) an investor who is a disputing Party according to the terms of the FTA. Opening the joint decision device to investor access is unique to the 2010 ASEAN-Australia-New Zealand FTA.

The joint decision devices in Article 30(3) of the 2012 US Model BIT and Article 27, Chapter 11 (Investment) of the 2010 ASEAN-Australia-New Zealand FTA are specifically issued to control particular interpretations in pending arbitral proceedings. Under these provisions, the arbitral tribunal have to completely defer to any interpretation jointly issued by the States parties to the treaty, regardless of the actual terms of the joint decision in relation to the treaty text, the relevant applicable law to the treaty, or States' own prior historical practices that evidence their understanding of the treaty standards subject of the joint decision. As such, these types of joint decisions by States are not mere "subsequent agreements" under Article 31(3)(a) of the Vienna Convention on the Law of Treaties (VLCT), which the arbitral tribunal could ordinarily consider together with treaty text and context in the process of interpretation. As designed, it would appear that the joint decisions by States in the 2012 US Model BIT and the 2010 ASEAN-Australia-New Zealand FTA do not leave any room for the tribunal to interpret the particular treaty provision subject of any joint decision. These joint decisions differ from the official general interpretations issued by institutions such as the North American Free Trade Agreement (NAFTA) Free Trade Commission (NAFTA FTC) under NAFTA Article 1131(2), or the World Trade Organization (WTO) Ministerial Conference and General Council under Article IX:2 of the WTO Agreement. The NAFTA FTC, and the WTO Ministerial Conference and General Council, do not issue interpretations that are specifically particularized to pending disputes. While the NAFTA FTC Note of Interpretation of 31 July 2001 was issued when there were multiple pending arbitrations, the terms of the Note simply clarified the substantive content of the "fair and equitable treatment" standard without regard to any specific dispute.

The broad form of joint decisions typified under the 2012 US Model BIT and the 2010 ASEAN-Australia-New Zealand FTA pose some intriguing issues of procedural and substantive fairness. In the first place, joint decisions introduce some uncertainty to the scope of applicable law to the arbitration. The joint decision specifically interpreting a treaty standard at issue in a particular dispute expands the applicable law governing that arbitration *ex post*, when respondent States are already midstream into the arbitration. However, there is nothing under the 2012 US Model BIT or the 2010 ASEAN-Australia-New Zealand FTA that requires joint decisions to conform with international legal standards. States are thus perfectly free to interpret a treaty standard *ex post* purely according to their own discretion, without being obligated to refer to, or consider, the treaty standard's independent normative existence and substantive content under international investment law, or to the rules of interpretation under VCLT Article 31. All that appears necessary is for States to mutually consent to an interpretation of the pre-existing investment treaty standard, in order to make this interpretation controlling over any other interpretation that could be issued by the arbitral tribunal in regard to the dispute before it. It is not clear if the joint decision under the 2012 US Model BIT and the 2010 ASEAN-Australia-New Zealand FTA will also apply to future disputes between the Parties involving the same treaty standard, or would only apply *pro hac vice*.

More importantly, joint decisions of this nature have the potential to wreak some havoc on the orderly conduct of arbitral proceedings, and undermine the presumed impartiality and independence of the arbitrators tasked to resolve the investor-State dispute. States who are not parties to the arbitral proceeding, but who are parties to the investment treaty, can directly intervene, control, and prevail over a tribunal's interpretation of treaty standards long after the treaty has been concluded and problematically, when a dispute is already underway. The form and content of the interpretation through the joint decision is of unlimited scope, and may thus effectively amend the original investment treaty without need of complying with rules for treaty amendment as stipulated in the investment treaty or in VCLT Articles 39-41 Arbitrators who are mandated to be independent and impartial would virtually have to rubber-stamp any interpretation issued by the States Parties to the treaties, regardless of the actual content of the interpretation or its consistency with international law. Neither is there any recourse or appeal against arbitrary joint decisions intended solely to influence or induce a particular outcome for a pending dispute. Absent any systemic or functionally centralized controls in place – such as those found within the respective institutional mandates of the NAFTA FTC, the WTO Ministerial Conference and General Council – to govern the States' joint decision process, disputing parties are constrained to rely on the good faith and judicious restraint of the States Parties issuing the joint decision.

While one can readily anticipate that the joint decision device would be a welcome mechanism for States seeking to recalibrate public policy spaces and investment protection in their existing investment treaties through subsequent interpretations of ambiguous treaty standards, as shown above the lack of safeguards in the broad formulations of the joint decision device in the 2012 US Model BIT and the 2010 ASEAN-Australia-New Zealand FTA could exacerbate the imbalance in ways prejudicial to the interests of all States Parties to the treaties. One way to ensure that the joint decision device would not be abused is to limit the mandate of the States Parties to issue the joint decision as a "subsequent agreement" that operates to clarify the terms of the treaty under VCLT Article 31(2)(a), without particularizing its application to any dispute. The joint decision would thus constitute a significantly persuasive and authoritative text for the independent consideration of an arbitral tribunal in a given dispute, while also contributing to the growing record of State practice and *opinio juris* on standards of protection in international investment law as a whole.

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