

Chapter 12: The Return of the Home State and the Rise of ‘Embedded’ Investor-State Arbitration

Wolfgang Alschner*

Introduction

Prior to the advent of investor-State arbitration (ISA), the international enforcement of investment claims was an often contentious ‘ménage à trois’.¹ The injured investor would seek diplomatic protection from its home State which would then enforce the espoused claim against the host State using diplomatic, judicial and, at its extreme, even violent means – the well-known ‘gunboat diplomacy’.² Giving foreign investors direct access to international arbitration is widely celebrated as a major achievement of modern investment treaty law because it ended this ‘ménage à trois’. By removing the home State from the settlement of investment disputes, it enabled ‘the true complainant [the investor] to face the true defendant [the host State]’.³ Thereby, it is said, investor-State arbitration made a crucial contribution to the de-politicization, legalization and pacification of investment relations.⁴

Today, however, the investor’s home State is gradually re-entering the investment arbitration stage by four principle routes. First, international investment agreements modeled on the North American Free Trade Agreement (NAFTA) allow the home State to participate in arbitrations through non-disputing State parties’ submissions. Second, the long dormant State-to-State arbitration clauses are increasingly put to use by both home and host states, amongst others, to affect prior, parallel or subsequent investor-State arbitrations.⁵ Aside from such unilateral means of intervention, recent treaties also ascribe a more prominent role to the home State alongside the other contracting parties. These agreements delegate vital dispute settlement functions to agencies or representative of the contracting parties. Under the so-called *renvoi* mechanisms, home and host State officials are called to assess claims relating to taxation issues or are tasked to interpret the meaning of reservations to the treaty.⁶ Finally, many of these treaties also foresee the establishment of a treaty-based joint commission, which is authorized to issue interpretations that are binding on tribunals, or delegate this

* PhD Candidate, Graduate Institute of International and Development Studies (IHEID), Geneva, Switzerland, wolfgang.alschner@graduateinstitute.ch. I want to thank the organizers, in particular Shaheez Lalani and Rodrigo Polanco, and the participants of the conference “The Role of the State in Investor-State Arbitration” for their engaging comments and feedback.

¹ Adapted from Weil who speaks of a different ménage à trois; Prosper Weil, “The State, the Foreign Investor, and International Law: The No Longer Stormy Relationship of a Ménage À Trois,” *ICSID Review* 15, no. 2 (September 21, 2000): 401–416, doi:10.1093/icsidreview/15.2.401.

² Jonathan Gimblett and O.Thomas Johnson, Jr., “From Gunboats to BITs: The Evolution of Modern International Investment Law,” in *Yearbook on International Investment Law & Policy Vol. 2010-2011*, ed. Karl P. Sauvant, 2011.

³ Jan Paulsson, “Arbitration Without Privity,” *ICSID Review* 10, no. 2 (September 1, 1995): 256.

⁴ See *infra* notes 27-29.

⁵ Cases in point are the 2003 Peru v Chile and the 2011 Ecuador v United States arbitral proceedings Anthea Roberts, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority*, SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, August 23, 2013), <http://papers.ssrn.com/abstract=2315078>. *Harvard International Law Journal* 55 (2014), forthcoming, accessed January 31, 2014, <http://ssrn.com/abstract=2315078>.

⁶ See, for example, 2012 U.S. Model BIT Article 20 (Financial Services), 21 (Taxation) or NAFTA Article 1132 (Interpretation of Annexes). 2012 U.S. Model Bilateral Investment Treaty (BIT), accessed January 31, 2014, <http://www.state.gov/documents/organization/188371.pdf>. North American Free Trade Agreement (NAFTA), Dec. 17, 1992, 32 ILM 289, 605 (1993).

power to the contracting States directly.⁷ After being virtually excluded from investment arbitration for many decades, the home State has made a remarkable comeback.

What should we make of the home State's increasing unilateral and joint interventions? Individually, each of these elements has attracted both criticism and praise from commentators. The criticism has been directed at the substantive impact of these tools, which presumably introduce a bias into investment arbitration. On one extreme, some commentators fear that the return of the home State could favor the position of the foreign investor *vis-à-vis* the host State, marking a revival of diplomatic protection.⁸ On the other extreme, the return of the home State could also tip the balance in the opposite direction. As a potential respondent in parallel or future litigations, the home State has an incentive to collude with the host State in its interventions. Such collusion has been criticized as undermining the protective obligations in investment treaties.⁹ Criticism has also been levied against the procedural impact of these tools. Commentators contend that they impose unnecessary costs and delays on the real disputing parties;¹⁰ undermine the neutrality and impartiality of the arbitral mechanism, raising due process concerns;¹¹ and, replace law-based predictability with politics-based discretion.¹²

Other scholars are more enthusiastic about the home State's return and praise the usefulness of its interventions for reforming the investment arbitration system. Under the headings '(re)balancing',¹³ 'refinement',¹⁴ or 'recalibration',¹⁵ they consider the return of the (home) State as a natural reaction to

⁷ See, for example, NAFTA Article 1131. See also United Nations Conference on Trade and Development (UNCTAD), "Interpretation of IIAs: What States Can Do", IIA Issue Note no. 3, December 2011, accessed February 5, 2014, unctad.org/en/docs/webdiaeia2011d10_en.pdf.

⁸ Gabrielle Kaufmann-Kohler, "Chapter 15. Non-Disputing State Submissions in Investment Arbitration: Resurgence of Diplomatic Protection?," in *Diplomatic and Judicial Means of Dispute Settlement*, ed. Marcelo Kohen, Laurence Boisson de Chazournes, and Jorge E. Viñuales (Brill Academic Publishers), 307–326, accessed October 9, 2013, http://booksandjournals.brillonline.com/content/b9789004209985_017.

⁹ Charles H. II Brower and S. Blanchard, "From 'Dealing in Virtue' to 'Profiting from Injustice': The Case Against Re-Statification of Investment Dispute Settlement," *Transnational Dispute Management* 10, no. 4 (2013); Charles H. II Brower, "Investor-State Disputes under NAFTA: The Empire Strikes Back," *Columbia Journal of Transnational Law* 40 (2002 2001): 43.

¹⁰ Martin Hunter and Alexei Barbuk, "Procedural Aspects of Non-Disputing Party Interventions in Chapter 11 Arbitrations," *Asper Review of International Business and Trade Law* 3 (2003): 162, 169.

¹¹ *Ibid.*, 159; Gabrielle Kaufmann-Kohler, "Interpretive Powers of the Free Trade Commission and the Rule of Law," *Fifteen Years of NAFTA* (2011): 175–194.

¹² *Republic of Ecuador v. United States of America*, PCA Case No. 2012-5, Expert Opinion of Prof. Christian Tomuschat (Aug. 24, 2012). According to Tomuschat (§ 32), the object and purpose of BITs was that '[i]nvestment disputes should be taken out from their political context, being instead entrusted to independent arbitrators, the pronouncements of which the contracting parties would respect' which he contrasts to a process where 'controversial points would be settled by agreement between the parties concerned, through a political process'. Unless otherwise indicated, all cases cited in this chapter are available online at "Investment Treaty Arbitration (ITA)", accessed February 5, 2014, <http://italaw.com>.

¹³ Roberts, *State-to-State Investment Treaty Arbitration*; A. Roberts, "Power and Persuasion in Investment Treaty Interpretation," *American Journal of International Law* 104, no. 2 (2010): 179–225. Anne Van Aaken, "International Investment Law between Commitment and Flexibility: A Contract Theory Analysis," *Journal of International Economic Law* 12, no. 2 (2009): 507–538. Alex Mills, "The Balancing (and Unbalancing?) of Interests in International Investment Law and Arbitration", in *The Foundations of International Investment Law*, eds. Zachary Douglas, Joost Pauwelyn and Jorge Viñuales (forthcoming, Oxford University Press, 2014), ch. 12.

¹⁴ Federico Ortino, "Refining the Content and Role of Investment 'Rules' and 'Standards': A New Approach to International Investment Treaty Making," *ICSID Review* 28, no. 1 (May 1, 2013): 152–168, doi:10.1093/icsidreview/sit002.

¹⁵ Jürgen Kurtz, "The Shifting Landscape of International Investment Law and Its Commentary," *The American Journal of International Law* 106, no. 3 (July 1, 2012): 686–694, doi:10.5305/amerjintlaw.106.3.0686.

(mis)interpretations in the exploding arbitral case law. According to these authors, the current trajectory of investment treaty-making is about (i) placing a check on tribunals' discretion and (ii) striking a balance between the protection of investors abroad and the right to regulate at home. Intervention by the home State is one of the means through which these two goals are to be achieved.

This contribution seeks to engage with this debate from a novel angle. Rather than considering the various means of home State intervention in isolation, it looks at them holistically and highlights their interconnectedness. The core argument advanced here is that we observe a significant institutional transition from a highly privatized 'pure' investor-State dispute settlement based on the exclusion of the home State to a new form of 'embedded' investor-State arbitration which retains the traditional core of direct opposition between investor and host States, but 'embeds' it in the context of stronger involvement of and control by the contracting States. While the previously excluded home State is the primary user of this novel infrastructure, 'embedded' investor-State arbitration forms part of what Alvarez described as the 'return of the State', since also the disputing State and, in multilateral agreements such as NAFTA, third non-disputing States can benefit from it.¹⁶ Embedded investor-state arbitration thus marks an increased State involvement more generally, the consequences of which require a nuanced assessment.

The contribution of this chapter is threefold. First, by tracing the transition from 'pure' to 'embedded' ISA, the article re-evaluates claims regarding the drivers of institutional innovation in investment treaty law. Proponents of the 'rebalancing' literature tend to see current changes in investment treaty law-making as reactions to the increased threat of investor-State claims. They investigate "whether these cases indicate that states have relinquished too much 'policy space' in signing IIAs and whether the threat of investor-state arbitration is casting a 'regulatory chill' over domestic measures."¹⁷ Rising investment claims have certainly contributed to the proliferation of a more defensive treaty model that utilizes a number of tools, including contracting States' interventions, to reduce exposure to investment claims. Yet the origins of the return of the home State and 'embedded' ISA lie elsewhere. Indeed, 'embedded' ISA *pre-dates* the current wave of investment cases which began in the late 1990s and early 2000s: the first time a modern investment treaty made the transition from 'pure' to 'embedded' ISA was already in NAFTA in 1992. Hence, in its origins, 'embedded' ISA was not a *tactical* (or opportunistic) response by host States to escape liability in the face of rising investment claims; rather, it emerged as part of a *strategic* re-orientation of investment treaty law to accommodate the novel situation of bi-directional investment flows that necessitated a different treaty design.

Second, by developing the concept of 'embedded' ISA the article ties together several parallel developments often only discussed in isolation. In particular, it looks at the inner workings of embedded ISA from two angles. On the one hand, each of the elements of 'embedded' ISA (*i.e.* (i) non-disputing party interventions, (ii) authoritative interpretations, (iii) *renvoi* of questions of fact and of law to State representatives and (vi) State-to-State arbitrations) interact with the private 'core' of ISA. On the other hand, these four elements interact among themselves. They complement each other by (1) policing existing interpretations, (2) providing the possibility for escalation, thereby changing the incentive structure in the struggle regarding interpretation, and (3) allowing for tailor-made and sequenced responses on factual issues.

Third, the chapter makes a tentative assessment on how to evaluate the return of the home State and the rise of 'embedded' ISA. Since recourse to non-disputing party interventions, joint interpretations, *renvoi* clauses and State-to-State arbitration remains relatively rare to date, its impact on the body of investment law is still difficult to predict. Nevertheless, an evaluation of existing cases and the surrounding literature suggests that fears of a new substantive bias either in favor of the investor (diplomatic protection) or the host State (collusion) are overstated. If anything, greater State involvement is likely to drive investment arbitration towards more moderate and balanced outcomes.

¹⁶ José E. Alvarez, "Return of the State, The," *Minnesota Journal of International Law* 20 (2011): 223..

¹⁷ S. A. Spears, "The Quest for Policy Space in a New Generation of International Investment Agreements," *Journal of International Economic Law* 13, no. 4 (December 21, 2010): 1039, doi:10.1093/jiel/jgq048.

The procedural impact of ‘embedded’ ISA is more difficult to evaluate. ‘Embedded’ ISA has shifted investment arbitration away from its commercial arbitration heritage and moved it closer to public international law adjudication. Yet, the new mix of public and private international law elements has created new tensions. Many aspects of the interaction between the tools of State intervention and the core ISA remain unsettled and several issues, such as the costs of non-disputing party interventions, currently shouldered by the disputing parties, or the exclusion of investors from inter-State deliberations, call for further refinement.

This chapter illustrates the historic transition from ‘pure’ ISA to the return of the home State and the rise of ‘embedded’ ISA. It engages with the inner workings of ‘embedded’ ISA, looking at the impact of the tools of intervention on the core ISA. It then analyses the interaction among elements of ‘embedded’ ISA and offers a few conclusions.

