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Reassertion of Control through Binding Joint Interpretation in International Investment Agreements: Recent Developments and Suggestions for China

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Abstract

Recent practice has shown that in cases of ambiguity or lacunae in international investment agreements (IIAs), arbitral tribunals have always come to divergent interpretations of identically or similarly worded treaty obligations. To limit tribunals' broad discretion over treaty interpretation and ensure that the treaty texts best reflect the intent of contracting states, a growing number of states have attempted to use the joint interpretation mechanism as an innovative solution to exercise their control over IIAs. The awareness of using the joint interpretation mechanism to address concerns regarding what it considers to be adverse interpretations by investment arbitration tribunals has been gradually formed in China for the last several years. Due to insufficient practice of the Chinese government regarding the use of the mechanism in investment arbitration, this article points out that China may rush into concluding IIAs containing template joint interpretation provisions with little consideration to controversial issues associated with implementation of the mechanism in arbitration. Subsequently, the article raises relevant factors to be taken into account by China and its counterparties along the "Belt and Road" while incorporating the mechanism into their upcoming IIAs.

Keywords: *Belt and Road Initiative, joint interpretation mechanism, investment arbitration, public welfare, regulatory autonomy, VCLT*

1. Introduction

International investment agreements (which include bilateral investment treaties and free trade agreements with investment chapters) (IIAs), as the products of compromise between or among sovereign states, inevitably contain

vague and ambiguous provisions (Methymaki and Tzanakopoulos, 2016: 6). In the determination of the true meaning to contentious IIA provisions, Article 31(3) of the Vienna Convention on the Law of Treaties (VCLT) explicitly requires tribunals to take into account any subsequent agreements or subsequent practices (subsequent agreements) reached by all contracting states after the date of conclusion of the IIA as authentic means of treaty interpretation (International Law Commission, 2013: 31). Although the above methods should be strictly complied by tribunals in deciding the meaning of vague provisions (UNCTAD, 2011: 2), the International Law Commission (ILC) clarified that such methods are not necessarily conclusive in the sense that they override all other means of treaty interpretation (UNCTAD, 2011: 2). Due to the non-binding effect of subsequent agreements, states may worry that even if a clear interpretative statement has been issued by them, arbitrators would choose to ignore or otherwise discount the statement (Gertz and John, 2015: 4). As pointed out by Professor Roberts, tribunals normally rely on awards rendered by prior tribunals[1] or academic opinions (Roberts, 2010: 179), with little consideration of the statements and practices of states in general or the treaty parties in particular (Gordon and Pohl, 2015: 12).

States frequently assign the power to competent tribunals to settle investor-state disputes through the arrangement contained in their IIAs, but this does not imply that the tribunals are granted the full interpretive power to determine the true intents of states (Roberts, 2010: 179; Gertz and John, 2015: 2). When arbitrators use the discretion to adopt expansive interpretations of state obligations, states may perceive that "investment treaties are being used by investors in ways governments didn't intend or foresee" (Gertz and John, 2015: 4). Recent practice has shown that in cases of ambiguity or lacunae in investment treaties, arbitral tribunals have always come to divergent interpretations of identically or similarly worded treaty obligations (Jaime, 2014: 278). Those interpretations accomplished by the tribunals may in fact ignore the norm that the contracting states are the creators and masters of their treaties. After treaties are in force, the contracting states retain the power to shape their mutual understandings on contentious provisions (Gertz and John, 2015: 2). In practice, states can rely on several options, such as termination of the treaty, negotiation of amendment, or treaty interpretation, to ensure that the provisions of the treaty best reflect their intents. In practice, the former two options have been deemed as costly and time-consuming, so the interpretation option has been frequently used by states because it is lower-cost, faster and more feasible to avoid unpredictable arbitral rulings (Gertz and John, 2015: 4).

Whereas the VCLT does not adopt the practice that subsequent agreements would appear to be decisive of the meaning, subsequent agreements can be conclusive when all contracting states to the treaty impose a binding

effect on them (International Law Commission, 2013: 22).[2] In accordance with a recent report released in 2013, the ILC recognizes 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" (International Law Commission, 2013: 22). In recent years, with the rise of treaty interpretation in investment arbitration, a growing number of states have started the practice to adopt the joint interpretation mechanism into their IIAs. Although the words describing the mechanism vary under different IIAs, such a mechanism equips a permanent organ set up by all contracting states or the states themselves with the explicit power to issue binding interpretative statements on contentious provisions; tribunals of ongoing or subsequent cases should strictly comply with the joint statements (Johnson and Razbaeva, 2014: 4).[3]

