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Belt and Road Initiative: Joint Interpretation Mechanism in Investment Agreements

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In 2013, China proposed to jointly build the "Belt and Road" Initiative. While the international investment agreements ("IIAs") proposed to be concluded with China and its counterparties along the "Belt and Road" will provide a robust source of potential investor protections, they must be easily understood among investors, states, and international tribunals.

IIAs, as the products of compromise between or among states, will likely contain vague and ambiguous provisions. In order to limit tribunals' otherwise broad discretion over treaty interpretation and ensure the treaty texts best reflect the states' intent, states may choose to incorporate a binding joint interpretation mechanism into the treaty texts. Although the words describing the mechanism under different IIAs may differ, such mechanism typically entrusts an organ or the states themselves with the explicit power to issue binding interpretative statements on contentious provisions.

For the last decade, China has increasingly adopted a joint interpretation mechanism in the new generation of IIAs. Currently, at least six Chinese IIAs, namely the treaties concluded with Canada, Australia, Uzbekistan, Cuba, New Zealand, and Tanzania, have officially adopted the mechanism aiming to strike a better balance between the interpretative right between contracting states and tribunals.

However due to the insufficient practice in China on the issuance of joint interpretation statements in investment arbitration, China may rush into concluding IIAs containing template joint interpretation provisions with little consideration of the following factors:

1. Entrusting a Specific Organ with Authority to Issue Joint Interpretation

Among the above six IIAs stated above, only the China-Australia FTA[1)] has set up an organ, the Committee on Investment ("CI"), to be entrusted with the authority to issue a joint decision declaring its interpretation of a provision of the FTA pursuant to Article 9.7.3(b). The joint decision shall be binding on a tribunal of any ongoing or subsequent disputes. However, the other five Chinese IIAs containing joint interpretation provisions do not designate a specific organ to be responsible for issuing interpretative statements.

Reaching a common understanding on contentious provisions would be difficult because states might not always aware of how their IIAs practice aligns with that of other states, and may not know the issues of international investment law on which they agree or disagree.[2] In the absence of a prior designated organ to issue joint interpretation decisions, states tend to reach their joint decision only in the circumstances of potential acrimonious negotiations or arbitrations.[3]

In addition, if a tribunal requests China and its counterparties to reach a joint decision on contentious provisions, the states are bound to plan meetings or send visiting delegations. There can be heavy costs involved. Also IIAs normally provide a fixed period of time for states to issue joint decisions. This can vary from 60 days to 90 days. Even though the fixed period of time aims to ensure the efficiency of arbitral proceedings, it can be difficult in practice to spur states' bureaucracies into action to reach a joint statement within the time period.

Confronted with the above obstacles, it is important for China and its counterparties to designate an organ to be entrusted with the authority to issue joint interpretation statements in their upcoming IIAs. The designated organ should comprise senior government officials and investment law experts. The organ, with the assistance of academics and non-governmental organizations dealing with investment laws, should aim to "*compile evidence of which states have asserted similar legal arguments in arbitration hearings, identifying commonalities across states and groups of states which may form the basis for joint interpretative statements*."[4] Hence, through the assistance of the organ, a joint statement may be produced to guide the tribunal on the determination of the meaning to a contentious provision without delay.

2. Distinguishing the Nature of Joint Understanding on Contentious Provision

An interpretation statement clarifies the meaning of unclear provisions or what the norm has always been, so a true interpretation has retroactive effect in examining conduct of the state after IIA has entered into force. On the contrary, an amendment, as an agreed modification to the original IIA, creates new norms and thus has no retroactive effect to previous conduct of the state.[5]

In particular, when a joint interpretation statement is issued at the time when an investment case is pending, the nature of the joint statement may be disputed, namely whether the statement is a true interpretation or a disguised amendment of the IIA. This is so even if an IIA stated that a joint interpretation statement should bind tribunals of ongoing and subsequent cases as the previous practices of the NAFTA arbitrations show.

When the *Pope & Talbot Inc. v. Canada* ("Pope & Talbot") arbitration[6] was ongoing, the Free Trade Commission ("FTC") of the NAFTA, on July 31, 2001, jointly issued the Notes of Interpretation of Certain Chapter Provisions ("the Notes"),[7] aiming to present the three contracting states' joint understanding on the minimum standard of treatment of Article 1105.