The Return of the Home State

‘Pure’ Investor-State Arbitration and the Exclusion of the Home State

Following the often-violent disputes of the 19th century between home and host States over the proper treatment of foreign capital, the 20th century marked a turn towards judicial settlement of investment disputes.¹⁸ In 1899 the International Court of Arbitration was set up¹⁹ and in 1907 signatories to the Second Hague Peace Conference agreed to refrain from using force to recover debts if claims were submitted to inter-State arbitration.²⁰ While arbitration thus alleviated the risks of investment disputes escalating into violent conflict, it was still the investor’s home State and not the investor himself who would bring a claim. The aggrieved investor would have to lobby his home government to espouse his claim via the route of diplomatic protection and his home State would then pursue the claim in its own right either through inter-governmental channels or through judicial means.²¹ This mechanism ascribed a central role to the home State in investment dispute settlement, leaving it to the State’s discretion to choose whether or not to espouse a claim and what remedies to pursue.²² On the one hand, this had its advantages as investment claims were mediated through the home States. On the other hand, it dragged home States into potentially politically sensitive disputes that they would have preferred to avoid.²³ In addition, the involvement of both States produced anxieties regarding a revival of gunboat diplomacy²⁴ and a general fear that investment disputes could poison inter-State relations.²⁵ To many observers, this ‘ménage à trois’ in the settlement of investment disputes was thus in need of reform.

¹⁸ Gimblett and Johnson, Jr., “From Gunboats to BITs: The Evolution of Modern International Investment Law.”

¹⁹ See Title IV “On International Arbitration”, The Hague Convention for the Pacific Settlement of International Disputes of 1899, Jul. 29, 1899, 1 Bevens 230; 1 AJIL 103 (1907), accessed February 5, 2014, avalon.law.yale.edu/19th_century/hague01.asp.

²⁰ See Article 1, Convention respecting Limitation of Employment of Force for Recovery of Contract Debts, Oct. 18, 1907, 36 Stat. 2241, 1 Bevens 607, accessed February 5, 2014, avalon.law.yale.edu/20th_century/hague072.asp.

²¹ Edwin Montefiore Borchard, *The Diplomatic Protection of Citizens Abroad: Or, the Law of International Claims* (Banks Law Pub. Co., 1915). Of course, an investor could (and was for the purpose of exhausting domestic remedies as a pre-condition for diplomatic protection also obliged to) have recourse to domestic courts. This option, however, was generally seen as less attractive as host State courts were perceived as potentially biased against the foreign claimant.

²² For differences between diplomatic protection and investment arbitration see Zachary Douglas, *The International Law of Investment Claims* (Cambridge: Cambridge University Press, 2009), chap. 1.

²³ See, for instance, Kenneth J. Vandeveld, *U.S. International Investment Agreements* (Oxford: Oxford University Press, 2009), 26–30.

²⁴ This fear was not merely hypothetical, as demonstrated by the 1956 invasion by France and Britain following the Egyptian nationalization of the Suez Canal, owned mainly by French and British shareholders.

The ICSID Convention,²⁶ opened for signature in 1965, and the subsequently signed bilateral investment treaties (BITs) referring to it, sought to remedy these shortcomings of diplomatic protection by privatizing the process of investment arbitration. Rather than relying on espousal by the home State, the investor could bring a direct claim against the host State on its own. The Convention went even further by excluding the home State's right to exercise diplomatic protection for the duration of the investor-State arbitration in ICSID Article 27. Hence, the ICSID Convention and consent to its jurisdiction in BITs "push[ed] the home State of the investor back to the sidelines"²⁷ and ended the troublesome 'ménage à trois'. The privatization of investment dispute settlement is thus widely celebrated for depoliticizing,²⁸ legalizing,²⁹ and ultimately pacifying international investment relations.³⁰

The Return of the Home State and the Rise of 'Embedded' ISA

During the past twenty years, this founding narrative of investor-State arbitration has been increasingly challenged by a gentle, but ever more widespread return of the home State into the realm of investment arbitration. To be fair, the home State was never entirely gone. Through the conclusion of close to 3,200 BITs and Free Trade Agreements (FTAs) with investment chapters³¹ that, for the most part, provide for consent to investor-State arbitration, home States sought to protect their capital abroad. By approaching potential investment destinations with model treaties, they became the true architects of the investment treaty universe. Aside from signing treaties, home States could also be more directly involved in investment arbitration by taking up subrogated investment claims,³² or by

²⁵ Gimblett and Johnson, Jr., "From Gunboats to BITs: The Evolution of Modern International Investment Law," 692.

²⁶ International Centre for Settlement of Investment Disputes (ICSID), created by the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 UNTS 159.

²⁷ Tomuschat, Expert Opinion in *Ecuador vs. U.S.*, ¶ 32.

²⁸ Broches writes that investor-state arbitration "would have the great merit of helping to remove investment disputes from the intergovernmental political sphere." Aron Broches, *Selected Essays: World Bank, Icsid, and Other Subjects of Public and Private International Law* (Martinus Nijhoff Publishers, 1995), 163; Ibrahim F. I. Shihata, "Toward a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA," in *Investing with Confidence: Understanding Political Risk Management in the 21st Century*, ed. Kevin W. Lu, Gero Verheyen, and Srilal Mohan Perera (World Bank Publications, 2009), 2–35; Vandevelde, *U.S. International Investment Agreements*, 29–30 stating that "the policy of the BITs at the inception of the program was to depoliticize investment disputes by channeling them into a legal disputes mechanism created by the BIT itself."; On a potent critique of the term, see Martins Paporinskis, *The Limits of Depoliticisation in Contemporary Investor-State Arbitration*, SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, October 1, 2010), <http://papers.ssrn.com/abstract=1716833>.

²⁹ As Reisman writes, 'part of the compact upon which BITs rest is the "legalization" and corresponding "depoliticization" of the standards of dispute resolution for investor-state disputes', *Ecuador v. U.S.*, Expert Opinion of Prof. W. Michael Reisman, ¶ 25 (Apr. 24, 2012), accessed January 31, 2014, http://www.pca-cpa.org/showpage.asp?pag_id=1455.

³⁰ Already in 1927 Borchard argued that: "By enabling the injured citizen to sue the defendant state in the international forum [...] all three parties [i.e. the national, his home and host state] to the issue and the cause of peace would be benefited, for they would rely upon legal processes for the assurance of international due process of law to the alien." Edwin M. Borchard, "Limitations on Coercive Protection," *The American Journal of International Law* 21, no. 2 (April 1, 1927): 305, doi:10.2307/2189131.

³¹ UNCTAD, *World Investment Report 2013 - Global Value Chains: Investment and Trade for Development* (UNCTAD/WIR/2013), 101.

³² Germany, for instance, requires an existing BIT for the grant of a state-sponsored investment insurance and has consistently included subrogation clauses in its treaties. If the insurance is paid out, the claim passes to the subrogee (then the home state) who then seeks to recover the money from the host state through the arbitration process. That is why Germany - albeit unsuccessfully - sought to insert a special provision into the ICSID affirming the right of the home state to act as subrogee. Antonio R. Parra, *The History of ICSID* (Oxford

investing abroad through state-owned enterprises or sovereign wealth funds that could challenge the host State in ISA.³³

Furthermore, the ICSID Convention clarifies that the investor's home State is not fully excluded from investment arbitration. Article 27 of the ICSID Convention constitutes a mere suspension but not a prohibition of diplomatic protection. According to Article 27(1) diplomatic protection can, and in fact sometimes is, exercised if a host country fails to pay an award rendered against it.³⁴ Moreover, Article 27(2) explicitly allows informal diplomatic exchanges for the settlement of investment disputes. Finally, the mere existence of investor-State arbitration has not rendered inter-State dispute settlement superfluous. Home States have brought investment disputes to the ICJ³⁵ or have framed them as trade disputes and brought them to the WTO.³⁶ Also, State-to-State arbitration continues to be included in investment treaties, even though it has remained scarcely used (see below). In spite of these various methods of involvement, the home State has remained largely marginal in the architecture of post-ICSID investment treaties and detached from the majority of investment disputes.

This began to change with the conclusion of NAFTA in 1992. NAFTA, for the first time in investment treaty history, assembled four elements designed to enhance (home) State involvement in the arbitration process: (i) non-disputing State party interventions (Article 1128), (ii) authoritative interpretations by the contracting States (Article 1131(2)), (iii) *renvoi* of questions of fact (on taxation: Article 2103(6); on financial services: Article 1415) and of law (Article 1132) to State representatives and (iv) State-to-State arbitration (Article 2008). Together, these four elements 'embedded' investor-State arbitration in a system of inter-State control. NAFTA thus marked the return of the home State to investment arbitration and the beginning of a transition from post-ICSID privatized or 'pure' ISA to 'embedded' ISA.

Far from being unique to NAFTA, 'embedded' ISA has since found its way into an increasing number of agreements across the globe. First, the three NAFTA parties incorporated 'embedded' ISA in their recent BITs as well as in their FTAs with investment chapters.³⁷ Second, 'embedded' ISA

University Press, 2012), 41,82, 91; For the US context see Theodor Meron, "OPIC Investment Insurance Is Alive and Well," *The American Journal of International Law* 73, no. 1 (January 1, 1979): 109, fn. 21.

³³ See for instance, Lauge S. Poulsen, *Investment Treaties and the Globalisation of State Capitalism: Opportunities and Constraints for Host States*, SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, May 4, 2012), <http://papers.ssrn.com/abstract=2050919>.

³⁴ Falling short of an outright espousal of the claim, the United States, for instance, has blocked votes at the World Bank and Inter-American Development Bank to grant loans to Argentina in response to the country's failure to pay the ICSID awards rendered against it. See: "US will vote against loans to Argentina in World Bank and IDB", MercoPress, Sep. 29, 2011, accessed February 5, 2014, <http://en.mercopress.com/2011/09/29/us-will-vote-against-loans-to-argentina-in-world-bank-and-idb>.

³⁵ *Case Concerning Elettronica Sicula S.p.A. (ELSI)* (U.S. v. Italy), 1989 I.C.J. Reports 15, (Judgment, Jul. 20, 1989).

³⁶ Consider for instance the on-going litigation against Australia on Plain Packaging before a WTO panel and an investment tribunal. See WTO Disputes, Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WT/DS435/1 (Apr. 10, 2012) and WT/DS/434/1, (July 23, 2012); and *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12.

³⁷ See, for instance, Canada–Peru BIT (Agreement between Canada and the Republic of Peru for the Promotion and Protection of Investments, Nov. 14, 2006, Can.-Peru), US–Uruguay BIT (Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, Nov. 4, 2005, U.S.-Uru.), US–Rwanda BIT (Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, Feb. 19, 2008, U.S.-Rwanda), US–Panama FTA (United States – Panama Trade Promotion Agreement, Jun. 28, 2007, U.S.-Pan.), Central America–Mexico FTA (Tratado de Libre Comercio entre los Estados Unidos Mexicanos, y las Repúblicas de Costa Rica, El Salvador, Guatemala, Honduras y Nicaragua, Nov. 22, 2011), ch.11. Unless otherwise stated, all BITs are available at UNCTAD, "Investment

spread from the NAFTA parties to South America, starting with Chile, which used NAFTA as template for its FTA negotiations,³⁸ and subsequently to other States of Latin America.³⁹ Over time, it diffused to other parts of the world and is used today, for example, in agreements concluded by Australia,⁴⁰ Japan⁴¹ and Taiwan.⁴² Also the leaked negotiation text of the Trans-Pacific Partnership's investment chapter follows the 'embedded' ISA logic.⁴³ Hence, 'embedded' ISA has become a global phenomenon.

Aside from its inclusion in treaty texts, States have begun to use the tools of 'embedded' ISA in practice. In the NAFTA context, at least 64 so-called 'Article 1128 submissions' by non-disputing State parties have been filed in a total of 22 investor-State arbitrations.⁴⁴ Moreover, in 2001, the NAFTA Free Trade Commission (FTC), comprising minister-level representatives of the three NAFTA States, issued an authoritative interpretation on certain NAFTA Chapter 11 provisions with a view to impact ongoing and subsequent ISA proceedings.⁴⁵ Finally, since 2002, three State-to-State arbitrations have been launched: one by the home State⁴⁶ and two against it.⁴⁷ These examples, admittedly, only affect a minority of the over 500 known ISA cases.⁴⁸ This, however, should not obscure their importance for the investment treaty universe more generally, as we are likely to see only the beginning of a larger transition.