The adoption of a joint interpretation mechanism in IIAs is an innovative solution to address states' concerns regarding what it considers to be adverse interpretations by investment arbitration tribunals. One of the earliest and relatively well-known examples concerning joint interpretation with binding effect is the North American Free Trade Agreement (NAFTA). Pursuant to Article 2001 of the NAFTA, the Free Trade Commission (FTC) composing cabinet level representatives of the NAFTA parties or their designees was set up. Any interpretations to the NAFTA provisions issued by the FTC shall be binding upon arbitral tribunals established under Chapter 11 (NAFTA, art 1131(2)). The joint interpretation provisions under Article 2001 are in no way unique. As pointed out by a recent study, "the percentage of IIAs containing such provisions has gradually increased and currently most of the 'mega-regionals', as well as many model Bilateral Investment Treaties (BITs) or newly concluded BITs and FTAs contain them" (Methymaki and Tzanakopoulos, 2016: 6; Kohler, 2011: 175-177). Through explicitly providing in the IIAs that joint declarations issued by the contracting states are conclusive, the states may "bypass procedural requirements imposed by domestic law that must otherwise be satisfied before states can enter into other binding international agreements like amendments or new treaties" (Johnson and Razbaeva, 2014: 5).

In 2013, China proposed to jointly construct the "Belt and Road" Initiative (B&R Initiative) (State Council of the People's Republic of China, 2015), while the IIAs proposed to be concluded by China and its counterparties along the B&R will provide a robust source of potential investor protection, they must be easily understood among investors, states and international tribunals. Although recently concluded Chinese IIAs show that the Chinese approach towards the binding joint interpretation mechanism has gradually progressed, due to insufficient practice of the

Chinese government regarding the use of joint interpretation in investment arbitration, China may rush into concluding IIAs containing template joint interpretation provisions with little consideration to several controversial issues while including the mechanism into the upcoming IIAs. In this article, section 2 identifies that China has gradually incorporated the joint interpretation mechanism into recently concluded IIAs and examines the key different practices among the IIAs. Section 3 highlights the potential concerns associated with the use of joint interpretation during arbitral proceedings. To support the implementation of the mechanism in investment arbitration, the article raises relevant counterarguments to these concerns. Section 4 proposes China enhance its awareness of using interpretative statements as a legal tool to alleviate the risk of expansive arbitral rulings. In addition, in order to promote the rule of law through using joint interpretation mechanism during arbitral proceedings, several suggestions will be proposed.

2. Joint Interpretation Mechanism as an Emerging Phenomenon in the New Generation of Chinese IIAs

Infamously ambiguous languages, unclear provisions and unwritten understandings in existing investment treaties could give rise to "costly litigation and creates openings for tribunals to give unintended or incorrect interpretations to treaty provisions" (Johnson and Razbaeva, 2014: 1). As noted above, the joint interpretation mechanism creates special rules giving the contracting states' subsequent agreement greater force that it might otherwise have under Article 31(3) of the VCLT (Gertz and John, 2015: 1).[4] For instance, in *CME Czech Republic B.V. vs. The Czech Republic (CME)*, the contracting states submitted a submission (agreed minutes) to clarify certain issues on the interpretation and application of the disputed treaty. To decide the relevant issues involved in the dispute, the tribunal adopted the interpretations listed in the agreed minutes to support its holding (CME Award, para 27-28). Presently, China has concluded IIAs with nearly 140 states and regions (Investment Policy Hub, 2019). It is common place by now to say that the hundreds of IIAs, especially those negotiated throughout the 1980s and 1990s, inevitably contain broad standards and vague languages, leaving arbitral tribunals with insufficient guidance to decide investment treaty cases with substantial discretion.

2.1. Rise of the States' Joint Power over Treaty Interpretation in China

According to a recent study conducted by a Chinese commentator, the Chinese approach towards the binding joint interpretation mechanism in the new generation of Chinese IIAs has progressed as well (Zhao, 2017:

152-154). To date, at least six Chinese IIAs, namely the IIAs concluded with Canada, Australia, Uzbekistan, Cuba, New Zealand and Tanzania have officially adopted the mechanism aiming to strike a better balance between the interpretative rights of contracting states and tribunals.

