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## **The Balancing (and Unbalancing?) of Interests in International Investment Law and Arbitration**

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### **I. INTRODUCTION**

This chapter examines the dynamic balancing, rebalancing and (perhaps) unbalancing of interests which takes place in international investment law and arbitration. It thereby explores the validity of concerns which have been expressed that the investment arbitration system contains distorting structural biases which impair the legitimacy of its dispute settlement processes – that features of the system lead it to favour certain interests over others.

Section 2 of the chapter analyses the contention that investment treaty negotiations establish an equilibrium between the state parties, reflecting both their interests and negotiating strengths. This is not the only way of viewing investment treaty negotiations – states might, for example, be viewed as opting in to an existing ‘regime’ of international standards – but it is nevertheless an important perspective which focuses attention on the particularity of the bargain struck in each individual investment treaty.<sup>1</sup> Section 3 examines the system of international investment dispute settlement through arbitration, and explores a range of ways in which the arbitral process might be said to rebalance or unbalance the equilibrium established between the state parties to the investment treaty. Some of the practical implications of this analysis are then explored in Section 4, through an examination of the impact of different approaches to investment treaty interpretation on this question of interest balancing. The way in which various interests are balanced, rebalanced and (perhaps) unbalanced in international investment law is thus an issue which goes not only to broader theoretical questions of the fairness and legitimacy of the system as a whole, but also to more practical questions like competing methodological approaches to treaty interpretation.

The method adopted by this chapter is analytical rather than empirical – it seeks to examine the balance of interests in international investment law and arbitration as a matter of structure and principle, rather than attempt to study historical practice and experience. There are three main explanations or justifications for this approach. The first is that a significant amount of empirical (or quasi-empirical) work has been and continues to be done on the effectiveness

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<sup>1</sup> On these competing perspectives on international investment agreements, see further eg Alex Mills, ‘Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration’ (2011) 14 *Journal of International Economic Law* 469, and the contributions to this volume by Stephan W Schill and Martins Paparinskis.

and fairness of international investment law and arbitration,<sup>2</sup> although it is fair to say that the results of this work have thus far been inconclusive, and that methodological issues remain highly contested.<sup>3</sup> The second is that empirical work can only ever form part of developing an understanding of questions of fairness concerning investment law and arbitration, as it can only identify correlation and not causation. Although increasingly accurate determinations of correlation will of course inform identification of possible causes (through demonstrating that certain variables appear insignificant in practice),<sup>4</sup> further analytical work is always required to understand the mechanism through which any empirically identified trend or relationship is produced, and developing this understanding is necessary if any perceived concerns raised by the analysis are to be addressed. The third is that there may be good reasons why the fairness of international investment arbitration is a difficult subject to examine empirically. Statistical analysis may reveal how often claimants are successful, or how large their awards are, or how often developed or developing countries prevail (even if these categories themselves will often be contentious). But this on its own is not enough to tell us anything about the ‘fairness’ of the system, without assumptions about the equality of arms of the parties and the distribution of claims. It may be, for example, that the success rate of claimants is affected more by self-selection based on the perceived costs and risks of investment arbitration than by its ‘fairness’. If the system were perceived as uncertain and expensive (in general, or by particular categories of claimants), it might only be claimants with a very strong case seeking large damages awards who brought cases – and thus the investment arbitral system might have a high rate of successful claims, without this indicating bias in favour of claimants (in general, or for particular categories of claimants). If, on the other hand, claimants saw investment arbitration as an inexpensive (relative to the possible return) means through which somewhat speculative claims might be brought, it would not be a surprise to see a relatively low success rate, without that indicating bias in favour of host states. Empirically demonstrating bias, or the favouring of certain interests over others, would seem to require an evaluation of the strength of the cases brought, to determine whether ‘weak’ cases were nevertheless successful, or ‘strong’ ones nevertheless failed. But this type of evaluation is, of course, difficult and perhaps inherently subjective, and would seem to inevitably involve second-guessing the decisions of arbitral tribunals themselves, making an empirical methodology itself dependent on a different form of analytical approach. This is by no means to dismiss the value of empirical work, which makes an essential contribution to scholarship in the field of investment law and arbitration as elsewhere, but merely to note the difficulties faced by such work in providing a complete analysis of the field, and thus the continued need for the type of analytical research pursued in this chapter.

