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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
INVESTMENT COMMITTEE****Cancels & replaces the same document of 21 March 2025****Approaches available under international law to transition from older to more recent designs in investment treaties – “subsequent agreements”: the role of interpretive statements****A scoping paper by the OECD Secretariat**

This note supported Track 2 discussions held on 12 March 2024. It considers interpretive statements (“subsequent agreements”) made in respect of existing treaties. It seeks to address interest expressed by delegations in earlier Track 2 meetings in better understanding how interpretive statements could be considered as a means for transition of investment treaties.

This note is made public to ensure transparency of government conversations under Track 2. Delegates had an opportunity to comment on this note before its public release. The note does not prejudge the outcomes of discussion under the Track 2 work programme.

The work on the Future of Investment Treaties is documented at <https://oe.cd/foit2>.

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Context and purpose of this note

1. Jurisdictions participating in Track 2 of the work programme on the *Future of Investment Treaties* are considering the merits and potentially means to transition¹ substantive clauses of investment treaties² with earlier designs to current approaches.
2. In 2023, Track 2 discussions began addressing how a transition of earlier-to-current designs could be achieved efficiently and for potentially large stocks of treaties. Among others, participants discussed the potential of treaty amendments and modifications in this endeavour.³ This note provides additional material for the consideration of practical means that allow interested governments to carry out a transition.⁴
3. The note focuses on interpretive statements made in respect of existing treaties and seeks to further the understanding of their potential as a means to transition substantive treaty clauses in the context of Track 2 work. Earlier expressions of subsequent agreements have included exchanges of diplomatic notes, among others. In recent years, interest in and use of such instruments has increased considerably, both in terms of the making of “ad hoc” interpretive statements,⁵ and in parallel, with respect to the inclusion of treaty provisions providing for “built-in” binding treaty interpretation, which sometimes also feature accompanying institutional arrangements.⁶
4. Interpretive statements are to be assessed and considered against the general rules on treaty interpretation and more specifically those laid out by the Vienna Convention on the Law of Treaties (1969) (VCLT) pertaining to “subsequent agreements”, outlined in section 1. This analysis, which considers the work of the International Law Commission

¹ The term “transition” is used as an umbrella term for any kind of intervention on an existing treaty.

² ‘Investment treaties’ are understood to include bilateral investment treaties (BITs), multilateral and plurilateral investment treaties, and investment chapters included in bilateral or plurilateral preferential trade agreements (PTAs).

³ Summaries of Discussion of the Track 2 meetings of 27 June 2023 and 7 November 2023, publicly available on the Future of Investment Treaties’ dedicated webpage <https://www.oecd.org/foit2>.

⁴ The FET clause was suggested as a test clause to spearhead this reflection with the expectation that the findings could be applied to other substantive provisions that governments may want to transition. See, “Directions for work under Track 2 of the programme on the Future of Investment Treaties”, OECD Secretariat note, 7 November 2023, publicly available at <https://oe.cd/Track2directions>.

⁵ Track 2 participants have in recent years entered into a number of joint interpretive agreements, e.g., the India-Bangladesh Joint Interpretive Agreement (2017), the [Colombia-India BIT \(2009\) – Joint Interpretative Declaration \(2018\)](#), the [Colombia-France BIT \(2014\) – Joint Interpretative Declaration \(2020\)](#), and the Colombia-Israel FTA – Joint Interpretative Declaration (2020).

⁶ Built-in binding treaty interpretation mechanisms were first featured in NAFTA (1994), and now feature in a number of treaties, including [CAFTA-DR \(2004\)](#), [Chile-Peru FTA \(2006\)](#), [ASEAN-India Investment Agreement \(2014\)](#), [CETA \(2016\)](#), [CPTPP \(2018\)](#), [USMCA \(2018\)](#), as well as in a number of model BITs, e.g. the [US Model BIT \(2012\)](#), [Canada’s Foreign Investment Promotion and Protection Agreement \(FIPA\) Model \(2021\)](#), and the [Netherlands’ Model BIT \(2018\)](#), among others.

(ILC) on treaty interpretation and subsequent agreement (ILC Conclusions)⁷ as well as academic literature, is preliminary and non-exhaustive, and is primarily concerned with addressing the question of interpretive statements in respect of treaties which do not feature built-in binding interpretation mechanisms that provide that parties may reach conclusive interpretation statements. Section 2 considers the use of and reliance on interpretive statements in investor-state dispute settlement (ISDS) on the basis of literature review. The review is exploratory and thus limited.