Pursuant to the China-Tanzania BIT[5] and the China-New Zealand BIT[6], the tribunal shall, upon the request of the respondent state, require the contracting states to issue a joint interpretation statement concerning the meanings of any provisions in dispute. Such a joint decision shall have a binding effect on the tribunal and the award made by the tribunal should strictly comply with the decision (China-Tanzania BIT, art 17; China-NZ FTA, art 155). To preserve the efficiency of investor-state arbitral proceedings, the states are bound to give their joint consent within 60 days of the delivery of the request. If the states fail to reach a statement within the time limit, the tribunal shall make the final determination on its own account. In addition, although the China-Uzbekistan BIT shares many similarities with the above two IIAs, two distinct rules are established by the China-Uzbekistan BIT. First, a joint interpretation statement shall have binding effect on both pending tribunal and subsequent tribunals established pursuant to the BIT. In addition, to assist arbitrators in the determination of their cases, the BIT grants the contracting states 70 days to reach their joint understandings on contentious provisions (China-Uzbekistan BIT, art 16(2)). Pursuant to the China-Cuba BIT Amendment (2008), the joint interpretation provision is much more general, Article 10(7)(5) only provides that, upon the mutual agreements reached by the contracting states, a joint declaration concerning the meaning of treaty provisions shall bind pending and subsequent tribunals (China-Cuba BIT Amendment, art 10(7)(5)). The BIT failed to go further to identify the time limit for the contracting states to submit their mutual understandings. In accordance with the analysis made above, the four IIAs are relatively general.

The China-Canada FTA also adopted the traditional practice that the contracting states themselves can issue a joint interpretation on general treaty provisions either in the contest of charged treaty negotiations or hostile arbitrations, such an interpretation will be binding on a tribunal established under the treaty (China-Canada FTA, art 30(1)). Besides the right of issuing binding interpretations on general provisions, the BIT allows the contracting states to issue joint interpretation on the reservation and exception provisions. In accordance with Article 30(2), where a respondent state asserts as a defence that the measure alleged to be a breach is within the scope of the reservations and exceptions set out in Article 8(1), (2) and (3), on request of the respondent state, the tribunal shall request both states to issue a joint interpretation decision (China-Canada FTA, art 30(1)). The states should submit in writing their joint decision to the tribunal within 60 days of delivery of the request, and the interpretation shall be binding only on the pending tribunal.

2.2. Groundbreaking Development of Joint Interpretation Mechanism under China-Australia FTA

The China-Australia FTA is identified as one of the most modern IIAs concluded by China so far. Even though it is not the first Chinese IIA adopting the joint interpretation mechanism, the provisions under the FTA shall be regarded as the most advanced ones regarding the states' binding interpretative power (Zhao, 2017: 147). First, the FTA restates that the tribunals are strictly bound to decide the issues in the dispute with this FTA as interpreted according to customary rules of treaty interpretation of public international law, as codified in the VCLT (China-Australia FTA, art 9.18.2). Also, one of the most essential creations of the FTA is that the Committee on Investment (CI) was set up by the two contracting states. Pursuant to Article 9.7.3(b), the CI may, in accordance with Article 9.18.2[7] and Article 9.19[8], adopt a joint decision of the contracting states, declaring its interpretation of a treaty provision.

Moreover, pursuant to Article 9.11.4, 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 (China-Australia FTA, art 9.11.4). For the first time in Chinese IIA history, the FTA allows the respondent state, within 30 days of the date on which it receives a request for consultation made by the investor, pointing out 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" listed in Article 9.11.4. Under this scenario, the respondent state should deliver the investor and the home state of the investor a "public welfare notice" clarifying the basis for its position (China-Australia FTA, art 9.11.5). Upon receiving the "public welfare notice", a negotiation on the nature of the measure will be carried out by the CI or the states themselves within 90 days. During the negotiation, the dispute resolution procedure will be automatically suspended (China-Australia FTA, art 9.11.6). A joint statement reached by the states will have binding nature on a tribunal and any decision or award rendered by a tribunal must be consistent with the joint decision (China-Australia FTA, art 9.19.3).[9]

2.3. Key Differences

Based on the analysis made above, although China has increased its awareness regarding the goals promoted by states' binding interpretive power, different IIAs adopted distinct practices. To be more specific, there are at least four key distinctions among the six IIAs. First and foremost, two IIAs, namely the China-Canada BIT and the China-Australia FTA, grant the state parties the