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<sup>2</sup> See eg Jason Webb Yackee, ‘Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence’ (2011) 51 *Virginia Journal of International Law* 397; Kathleen S McArthur and Pablo A Ormachea, ‘International Investor-State Arbitration: An Empirical Analysis of ICSID Decisions on Jurisdiction’ (2009) 28 *The Review of Litigation* 559; Susan D Franck, ‘Development and Outcomes of Investment Treaty Arbitration’ (2009) 50 *Harvard International Law Journal* 435; Ole Kristian Fauchald, ‘The Legal Reasoning of ICSID Tribunals – An Empirical Analysis’ (2008) 19 *European Journal of International Law* 301; Susan D Franck, ‘Empirically Evaluating Claims About Investment Treaty Arbitration’ (2007) 86 *North Carolina Law Review* 1.

<sup>3</sup> See further eg the debate between Van Harten and (jointly) Franck, Garbin and Perkins, in Sauvant (ed) (2010-11) *Yearbook of International Investment Law & Policy*.

<sup>4</sup> See further (in a different but related context) Emma Aisbitt, ‘Bilateral Investment Treaties and Foreign Direct Investment: Correlation Versus Causation’, in Karl P Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford University Press, 2009).

## II. INVESTMENT TREATY NEGOTIATIONS AS INTEREST BALANCING

This section analyses the contention that each bilateral investment treaty ('BIT') or other international investment agreement can be viewed as an equilibrium established between two (or more) states, which at least in part reflects their counter-balancing interests and negotiating strengths. This is, of course, not an undisputed way of viewing an investment treaty. Those who adopt the view that international investment law functions as a coherent regime, an international system ('emerging', 'evolving', or already fully present<sup>5</sup>) for policing the exercise of administrative authority, are more likely to focus on the commonalities of investment treaties than their differences; on the balance of the system viewed as a whole. From this 'multilateralist' perspective, the core obligations of investment treaties, including in particular the fair and equitable treatment standard, are not determined by the negotiating balance between the state parties to each treaty, but rather by the global processes through which the system of international investment law is (argued to be) under construction. The focus on negotiations in particular BITs, from this perspective, may seem misplaced. This may particularly be the case where a BIT includes a 'Most Favoured Nation' ('MFN') clause. The adoption of such a clause may, if the states involved have already entered into previous BITs with strong standards of investment protection, render any detailed negotiation of the standards of treatment in the particular BIT somewhat redundant. The MFN clause means that the highest standard applicable in any BIT entered into by each state will apply to it.

It is, however, nevertheless an important feature of modern international investment law that there is significant differentiation in BITs. Indeed, there is something unsatisfactory about the claim that states, in entering into a BIT some years ago, 'intended' to sign up to a system of international investment law which did not exist until recent years, or at least was not yet 'discovered' by academic scholarship. This is not least because one of the historically understood purposes of BITs was to attract investment by presenting a competitive advantage to particular foreign investors, rather than merely adhering to multilateral standards. While this is not to deny the (at least partial) emergence of systemic elements in international investment law, those who focus on international investment law as a single regime or system tend to over-state its degree of systemic integrity, and overlook the extent of variation in individual agreements.<sup>6</sup> The use of the same or similar terminology in different treaties may indicate that the state parties to each treaty intended the same meaning – but it does not *necessarily* do so. Some of these issues are discussed further in Sections III and IV below, as it is in the context of dispute resolution and in particular treaty interpretation that these