5. The note draws on and complements earlier work of the OECD-hosted investment policy community,⁸ and considers and refers to existing and published information and research on the topic considered.⁹ Additional commentary, legal practice – including the jurisprudence of international courts such as the ICJ – and literature not considered in this note may impact, adjust, or otherwise refine the preliminary analysis put forward in this note.

6. Issues for consideration for the Track 2 meeting of 12 March 2024 and key take-aways precede these sections.

⁷ While the work and conclusions of the ILC on this topic – among others – carry a considerable degree of authority, it is not legally binding. The ILC identified at its 60th session in 2008 the topic of “Treaties in time” (later re-titled “Subsequent agreements and subsequent practice in relation to the interpretation of treaties”) for inclusion in its programme of work. The Special Rapporteur, Georg Nolte, issued a first report in March 2013, outlining an initial five draft conclusions. The work concluded in 2018 at the 70th session of the ILC, with the Special Rapporteur’s submission before the ILC of a fifth report setting forth 13 draft conclusions. The ILC adopted these [draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties](#) and their [commentaries](#). Upon recommendation of the ILC (see, Report of the International Law Commission on the work of its seventieth session (30 April-1 June and 2 July-10 August 2018, Yearbook... 2018), the UN General Assembly took note of the 13 draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties ([General Assembly resolution 73/202, Subsequent agreements and subsequent practice in relation to the interpretation of treaties, A/RES/73/202, 3 January 2019](#)). Unless indicated otherwise, only the final ILC Conclusions have been considered in the elaboration of this note.

⁸ Gaukrodger, D. (2016), “The legal framework applicable to joint interpretive agreements of investment treaties”, OECD Working Papers on International Investment, No. 2016/01, OECD Publishing, Paris, <https://doi.org/10.1787/5jm3xgt6f29w-en>; Gordon, K. and J. Pohl (2015), “Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World”, OECD Working Papers on International Investment, 2015/02, OECD Publishing, <https://doi.org/10.1787/5js7rhd8sq7h-en>.

⁹ The work carried out by UNCITRAL Working Group III addressing the question of treaty interpretation in the context of potential ISDS reform options should also be considered; see in that regard, UNCITRAL Working Group III, “Possible reform of investor-State dispute settlement (ISDS) – Interpretation of investment treaties by treaty Parties – Note by the Secretariat”, [A/CN.9/WG.III/WP.191](#).

Issues for consideration

7. **General considerations**
 - Do jurisdictions participating in Track 2 view interpretive statements as a useful tool for the purposes of transitioning earlier-to-current designs and treaties?
 - What elements and criteria have jurisdictions participating in Track 2 considered when elaborating and agreeing upon joint interpretative declarations or statements?
 - Given some degree of uncertainty as to their conclusive effect, are interpretive instruments effective to transition earlier-to-current treaties and designs?
 - What elements other than those highlighted in the note appear useful in enhancing the persuasiveness of subsequent agreements?
 - Do interpretive statements require similar or different procedures as treaty amendments under your jurisdiction’s domestic law?
 - What are the applicable procedures to issuing and publishing interpretive instruments in your jurisdiction?
8. **Practical opportunities**
 - Could “bare” FET clauses – those that solely refer to “fair and equitable treatment” without any further specification – likely be transitioned towards either one of the two newer and current approaches (i.e., FET associated with and limited to MST under CIL, or a closed-list FET provision) by way of an interpretation, or would such a transition amount to a treaty amendment or modification?
 - Could other types of FET clauses be transitioned towards either one of the two newer and current approaches by way of an interpretation, or would such a transition amount to a treaty amendment or modification?
9. **Other considerations**
 - Would a plurilateral interpretive statement be more persuasive due to the weight of numbers than bilateral interpretations of individual treaties?¹⁰
 - What effect, if any, does a plurilateral interpretation have on treaties in which only one party has agreed to the interpretation (e.g., because the partner jurisdiction not participate in Track 2 or has not formally joined the interpretation)?

¹⁰ See in that regard, *op cit.*, Gordon and Pohl, the “exit” and “voice” strategies and incentives for “voices” to be heard to avoid “exit” scenarios; see also, *op cit.* Gaukrodger, p. 14, “Commentators have also suggested that, as a practical matter, arbitrators’ incentives and the balance between exit and voice may also be relevant to the likely impact of agreed government input into interpretation. Roundtable discussions have identified a possible economic incentive for arbitrators to preserve ISDS. It has been suggested that this interest may be a factor in their degree of openness to agreed government input into interpretation.” (internal footnotes omitted).