power to issue joint interpretation on the reservation and exception provisions. Also, one groundbreaking practice established by the China-Australia FTA is that where the respondent state deems that a measure alleged by the investor falls into the scope of the "public welfare" provision, the tribunal can request both states to issue a joint statement on the nature of the measure. If the measure is deemed as a non-discriminatory measure by the states, it will not be the subject of a claim under the FTA. The second distinction is whether a permanent organ responsible for issuing joint interpretation is set up. Among the six IIAs, only the China-Australia FTA assigns the CI with the authority to issue a joint interpretation on behalf of the contracting states. The CI could enable the officials from China and Australia to regularly meet and discuss issues of mutual concerns. On the contrary, in the absence of a designated organ under other IIAs, when China has the intention to issue a joint interpretation with the counterparties, they are bound to plan meetings, send visiting delegations, etc., the heavier costs associated with the transaction will be increased. The third distinction is the time constraint applicable to the contracting states to reach their joint decisions. Among the six IIAs, only the China-Cuba BIT failed to set up a fixed period of time applicable to the contracting states to reach their joint interpretation statement. To preserve the efficiency of arbitral proceedings, all other IIAs established a time constraint requiring the states to issue their joint decisions in a timely manner. The last distinction is whether a joint interpretation decision reached by all contracting states binds pending tribunals or tribunals of ongoing and subsequent disputes among the IIAs. As indicated above, only the IIAs concluded with Tanzania and New Zealand adopt the practice that a joint interpretation decision shall bind the pending tribunal. In contrast, the other four IIAs adopt the practice that a joint interpretation issued by the contracting states shall have binding effect not only on pending tribunals but also on subsequent tribunals established pursuant to the IIAs.

3. Potential Concerns Associated with the Implementation of Binding Joint Interpretation

As studied above, China has started to adopt the practice of incorporating the joint interpretation mechanism into the contexts of a new generation of Chinese IIAs, indicating that such a joint interpretation should be binding on a tribunal of ongoing or subsequent disputes. Previously, the FTC of NAFTA, on 31 July 2001, jointly issued the Notes of Interpretation of Certain Chapter Provisions (Notes), aiming to present the three contracting states' joint understandings on the minimum standard of treatment of Article 1105 of NAFTA. The Notes was issued at the time when several disputes were pending, which caused the following concerns.

One of the key arguments presented in these cases is whether the tribunals are authorized to review the nature of the Notes issued by the FTC. On the one hand, in *Pope & Talbot Inc. v. Canada*, the claimant investor argued that since the issue of minimum standard of treatment was not discussed among the three contracting states during the negotiation of NAFTA, the Notes is not a true interpretation but a modification of NAFTA. In the final award, the tribunal restated that Article 1131 of NAFTA grants a tribunal the right to decide the issues in dispute in accordance with the NAFTA and applicable rules of international law (NAFTA, art 1131(1)). If an issue regarding whether the FTC has acted in accordance with Article 2001 in issuing an interpretation, the tribunal has a duty to "consider and decide that question and not simply to accept that whatever the Commission (FTC) has stated to be an interpretation is one for the purposes of Article 1131(2)" (Pope & Talbot, para 23). In the final award, given the issue of minimum standard of treatment was not discussed during the negotiation of NAFTA, the tribunal chose to believe that the Notes is not an interpretation, but an amendment to NAFTA. On the contrary, in *Mondev Int'l Ltd. v. USA*, the tribunal accepted the Notes is not an amendment to the NAFTA but a valid interpretation (Mondev, para 122). In addition, the tribunal of the *ADF Group Inc. v. Canada* found that there could be no more "authentic and authoritative source of instruction on what the Parties intended to convey in a particular provision of NAFTA" (ADF Award, para 117). The tribunal further provided that nothing in NAFTA suggests that a 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" which presumably may be disregarded until ratified by all the Parties under their respective internal law (ADF Award, para 117).

Making a distinction between a true interpretation and a modification to an IIA aims to determine whether a states' joint statement shall have binding effect on tribunals of ongoing disputes. An interpretation to a treaty clarifies the meaning of contentious provisions or what the norm has always been, so it has retroactive effect to state conducts made after a treaty entered into force. On the contrary, an amendment, as the agreement on any modification to an original treaty, creating new norms, has no retroactive effect to previous state conducts. In practice, the distinction between interpretation and amendment is "notoriously difficult to draw" (Methymaki and Tzanakopoulos, 2016: 22). As Professor Kohler suggested: "the conduct of the host state of the investment must be measured on the basis of norms in effect when the conduct occurred and not of newly created norms" (Kohler, 2011: 191-192). Hence, if a joint statement is indeed regarded as an amendment, such a statement rendered in the pendency of arbitration shall not have binding effect on the tribunal. Even though the Notes was believed to be an amendment of NAFTA by the *Pope* tribunal, the tribunal did not go further to engage in an analysis on the

binding effect of the Notes since the conclusion reached in the partial award would stand even under the regime of the interpretation contained in the Notes (Pope & Talbot, para 47).[10]