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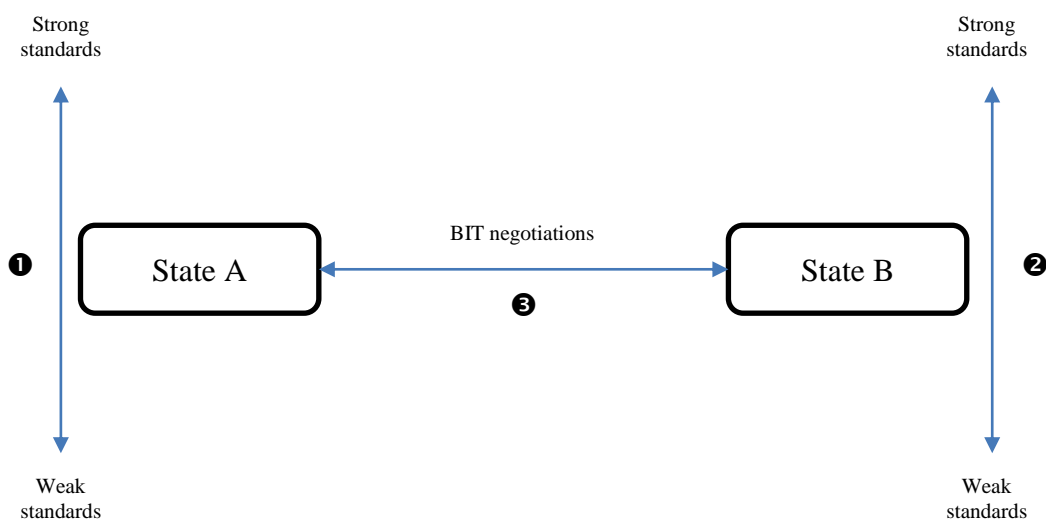
<sup>5</sup> See further eg José E. Alvarez, 'Is the International Investment Regime a Form of Global Governance?', in Albert Jan van den Berg (ed), *International Council for Commercial Arbitration: ICCA Congress Series 16* (Kluwer Law International, 2012), at p.137; José E. Alvarez and Karl P. Sauvant (eds), *The Evolving International Investment Regime* (Oxford University Press, 2011); José E. Alvarez, *The Public International Law Regime Governing International Investment* (Brill, 2011); Jeswald W. Salacuse, 'The Emerging Global Regime for Investment' (2010) 51 *Harvard International Law Journal* 427; Stephan W. Schill, *The Multilateralization of International Investment Law* (Cambridge University Press, 2009), at p.369ff.

<sup>6</sup> Thus, it has been argued that 'each BIT reflects the promotion and protection of each country's interest and the principles of law that are distilled into each treaty are essentially a by-product of an exchange of quid pro quo between the negotiating parties' – Bernard Kishojian, 'The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law' (1994) 14 *Northwestern Journal of International Law and Business* 327, at p.373.

questions make arguably their strongest impact. For the purposes of this present section, however, the focus of analysis is on the negotiation of a particular individual investment agreement.

The approach taken in this section is to represent and analyse the dynamics of the negotiation of a BIT through a ‘force diagram’, with each ‘force’ reflecting the ‘pull’ of a particular set of interests. There are three key sets of counter-balancing forces involved – marked in Figure 1, and explained in the following text. The focus of analysis in this chapter is on the negotiation of the standards of treatment under a BIT, but this will be only one of the issues determined during the course of the BIT negotiations – another equally critical issue, for example, will be the definition of what constitutes an ‘investment’, and thus the scope of application of those standards.<sup>7</sup> The analysis set out in this chapter is equally applicable to this question, but for the sake of simplicity of presentation (including the avoidance of the additional dimension which would be required to represent both scope and strictness of BIT standards diagrammatically) it will not be examined in detail.<sup>8</sup>

**FIGURE 1**



## 2.1 The negotiating position of State A

The first balance of interests or ‘forces’ involved in the negotiation of a BIT is the set of influences which determine the negotiating position of State A – whether State A favours a

<sup>7</sup> On the importance of the characterisation of proprietary interests at stake in an investment, see the contribution to this volume by Zachary Douglas.

<sup>8</sup> A further key issue in investment treaty negotiations, not directly explored in this chapter, will be the form and extent of any submission to arbitration or other dispute resolution mechanism. The scope of that consent may also itself be subject to later ‘reinterpretation’ by an arbitral tribunal – although this will not be a rebalancing of ‘standards’ between the parties to the treaty, but a rebalancing of decision-making power between the state parties to the treaty and the arbitral tribunal itself (and thus also between the state parties and any investor). The analysis in this chapter operates on the presumption that there is consent to binding arbitral dispute settlement.

BIT with strong standards of investor protection or weak standards of investor protection. (This is marked as '①' in Figure 1.) One obvious consideration which is likely to affect this determination is whether State A expects that it will largely be affected by the treaty in the capacity of a host state, or in the capacity of an investor state – in other words, whether it anticipates being a net capital importer or exporter. If it expects the former, State A is of course more likely to argue in favour of limitations on investor protection (and a narrow definition of what counts as an investment for the purposes of the BIT), to maintain its regulatory capacities, while in the latter case it is more likely to argue in favour of stronger protection for its nationals who are likely to invest in State B (and a broad definition of investment).