Key take-aways

10. This note outlines the requirements and effect of interpretive statements for a potential transition of substantive clauses of investment treaties.
11. Subsequent agreements such as interpretive statements are made at any point in time *after* the conclusion of a given treaty, even if the treaty is not in force. They **require**:
- An agreement between *all parties* to an existing treaty;
 - Deliberate *agreement* between the treaty parties, that is, the “common understanding by the parties regarding the interpretation of a treaty”, of which the parties are aware and that they accept; and
 - A *specific intent* regarding the interpretation of a given treaty or the application of its provisions; this interpretation may either reflect a retrospective understanding at the time of conclusion of the treaty, or a contemporaneous interpretation that emerged after the conclusion of a given treaty.
12. Interpretive statements produce the following **effects**:
- They contribute to the clarification of the ordinary meaning of a treaty;
 - In the absence of specific agreement, their effect is retroactive and reaches back to the entry into force of the treaty (in contrast with treaty amendments, which change the meaning of the original text in a prospective manner); this rule may nevertheless be deviated from by State Parties; and
 - They are binding in that they must be taken into account in the interpretive process; different views exist as to whether they are necessarily conclusive in effect.
13. Interpretive statements in relation to a treaty which do not satisfy the constitutive requirements set out by its governing framework for subsequent agreements under the VCLT – e.g., a unilateral interpretive statement by a party to a bilateral investment treaty, or a joint interpretation by several but not all parties to a multilateral treaty – would not be deemed a subsequent agreement, and thus not hold the same interpretive weight and authority under the VCLT. They may still be considered as other means of interpretation:
- As “subsequent practice” under Article 31(3)(b) of the VCLT; or alternatively
 - As a “supplementary means of interpretation” under Article 32 VCLT if for example such practice does not establish the agreement to all parties to a treaty. These hold a lesser degree of authoritative value in the interpretive process: recourse to a means of supplementary interpretation is not mandatory, but could be relied on when the “ordinary meaning” of text is left unclear.
14. An exploratory and limited consideration of interpretive statements in investment arbitral practice suggests a degree of remaining uncertainty as to how interpretive statements achieve states’ objectives. Such uncertainty arises among others from considerations on the extent to which a statement is interpretive rather than amending or modifying, and the need for a correct assessment by treaty-users of interpretive statements and their interpretive weight in the light of the legal framework for subsequent agreements. The effect of subsequent agreements on third parties such as investors covered by a given treaty could also be considered in examining the weight and persuasiveness of an interpretive statement.

1. International legal framework relating to the interpretation of treaties

15. Treaty interpretation by tribunals relies on rules provided for within a given treaty, and also on general treaty interpretation rules provided for in the VCLT. Indeed, treaties “are not just dry parchments” – rather, they can “change over time, and must adapt to new situations, evolve according to the social needs of the international community and can, sometimes, fall into obsolescence”.¹¹ This section considers the legal framework relating to treaty interpretation and more specifically treaty interpretive statements as “subsequent agreements” pursuant to the VCLT. The doctrinal debate as to what distinguishes an treaty interpretation from a treaty amendment is a complex one and is addressed only succinctly in this note.

16. The VCLT, as confirmed by the ILC’s work on subsequent agreements and subsequent practice, recognises and confirms that the common will of treaty parties holds a specific authority when identifying the meaning of a given treaty, even so after the conclusion of a treaty. As per the VCLT and its provisions on the *General rule and means of interpretation*, investment treaties are to be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.¹²

17. The VCLT identifies subsequent agreements, together with other elements laid down under Article 31 VCLT, as one of the means available to interpret the ordinary meaning of treaty text.¹³ Such means, as per the VCLT, “shall be taken into account” for the purposes of treaty interpretation. The means of interpretation set out in Article 31 VCLT are to be read and applied in a “single combined operation”, in no particular hierarchy.¹⁴ As per the ILC Conclusions, subsequent agreements are an authentic means of interpretation and are “objective evidence of the understanding of the parties as to the meaning of the treaty”, thereby underscoring the important role which States play in the interpretation of their treaties.¹⁵

¹¹ Report of the International Law Commission, UNGAOR, 60th session, Supp No 10, UN Doc A/63/10 (2008), Annex A (Treaties over time in particular: Subsequent Agreement and Practice), paragraph 1.

¹² Article 31(1) VCLT.

¹³ Article 31 VCLT. Article 31(3) specifically also identifies “subsequent practice” and “relevant rules of international law”, which are not considered for the purposes of the present note. While the ILC Conclusions do at times define, pertain to or relate to both subsequent agreements and subsequent practice *together*, will only be addressed, for the purposes of this note, definitions and clarifications insofar as they pertain to subsequent agreements. See in that regard, Ascensio H. (2016), “Article 31 of the Vienna Convention on the Law of Treaties and International Investment Law”, ICSID Review – Foreign Investment Law Journal, Volume 31, Issue 2, Spring 2016, pp.366-387, <https://doi.org/10.1093/icsidreview/siw008>, who notes that “... Article 31(3)(a) and (b) [are] not meant to prevail over all other elements of the same article but, rather, [must] be ‘taken into account’ and, thus, should not contradict the ordinary meaning, context, object and purpose of the Treaty”.