As noted above, the *Pope* tribunal took the view that the Notes itself is tantamount to an amendment to NAFTA, it is clear that the procedure of issuing the Notes is in contrast with the procedure of treaty amendment under NAFTA. In accordance with Article 2202,[11] any modification shall be regarded as a part of NAFTA when it is approved in accordance with the applicable legal procedures of each state. Since the Notes was issued without satisfying with the procedure provided pursuant to Article 2202, whether the Notes shall have binding effect on subsequent tribunals is in question because the issuance of the Notes violated the procedural requirement explicitly contained under Article 2202. On the contrary, Article 39 of the VCLT provides that states can modify their treaties by any means if agreed. Since the FTC is an emanation of the three states to the NAFTA, a commentator pointed out that "one may consider that an amendment by way of an FTC interpretation amounts to an amendment by the contracting states themselves and, therefore, is binding upon a Chapter 11 tribunal" (Kohler, 2011: 191). In *Methanex*, the tribunal took the view that the Notes is entirely legal and binding upon a tribunal. Even though the Notes constituted a far reaching substantive change, there would be nothing to support that "far reaching changes in a treaty must be accomplished only by formal amendment rather than by some form of agreement between all of the Parties" (Methanex, Part IV, Chapter C, Page 10).

In addition, the respondent state, as a contracting state to the treaty giving its understandings on contentious provisions, would undoubtedly contribute to the contents of the interpretation. Also, as a disputing party to the arbitration, the respondent state might benefit from the interpretation where the contents influence the outcome in its favour. The difficulty here lies in the "two hats worn by the respondent state" (Kohler, 2011: 192). So this appears to be "contrary to due process, specifically contrary to the principle of independence and impartiality of justice, which includes the principle that no one can be the judge of its own cause" (Kohler, 2011: 192). Furthermore, Article 1115 of NAFTA requires equal treatment to both disputing parties.[12] There are some voices against interpretative power on the basis that the interpretation is "out of the blue", without any prior public consultation and giving any warning to investors to ongoing arbitration, which may violate the principle of equal treatment of parties (Kohler, 2011: 188-189).

Confronted with the above concern, different voices have been raised. First, as the masters and creators of their investment treaties, there is a strong legal basis for states to regain the role to shape their understandings on ambiguous provisions through issuing joint statements (Jin, 2017: 96). For

instance, in *Methanex*, the tribunal pointed out that it is perfectly proper for a legislature to clarify its original intent when if it, having enacted an IIA, feels that a tribunal implementing it has misconstrued its intention (Methanex, Part IV, Chapter C, Para 22.).[13] Furthermore, as one commentator argued, a joint interpretation statement is issued by all contracting states rather than the respondent state. Upon carefully balancing the protection of foreign investment and public interests involved in investment disputes, the states come to an interpretation that can preserve the interests of all parties (Jin, 2017: 96). Moreover, a joint interpretation not only addresses the urgent demand of clarifying the meaning of contentious provisions in arbitral proceedings but also considers the interests of investors (Jin, 2017: 96). Due to the dual role as both capital-importing and capital-exporting state of the respondent state, the legitimate interests of their own citizens investing abroad will be taken into account while negotiating a joint interpretation with its counterparties. Given the binding effect of the joint interpretation on subsequent tribunals, it is reasonable to expect that both the respondent state and the home state will be more cautious and objective while developing their understandings on contentious provisions.

4. Reassertion of Control through Binding Joint Interpretation: Factors to be Considered by China

In practice, most states have refrained from reaching binding joint interpretation decisions to clarify contentious treaty provisions even though they are concerned about inconsistent decisions issued by tribunals (Gertz and John, 2015: 3). In addition, the findings of a commentator who previously conducted a survey on using subsequent agreement method to interpret ambiguous provisions, negatively showed that adjudicatory bodies had rarely relied on such a method and further concluded developing consensus among the states to a treaty for an interpretive agreement would be difficult (Murphy, 2013: 84-85). One key reason underlying the finding is that state officials may lack the relevant understanding in terms of the use of binding subsequent agreements outside of an established forum or a particular dispute (Gertz and John, 2015: 3). The recently concluded Chinese IIAs mentioned above, to some extent, shows that the Chinese government has reached the awareness concerning the important role played by the joint interpretation mechanism in constraining tribunals' broad discretion over treaty interpretation, but the limited number of IIAs containing the joint interpretation mechanism with binding force do not simply imply that China will positively engaged in the conclusion of IIAs containing such provisions in the future. Since most of the counterparties of the six IIAs have already adopted the mechanism into their previous IIAs before concluding the IIAs with China, the adoption of the mechanism in