This is, however, only one of a number of influences which may affect the negotiating position of State A. Another factor may be the relative influence of potential investors from State A who might be seeking to invest in State B, as well as potential foreign investors from State B who might be seeking to invest in State A. In each case, the investors are likely to try to influence State A's negotiating position, in favour of stronger standards of protection. The potential investors from State A may try to influence government policy (to enhance their prospective benefit from the BIT) through various forms of pressure, which might range from political donations to threats to relocate away from State A and thereby diminish its tax revenue. Potential investors from State B might equally seek to influence State A's negotiating position by suggesting that possible investments in State A will be contingent on a certain standard of treatment being adopted in the BIT. State A may also be influenced by potential investors in State B who are not presently operating out of State A, but might relocate in order to do so if the BIT provides advantageous terms – a BIT with strong standards of investor protection might have the effect of persuading potential investors in State B to base themselves in State A (promoting capital flows into both BIT states), as well as the better known intention of encouraging capital flows between the two states.

Aside from investors, a variety of further groups within each state might seek to influence State A's negotiating position. A countervailing force might, for instance, be present in the form of groups who would advocate for less restriction on state regulatory capacity, out of a desire to promote other regulatory objectives – human rights protection, environmental protection, or maintenance of labour standards, for example. Pursuit of each of these other regulatory objectives might be compromised to the extent that a foreign investor is promised a standard of treatment which limits the ability of State A to affect the investor's regulatory environment. These interests groups may be from State A, State B, or from neither or both states. In any case, they will be seeking to influence State A's negotiating position in favour of maintaining regulatory flexibility – reducing the standard of protection offered to foreign investors.

Similar interests may even be promoted by companies already operating in State A (whether or not based there), who would not welcome the increased competition which might be introduced through a BIT which was strongly favourable to new investors from State B. If a company operating in State A is not from State A, this may be further complicated by the fact that it may be operating under a different BIT between State A and a third state. If that BIT contains an MFN clause, and relatively limited standards of protection, the company may benefit from any increased standard of protection under the new BIT with State B, which might outweigh any cost of the increased competition from State B investors.

How much influence all these parties will actually be able to exert on the negotiation of a BIT will of course depend on how open the government of State A is to lobbying by both domestic and foreign constituencies. Some BITs may be negotiated without any advance wider public consultation or publicity, making it more likely that they will reflect the government's own perception of its national interest. Others may be the product of a more prolonged public consultation, opening the possibility for a range of further potential interests to be taken into consideration.

The dynamics of the various influences on State A in its BIT negotiations are clearly complex. There is something unsatisfactorily reductionist in expressing this in the form of 'opposing forces' – as there will of course be competing interests in a variety of directions, including among interest groups favouring human rights, or environmental protection, or labour standards. Nevertheless, and at the cost of some oversimplification, the negotiating position of State A may be understood to operate somewhere on a spectrum of differing levels of investor protection, reflecting the strength of these competing interests.

## **2.2 The negotiating position of State B**

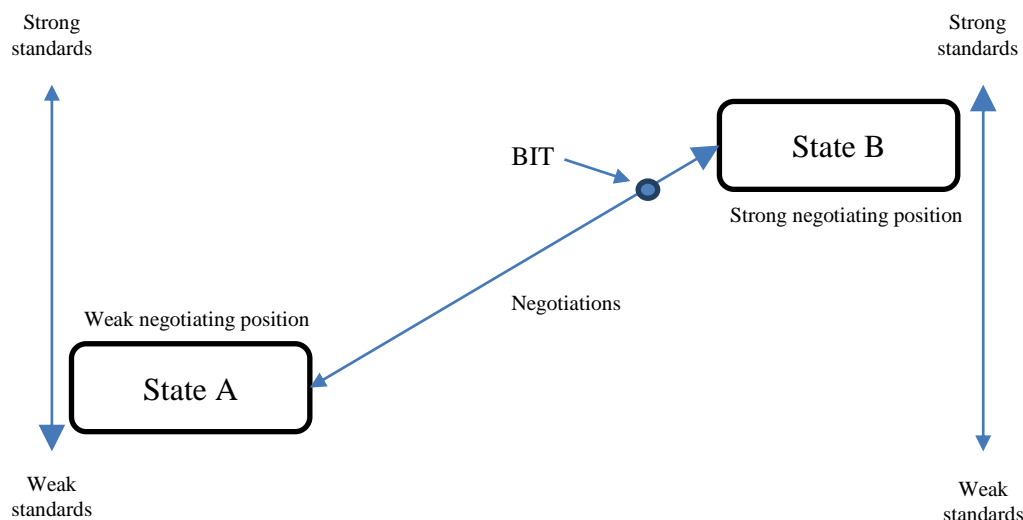
The analysis of the variety of competing interests affecting State A's negotiating position is equally, symmetrically, applicable to State B. State B is therefore subject to an equivalent variety of counter-balancing interests or 'forces'. (This is marked as '❷' in Figure 1.)