¹⁴ VCLT commentary 1966, Article 28, paragraph (8).

¹⁵ ILC Conclusion 3, commentary paragraphs (3) *et seq.*

18. The language of VCLT Article 31(3)(a) provides that subsequent agreements are made *between the parties* of a given treaty, are *subsequent* to a treaty – as early as a treaty’s conclusion, rather than entry into force¹⁶ – and concern the *interpretation* of the said treaty or the *application of its provisions*.

19. **Requirements.**¹⁷ The ILC Conclusions confirm that subsequent agreements do not need to meet specific formality requirements, noting that subsequent agreements “may take a variety of forms” and not necessarily the same as those of the treaty being interpreted.¹⁸ Nevertheless, the ILC Conclusions shed light on a number of elements which may guide treaty-users in the treaty interpretation process.

- **Parties.** The VCLT provides that a subsequent agreement must be made “between the parties”, which the ILC Conclusions have confirmed as referring to an agreement reached between *all* parties to a treaty.¹⁹ A unilateral interpretation of a bilateral treaty or a multilateral interpretation of a multilateral treaty which does not reflect the agreement of all parties to that treaty, for example, would fail to meet the requirements of a subsequent agreement.
- **No formal requirements, but nevertheless a common understanding.** An interpretive statement in the form of a subsequent agreement requires that the parties to a given treaty reach such “agreement”. This term has been defined by the ILC Conclusions as a “common understanding by the parties regarding the interpretation of a treaty” and a “deliberate common act or undertaking by [all] the parties”, which presupposes that “the parties must be aware of it and accept the interpretation contained therein”.²⁰ Conflicting positions regarding the interpretation of a treaty therefore preclude the existence of a subsequent agreement.²¹ Further, the expression of a “common” understanding may be reached individually, or via a “mutual awareness of a shared understanding”.²²
- **Intent.** The ILC Conclusions underline that parties to a given subsequent agreement must have “taken a position regarding the interpretation of the treaty” or the application of its provisions specifically, and must “intend, possibly among

¹⁶ Article 10 VCLT; ILC Conclusion 4, commentary paragraph (2).

¹⁷ Additional requirements, pertaining among others to a person’s capacity to represent a state for the purposes of a subsequent agreement are not considered in the present note.

¹⁸ ILC Conclusion 6(2). See also, *op cit.*, Gaukrodger, p. 7, citing Mustafa Yasseen, *L’interprétation des traités d’après la Convention de Vienne*, 151 Recueil des Cours 1, 45 (1976 III).

¹⁹ ILC Conclusion 4(1), commentary paragraph (4).

²⁰ ILC Conclusion 10, commentary paragraphs (1) *et seq.*; see also, ILC Conclusion 4(1), commentary paragraphs (5), (10) *et seq.*; ILC Conclusion 6(2), paragraph (22).

²¹ ILC Conclusion 10, commentary paragraph (4) nuances different applications from conflicting interpretations, noting that “... agreement is only absent to the extent that the positions of the parties conflict and for as long as their positions conflict. The fact that parties apply a treaty differently does not, as such, permit a conclusion that there are conflicting positions regarding the interpretation of the treaty. Such a difference may indicate a disagreement over the one correct interpretation, but it may also simply reflect a common understanding that the treaty permits a certain scope for the exercise of discretion in its application.”

²² ILC Conclusion 10, commentary paragraphs (8) *et seq.*

other aims, to clarify the meaning of a treaty or how it is to be applied”.²³ An explicit reference linking the subsequent agreement to the concerned treaty may determine such intent.²⁴ Further, the ILC Conclusions note that subsequent agreements can support both a contemporaneous as well as an evolutive treaty interpretation, and in particular, “may assist in determining whether or not” an evolutive interpretation is appropriate with regard to a particular treaty term. Based on its assessment of the practice and jurisprudence of international courts and tribunals, a contemporaneous approach was principally applied in interpreting specific treaty terms, whereas a more evolutionary interpretation has related to more general terms.²⁵

20. If a subsequent agreement does not satisfy the standards set out by its governing framework, it may nevertheless still be considered – depending on the circumstances – as a subsequent practice, or as a *supplementary means of interpretation* (e.g., subsequent practice that does not establish the agreement to all parties to a treaty).²⁶ Supplementary means of interpretations may be used to confirm a meaning resulting from an application of Article 31 VCLT, or to determine the meaning when an interpretation according to Article 31 leaves the meaning ambiguous or is manifestly absurd. Recourse to means of supplementary interpretation is nevertheless not mandatory, in contrast to recourse to general rules of interpretation pertaining to the ordinary meaning of treaty text.