the six IIAs may be led by the counterparties rather than positively promoted by China (Zhao, 2017: 148). China urgently needs to enhance its awareness of using binding interpretative statements as a legal tool to alleviate the risk of expansive arbitral rulings and be positively engaged in the negotiation of incorporating the mechanism into its subsequent IIAs. Indeed, enhancing the awareness is far enough. Due to the concerns involved in the issuance of a binding joint interpretation in the pendency of an arbitration illustrated above, if the concerns are not well addressed in subsequent Chinese IIAs, the rule of law will be definitely be hindered rather than promoted (Kohler, 2011: 194). Due to the insufficient practice of the Chinese government regarding the use of joint interpretation statements in investment arbitration, China needs to take into account the following factors while incorporating the joint interpretation mechanism into the upcoming IIAs.

4.1. Entrusting a Permanent Organ with Authority to Issue Joint Interpretation

In contrast with the China-Australia FTA, the other five Chinese IIAs containing the joint interpretation provisions failed to design a permanent organ to be responsible for issuing interpretative statements. Lacking a permanent organ is problematic due to the following concern. Under the NAFTA, the FTC enables the officials from the contracting states to regularly meet and discuss issues of mutual concern (UNCTAD, 2011: 11). On the contrary, in the absence of a specific organ, if a state has the intention to reach a joint interpretation with other counterparties, all of them are bound to plan meetings, send visiting delegations, etc. So the heavier costs associated with the transaction would hold the states back and leave the states without a focal point for initiating discussions on an interpretive statement (Gertz and John, 2015: 4). In addition, the six IIAs concluded by China explicitly require the contracting states to reach their joint interpretation within a specific time period. Even though the time constraint aims to ensure the efficiency of arbitral proceedings will not be undermined by the intervention, a commentator pointed out that it is difficult to spur their bureaucracies into action to pursue interpretative statements. As a finding stated:

> The bureaucratic agencies responsible for international investment have many different priorities competing for their time, resources and political capital, and participants said that drawing attention to the relatively arcane issue of investment treaty interpretation would be an uphill battle. Explaining the complexity and nuance to busy ministers and high-ranking officials would be a challenge, and it could be difficult to justify action, particularly as there would not necessarily be an immediate payoff from issuing an interpretive statement. (Gertz and John, 2015: 5)

Confronted with the above concern, this article proposes China and its counterparties to set up an organ consisting of senior officials and investment law experts to be entrusted with the authority to issue joint interpretation statements in the upcoming IIAs. The organ, with the assistance of academics and NGOs, can work 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" (Gertz and John, 2015: 5). In addition, during arbitral proceedings, when the tribunal needs to determine the true meanings of vague provisions, the tribunal shall request the organ to issue a joint interpretation statement. Upon receiving the joint decision, the tribunal will be more likely to view such an action as a good faith interpretation rather than an opportunistic attempt to avoid potential liability (Gertz and John, 2015: 4).

4.2. Ensuring the Binding Effect of Joint Interpretation

In terms of the binding effect of joint interpretation, two distinct practices have been adopted by the Chinese IIAs. Two IIAs chose the view that a joint interpretation will only bind tribunals of ongoing cases, while the other IIAs stated that tribunals of ongoing and subsequent cases should strictly comply with a joint interpretation while making the determination on the meaning of vague provisions. The first practice raises the concern that even if the contracting states have issued a clear statement on vague provisions, subsequent tribunals would choose to ignore or otherwise discount the statement. When subsequent tribunals use their substantial discretion to adopt expansive interpretations of state obligations, states may perceive that their investment treaties are being interpreted in ways they didn't intend or foresee. In light of this concern, China should strictly distinguish the terms "a tribunal" and "the tribunal". To reduce uncertainty of treaty interpretation and restrict tribunals' power to give unintended interpretation, this article suggests that China adopt the practice that a joint interpretation on general treaty provisions should bind a tribunal of ongoing and subsequent cases established pursuant to a treaty.

As noted earlier, even if an IIA adopts the approach that a joint interpretation statement should have a binding effect on tribunals, based on the practice of the NAFTA, when a joint interpretation statement is issued at the time when an investment case is pending, the tribunal may tend to make the determination on the nature of the joint statement, namely whether the statement is a true interpretation or a disguised amendment. Indeed, when a tribunal holds that a joint statement aims to clarify the possible meanings that fall within the interpretative radius of a norm, there will be no difficulty for the arbitrators to take the statement as a binding instrument. On the contrary,

when the tribunal reaches the conclusion that the statement is actually modifying the norm and is constituted as an unlawful amendment, avoiding answering the binding nature of the statement would cause the concern of the legitimacy of award as the *Pope* case showed (Zhao, 2017: 150).