Why did this transition occur in the first place and why did it originate in NAFTA? There are at least three reasons that help to explain the inclusion of stronger inter-governmental elements in investment arbitration under NAFTA. To begin with, NAFTA was a new specimen of investment treaty law in two ways. First, it was the first time after the ICSID Convention that an investment treaty was signed between capital-exporting countries. Traditionally, BITs were designed to cover an asymmetrical investment relationship: former US negotiator Alvarez notes that:

Instruments Online: Bilateral Investment Treaties", accessed January 31, 2014, http://www.unctadxi.org/templates/DocSearch_779.aspx

³⁸ See, for example, Chile–Canada FTA (Canada-Chile Free Trade Agreement, Dec. 5, 1996, Can.-Chile), Chapter G.

³⁹ Such as Peru, Uruguay and Central America (see *supra* n. **Error! Bookmark not defined.**).

⁴⁰ Chile–Australia FTA (Australia – Chile Free Trade Agreement, Jul. 30, 2008, Austl.-Chile), ch. 10.

⁴¹ Chile–Japan FTA (Agreement Between Japan and The Republic of Chile for a Strategic Economic Partnership, Mar. 27, 2007, Japan-Chile), ch. 8; Mexico–Japan FTA (Agreement Between Japan and the United Mexican States for the Strengthening of the Economic Partnership, Sep. 17, 2004, Mex.-Japan), ch. 7.

⁴² Panama–Taiwan FTA (Free trade Agreement between The Republic of China and the Republic of Panama Aug. 21, 2003, Taiwan-Pan.), ch. 10.

⁴³ "Leaked Transpacific Partnership Investment Chapter" (June 2012), Citizens Trade Campaign, accessed February 5, 2014, www.citizenstrade.org/ctc/wp-content/uploads/2012/06/tppinvestment.pdf.

⁴⁴ Figure based on NAFTA 1128 submissions retrieved from Investor-State Law Guide, accessed September 3, 2013, investorstatelawguide.com. The actual number of NAFTA 1128 submissions is higher as not all such documents are in the public domain.

⁴⁵ NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions*, Jul. 31, 2001, accessed February 5, 2014, www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp

⁴⁶ See *Italian Republic v. Republic of Cuba*, ad hoc state-state arbitration, and Michele Potestà, "Republic of Italy v. Republic of Cuba," *The American Journal of International Law* 106, no. 2 (April 1, 2012): 341–347, doi:10.5305/amerjintelaw.106.2.0341.

⁴⁷ *Peru v Chile*, see UNCTAD, *Investor-State Disputes arising from Investment Treaties: A Review*, UNCTAD Series on International Investment Policies for Development (New York and Geneva: United Nations, 2005), 12, n. 1. See *Republic of Ecuador v. United States of America*, PCA Case No. 2012-5.

⁴⁸ According to UNCTAD, 514 cases had been filed until the end of 2012 see UNCTAD, *World Investment Report 2013*, 110.

[in the] early days of the U.S. BIT program, the treaty's references to 'reciprocal' investment flows was something of a fraud [...] The U.S. model BIT of that period was negotiated with countries where there was largely a one-way flow of FDI from the U.S. to them.⁴⁹

But NAFTA was different. To make NAFTA work, a compromise had to be struck, on the one hand, to promote investment flows to capital importer, Mexico, by extracting a credible commitment that investment protection standards would be observed and, on the other hand, to ensure that the same standard would not backfire against the capital exporters, Canada and the U.S., which, for the first time, felt potentially exposed to investment claims.⁵⁰ Embedding investor-State arbitration in a system of tighter intergovernmental control was a solution to adjust the traditional asymmetry of investment treaties to a context of bi-directional investment flows and to moderate the exposure to investment claims.

Second, NAFTA was a new investment treaty specimen in the sense that rather than opting for a self-standing investment agreement, NAFTA Chapter 11 was part of a larger treaty that covered both investment and trade. The fusion of trade and investment governance in one instrument led to new cross-fertilization. In particular, trade law's traditional stance on inter-governmental rather than on private dispute resolution inspired the drafting of NAFTA's investment arbitration provision. Public international law elements at the time also being negotiated in the Uruguay Round deliberations, like third party participation or authoritative interpretations, thus found their way into Chapter 11.⁵¹ Interestingly, their inclusion into NAFTA produced a temporary discrepancy in the U.S. treaty network, where NAFTA displayed an embedded investment arbitration approach whereas prior *and* subsequent U.S. standalone BITs continued to subscribe to a purer form of investment arbitration without authoritative interpretations or non-disputing party interventions.⁵² This discrepancy was remedied through the adoption of the 2004 U.S. model BIT and subsequent BITs that closely followed NAFTA on non-disputing party submissions, *renvoi* provisions and authoritative interpretations.⁵³

Third, the United State was well-placed to engage in this institutional innovation. It was only in the 1980s when the country had abandoned its traditional policy of concluding Friendship, Commerce and Navigation (FCN) treaties and switched to the European-style BITs.⁵⁴ Before that

⁴⁹ José Enrique Alvarez, "The Evolving BIT," *Transnational Dispute Management* (2010): 3, www.transnational-dispute-management.com/article.asp?key=1542.

⁵⁰ David R. Haigh, "Chapter 11--Private Party vs. Governments, Investor-State Dispute Settlement: Frankenstein or Safety Valve," *Canada-United States Law Journal* 26 (2000): 130–1; Guillermo Aguilar Alvarez and William W. Park, "New Face of Investment Arbitration: NAFTA Chapter 11, The," *Yale Journal of International Law* 28 (2003): 366–371.

⁵¹ Consider, for instance, Article IX (2) of the WTO Agreement on authoritative interpretations or Article 10 of the DSU on third parties. Marrakesh Agreement Establishing the World Trade Organization (WTO), Apr. 15, 1994, 1867 UNTS 154. Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement, Annex 2, 1869 U.N.T.S. 401.

⁵² See for instance the US–Jordan BIT (Treaty between the Government of the United States of America and the Government of the Hashemite Kingdom of Jordan Concerning the Encouragement and Reciprocal Protection of Investment, Jul. 2, 1997, U.S.-Jordan) or US–Albania BIT (Treaty between the Government of the United States of America and the Government of the Republic of Albania Concerning the Encouragement and Reciprocal Protection of Investment, Jan. 11, 1995, U.S.-Alb.).

⁵³ Vandeveld, *U.S. International Investment Agreements*, 106–107 Furthermore, Vandeveld notes that that "the 2004 model marked a partial departure from the policy of depoliticizing investment disputes. Faced for the first time with the prospect of being named as a respondent in an investment dispute, the United States wished not to require the involvement of the investor's home state in the dispute, but to permit the home state in agreement with the host state to foreclose partially or entirely the investor's recourse to investor-state arbitration." (p. 30) This was, of course, already possible under NAFTA.

⁵⁴ See: Wayne Sachs, "New U.S. Bilateral Investment Treaties, The," *International Tax & Business Lawyer* 2 (1984): See ; Pamela B. Gann, "U.S. Bilateral Investment Treaty Program, The," *Stanford Journal of*

policy change, FCN treaties had been the principle U.S. tool for investment protection abroad. In contrast to the simple and brief European BITs that focused on investment protection in isolation, FCN treaties were comprehensive and complex agreements that treated investment protection alongside other subject areas like trade but also navigation or consular relations and contained an important intergovernmental dimension. Even after that policy shift, the U.S. BIT program retained a number of FCN features. Hence when NAFTA necessitated a new treaty design, American negotiators, because of their FCN heritage, were arguably more willing to insert more public international law tools into the arbitration process, rather than being ideationally rooted in European style BITs and their reliance on privatized ISA.⁵⁵

An important conclusion can be drawn from this section. ‘Embedded’ ISA originated not as a response to rising numbers of investment claims or arbitral (mis)interpretations, but rather as a superior mechanism for governing investment dispute resolution in the face of bi-directional investment flows. Having said that, it is undeniable that the surge in investment claims was instrumental in the proliferation of ‘embedded’ ISA. As highlighted above, the United States only started including ‘embedded’ ISA into its BIT network in 2004, after it had been a defendant in several investment disputes. Had investment claims not kicked off, NAFTA’s embedded ISA may well have been an exception. In light of the persistent growth of investment arbitration and with more and more investment relationships being characterized by bi- rather than unidirectional investment flows, ‘embedded’ ISA is likely to become more frequent than ‘pure’ ISA in future investment treaty-making.

‘Embedded’ ISA and Its Inner Workings

After tracing its emergence, we now turn to exploring the inner working of ‘embedded’ ISA. Before discussing the interaction between the inter-State elements with the still privatized ISA core and the interaction among the inter-State elements themselves, we need an analytical framework that can guide our assessment.

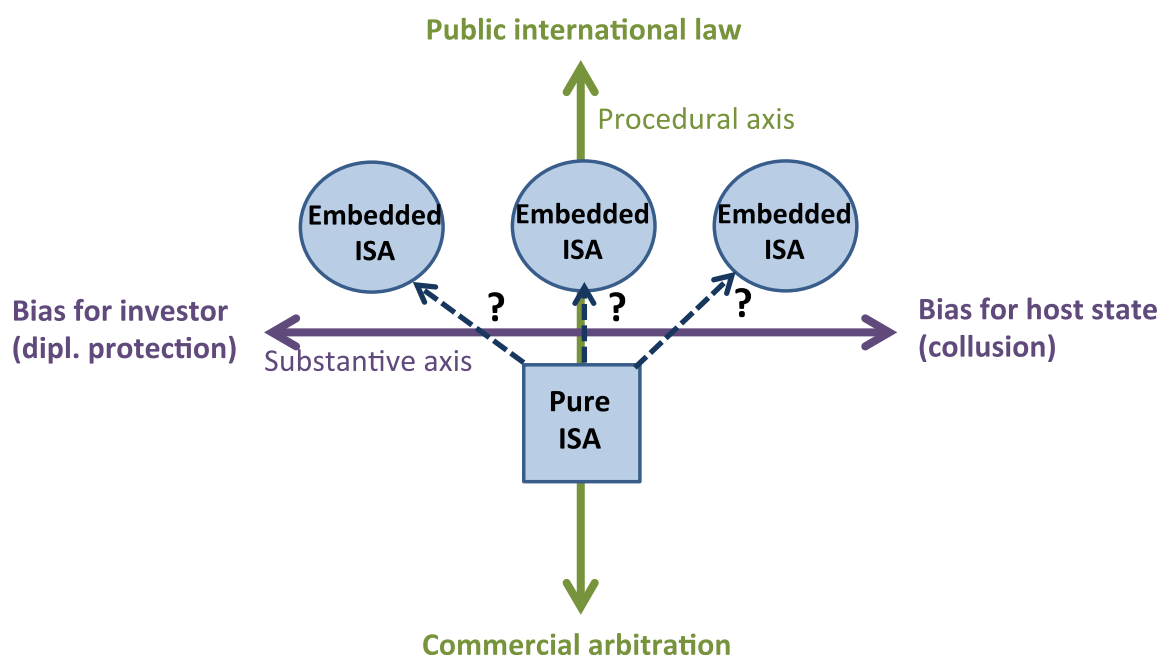
Some Analytical Considerations

To evaluate the return of the home State and the impact of the transition from ‘pure’ to ‘embedded’ ISA, it is best to think about investor-State arbitration as being situated in a coordination system with two axes – a substantive one and a procedural one (Figure 1). The substantive axis is concerned with the question of who is likely to benefit from the (home) State interventions: the investor (marking a return of diplomatic protection) or the host State (suggesting collusion among the contracting parties)? The procedural axis describes investment arbitration’s nature as a hybrid system containing both private elements inspired by commercial arbitration and public elements inspired by public international law. How does ‘embedded’ ISA affect this hybrid heritage? While the transition from pure to embedded ISA is likely to move investment arbitration closer to traditional public international law adjudication, its impact on the substantive axis is more difficult to anticipate. The following sections will revisit arguments raised in the literature that suggest that the inclusion of the four elements of embedded ISA shift investment arbitration either towards one extreme or towards the center. These movements will help us to make sense of the impact of embedded ISA.

International Law 21 (1985): 373; Kenneth J. Vandeveld, “Bilateral Investment Treaty Program of the United States, The,” *Cornell International Law Journal* 21 (1988): 201.

⁵⁵ For an elaboration of the impact of FCN treaties see Wolfgang Alschner, *Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law*, SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, August 13, 2013), <http://papers.ssrn.com/abstract=2309467>.

Figure 1: An analytical framework to assess the impact of embedded ISA⁵⁶



In addition, we need to clarify what impact is actually measured. Here it is useful to differentiate between States that use the tools of embedded ISA either (1) to impact the abstract interpretation of a treaty or (2) to provide a specific factual intervention in a concrete dispute. To give an example, a home State may make an intervention creating a bias for an investor both by advocating an expansive position on the interpretation of an investment obligation or by aggressively pursuing a concrete diplomatic protection claim. Vice versa, a home State's intervention may be biased against the investor if it advocates a restrictive reading or settles a diplomatic protection claim against the wishes of its investor.