21. **Effect on treaty parties.** Subsequent agreements are as per the VCLT binding to the extent that they “shall be taken into account” in the interpretation of the ordinary meaning of treaty text. The ILC Conclusions notes that even if they are not “in themselves legally binding”, they can be conclusive as part the interpretation process pursuant to Article 31.²⁷ The ILC Conclusions provide some guidance to treaty-makers for the determination of such agreements’ interpretive weight and persuasiveness.

- **Outcome.** The ILC conclusions notes that subsequent agreements contribute, together with other means of interpretation, to the clarification of the ordinary meaning of a treaty, and that this process may result in “narrowing, widening, or

²³ ILC Conclusion 6 and commentary. The ILC’s commentary explores at length what factors and considerations should and could be considered when making such a determination.

²⁴ ILC Conclusion 4(1), commentary paragraphs (13) *et seq.* In that regard, the ILC Conclusions provide that “Whether an agreement is one “regarding” the interpretation or application of a treaty can sometimes be determined by some reference that links the “subsequent agreement” to the treaty concerned. Such a reference may be explicit, but may also be comprised in a later treaty”, ILC Conclusion 4(1), commentary paragraph (14) (internal footnotes omitted).

²⁵ ILC Conclusion 8, commentary paragraphs (4), (18) *et seq.* In that regard, the ILC has also found that “[t]he jurisprudence of international courts and tribunals and pronouncements of expert treaty bodies thus confirm that subsequent agreements and subsequent practice under articles 31 and 32 “may assist in determining” whether or not a “term” shall be given “a meaning which is capable of evolving over time””. See also, ILC Conclusion 3, commentary paragraph (3). *Op cit.* Gaukrodger, p. 10, has noted in that regard that some ISDS tribunals have suggested that subsequent agreement are only relevant in addressing treaty parties’ *original* intent.

²⁶ Article 32 VCLT.

²⁷ ILC Conclusion 10, commentary paragraph (11); see also, *op cit.* Gaukrodger, p. 9; see also, Alcolea, L. C. (2023), “States as Masters of (Investment) Treaties: The Rise of Joint Interpretive Instruments, Chinese Journal of International Law, Volume 22, Issue 3, September 2023, p. 485 *et seq*

otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties”.²⁸

- **Retroactive.** Subsequent agreements are retroactive, their effect reaching back to the entry into force of the treaty text – in contrast with treaty amendments, which change the meaning of the original text in a prospective manner.²⁹ State parties may nevertheless deviate from this rule and confer a proactive effect only to their interpretive statement.³⁰
- **Binding and/or conclusive?** The question of whether or not subsequent agreements carry a binding and conclusive effect has generated considerable debate.³¹ Earlier ILC commentary on the draft VCLT provided that Article 31 means of interpretation – including subsequent agreements – were “all of an obligatory character and by their very nature could not be considered to be norms of interpretation in any way inferior to those which precede them”.³² The ILC Conclusions maintain that subsequent agreements are an authentic means of interpretation to take into account in the interpretive process, together with other means of interpretation such as the object and purpose of a treaty. They provide however that such agreements do not carry a “necessarily... conclusive effect”,³³ and must be used together with other means of interpretation available under Article 31 VCLT rather than “override” them. The ILC highlighted notwithstanding, that this “does not exclude that the parties to a treaty, if they wish, may reach a binding agreement regarding the interpretation of a treaty”, i.e., when they consider such agreement binding, citing NAFTA’s Article 1131.³⁴

²⁸ ILC Conclusion 7(1) and commentary paragraphs (2) *et seq.*

²⁹ Article 28 VCLT. See also, *op cit.*, Gaukrodger, pp. 8-9, citing Mustafa Yasseen, *L’interprétation des traités d’après la Convention de Vienne*, 151 *Recueil des Cours* 1, 45 (1976 III).

³⁰ See e.g., [Netherlands’ Model BIT](#) (2018), which provides that a joint interpretive declaration adopted by way of the treaty’s built-in interpretation mechanism “is not applicable in cases where the Tribunal was already established” as per the terms of the treaty.