To solve the above concern, China and its counterparties need to provide for the permanent 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 permanent organ, on behalf of the contracting states, may decide the joint statement shall have binding effect from a specific date. Since the EU also realized this concern, the above proposal has been incorporated into the newly concluded EU Free Trade Agreement, including the EU-Canada Comprehensive Economic and Trade Agreement[14] and the EU-Singapore Investment Protection Agreement.[15] The above proposal aims to serve two goals. First, it will avoid a disguised amendment to have binding effect on tribunals of ongoing cases since the norms of amendment have no retroactive effect. In addition, a joint statement may reflect the common understanding of all contracting states on key issues that have not been addressed before or have been brought into public spotlight recently, so issuing the statement aims to regulate states' future behaviours, which will contribute to the consistency of treaty interpretation by subsequent tribunals.

4.3. Setting up a Reasonable Time Constraint Applicable to the Issuance of Joint Interpretation

To preserve the efficiency of investment arbitration, it is important for China and its counterparties to confirm a reasonable time period for the states or the permanent organ to reach their mutual understandings on vague provisions during arbitral proceeding in their upcoming IIAs. If the permanent organ is requested by the tribunal or petitions the tribunal on its own account to issue a joint decision on vague provisions during arbitral proceedings, the organ should deliver its final and binding understandings to the tribunal within the time period. Based on the practice of the six IIAs, either 60 days or 70 days are set out to bind all contracting states or the CI. The time limitation provision aims to avoid arbitral proceedings to be delayed by the intervention of the contracting states. In addition, if the organ cannot reach a mutual understanding on the disputed provision, which implies a common practice between or among the states has not been formed yet. So such an issue is more appropriate to be addressed by the tribunals of ongoing cases rather than the permanent organ.

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

The last decade has witnessed a growing debate regarding one of the key asymmetric nature of investment treaties, which imposes a number of obligations on states, but do not seem to hold investors accountable for the social, environmental and economic consequences of their investment activities (Fan, 2018). 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" (Roberts and Braddock, 2016). Such an innovation was incorporated into the China-Australia FTA. The mechanism allows the respondent state to deliver the claimant investor and the non-disputing state a "public welfare notice" when it deems that the disputed measure falls within the scope of the carve-out. The notice will suspend the dispute resolution procedure and a 90-day consultation period is triggered between the states. When the alleged measure is confirmed as a non-discriminatory measure for legitimate public welfare objectives, it will not be subjected to investment claims. To recalibrate the balance between investor protection and state sovereignty, and between the interpretative power of tribunals and state parties, it is suggested that this innovation be adopted by China in negotiating IIAs with its counterparties along the B&R. The innovative approach would serve as a strong safeguard for China and its counterparties to regain their control over regulatory autonomy in the future. Indeed, if China and its counterparties are unable to reach the agreement on whether or not the measure falls within the carve-out, the tribunal shall decide the issue on its own account.

5. Conclusion

Recent years have witnessed the dissatisfaction of growing states with the way in which their IIAs have been interpreted by tribunals; so how to ensure that states will not end up being bound by obligations they did not assume has become an urgent task in the international investment law community. To date, a growing number of states have attempted to create the tool of binding joint interpretation to exercise control over their IIAs and ensure that the obligations they have undertaken are interpreted consistently by tribunals. It is without doubt that China will conclude more IIAs or amend the outdated treaties with its counterparties along the B&R in the near future. Even though China will be more careful in producing an IIA text completely free of ambiguity, as a product of compromise, the text will inevitably contain

vague and ambiguous provisions. Recently concluded Chinese IIAs evidence a rise in provisions that allow the contracting states or a permanent organ to issue an interpretation of the treaty that is binding on tribunals. But due to the insufficient practice of the Chinese government on the use of joint interpretation statements in investment arbitration, this article has raised the concern that China may rush into concluding IIAs containing template joint interpretation provisions with little consideration to the controversial issues involved in the implementation of the binding joint interpretation mechanism in arbitral proceedings.