The distinction of interpretive versus factual intervention matters insofar as there is another dynamic at play. Interventions on interpretation aim to establish, affirm, contest or modify the meaning and the allocation of interpretive authority.⁵⁷ A treaty bargain is not set in stone. Because of transaction costs, uncertainty about the future, inherent linguistic ambiguities and other factors, even the most carefully negotiated investment agreement remains an 'incomplete contract'. Amongst others, these gaps are filled through interpretation in the course of dispute settlement.⁵⁸ Also, sociological, legal realists' or constructivists' accounts suggest that the meaning of norms is not merely objectively established, but subjectively interpreted.⁵⁹ Here 'embedded' ISA plays an important role. Interpretive

⁵⁶ For reasons of convenience, the 'pure' form of investor-State arbitration is assumed to be substantively neutral. Whether this is actually the case is a different question, which is beyond the scope of this contribution.

⁵⁷ For highly insightful investigations in interpretive contestation in investment law see Roberts, "Power and Persuasion in Investment Treaty Interpretation.", 179–225.

⁵⁸ Van Aaken, *International Investment Law between Commitment and Flexibility*, 527-531; Wolfgang Alschner, *Interpreting Investment Treaties as Incomplete Contracts: Lessons from Contract Theory*, SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, July 18, 2013), <http://papers.ssrn.com/abstract=2241652>.

⁵⁹ Alexander Wendt, *Social Theory of International Politics*, Cambridge Studies in International Relations 67 (Cambridge: Cambridge University Press, 1999); Ulrich Fastenrath, "A Political Theory of Law: Escaping The Aporia of the Debate on the Validity of Legal Argument in Public International Law," in *From Bilateralism to Community Interest*, ed. Ulrich Fastenrath et al. (Oxford: Oxford University Press, 2011); Stanley Eugene Fish, *Is There a Text in This Class?: The Authority of Interpretive Communities* (Harvard University Press, 1980).

contestation and affirmation by the contracting States of the original bargain form a central aspect of the post-negotiation life of a treaty and of ‘embedded’ ISA.⁶⁰ To use Klabber’s adaptation of the famous Clausewitz quote: “interpretation is the continuation of treaty negotiations by other means.”⁶¹ Contracting States through their subsequent practice can police aspects of the original bargain that they wish to see maintained and they can adjust other aspects that they wish to modify.⁶²

Factual interventions, in contrast, are motivated by a different dynamic. Rather than abstract contestations over meaning, practical concerns dictate the factual interventions by the (home) State in embedded ISA. These concerns may range from relatively minor considerations, such as evidence that could be useful to the tribunal or vital concerns of national interest that warrant a direct interaction among States. Because the considerations differ on interpretive and factual interventions, the following sections will pay due regard to this distinction. Table 1 provides an overview detailing which tools allow what kind of intervention and whether they are used unilaterally or jointly by contracting States.

Table 1: Overview of embedded ISA tools

<i>Tools</i>	<i>Source</i>	<i>Law/Fact</i>
Non-disputing party intervention	Unilateral	Law/(Fact?)
Authoritative Interpretation	Jointly	Law
<i>Renvoi</i>	Jointly	Law/ Fact
State-to-State Arbitration	Unilateral	Law/Fact

Embedded ISA and its Interaction with the Private Core of ISA

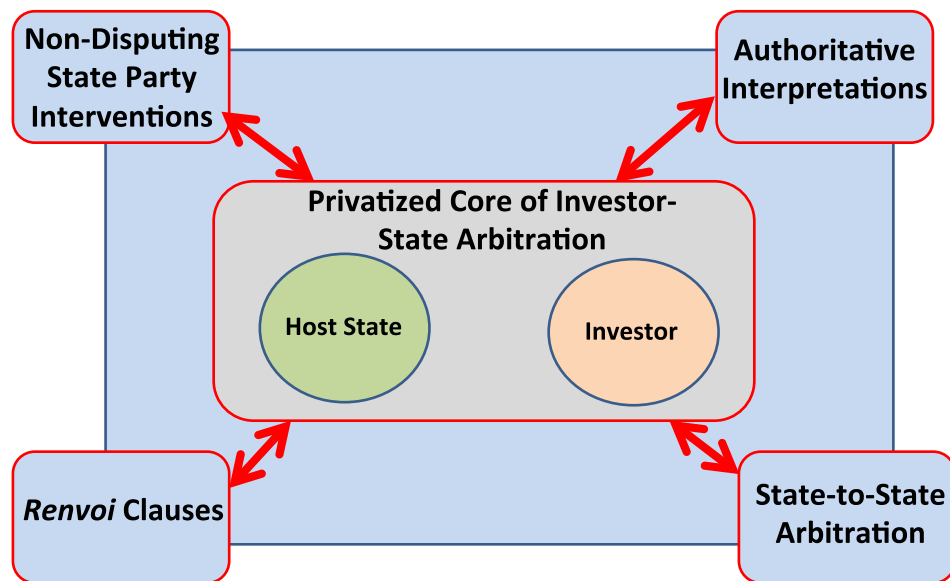
The idea of ‘embedded’ ISA is based on four tools of (home) State involvement in the arbitration process: (i) non-disputing party intervention, (ii) authoritative interpretation, (iii) *renvoi* of questions of fact and of law to State representatives and (iv) State-to-State arbitration. Each of them interacts with the private core of ISA (Figure 2).

⁶⁰ Of course, the contracting States are not the only actors with an interest and the power to affect the negotiated bargain. Also international tribunals possess interpretive authority. In addition, investors in their pleadings, NGO’s through *amicus curiae* submissions or expert interventions may influence the treaty. See Mills, *The Balancing (and Unbalancing)*, ch. 12.

⁶¹ Jan Klabbers, “On Rationalism in Politics: Interpretation of Treaties and the World Trade Organization,” *Nordic Journal of International Law* 74 (2005): 406.

⁶² See Mills, *The Balancing (and Unbalancing?)*, ch. 12).

Figure 2: Inner workings of embedded ISA (I): Interaction with private core of ISA



Non-disputing Party Intervention

NAFTA was the first modern investment treaty to provide a specific mechanism for the participation of non-disputing State parties in the course of arbitration between a foreign investor and the host State. Articles 1127 and 1129 “make the participation of non-disputing NAFTA Parties in Chapter 11 arbitrations [an] inter-governmental business”:⁶³ the notice of claims as well as the pleadings are distributed by the responding party directly to the other State parties (Article 1127) and evidentiary documents can be obtained from the other State party upon request (Article 1129). Most importantly, a non-disputing party can, as of right,⁶⁴ make a submission to the tribunal on a question of interpretation upon serving notice to the disputing parties (Article 1128). Strictly speaking, non-disputing party interventions are nothing new. Already the 1962 Draft Convention on the Protection of Foreign Property of the Organization for Economic Co-operation and Development (OECD) foresaw such a right both for State-to-State arbitration and for ISA.⁶⁵ Yet, this early initiative was not taken up in subsequent BITs. Even the ultimately failed Multilateral Agreement on Investment (MAI) contained a provision for non-disputing State party submissions.⁶⁶ Whereas non-disputing party interventions used to be more common in regional or multilateral treaties, they are now increasingly included in bilateral FTAs and BITs across the globe.⁶⁷ At the same time, they have not yet become a universal feature and

⁶³ Hunter and Barbuk, “Procedural Aspects of Non-Disputing Party Interventions in Chapter 11 Arbitrations,” 163.

⁶⁴ Meg Kinnear, Andrea Bjorklund, and John F. G. Hannaford, *Investment Disputes Under NAFTA. An Annotated Guide To NAFTA Chapter 11*, Lslf (Kluwer Law International, 2006), 1128–2.

⁶⁵ Annex, para 6b), see Parra, *The History of ICSID*, 16.

⁶⁶ Article D (12) on Third Party Rights reads: ‘[t]he arbitral tribunal shall notify the Parties Group of its formation. Taking into account the views of the parties, it may give to any Contracting Party requesting it an opportunity to submit written views on the legal issues in dispute, provided that the proceedings are not unduly delayed thereby. Any Contracting Party requesting it within thirty days after receipt by the Parties Group of the notification of the tribunal’s formation shall be given an opportunity to present its views on issues in dispute in which it has a legal interest.’ OECD, Multilateral Agreement on Investment (MAI) Draft Consolidated Text, Apr. 22, 2009, OECD Doc. No. DAFFE/MAI(98)7/REV1, accessed January 31, 2014, www1.oecd.org/daf/mai/index.htm.

⁶⁷ See for example, COMESA Investment Agreement Art. 7(2). Investment Agreement for the COMESA Common Investment Area, May 23, 2007, accessed January 23, 2014, <http://vi.unctad.org/files/wksp/iiawksp08/docs/wednesday/Exercise%20Materials/invagreecomesa.pdf>. (adopted

some regional treaties limit non-disputing State party intervention to State-to-State arbitrations.⁶⁸ When it comes to their use in practice, apart from NAFTA, non-disputing State party interventions are frequently invoked under Article 10.20 of the Central America Free Trade Agreement (CAFTA).⁶⁹

The higher frequency of non-disputing party clauses and actual submissions in regional treaties as compared to BITs can be explained by a different incentive structure. First of all, regional treaties, because of the multitude of parties involved, often generate more disputes. Where a State expects to be a repeat player, either as a potential respondent or as a home State, it has a greater interest in influencing the interpretation of the underlying agreement for future cases. For example, States can pursue predictability in their intervention ensuring that a legal provision is interpreted consistently *vis-à-vis* all investors; home States may also intervene to safeguard a high level of investment protection or host States may seek to enhance policy space in the agreement to reduce their exposure to investment claims in future disputes.

Second, whereas, at least traditionally, BITs were signed between a capital importer and a capital exporter, regional agreements like CAFTA and NAFTA involve States that are both destinations and sources of foreign investment. Hence, a contracting State does not know on which side – respondent or home State – they are more likely to end up in future litigation. Therefore, they have an interest in preventing extreme interpretations by arbitral tribunals. Since investment treaties primarily contain obligations on States rather than rights for them, non-disputing interventions tend to be more frequently targeted at policing the ceiling of investment protection standards (preventing interpretations skewed in favor of the investor) rather than their floor (preventing interpretations skewed in favor of the host State).⁷⁰ Of course, the combination of repeat players coupled with uncertainty as to which State will more likely be a respondent is not unique to regional treaties but rather a function of the underlying capital movement structure. Hence, we should expect a rise in non-disputing party interventions also in future bilateral treaties. For example, bi-directional investment flows will underlie the future bilateral Transatlantic Trade and Investment Partnership between the European Union (EU) and the U.S. As a result, the contracting States are likely to provide for and actively use non-disputing party interventions.

Aside from these game-theoretical considerations, another reason for the current absence of non-disputing State party submissions in bilateral treaties is the lack of provisions to this effect in many BITs. Of course, the lack of such a clause does not preclude home State interventions *per se*. A country can simply issue a unilateral statement on interpretation in case it is dissatisfied with the interpretation of an arbitral tribunal. Switzerland chose this path, criticizing the *SGS v Pakistan* tribunal's reading of the umbrella clause in the Switzerland-Pakistan BIT after the Tribunal had rendered its award.⁷¹ While this statement may have persuasive effect on future tribunals, it is of little

at the 12th Summit of COMESA Authority of Heads of State and Government, held in Nairobi, Kenya, May 22-23, 2007).

⁶⁸ See for example, China–Japan–South Korea Investment Agreement Art. 17 (2) c). Agreement among the Government of Japan, the Government of the Republic of Korea and the Government of the People's Republic of China for the Promotion, Facilitation and Protection of Investment, Japan-S.Korea-P.R.C., May 13-2012, accessed February 5, 2014, http://www.meti.go.jp/policy/trade_policy/epa/pdf/CJK%28English%29.pdf.

⁶⁹ Consider for example, the submission of Costa Rica and Nicaragua referred to in *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, ¶¶ 81-82 (Mar. 14, 2011).

⁷⁰ This is confirmed by the findings of Professor Kaufmann-Kohler: "A review of the publicly available record of cases under NAFTA shows that, in a total of 19 cases where the investor's home State filed one or more submissions under Article 1128, in only two instances did the non-disputing State endorse the position of the claimant, i.e. of its own national against the foreign State. In the other 17 out of 19 cases, the national State of the investor sided with the latter's opponent." (Footnote omitted) Kaufmann-Kohler, "Chapter 15. Non-Disputing State Submissions in Investment Arbitration," 319.

⁷¹ Switzerland send a letter to this effect to the ICSID Secretariat, which is reprinted in its relevant parts in Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*

help to the investor (here SGS), which still had to comply with the award. Alternatively, even in the absence of a specific provision, a non-disputing State may submit a brief in an ongoing dispute either upon invitation by the tribunal or upon its own initiative as *amicus curiae*. In *Achmea v. Slovak Republic*, the Dutch government was invited to make a submission and the European Commission filed an *amicus curiae* brief.⁷² A clear disadvantage as compared to NAFTA Article 1128-type submissions, which can be filed as of right, is that *amicus curiae* briefs are accepted at the discretion of a tribunal. *Amicus curiae* submissions can actually be more extensive than Article 1128 submissions as the latter are limited to “a question of interpretation of this Agreement” while the former may comment on both law and fact.⁷³ Although this may seem surprising at first, underlying this distinction is the concern that Article 1128 submissions could be used to introduce a form of diplomatic protection through the backdoor.