³¹ See e.g., *op cit.* Gaukrodger, p. 9; see also, *op cit.* Alcolea, pp. 485-492, who notes *inter alia* that “Given that the entire purpose of many joint interpretations of investment treaties, i.e. to ensure that investment tribunals interpret their text in the way that the State parties intend them to, would be frustrated if they were not binding, and that their binding nature is often explicitly spelled out, it is safe to say that there are few situations in which an investment tribunal correctly applying the VCLT could justifiably ignore or refuse to apply a joint interpretation of an IIA”, p. 492; see also, Marotti L. (2020), “The proliferation of joint interpretation clauses in new international investment agreements: a mixed blessing?”, *ICSID Review*, Vol. 35, No. 1-2 (2020), <https://doi.org/10.1093/icsidreview/siaa001>.

³² Yearbook of the International Law Commission Vol. II 1966. Draft Articles on the Law of Treaties with Commentaries, [1966] 2 *Y.B. Int’l L. Comm’n* 187, U.N. Doc. A/CN.4/SER. A/1966/Add. 1, paragraph 220.

³³ ILC Conclusion 3 and commentary paragraphs (1) *et seq.* In that regard, the ILC has noted that “... when the Commission has characterised a “subsequent agreement” as representing an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation”, it did not go quite as far as saying that such an interpretation is necessarily conclusive in the sense that it overrides all other means of interpretation.” (internal footnotes omitted) (ILC Conclusion 3 commentary, paragraph (4)).

³⁴ ILC Conclusion 3, commentary paragraphs (5)-(6) *et seq.*

- **Some criteria that may be helpful in determining their interpretative weight.** The ILC Conclusions identify some criteria which may positively impact the “interpretive weight” to be accorded to a given subsequent agreement. These include but are not limited to a given agreement’s clarity and specificity, and the emphasis given by parties to a particular subsequent agreement, for example.³⁵

22. **Effects on covered investors.** The VCLT and the ILC Conclusions do not directly address the effect of subsequent agreements on the rights of investors. The potential effect interpretive statements may have on third party rights such as those of covered investors in the context of ISDS could nevertheless be considered when assessing the use of subsequent agreements. Legal commentary has laid out a number of reflexions on this matter, including in relation to the reasonableness and the timing of an interpretive statement vis-à-vis an investment, an alleged breach, and the filing of a claim.³⁶ Commentators have considered doctrines which could in certain instances protect investors’ reliance or expectations on a treaty from an agreed interpretation.³⁷ Others have noted that it would, under existing legal theories and doctrines, be “hard to accept that international law imposes further limitations on States’ interpretative powers whose objective is to protect the substantive position of investors under the treaty”.³⁸

³⁵ ILC Conclusion 9, commentary paragraph (2).

³⁶ Op cit., Gaukrodger, pp. 11-13, citing Roberts, A. (2010), “Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States”, *American Journal of International Law*, Vol. 104, pp. 207-215, who has outlined a framework for analysis of treaty interpretations and the degree to which covered investors should or could be protected from their effects. See also, Johnson L, Razbaeva M., “State Control over Interpretation of Investment Treaties” (2014), https://scholarship.law.columbia.edu/sustainable_investment_staffpubs/89.

³⁷ Op cit., Gaukrodger, pp. 11-13.

³⁸ Op cit., Marotti, pp. 77-78; see also, op cit., Alcolea, p. 500. See also in this regard, op cit. Johnson, Razbaeva, p. 17, citing Nolte G. (2013), “Jurisprudence under special regimes relating to subsequent agreements and subsequent practice,” in Georg Nolte, ed., *Treaties and Subsequent Practice* (Oxford, United Kingdom: Oxford University Press, 2013), p. 237, “The comparatively limited use of subsequent agreements and subsequent practice by ICSID tribunals as means of treaty interpretation or modification has been criticized. The point has been made that the reluctance of the tribunals may be due to the consideration that a wider use of subsequent practice would give states an inappropriate possibility to retroactively affect and diminish the rights of private investors. This consideration would, however, underestimate the role of states as masters of the treaty and law-givers. The jurisprudence of the European Court of Human Rights indeed demonstrates that an international court can guarantee fundamental rights and at the same time amply take subsequent practice of the parties into account as a pragmatic orientation for where to draw the line between rights and possible limitations. In addition, taking subsequent agreements and subsequent practice more into account can provide an avenue for tribunals to engage in a dialogue with states and among each other with a view to better harmonize their own body of jurisprudence, and thus to compensate somewhat for the lack of a common appeals procedure”.