The article proposes several factors to be considered by China while incorporating the mechanism into its upcoming IIAs. First, since the existence of a permanent organ to be responsible for issuing binding joint interpretation could facilitate the exchange of views and the formulation of common interpretations between the contracting states in a timely manner, it is suggested that a permanent organ should be established with the power to issue joint interpretations. Also, given the concern that arbitrators would choose to ignore a clear interpretative statement issued by the organ, China and the counterparties should set out an express regime for binding joint interpretative agreements in the IIAs, awards issued by the tribunals must be consistent with the interpretation. Furthermore, to protect the efficiency of arbitral proceedings, a reasonable time constraint must be determined for the organ to develop its consensus on contentious provisions under the newer-style Chinese IIAs. Moreover, to protect the legitimate and non-discriminatory public welfare regulation of China and its counterparties from investor-state claims, the article further suggests that measures of the respondent state that are non-discriminatory and for legitimate public welfare objectives shall not be the subject of a claim. When the respondent state believes that the measure falls within this exception, the respondent state is permitted to issue a "public welfare notice" specifying the reasons to the tribunal. If the treaty parties agree that the challenged measure fits within the scope of the carve-out, an award issued by the tribunal must be consistent with that decision. Such an innovation would serve as a safeguard for China and its counterparties to regain their control over regulatory autonomy in the future.

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Notes

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1. "Arbitral Panels, even if they do not create jurisprudence, nevertheless contribute to the accumulation of a body of thought on the meaning of investment treaty terms that influences other arbitrators' decisions."
2. "It is, however, always possible that provisions of domestic law prohibit the government of a State from arriving at a binding agreement in such cases without satisfying certain – mostly procedural – requirements under its constitution."
3. The joint interpretation mechanism also reflects the clarification made by the ILC in 2012, "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."
4. "Such interpretations offer a promising avenue for states seeking to regain control, and reorient, the international regime."
5. "1. In the dispute settlement procedure stipulated in Article 13, upon the request of the Contracting Party to the dispute, the arbitral tribunal shall require both Contracting Parties to interpret articles of this Agreement in relation to the dispute. The Contracting Parties shall submit in writing a combined decision of the interpretation to the arbitral tribunal within sixty days after the request was raised. 2. The combined decision made by both Contracting Parties pursuant to Paragraph 1 shall be binding upon the arbitral tribunal. The award shall be consistent with the combined decision. If both Contracting Parties fail to make such decision within sixty days, the arbitral tribunal will make a decision independently."
6. "1. The tribunal shall, on request of the state party, request a joint interpretation of the Parties of any provision of this Agreement that is in issue in a dispute. The Parties shall submit in writing any joint decision declaring their interpretation to the tribunal within 60 days of delivery of the request. 2. A joint decision issued under paragraph 1 by the Parties shall be binding on the tribunal, and any award must be consistent with that joint decision. If the Parties fail to issue such a decision within 60 days, the tribunal shall decide the issue on its own account."
7. "A joint decision of the Parties, acting through the Committee on Investment, declaring their interpretation of a provision of this Agreement shall be binding on a tribunal of any ongoing or subsequent dispute, and any decision or award issued by such a tribunal must be consistent with that joint decision."
8. "Where a respondent asserts as a defence that the measure alleged to be a breach is within the scope of an entry set out in Section A or B of its Schedule of Non-Conforming Measures in Annex III, the tribunal shall, on request of the respondent, request the interpretation of the Parties on the issue."
9. "A decision between the respondent and the non-disputing Party that a measure is of the kind described in Article 9.11.4 shall be binding on a tribunal and any decision or award issued by a tribunal must be consistent with that decision."

10. "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"".
11. "1. The Parties may agree on any modification of or addition to this Agreement. 2. When so agreed, and approved in accordance with the applicable legal procedures of each Party, a modification or addition shall constitute an integral part of this Agreement."
12. "Without prejudice to the rights and obligations of the Parties under Chapter Twenty… this Section establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal."
13. "If a legislature, having enacted a statute, feels that the courts implementing it have misconstrued the legislature's intention, it is perfectly proper for the legislature to clarify its intention. In a democratic and representative system in which legislation expresses the will of the people, legislative clarification in this sort of case would appear to be obligatory."
14. "Where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may, pursuant to Article 8.44.3(a), recommend to the CETA Joint Committee the adoption of interpretations of this Agreement. An interpretation adopted by the CETA Joint Committee shall be binding on the Tribunal established under this Section. The CETA Joint Committee may decide that an interpretation shall have binding effect from a specific date."
15. "Where serious concerns arise as regards issues of interpretation which may affect matters relating to this Agreement, the Committee, pursuant to subparagraph 4(f) of Article 4.1 (Committee), may adopt interpretations of provisions of this Agreement. An interpretation adopted by the Committee shall be binding on the Tribunal and the Appeal Tribunal and any award shall be consistent with that decision. The Committee may decide that an interpretation shall have binding effect from a specific date."

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