This brings us to the evaluation of the non-disputing party submissions in the literature along the substantive and procedural axis introduced above. Non-disputing party submissions are perceived to potentially bias investment arbitration with arguments going in both directions. For Gabrielle Kaufmann-Kohler, non-disputing party submissions risk marking a return of diplomatic protection.⁷⁴ Focusing on the distinction between submissions on interpretation and those on facts, she asserts that the former are generally permissible while the latter may be problematic, as they blur the boundaries with diplomatic protection. Although this raises the somewhat awkward result of allowing *amicus curiae* to be more extensive submissions (on law and fact) than those of non-disputing parties (on law only), this is justified, according to Kaufmann-Kohler by the risk of covert diplomatic protection. She suggests that arbitrators should reject submissions on fact *e.g.*, by construing the applicable arbitration rules in light of Article 27 of the ICSID Convention.⁷⁵

The interpretation versus fact distinction is consistent with the typical introductory phrase used by the United States, Canada and Mexico in their 1128 submissions: *e.g.*, “[t]he United States does not, through this submission, take a position on how the following interpretation applies to the facts of this case.”⁷⁶ On the other hand, many submissions in the NAFTA context actually do contain factual

(Alphen aan den Rijn: Kluwer Law International, 2009), 466–467; Kaufmann-Kohler, “Chapter 15. Non-Disputing State Submissions in Investment Arbitration,” 315.

⁷² *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (formerly *Eureko B.V. v. The Slovak Republic*), Award on Jurisdiction, Arbitrability and Suspension, ¶¶ 151-166 (Oct. 26, 2010). See for commentary, Kaufmann-Kohler, “Chapter 15. Non-Disputing State Submissions in Investment Arbitration,” 316.. See also *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, ¶¶ 249-263 (Oct. 21, 2005).

⁷³ Mexico first opposed the admission of *amicus curiae* submissions on that ground, see *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, First Mexican 1128 Submission (Jun. 11, 2001), accessed February 5, 2014, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/parcel.aspx?lang=eng>. Later, Mexico changed its stance and the three NAFTA parties issued the ‘Statement of the Free Trade Commission on non-disputing party participation’ on 7 October 2003 which allowed *amicus curiae* submissions both on law and on facts, accessed February 5, 2014, www.state.gov/documents/organization/38791.pdf.

⁷⁴ Kaufmann-Kohler, “Chapter 15. Non-Disputing State Submissions in Investment Arbitration.”

⁷⁵ *Ibid.*, 319–324; Similarly, Weiler rejects 1128 submissions on facts regardless which side they support as legally impermissible and agenda-driven. Weiler Todd, “The Ethyl Arbitration: First of Its Kind and a Harbinger of Things to Come,” *American Journal of International Arbitration* 11, no. 1–2 (2001): 201.

⁷⁶ For the United States, see, for instance, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, United States Article 1128 Submission (Damages Phase), ¶ 1 (Sep. 18, 2001), accessed February 5, 2014, <http://www.state.gov/s/l/c3746.htm>; *Chemtura Corp. v. Government of Canada*, United States 1128 Submission, ¶ 1 (Jul. 31, 2009), accessed February 5, 2014, <http://www.state.gov/s/l/c29737.htm>; *Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/1, U.S. 1128 Submission, ¶ 1 (Feb. 27, 2003), accessed February 5, 2014, <http://www.state.gov/s/l/c5817.htm>. Similarly for Canada, see, for instance, *Fireman's Fund Insurance v. Mexico*, Canada 1128 Submission, ¶ 3 (Feb. 27, 2003), accessed February 5, 2014, <http://www.transnational-dispute-management.com/legal-and-regulatory-detail.asp?key=5710>; *ADF Group Inc.*

interventions.⁷⁷ Although the primary, and arguably more important, purpose of non-disputing party submissions is the policing of the interpretation of an agreement, interventions on facts may also be helpful. Home States have a legal interest not only in the interpretation of a treaty, but also in its application to particular disputes. Indeed, from that point-of-view, non-disputing State submissions could be akin to WTO third party submissions that may elucidate both points of law and fact. Furthermore, a non-disputing State party could circumvent the limits of Article 1128-type clauses by filing *amicus curiae* briefs relating to the facts of the specific dispute. Hence, there is good reason to not be too strict about enforcing substantive limitations on non-disputing party submissions.

But would a relaxed approach to accepting submissions on fact open the door to diplomatic protection? It is submitted that such fears are overstated. First, Kaufmann-Kohler herself admits that, currently, home State interventions on behalf of their investors are rare, as most of the submissions support the responding host States.⁷⁸ Second, Article 27 of the ICSID Convention did not intend to exclude any form of home State intervention *per se*, but was meant to prevent a parallel diplomatic protection claim from being launched.⁷⁹ Indeed, home State interventions that facilitate dispute settlement are explicitly allowed. Third, in any case, non-disputing party interventions, even where they support the claim of an investor in the particular case, are quite different from diplomatic protection. Aside from technical differences (*e.g.*, no exhaustion of local remedies required; State is not invoking its own right), they differ from diplomatic protection in the sense that non-disputing State party submissions occur as a part of structured, legal proceedings rather than discretionary and potentially politicized diplomatic consultations. The distinction between diplomatic protection and other State interventions in the dispute settlement procedure was also discussed in *Pac Rim Cayman v. El Salvador*. The tribunal clearly distinguished between CAFTA Article 18.3 information requests or 20.4 inter-State consultations on the one hand, and diplomatic protection on the other.⁸⁰ Thus, the notion of diplomatic protection must not be overstretched to encompass other forms of home State interventions. Understood in this narrow sense, diplomatic protection is not returning in the guise of non-disputing party interventions. In sum, both the risk of a return of diplomatic protection and the importance of the distinction between submissions on interpretation and submissions on fact are overstated.

But what about the other extreme? Are non-disputing party submissions creating a bias in favor of the respondent State? At least in the realm of NAFTA, this seems to be a more acute worry, as indicated by the number of such interventions supporting the respondent, as cited by Kaufmann-Kohler. As Todd Weiler remarks, “[t]he days when a government would lend its support for a claim made by its investor against another country appear to have passed into history.”⁸¹ On the balance, however, this concern may also be overstated. First of all, if States were ultimately concerned about reducing their liability as much as possible, they would simply exit the system by denouncing or

v. United States of America, ICSID Case No. ARB(AF)/00/1, Canada First 1128 Submission, ¶ 3 (Jan. 18, 2002), accessed February 5, 2014, <http://www.state.gov/documents/organization/142319.pdf>. Similarly for Mexico, see, for instance, *ADF v. U.S.A.*, Mexico First 1128 Submission, ¶ 1 (Jan. 18, 2002), accessed February 5, 2014, <http://www.state.gov/s/l/c3754.htm>.

⁷⁷ See the examples and discussion in Hunter and Barbuk, “Procedural Aspects of Non-Disputing Party Interventions in Chapter 11 Arbitrations,” 165–169.

⁷⁸ Kaufmann-Kohler, “Chapter 15. Non-Disputing State Submissions in Investment Arbitration,” 312–3.

⁷⁹ The waiver of diplomatic protection is the “quid pro quo for ICSID arbitration”. Aron Broches, “The Convention on the Settlement of Investment Disputes between States and Nationals of Other States,” in *Recueil Des Cours, Collected Courses, Volume 136 (2007)* (Martinus Nijhoff Publishers), 374, accessed October 15, 2013, http://nijhoffonline.nl/book?id=er136_er136_331-410.

⁸⁰ *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, ¶¶ 4.87-4.89 (Jun. 1, 2012).

⁸¹ Todd Weiler, “NAFTA Investment Law in 2001: As the Legal Order Starts to Settle, the Bureaucrats Strike Back,” *International Lawyer (ABA)* 36 (2002): 348.

terminating their investment treaties. This, however, happens only rarely.⁸² So we must assume that non-disputing parties in their interventions seek to strike an appropriate balance between the protective interests of their investors as home States and their own regulatory interests as host States. Pearce and Coe expect such a balanced approach:

NAFTA Parties are unlikely to endorse interpretations and theories of recovery that enlarge their own exposure to claims... [at the same time] such submissions may provide an important check upon fanciful theories of recovery or treaty interpretations proffered by only one NAFTA Party.⁸³

Second, home States have no incentive to use such submissions excessively. As Anthea Roberts explains, home States may not want to engage in interpretive statements in order to allow “their investors to pursue broad interpretations even where those states would vigorously oppose such an interpretation if they were subject to it in an investor-state claim.”⁸⁴ Also the elaboration of submissions is time and resource intensive and will thus only be used selectively. Even among the highly active NAFTA parties, only about every third dispute involves 1128 submissions.⁸⁵ Hence, contracting States carefully choose the disputes and topics that require intervention, rather than consistently supporting their fellow States in ongoing disputes.

It is more delicate to make an assessment on the procedural private-public axis. From a public international law angle, it is not uncommon to allow for non-disputing party interventions. In the WTO, where such interventions are common practice, the inevitable additional costs and delays are borne by the WTO membership at large and are tolerated and even encouraged as an expression of the collective participation in a multilateral dispute settlement mechanism. By contrast, from a private international law or commercial arbitration point-of-view, where proceedings take place *in camera* at the exclusion of outside interests, the additional involvement of non-disputing parties is perceived as a burden, not in the least because the additional costs on the tribunal are borne by the actual disputants. Today, as Hunter and Barbuk observe, “non-disputing Party interventions are effectively ‘for free’”.⁸⁶ Put differently, the public international law tools of ‘embedding’ ISA are subsidized by the privatized core of ‘pure’ ISA. Here the ASEAN Comprehensive Investment Agreement provides an interesting approach in Article 39(6) albeit with respect to the access of documents: “[t]he non-disputing Member State shall be entitled, *at its cost*, to receive from the disputing Member State a copy of the notice of arbitration [...] [emphasis added].”⁸⁷ Hence, cost-sharing may be one way to better mediate between ‘embedded’ ISA’s competing underlying procedural paradigms.

⁸² UNCTAD, “Denunciation of the ICSID Convention and BITS: Impact on Investor-State Claims”, IIA Issues Note, no. 2 (December 2010), accessed February 5, 2014, http://unctad.org/en/docs/webdiaeia20106_en.pdf; See also, Wolfgang Alschner, Ana Berdajs and Vladyslav Lanovoy, “Legal Basis and Effect of Denunciation Under International Investment Agreements”, Legal Memorandum, The Graduate Institute – Geneva, Trade and Investment Law Clinic (May 9, 2010), accessed February 5, 2014, <http://graduateinstitute.ch/fr/home/research/centresandprogrammes/ctei/projects-1/trade-law-clinic.html>.

⁸³ Clyde C. Pearce and Jack Jr Coe, “Arbitration under NAFTA Chapter Eleven: Some Pragmatic Reflections upon the First Case Filed against Mexico,” *Hastings International and Comparative Law Review* 23 (2000 1999): 338.

⁸⁴ Roberts, *State-to-State Investment Treaty Arbitration*, 46.

⁸⁵ According to my research on current NAFTA cases, until 2013 submissions have been received in 22 out of 60 disputes.

⁸⁶ Hunter and Barbuk, “Procedural Aspects of Non-Disputing Party Interventions in Chapter 11 Arbitrations,” 172 see also accompanying discussion at 162 and 172-174.

⁸⁷ ASEAN Comprehensive Investment Agreement, Feb. 26, 2009, accessed February 5, 2014, <http://www.asean.org/images/2012/Economic/AIA/Agreement/ASEAN%20Comprehensive%20Investment%20Agreement%20%28ACIA%29%202012.pdf>.

Authoritative Interpretations

A second innovation in NAFTA is Article 1131(2), which provides that the NAFTA Free Trade Commission (FTC) that regroups cabinet-level officials of the three NAFTA contracting States can issue interpretations of a NAFTA provision that are binding on an investor-State tribunal. In July 2001 the FTC famously made use of its power to clarify that the obligation to provide investors with ‘fair and equitable treatment’ and ‘full protection and security’ in NAFTA Article 1105 does not require a treatment above or beyond the customary international law minimum standard of treatment.⁸⁸ Although this is the only known instance of such an institutionalized authoritative interpretation by the contracting parties to an investment treaty, NAFTA is not the only treaty containing a provision to this effect. Indeed, similar clauses can be found in investment treaties around the world, some of them delegating the task of issuing interpretations to the contracting States directly rather than their representatives.⁸⁹ Even in the absence of an explicit reference in the treaty, states have issued joint statements on interpretation.⁹⁰ Such statements then derive their legal authority from general international law, specifically Article 31(3) of the Vienna Convention on the Law of Treaties (VCLT), which states that for the purposes of interpretation (a) subsequent agreements and (b) subsequent practice shall be taken into account. The ICJ, quoting from earlier work of the International Law Commission, stated in the *Kasikili/Sedudu Island* case that “an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation.”⁹¹ Such joint interpretations will thus be binding or at least highly persuasive on subsequent tribunals.⁹²

As for the impact of joint interpretations on ISA, the NAFTA FTC intervention was generally considered as an authoritative statement of the law by subsequent tribunals. The Tribunals in *Loewen* and *Glamis*, for example, highlighted the binding nature of such interpretations;⁹³ the *Methanex* Tribunal linked the FTC statement to VCLT Article 31(3)a) as “authentic interpretations given by the parties [which] override general rules of interpretation”;⁹⁴ and the *ADF* Tribunal showing the greatest deference stating that

⁸⁸ NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions, sec. B (2)*.