2. The use of interpretive statements in investment arbitral practice: preliminary elements for consideration

23. A brief and non-exhaustive consideration of investment arbitral practice as to the use of and reliance on interpretive statements – both in the presence of and absent express built-in mechanisms for binding treaty interpretations – brings to light a number of issues that Track 2 participants may wish to consider when reflecting on the tools for transitioning their stocks of early generation treaties. This consideration is merely exploratory, the objective being to define issues relevant to Track 2 participants interested in transitioning their earlier generation treaties by way of (an) interpretive statement(s).³⁹

24. The “border” separating subsequent agreements which interpret treaty text, and treaty amendments could raise issues for treaty-makers and treaty-users. A possible definition of treaty interpretations refers to “the determination of a range of possible meanings... that fall within the interpretative radius of a norm”, in contrast to amendments, which would “consist in determining that the meaning of a norm is one that would not fit within the range of possible meanings, thereby essentially modifying the interpretative radius, that is, modifying the norm”.⁴⁰ States as treaty-makers may thus interpret their treaties up to the limit of what would amount to a treaty amendment, and so an “unreasonable interpretation” could for example amount to a treaty amendment.⁴¹

25. The ILC Conclusions note in that regard that there is a presumption that treaty parties intend, by way of a subsequent agreement, to “interpret the treaty, not to amend or to modify it”, while acknowledging the inherent difficulty in distinguishing binding and conclusive subsequent agreements made under a “specific treaty provision that attributes binding force” to it, “simple” subsequent agreements which are binding but not per se conclusive, and amendments or modifications of treaties.⁴² The ILC Conclusions highlight that “States and international courts are generally prepared to accord parties a rather wide scope for the interpretation of a treaty by way of a subsequent agreement. This scope may even go beyond the ordinary meaning of the terms of the treaty. An agreement to modify a treaty is thus not excluded, but also not to be presumed.”⁴³

³⁹ See *op cit.* Gaukrodger, which addressed the legal framework application to joint interpretations agreements in relation to investment treaties and laid out a number of general criteria to consider in respect of the persuasiveness of non-binding interpretations, drawn from domestic administrative law. These include factors such as the reasonable of the interpretation, its clarity, and the quality of the process by which an interpretation is generated.

⁴⁰ *Op cit.*, Marotti p. 72, citing Methymaki E. and Tzanakopoulos A. (2016), “Master of Puppets? Reassertion of control through joint investment treaty interpretations”. In: Kulick A, ed. “Reassertion of control over the investment treaty regime”, Cambridge University Press. Views on what amounts to a treaty interpretation and what would constitute a treaty amendment diverge considerably; see in that regard, *op cit.*, Johnson, Razbaeva, pp. 17-18; Ascensio H. (2016), “Article 31 of the Vienna Convention on the Law of Treaties and International Investment Law”, *ICSID Review – Foreign Investment Law Journal*, Volume 31, Issue 2, Spring 2016, pp. 366-387, <https://doi.org/10.1093/icsidreview/siw008>, pp. 377-78.

⁴¹ See, *op cit.*, Marotti, p. 72; see also, *op cit.*, Gaukrodger, p. 13.

⁴² ILC Conclusion 7(3), commentary paragraphs (21)-(24).

⁴³ ILC Conclusion 7, commentary paragraph (24) (internal footnotes omitted).

26. Some NAFTA tribunals have considered the question of whether an interpretative instrument constituted a treaty interpretation or amounted to an amendment, especially in the context of claims pending at the time the Free Trade Commission's Notes on Interpretation of 2001 (Notes) was issued.⁴⁴ The Tribunal in *Pope & Talbot Inc v Canada* had to consider the Notes (which inter alia clarified that NAFTA's FET standard did not require a treatment additional or beyond that required under customary international law's minimum standard of treatment) after its finding on the merits, during the damages phase of the proceedings. It noted that it would not need to rule on the status of the interpretation – which it nevertheless stated it viewed to be an amendment – on the basis that a re-examination of its merits award against the Notes led to the same finding.⁴⁵ In contrast, the tribunal in *ADF Group Inc v United States of America*, in respect of the same Notes, held that “we 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”. It also noted that NAFTA tribunals were not empowered with making any determinations on the status of a statement and on whether it should amount to an interpretation or an amendment.⁴⁶

27. Literature has also shed light on the different ways in which arbitral tribunals have addressed the “Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection” (Achmea Declaration) and related statements in recent practice.⁴⁷ In different sets of proceedings, a number of arbitral tribunals held that neither the Achmea Declaration nor related statements by state parties to treaties could be deemed subsequent agreements pursuant to the VCLT, on various grounds, including that the Declaration did not specifically pertain to a given treaty's interpretation or that the statement was an “extrinsic” element that could not be used to “rewrite the ordinary meaning of the treaty”. Other tribunals, while considering the Declaration, seem to have given precedence to other elements and means of interpretation under Article 31 or 32 VCLT.⁴⁸ Further, and as noted by a commentator referring to intra-

⁴⁴ North American Free Trade Agreement, Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA Free Trade Commission, 31 July 2001, [SICE: TPD: NAFTA \(oas.org\)](https://www.oas.org/nafta/ftc/notes.asp).