Notwithstanding the Notes, the tribunal ruled that Article 1131 (1) of the NAFTA granted the tribunal the right to decide the issues in dispute in accordance with the NAFTA and applicable rules of international law. Therefore, the tribunal had a duty to consider and decide that question and not simply accept that whatever the FTC stated to be the true interpretation. In the final award, the tribunal held that the Notes were an amendment to the NAFTA, but did not analyse the binding effect of the Notes because it found that the conclusion reached in the partial award would stand even if the interpretation contained in the Notes was accepted.[8]

To take into consideration the possibility of tribunals following the Pope & Talbot ruling, China and its counterparties need to expressly clarify in the treaty that it is within the states' power to determine conclusively in the nature of a joint statement, the binding interpretation of a particular provision. The states also need to provide for the designated organ to have the power to debate and decide on the contents of the joint statement. When the organ holds that the joint statement aims to clarify the possible meanings that fall within the interpretative radius of a norm, both pending and subsequent tribunals should be strictly bound by the joint decision. On the contrary, if the understanding is in effect a modification to the treaty, the designated organ, on behalf of the contracting states, may decide the joint statement shall have binding effect from a specific date.

Such practice aims to serve two goals. Firstly, it will avoid a disguised amendment to have binding effect on tribunals of pending cases. In addition, a joint statement reflects the common understandings of all contracting states on any key issues which have not been addressed before or have been brought into public spotlight recently, so issuing the statement aims to regulate states' subsequent behaviours, which will contribute to the consistency of treaty interpretation by subsequent tribunals.

3. Protecting States' Legitimate and Non-discriminatory Public Welfare Regulation

As pointed out by an earlier blog, "Rebalancing the Asymmetric Nature of International Investment Agreements?", the last decade has witnessed the growing debate regarding one of the key asymmetric natures of IIA. It is claimed that IIAs impose a number of obligations on the states, but do not seem to hold investors accountable for the social, environmental and economic consequences of their investment activities.

Faced with the concern, one attempt to protect states' legitimate and non-discriminatory public welfare regulation from investor-state claims is to provide "an innovative feature that goes beyond existing safeguards for protecting the regulatory autonomy of states by providing a mechanism for joint treaty party control."[9] Such innovation has been incorporated into the China-Australia FTA.

Pursuant to Article 9.11.4 of the China-Australia FTA, a measure of a contracting state is non-discriminatory and for the legitimate public welfare objectives of public health, safety, the environment, public morals or public order shall not be the subject of a claim under the FTA. A respondent state, within 30 days of the date on which it receives a request for consultation made by an investor, should deliver the investor and the non-disputing state a "public welfare notice" clarifying that it considers a measure alleged to be in breach of an obligation set out in the FTA is of kind described as "Public Welfare". Upon receiving the notice, both states should carry out a negotiation in a timely manner. During the negotiation, the dispute resolution procedure will be automatically suspended. Any joint statement reached by China and Australia will have binding effect on the tribunal.

It is suggested that this feature be adopted by China in negotiating IIAs with its counterparties along the "Belt and Road". The innovative approach would serve as a strong safeguard for China and its counterparties to regain their control over regulatory autonomy in the future.

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References

?1 Adopted November 2014, entered into force 20 December 2015, accessed 20 Oct 2018.

?2 Geoffrey Gertz and Taylor St John, "State Interpretation of Investment Treaties: Feasible Strategies for Developing Countries" (2015) GEG & BSG Policy Brief, 4.

?3 Xinglong Yang, "Implementation of the Joint Interpretation Mechanism under the ASEAN Comprehensive Investment Agreement: Obstacles and Pragmatic Steps for the ASEAN" (2018) 11(1) Contemp. Asia. Arb. J, 130.

?4 Gertz (n 4) 5.

?5 Eleni Methymaki and Antonios Tzanakopoulos, "Master or Puppets? Reassertion of Control Through Joint Investment Treaty Interpretation" (2016) Oxford Studies Research Paper 10, 22.

?6 *Pope & Talbot Inc. v. Government of Canada* ("Pope & Talbot"), UNCITRAL (NAFTA), Award in Respect of Damages, accessed 15 October 2018.

?7 Adopted on 31 July 2001, accessed 20 Oct 2018.

?8 Pope & Talbot, para 47. (For the reasons, were the Tribunal required to make a determination whether the Commission's action is an interpretation or an amendment, it would choose the latter. However, for the reasons discussed below, this determination is not required. Accordingly, the Tribunal has proceeded on the basis that the Commission's action was an "interpretation"")

?9 Anthea Roberts and Richard Braddok, "Protecting Public Welfare Regulation through Joint Treaty Party Contorl: a ChAFTA Innovation." (REGNET, 24 June 2016), accessed 15 Oct 2018.

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