⁸⁹ See, for example, Article X(6) Canada–Czech Republic BIT (Agreement between Canada and the Czech Republic for the Promotion and Protection of Investments, May 6, 2009, Can.-Czech Rep.); Schedule Article 8(2) Mexico–Netherlands BIT (Agreement on Promotion, Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the United Mexican States, May 13, 1998, Neth.-Mex.).

⁹⁰ In *Achmea v. Slovak Republic*, Award on Jurisdiction, ¶¶ 165-166, Slovakia and the Netherlands agreed in a Note Verbale that the underlying BIT had not been terminated by virtue of the BITs termination procedure in Article 13. See also *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Final Award, ¶¶ 87-93 (Mar. 14, 2013), in which the Dutch and Czech Government agreed on a ‘common position’ which was taken into account by the tribunal.

⁹¹ *Case Concerning Kasikili/Sedudu Island* (Botswana v. Namibia), 1999 I.C.J. Reports 1045, ¶ 49 (Judgment, Dec. 13 1999).

⁹² See Roberts, “Power and Persuasion in Investment Treaty Interpretation,” 200 fn. 105.

⁹³ *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Final Award, ¶¶ 126-128 (Jun. 26, 2003). *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Final Award, ¶ 599 (Jun. 8, 2009).

⁹⁴ *Methanex v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, pt. II, ch. H, ¶ 23 (Aug. 3, 2005), quoting Oppenheim’s International Law 9th ed., (Longman, 1992), vol. 1, 630. with approval.

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.⁹⁵

On the other extreme, the *Pope & Talbot* Tribunal was much more critical of the validity and effect of the FTC interpretation.⁹⁶ In particular, it reviewed whether the interpretation was in fact an amendment of NAFTA⁹⁷ and whether it could retroactively affect previous findings by the Tribunal.⁹⁸ In the end the Tribunal was able to accommodate the FTC interpretation without having to alter its prior findings.⁹⁹

The impact of joint interpretations on ISA has received extensive scrutiny in the literature and sparked a controversial debate among academics. Going back to our two axes: on the substantive investment law, fears arose that contracting States could use interpretations to water down investment protection standards, thereby creating a bias in favor of host States.¹⁰⁰ Similar to the above discussion on non-disputing party interventions, such fears may be overstated. A joint interpretation requires a *common* understanding of treaty provisions among *all* contracting States. This sets a high bar for arriving at a joint interpretation, as every contracting State has a *de facto* veto power to prevent an interpretation that goes against its interests. Therefore, only a reading of a treaty clause that can accommodate the interests of both the home and host country of foreign investors is likely to pass that hurdle.¹⁰¹ True joint interpretations are thus likely to strive for moderation rather than extremes.

At the same time, the effectiveness of this veto mechanism in promoting moderation depends on the kind of documents, beyond an FTC-type statement, that could be used to infer common interpretations by the contracting States parties. As Anthea Roberts highlights, international law imposes little formal requirements on subsequent agreements or practice; what matters is that the pronouncements (or acquiescence) by the contracting States indicate a common intention as to a treaty's interpretation.¹⁰² At the extreme, some host countries in ISA sought to rely on home States' submissions, as respondents in other cases, in order to infer a common intention on interpretation of similar provisions in an ongoing dispute.¹⁰³ Less controversially, but still regularly disputed by investors, is that non-disputing party State submissions, if they correspond with a respondent's submissions, can together form a subsequent practice on interpretation.¹⁰⁴ Also other documents may

⁹⁵ *ADF v. U.S.*, Award, ¶177.

⁹⁶ *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award in Respect of Damages (May 31, 2002).

⁹⁷ *Ibid.*, ¶¶ 24-47.

⁹⁸ *Ibid.*, ¶¶ 48-51.

⁹⁹ *Ibid.*, ¶ 65.

¹⁰⁰ Alvarez and Park, "New Face of Investment Arbitration," 397-8; Weiler, "NAFTA Investment Law in 2001," 346-348; Brower, "Investor-State Disputes under NAFTA," 43-88.

¹⁰¹ Roberts, "Power and Persuasion in Investment Treaty Interpretation," 196.

¹⁰² *Ibid.*, 199-200.

¹⁰³ See *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, ¶ 47, n. 12 (Jun. 17, 2005): "[w]e do not believe, however, that an argument made by a party in the context of an arbitration reflects practice establishing agreement between the parties to a treaty within the meaning of Article 31(3)(b) of the on the Law of Treaties."

¹⁰⁴ See, for instance, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada*, ICSID Case No. ARB(AF)/07/4, Investor's Reply to 1128 Submissions of Mexico and United States, ¶¶ 6-12 (Sep. 1, 2010), accessed February 5, 2014, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/mobil-11.pdf>; *The Canadian Cattlemen for Fair Trade v. United States of America*, (formerly *Consolidated Canadian Claims v. United States of America*), UNCITRAL, Award on Jurisdiction, ¶¶ 186-187 (Jan. 28, 2008); Lee Mcaplan and Jeremy Ksharpe, "United States," in *Commentaries*

be relied on to evidence such an agreement among the parties. In *Aguas del Tunari*, Bolivia unsuccessfully tried to rely on Dutch parliamentary debate records to demonstrate a common interpretation of the Bolivia-Netherlands BIT.¹⁰⁵ These instances highlight the importance of verifying the existence of a true common intention on interpretation, rather than accepting potentially opportunistic allegations by responding States at face value. Where such true common intentions exist, however, tribunals should abide by them and trust the consensus rule to prevent a substantive bias.

On the procedural axis, joint interpretations underline the tensions in investment arbitration between its public international law and commercial arbitration roots expressed in the dual role of a State once as contracting party to the treaty and as respondent in an ongoing proceeding. The contracting NAFTA parties defended the legitimacy of their interpretive power based on international public law considerations,¹⁰⁶ while the criticism was founded on equality of arms considerations taken from the more symmetrical commercial arbitration. As an example of the latter Kaufmann-Kohler, taking the ‘rule of law’ concept as a benchmark, argues that joint interpretations may advance the rule of law by enhancing prospective predictability of what the law is.¹⁰⁷ At the same time, they may violate fundamental procedural rights either by retroactively changing the law in ongoing proceedings or by upsetting equality of arms and due process considerations underpinning the impartiality and independence of judicial systems.¹⁰⁸

These concerns were also reflected in the NAFTA debate of whether the FTC was indeed an interpretation or an amendment. Some argued that the distinction matters little in practice; what matters instead is the reasonableness of the interpretation.¹⁰⁹ Others insisted that a sharp distinction should be drawn between the two since amendments have to follow a different, more formal procedure and may only have prospective effect.¹¹⁰ Joint interpretations, in contrast, are less formal and arguably of retrospective effect and can thus take investors and tribunals in ongoing proceedings by surprise.¹¹¹ As a hybrid creature of both private and public international law, investment arbitration has to find a middle ground between the States’ role as both a masters of and subjects to the treaty *e.g.*, by implying timing limitations of interpretations that exclude an effect on ongoing proceedings.¹¹²

on Selected Model Investment Treaties, ed. Chester Brown, First edition, Oxford Commentaries on International Law (Oxford, United Kingdom: Oxford University Press, 2013), 804.

¹⁰⁵*Aguas del Tunari, S.A. v. Bolivia*, Decision on Respondent's Objections to Jurisdiction, ¶ 251: ‘[t]he coincidence of several statements does not make them a joint statement. And, it is clear that in the present case, there was no intent that these statements be regarded as an agreement.’

¹⁰⁶ See for example Canada’s submissions to the *Pope & Talbot* Tribunal: ‘[a]s a treaty, the NAFTA is the creature of the States that are party to it. ... In this instance, the Parties acting as the Commission have simply carried out a function that they expressly reserved for their Ministers to act collectively: to ensure correct understanding of the governing law through issuance of authoritative interpretation ... Where, because of the misinterpretation or misapplication of the terms of the NAFTA by subordinate tribunals, the Parties determine, as is their right, to set out the proper interpretation of the Treaty's provisions, tribunals have no option but to apply that interpretation. A Tribunal that disregards a Commission interpretation exceeds its jurisdiction.’ *Pope & Talbot v. Canada*, Canada’s Response to Tribunal’s Letter, 2–3 (Oct. 1, 2001), accessed February 5, 2014, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/pope-phase-43.pdf>.

¹⁰⁷ Kaufmann-Kohler, “Interpretive Powers of the Free Trade Commission and the Rule of Law,” 187.

¹⁰⁸ *Ibid.*, 190–194.

¹⁰⁹ Roberts, “Power and Persuasion in Investment Treaty Interpretation,” 200–201, 209–212.

¹¹⁰ Charles H. II Brower, “Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105,” *Virginia Journal of International Law* 46 (2006 2005): 347.

¹¹¹ *Ibid.*, 354; For the retrospective effect of interpretations see Roberts, “Power and Persuasion in Investment Treaty Interpretation,” 201.

¹¹² Kaufmann-Kohler, “Interpretive Powers of the Free Trade Commission and the Rule of Law,” 193–194; For a more cautious proposal see Roberts, “Power and Persuasion in Investment Treaty Interpretation,” 212–213.

Renvoi Procedures

Although to date, *renvoi* provisions have not yet been widely used in investment arbitration, they remain an important tool in the allocation of jurisdictional and interpretive authority between tribunals and contracting States. *Renvoi* provisions delegate certain questions of law or of fact that are raised in an investment dispute to the contracting States or their organs rather than to an arbitral tribunal. Such *renvoi* provisions come in two variations. First, there are interpretive *renvoi* clauses like Article 1132 of NAFTA that allow a disputing State party, invoking a reservation in its defense, to refer the interpretation of the invoked reservation's scope back to the contracting State parties. If they come to an agreement, such joint interpretation will be binding on the tribunal.

Second, there are also factual *renvoi* clauses concerning what may be called 'expert issues' such as taxation (*e.g.*, Article 2103(6) of NAFTA) or financial services (*e.g.*, Article 1415 of NAFTA). In case of a dispute on whether a taxation measure constitutes an expropriation under NAFTA's Chapter 11 the investor has to refer the case to the competent tax authorities of the NAFTA States parties prior to submitting a claim to arbitration. The authorities can then make a binding determination that the measure does not amount to an expropriation. Only if they fail to agree can the matter be referred to an arbitral tribunal. In the words of William Park, the tax *renvoi* mechanism thus amounts to a "tax veto".¹¹³ Other agreements merely endow findings of the contracting parties or their agencies with persuasive authority.¹¹⁴ Importantly, the *renvoi* clause typically only covers expropriation claims and not, *e.g.*, fair and equitable treatment.

In a dispute involving financial services, NAFTA Article 1415 allows a respondent State to refer the case to the NAFTA Financial Service Committee consisting of representatives from the NAFTA States' financial authorities to determine whether a measure invoked in defense by a respondent falls under NAFTA Article 1410 providing, amongst others, for a prudential measures carve-out (paragraph 1) and a monetary policy exception (paragraph 2). If a determination is made, it will be binding on the tribunal; otherwise, the issue will be for the tribunal to decide.

Strict timelines before the question reverts to the tribunal are a common feature of all of these *renvoi* provisions. For interpretive disputes, the contracting States typically have 60 days to come to an agreement. For factual determinations, the time limits are longer, ranging from 120 to 180 days.

The reasons for including *renvoi* provisions are both technical and political. They are technical insofar as they concern issues *e.g.*, financial measures or specific reservations that require considerable expertise more likely to be held by the competent authorities of the contracting States than by tribunals. They are also political since financial regulation and taxation are two highly sensitive areas at the heart of national sovereignty and, as such, more in need for policy flexibility.¹¹⁵ As for annexes, they are not only vital instruments for the preservation of policy space, but are expressions of the balance of concessions underlying the treaty. Since all States have an interest in policing this balance of concessions, it is natural to delegate their interpretation to them.¹¹⁶

¹¹³ William W. Park, "Arbitration and the Fisc: NAFTA's Tax Veto," *Chicago Journal of International Law* 2 (2001): 231. Article 21 of the 2012 *US Model BIT* contains a similar clause. For a non-US example, see Article 21(5) of the *China–Japan–South Korea Investment Agreement*.