⁴⁵ See, op cit., Gordon and Pohl, p. 28, citing Roberts, A. (2010), “Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States”, *American Journal of International Law*, Vol. 104, p. 180; see also, op cit., Marotti, pp. 74-75; see also op cit. Alcolea, pp. 495-497, considering *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award in Respect of Damages (31 May 2022); see also, Dumberry P. (2013), “The Emergence of Consistent Case Law: How NAFTA Tribunals have Interpreted the Fair and Equitable Treatment Standard”, *Kluwer Arbitration Blog*, accessible at: <https://arbitrationblog.kluwerarbitration.com/2013/10/30/the-emergence-of-a-consistent-case-law-how-nafta-tribunals-have-interpreted-the-fair-and-equitable-treatment-standard/>.

⁴⁶ See, op cit., Gordon and Pohl, p. 28, citing Roberts, A. (2010), “Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States”, *American Journal of International Law*, Vol. 104, p. 180; see also, op cit., Marotti, p.75, considering *ADF Group Inc. v. United States of America*, ICSID Case No.ARB (AF)/00/1, Award (9 January 2003).

⁴⁷ See, [Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection - European Commission \(europa.eu\)](https://ec.europa.eu/europe-press/declaration-15-january-2019-legal-consequences-achmea-judgment-and-investment-protection). This note does not take a position as to whether the Achmea Declaration and related states' statements constitute or not subsequent agreements pursuant to Article 31 VCLT. Rather, it relies on the position of respondent states in a series of arbitral proceedings that such statements do.

⁴⁸ See, op cit. Alcolea, analysis pertaining to “Joint interpretative statements in the context of Intra-EU investment arbitration”, which discusses a number but not all intra-EU ISDS awards,

EU investment practice in particular, “in general, tribunals often either do not reference the correct article of the VCLT when interpreting such statements, consider joint interpretative statements as merely confirmatory, à la Article 32 VCLT, or fail to reference relevant authorities and commentaries on the VCLT”.⁴⁹

28. Echoing the ILC Conclusions, literature has, in considering interpretive statements in the context of ISDS practice, contrasted interpretations based on built-in mechanisms for binding treaty interpretations from those that are entered into “ad hoc” by states, while also highlighting that an explicit statement that such statements are binding, that they are made by reference to Article 31(3)(a) VCLT, and even indicate their retroactive and/or prospective effect, may help ensuring that they are given effect to and applied.⁵⁰

including *PNB Banka v Latvia*, *Adamakopoulous v Cyprus**, *Strabag v Poland*, *Ekosol v Italy*, and *ESPF v Italy*, pp. 510-519.

* Note by the Republic of Türkiye

The information in this document with reference to “Cyprus” relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Türkiye recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of the United Nations, Türkiye shall preserve its position concerning the “Cyprus issue”.

Note by all the European Union Member States of the OECD and the European Union

The Republic of Cyprus is recognised by all members of the United Nations with the exception of Türkiye. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.

⁴⁹ Op cit. Alcolea, p. 526; see also, Kułaga Ł. and Turnbull K. (2024), “Conflict of Treaty Norms and Subsequent Agreements in Relation to the Interpretation of Treaties in International Investment Law”, in P. Merkouris et al. (eds.) *Custom and its Interpretation in International Investment Law*. Cambridge: Cambridge University Press (The Rules of Interpretation of Customary International Law), pp. 229-230.

⁵⁰ Op cit. Alcolea, p. 526; see also, op cit. Marotti for a discussion on built-in treaty interpretation mechanisms or “joint interpretation clauses” against the backdrop of subsequent agreements under Article 31(3)(a) VCLT and the distinction between “binding” and “conclusive” effect. The author’s position is that “[e]ven though from a formal point of view [joint interpretation clauses] are ‘subsequent agreements’ in the (rather broad) sense of article 31(3)(a) VCLT, they are substantially different from the point of view of the impact on the interpretative process. Article 31(a)(3) agreements *can* be conclusive (when the parties so decide), but in principle they are not necessarily so. In contrast, [joint interpretation clauses] must be conclusive as to the interpretation of the treaty, because the parties expressly have provided that they are decisive in the interpretative process”, p. 68.

Annex A. Extract from the VCLT

Article 31 General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any statement which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as a statement related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

Source: Vienna Convention on the Law of Treaties (1969).

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