¹¹⁴ See, for example, *ASEAN Comprehensive Investment Agreement*, Article 36 (8): '[a]ny tribunal that may be established under this Section shall accord serious consideration to the decision of both Member States under paragraphs 6 and 7 [concerning taxation measures]'. Similarly, see *ASEAN–Australia–New Zealand FTA* Chapter 11, and Article 25(6) and Article 21(5) of the *Energy Charter Treaty*, Dec. 17, 1994, 2080 UNTS 95.

¹¹⁵ Park, "Arbitration and the Fisc," 239; Abba Kolo, "Tax Veto as a Special Jurisdictional and Substantive Issue in Investor-State Arbitration: Need for Reassessment," *Suffolk Transnational Law Review* 32 (2009 2008): 476.

¹¹⁶ This was highlighted in *Mobil v. Canada* by the Claimant's Response to the Second 1128 Submissions, ¶ 9 (Feb. 7, 2011), accessed February 6, 2014, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/mobil-19.pdf>: '[the FTC] is ideally suited to assessing whether a new

Thus far, *renvoi* procedures have not been widely used in practice, although they were potentially applicable in a few cases. Under NAFTA's taxation *renvoi* procedure, the taxation authorities struck out an expropriation claim in *Feldman v. Mexico*¹¹⁷ and fully prevented arbitration in *Gottlieb Investors v. Canada*.¹¹⁸ Outside of NAFTA, a binding tax *renvoi* provision was relevant in *EnCana v. Ecuador* based on the Canada-Ecuador BIT. In that case, the claimant had submitted its case to the tax authorities of the two contracting States, but the two States had failed to make a joint determination so that the claim could proceed to arbitration.¹¹⁹ In *Mobil v. Canada*, the respondent, Canada, unsuccessfully contended that the challenged measure fell into the scope of its NAFTA reservations.¹²⁰ Canada did not, however, refer the question to the FTC for a binding interpretation pursuant to Article 1132.

Academic attention has focused primarily on taxation related *renvoi* clauses. Park and Kolo have criticized the potential for abuse of what they call a 'tax veto' to opportunistically reduce States' liability.¹²¹ These fears however may be largely overstated. Indeed, even if *renvoi* clauses were to be used more extensively, they are not likely to be very controversial. In contrast to non-disputing party interventions, authoritative interpretations or State-to-State proceedings, which are highly discretionary and under-regulated, *renvoi* clauses are highly legalized. They explicitly spell out how they coordinate with and are embedded within the arbitral proceedings. With a clear allocation of factual and interpretive authority, strict timelines, and a reliable fallback, they allow for State control without unduly interfering in the arbitral process. Hence, in both procedural and substantive terms, they strive for moderation.

State-to-State Dispute Settlement

State-to-State dispute settlement provisions are nothing new in the investment treaty universe. FCN treaties and early BITs relied exclusively on scarcely used State-to-State proceedings. However, recently, State-to-State dispute settlement has attracted renewed interest for three reasons. First, since 2002, three State-to-State arbitrations were launched pursuant to BITs. Two of them, *Peru v Chile* and *Ecuador v United States*, were directly motivated by parallel or prior investor-State arbitrations. This in itself was said to mark a historical turn. From the original State-to-State era to the era of exclusive investor-State arbitration, we are now seeing, as Anthea Roberts writes, the emergence of a third era of hybridity and interaction between the two modes of dispute settlements.¹²²

A second reason why State-to-State dispute settlement is becoming more important is because States, like Australia, decide to move away from investor-State-dispute settlement.¹²³ In order to

subordinate measure is consistent with the international bargain negotiated by the NAFTA Parties and reflected in the Annex.'

¹¹⁷ *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB/99/01, Award, ¶ 116 (Dec. 16, 2002).

¹¹⁸ *Gottlieb Investors Group v. Government of Canada*, Letter to Gottlieb Investors Group indicating determination (Apr. 29, 2008), accessed February 6, 2014, www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gottlieb.aspx?lang=eng.

¹¹⁹ *EnCana Corporation versus Republic of Ecuador*, LCIA Case No. UN 3481, Partial Award on Jurisdiction, ¶¶ 32-33 (Feb. 27, 2004).

¹²⁰ *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (May 22, 2012).

¹²¹ Kolo, "Tax Veto as a Special Jurisdictional and Substantive Issue in Investor-State Arbitration"; Park is views the clause more favorably but also questions the need for having administrators instead of arbitrators decide the question. Park, "Arbitration and the Fisc," 241.

¹²² Roberts, *State-to-State Investment Treaty Arbitration*, 16–22.

¹²³ On Australia's policy shift and its implications see Jürgen Kurtz, "Australia's Rejection of Investor-State Arbitration: Causation, Omission and Implication," *ICSID Review* 27, no. 1 (September 1, 2012): 65–86, doi:10.1093/icsidreview/sis006.

address a violation of the investment chapter in the Australia-United States FTA for example, investors from either country now have to lobby their government to launch State-to-State arbitration. A renewed role of inter-State dispute settlement is also advocated by a number of commentators¹²⁴ and international organizations¹²⁵ who draw comparisons to the WTO as a successful inter-governmental disputes settlement mechanism.

Third, and for present purposes most importantly, the inclusion of three other mechanisms of embedded ISA has changed the functioning of State-to-State arbitration. Rather than being just a parallel mechanism to the privatized core of ISA, State-to-State arbitration complements other inter-State involvements, such as non-disputing party interventions and interpretations, providing a credible threat of escalation. This point will be further developed in the next section.

Not only in practice, but also among scholars, the interaction between investor-State arbitration and State-to-State arbitration is just beginning to be explored. Although Aron Broches already contemplated the issue in 1972,¹²⁶ the more recent debate was launched only following the *Ecuador-United States* dispute, in the wake of which two opposing theories emerged. According to Reisman's and Tomuschat's expert submissions in that case, the investor-State arbitration mechanism has largely replaced the traditional State-to-State dispute settlement.¹²⁷ This, in turn, forms the background against which the current regime of a side-by-side of ISA and State-to-State arbitration has to be interpreted. Reisman argues that the modern BIT introduces a dual-track enforcement structure which assigns "a different range of disputes *exclusively* to each of track,"¹²⁸ with a broad jurisdictional scope being conferred on ISA and a residual scope being left for State-to-State. Anthea Roberts rejects the exclusive assignment of jurisdictional scope to either track and argues instead that both enforcement mechanisms overlap and co-exist.¹²⁹ By developing a hybrid theory of investment arbitration, she goes on to provide a conceptualization on how their parallelism can be managed.

This contribution considers that the second view is more convincing. The most cogent argument in favor of a broad jurisdictional basis for State-to-State arbitration to encompass areas also covered by ISA is the text of the BITs themselves that define the *ratione materiae* as disputes over the "interpretation and application of this agreement."¹³⁰ On that basis, commentators distinguish between two types of State-to-State disputes: (1) application disputes, *i.e.* diplomatic protection claims based on concrete facts, and (2) interpretation disputes, *i.e.* disagreements on the meaning and scope of treaty

¹²⁴ Simon Lester, "Liberalization or Litigation? Time to Rethink the International Investment Regime", CATO Policy Analysis, No. 730 (Jul. 8, 2013), 11.

¹²⁵ UNCTAD, "Investor-State Disputes: Prevention and Alternatives to Arbitration," UNCTAD Series on International Investment Policies for Development (United Nations: New York and Geneva, 2010), 95. David Gaukrodger and Kathryn Gordon, "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", OECD Working Papers on International Investment, 2012/03, OECD Publishing (Dec. 31, 2012). <http://dx.doi.org/10.1787/5k46b1r85j6f-en>.

¹²⁶ Broches, "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States," 376-378.

¹²⁷ See Reisman, *Expert Opinion*, in *Ecuador v. U.S.A.*; and Tomuschat, *Expert Opinion*, in *Ecuador v. U.S.A.*

¹²⁸ Reisman, *Expert Opinion*, in *Ecuador v. U.S.A.*, ¶ 23.

¹²⁹ Roberts, *State-to-State Investment Treaty Arbitration*, 4.

¹³⁰ See, for instance, Art. 9(1) Argentina-Chile BIT (Tratado entre la República Argentina y la República de Chile Sobre Promoción y Protección Recíproca de Inversiones, Aug. 2, 1991, Arg.-Chile); Art. 10 (1) Austria-India BIT (Agreement between the Government of the Republic of Austria and the Government of the Republic of India for the Promotion and Protection of Investments, Nov. 8, 1999, Aus.-India); Belgium/Luxembourg-Ethiopia BIT Art 12(1) (Agreement between the Belgian-Luxembourg Economic Union and the Federal Democratic Republic Of Ethiopia on the Reciprocal Promotion and Protection of Investments, Oct. 26, 2006, Belg.-Lux-Eth.); Art. 8 (1) China-Iceland BIT (Agreement between the Government of the People's Republic of China and the Government of the Republic of Iceland Concerning the Promotion and Reciprocal Protection of Investments, Mar. 31, 1994, P.R.C.-Ice).

obligations.¹³¹ Each category of dispute raises a host of issues with regard to the interaction of State-to-State arbitrations with ISA, which are beyond the scope of this paper. For the purpose of illustrating ‘embedded’ ISA, it must suffice to highlight the two most important (and controversial) points.

First, with respect to diplomatic protection disputes, much depends on whether State-to-State proceedings can preempt, prevent or suspend ISA proceedings.¹³² If home States can resort to State-to-State arbitration at the exclusion of ISA, *e.g.*, when they seek to defend an important legal interest and consider softer diplomatic means as insufficient, then such inter-governmental dispute settlement can be an important tool for controlling the use of ISA. Second, with respect to interpretive disputes, it is debated whether or not inter-State arbitral awards rendered are binding or at least, as proposed by Anthea Roberts, “highly persuasive”¹³³ for future investor-State tribunals. If one follows Broches, then authoritative interpretive agreements that are binding on an ISA tribunal can be reached either by mutual agreement of the parties or by an inter-State arbitral award.¹³⁴ In the remainder of this contribution, we proceed on the premise of a strong impact of State-to-State arbitration on ISA proceedings *i.e.* State-to-State arbitrations being able to preempt, prevent or suspend ISA proceedings and a binding impact on subsequent ISA tribunals.

Based on these two premises, State-to-State arbitration will have a strong impact on traditional ISA along the substantive and procedural axes. Substantively, State-to-State arbitration moves investment disputes back into the realm of diplomatic protection and increases the likelihood of disputes over interpretation being submitted to inter-State arbitration. As capital exporters are more likely to push for the former, and capital importing countries are more likely to seek an interpretive resolution through arbitration, the recourse to State-to-State dispute settlement may cause friction in international relations. On the procedural side, commentators are concerned with the role of investors, who may be sidelined in an increasing use of inter-State arbitration with claims being settled over the heads of the real victims.¹³⁵ Hence, depending on how the interaction of ISA and State-to-State proceedings is structured and managed, the latter may have the most severe impact, as compared to the other elements of embedded ISA, on the privatized core of ISA.

Interaction among the elements of ‘Embedded’ ISA

Analyzing the isolated interaction of these four factors with the core of ISA is not enough to capture the inner workings of ‘embedded’ ISA. Indeed, each of them cannot be properly understood without being considered in conjunction with the other three. They jointly frame the traditional ‘pure’ privatized core of ISA. A number of interactions between the four elements that frame investor-State arbitration were already discussed in passing. For instance, where non-disputing party interventions and submissions by the responding host State connote a common understanding of treaty provisions, this may amount to an authoritative interpretation through subsequent practice. Its persuasive authority would, of course, be derived from general international law and not a specific treaty clause like NAFTA Article 1131(2) on joint interpretations. Another area of overlap occurs through interpretations reached through *renvoi* procedures. But rather than areas of duplication, we are more interested in those interactions where two elements complement each other (Figure 3). This section

¹³¹ Michele Potestà, “State-to-State Dispute Settlement Pursuant to Bilateral Investment Treaties: Is There Potential?,” in *International Courts and the Development of International Law*, ed. Nerina Boschiero et al. (The Hague, The Netherlands: T. M. C. Asser Press, 2013), 755–756, http://link.springer.com/10.1007/978-90-6704-894-1_55; United Nations Conference on Trade and Development, *Dispute Settlement: State-State*. (New York: United Nations, 2003), 1; Roberts, *State-to-State Investment Treaty Arbitration* Roberts also lists a third type of “declaratory disputes”.. Roberts, *State-to-State Investment Treaty Arbitration*, 7, 54-56.

¹³² See discussion in Roberts, *State-to-State Investment Treaty Arbitration*, 34–41.

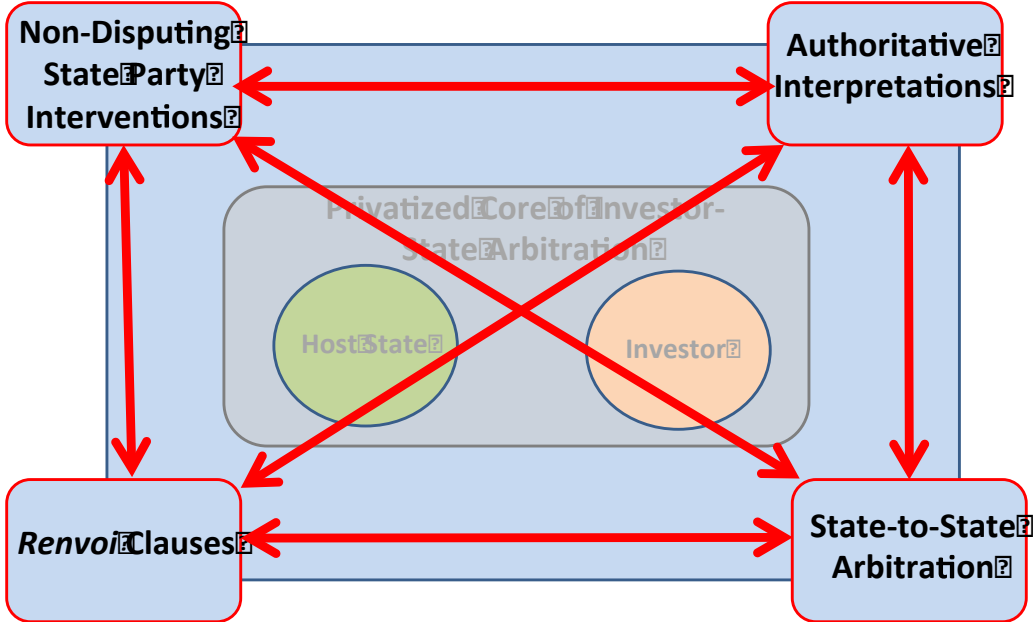
¹³³ *Ibid.*, 50.

¹³⁴ Broches, “The Convention on the Settlement of Investment Disputes between States and Nationals of Other States,” 377 “It would seem clear to me that the ICSID Tribunal will be bound by the interpretation of the bilateral treaty arrived at by the Contracting States, whether as a result of agreement or of arbitration.”

¹³⁵ Roberts, *State-to-State Investment Treaty Arbitration*, 39–41.

discusses three dynamics, in particular (1) policing interpretations, (2) escalation on interpretation, and (3) tailor-made factual intervention.

Figure 3: Inner workings of embedded ISA (II): Interaction among outer elements



Policing Interpretations

International treaties are ‘living instruments’ not only because their interpretation can evolve over time, but because all the players involved in investment arbitration engage in a dynamic struggle over the meaning of treaty terms and the allocation of interpretive authority. In consequence, questions of interpretation are never really ‘settled’ but are constantly subject to affirmation, contestation and modification. The four elements discussed above are vital tools in this interpretive struggle.

To illustrate the point, it is helpful to revisit the example of the FTC interpretation in July 2001. Given that the text of Chapter 11 is sufficiently unambiguous as to its binding force, the NAFTA parties could have limited themselves to this intervention in order to ensure that subsequent tribunals equate Article 1105 with the customary law minimum standard of treatment. This is not what they did, however. One of the reasons why we see so many non-disputing party interventions in early NAFTA case law is because the contracting States sought to police the interpretation established by the FTC (Graph 1). After the *Pope & Talbot* Tribunal had challenged the authority and binding nature of the FTC’s statement, e.g., by hinting that it was an amendment rather than an interpretation,¹³⁶ the three NAFTA parties set out to defend their interpretation. In 2002, the NAFTA parties filed corresponding submissions in *Mondev v United States*,¹³⁷ *ADF v United States*,¹³⁸ *Loewen v United States*,¹³⁹ and *Methanex v United States*,¹⁴⁰ criticizing the *Pope & Talbot* Tribunal and reinforcing their interpretation. The *UPS* tribunal thus noted:

¹³⁶ *Pope & Talbot v. Canada*, Award. See *supra* n. 96.

¹³⁷ *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, ¶¶ 106-109 (Oct. 11, 2002).

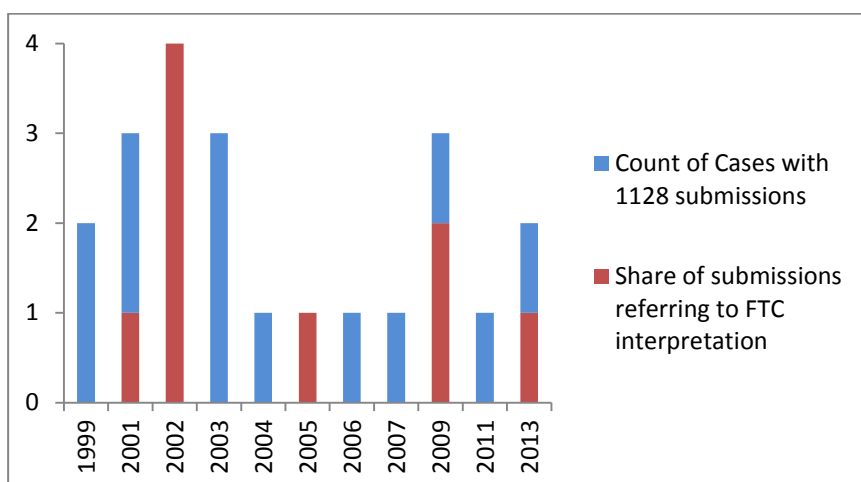
¹³⁸ *ADF v. U.S.*, Award, ¶¶ 119-126.

¹³⁹ *Loewen v. U.S.*, Canada Second 1128 Submission (Jun. 27, 2002) and Mexico Third 1128 Submission (Jul. 2, 2002), both accessed February 6, 2014, <http://www.state.gov/s/l/c3755.htm>.

¹⁴⁰ *Methanex v. U.S.*, Final Award, pt. II, ch. B, ¶ 21.

The NAFTA Parties have now submitted to a number of NAFTA tribunals that the ‘additive’ interpretation is not available to the tribunals. By their consistent position they provide, they say, an ‘authentic’ interpretation, in terms of article 31(3) of the Vienna Convention. And in any event the FTC’s Interpretation is binding on chapter 11 tribunals including this one.¹⁴¹

Graph 1: In the total of 22 NAFTA cases with 1128 submission, 9 submissions refer to the FTC statement¹⁴²



Today, the FTC interpretation is universally accepted by tribunals also because NAFTA parties have consistently used Article 1128 submissions to defend it. By focusing exclusively on costs and delays, Hunter and Barbuk fail to see this strategic use of Article 1128 submissions:

the written submissions of non-disputing Parties have often been quite repetitive and long ... It is particularly unacceptable when it occurs in relation to the FTC's interpretations that are in the public domain, and well known to all the participants in any particular Chapter 11 arbitration, including the members of the arbitral tribunal.¹⁴³

While the present account is limited to evidence from Article 1128 submissions and joint interpretations, the same could be said for non-disputing party submissions policing interpretations arrived at through *renvoi* procedures or State-to-State arbitrations. For the latter also the opposite could be true – non-disputing party submissions could be filed by a contracting State dissatisfied with an interpretation of a State-to-State tribunal. Hence, whereas non-disputing parties’ submissions may often be a tool to reaffirm a certain meaning, they may also be used for contestation.

Escalation on Interpretation

There is a second way in which the four elements interact with respect to interpretation: they provide a scale of escalation. If a home or non-disputing State seeks to affirm, contest or change the interpretation of a clause in an investment treaty, there are three options it can choose from with different benefits and drawbacks. First, it can file a non-disputing submission. While this option provides the State with full control over the content of interpretation, it will merely be of persuasive force on the tribunal. Second, it can seek an authoritative interpretation. This option is the most effective, being binding on the tribunal, but it also is the most difficult, as it requires the consent of all contracting States. Third, it can file a dispute over interpretation to the State-to-State tribunal. Although the final award is likely to be binding or highly persuasive on subsequent tribunals, the

¹⁴¹ *UPS v. Canada*, Award on Jurisdiction, ¶ 96 (Nov. 22, 2002).

¹⁴² The count takes the year in which the last 1128 submissions per case were filed.

¹⁴³ Hunter and Barbuk, “Procedural Aspects of Non-Disputing Party Interventions in Chapter 11 Arbitrations,” 169.

drawback is that, substantively, the State-to-State arbitral tribunal could decide either way. Here, uncertainty as to the outcome is the price of a highly authoritative award.

The mere existence of this range of options, allowing for a scale of escalation, changes the incentive structure in investment arbitration. As for the investor-State tribunal, faced with a credible threat of either a joint interpretation or a parallel State-to-State proceeding (again assuming that the investor-State tribunal would have to suspend proceedings and would be bound by the State-to-State tribunal's award) will incentivize the tribunal to give more weight to non-disputing party interventions. As for the interaction among the contracting States, the threat of State-to-State arbitration is likely to lead to more recourse to cooperative means of interpretation. *A priori*, capital-exporters have less incentive to agree to a joint interpretation with a capital-importer as compared to a situation of bi-directional investment flows where both States could become respondents. As Anthea Roberts highlights, in situations of such asymmetry, filing a State-to-State claim may often be the only option open to a capital-importing State in order to achieve clarity over the scope of its investment obligations. The availability of State-to-State arbitration can then level out power asymmetries, providing new incentives to negotiate a joint interpretation.¹⁴⁴ The dispute in *Ecuador v United States* is a case in point. Prior to filing its request for arbitration, Ecuador sought negotiation of a joint interpretation, but the U.S. did not respond. Had the success of Ecuador's arbitration claim been more likely, the U.S. may have been more forthcoming on an interpretive agreement.

Tailor-Made Factual Intervention

Non-disputing States, and first and foremost among them, the home State, often have a legal interest in an ongoing dispute. This legal interest will be of varying importance. In some cases, the non-disputing State may have access to particular facts or may have a particular concern that it wants to share. In these cases, non-disputing party or *amicus curiae* submissions may be an adequate tool of involvement. In other cases, the concerns may be of a much larger scale. This could be because a particular sector is involved that, by necessity, creates special concerns *e.g.*, the financial sector. Here, a *renvoi* clause is apt to address the issue. There are other cases, however, that cannot be restricted to specific sectors, but are still of major significance. They may involve measures that affect a whole class of investors or States like China with such important markets that individual investors do not launch investment claims for fear of reprisal.¹⁴⁵ Or, rather than having individual investors receiving compensation, a home country may want a host country's discriminatory law repelled, seeking the international law remedy of restitution rather than damages. In these latter cases, the non-disputing party may elect to proceed with a State-to-State claim. Hence, when it comes to facts and actual disputes, it is beneficial for non-disputing States to have a range of escalating options available to address varying situations in a more targeted manner.

Concluding Observations

The return of the home State has led to an institutional transformation from 'pure' to 'embedded' investor-State arbitration. Rather than being confined to the privatized litigation between the foreign investor and the host State, embedded ISA accommodates the legal interests of the home State and other non-disputing States parties through four means of direct involvement: (i) non-disputing party intervention, (ii) authoritative interpretations, (iii) *renvoi* of questions of fact and of law to State representatives and (iv) State-to-State arbitrations.

What should we make of this return of the (home) State? In spite of the fears expressed by some authors, the new means of intervention neither mark a return to the days of diplomatic protection, nor should they give rise to concerns about collusion between home and host States which undermine the investment protection standards. If anything, the increased involvement of States that are both home and host countries to foreign investors are likely to push substantive investment law more towards moderation.

¹⁴⁴ Roberts, *State-to-State Investment Treaty Arbitration*, 46.

¹⁴⁵ *Ibid.*, 12.

The same cannot be said about the developments of investment arbitration along its procedural axis. Certainly, the rise of embedded ISA has moved investment arbitration further away from commercial arbitration and closer to public international law. But rather than going all the way, the addition of these new public international law elements has created a strange *mélange*. Now, private disputing parties finance the intervention of non-disputing States, investors may see claims settled over their heads without having a voice in the negotiations and arbitral tribunals are forced to adjust their findings *ex post* to accompany an interpretation by the contracting States in ongoing proceedings. While none of these issues should be overstated, they point to the fact that the current mix of private and public elements can still be fine-tuned.

The real challenge for embedded ISA, however, lies in the legal uncertainty that still surrounds the use of its tools and impedes their application in practice. All elements, potentially apart from the *renvoi* mechanisms, would benefit from greater legal clarity as to their inherent limits and their effects on the core ISA. While work by scholars such as Anthea Roberts goes a long way in suggesting solutions for current problems, it is imperative for the lasting success of embedded ISA that these solutions also find their way into treaty practice. States as the architects of embedded ISA are better placed than *ad hoc* arbitration tribunals to fine-tune these emerging institutional structures.