## **2.3 Relative negotiating strength**

The above analysis seeks to understand the balance of interests which underlie the positions of both State A and State B in a BIT negotiation. In determining the balance of interests reflected in the final BIT, there is a further consideration – the relative negotiating strengths of the two states. (This is marked as '❸' in Figure 1.) Put simply, the state with the greater negotiating strength<sup>9</sup> is likely to receive a correspondingly greater proportion of its desired negotiating position. This is further illustrated diagrammatically in Figure 2.

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<sup>9</sup> Negotiating strength will be influenced by a complex range of factors, including material considerations (the resources each party commits to the negotiations, or brings to bear as leverage to achieve its preferred outcome), 'psychological' considerations (how much the potential benefits of agreement are perceived by each party as valuable to them), and procedural considerations (the level of individual expertise that each party is able to call upon, and the previous experience that each party has with similar negotiations). There is an extensive international theoretical literature on 'bargaining power' – for a recent helpful analysis of different approaches, albeit in a different context, see Gerald Schneider, Daniel Finke and Stefanie Bailer, 'Bargaining Power in the European Union: An Evaluation of Competing Game-Theoretic Models' (2010) 58 *Political Studies* 85.

**FIGURE 2**

In Figure 2, State A favours weak standards of protection – perhaps because, as a relatively impoverished developing state, it is likely to be a capital importer. For the same reason, at least in a period of capital scarcity, State A is in a relatively weak negotiating position. State A is seeking to attract capital from State B, but there are more states seeking capital than there are states with excess capital looking for advantageous host states in which its nationals may wish to invest. State B, in this diagram, by contrast, is in favour of strong standards of investor protection – perhaps because, as a relatively wealthy state, it anticipates being a capital exporter. For the same reason (and on the same presumptions noted above), it is in a relatively strong negotiating position. The negotiation between States A and B, according to these premises, is likely to lead not to a BIT which equally balances the negotiating positions of the two states, but rather to a BIT with relatively strong standards of protection for investors, reflecting the relative strength of State B’s negotiating position. As José Alvarez perhaps infamously described the situation with respect to the United States (in an era in which U.S. capital flows were more one-sided than they are now):

The U.S. “cookie cutter” approach to BIT negotiations results in a one-way conversation of imposed terms. A BIT negotiation is not a discussion between sovereign equals. It is more like an intensive training seminar conducted by the United States, on U.S. terms, on what it would take to comply with the U.S. draft. The result is an instrument that is not by any means balanced as between the rights and responsibilities of multinational corporations.<sup>10</sup>

This analysis highlights the importance of this third dimension of the balance of ‘forces’ involved in a BIT negotiation – but only when the two states have differing negotiating positions. If the two states have the same negotiating positions – both favouring strong, weak, or some intermediate level of investment protection – then their relative negotiating strengths will count for little, as the two states should easily come to an agreement which reflects their

<sup>10</sup> José E. Alvarez, ‘Remarks’ (1992) 86 American Society of International Law Proceedings 550, at p.553.

identical positions. Figure 1, for example, may be understood to illustrate a negotiation between two states with balanced BIT negotiating positions. However strong each state's negotiating strength is – where on the line between the two states the final BIT agreement can be 'located' – will not affect the level of investor protection.

## **2.4 Conclusions**

This analysis has sought to demonstrate a way of understanding BIT negotiations as establishing an equilibrium between competing interests or 'forces'. The range of interests involved is complex, but nevertheless they may each be understood to contribute to the final balance which is struck in establishing the standards (and scope) of protection under the BIT. Nothing in this analysis on its own can be taken to indicate any 'bias' or 'flaws' with the system of international investment arbitration – at least not any flaws which are absent from international law in general. The fact that investor companies or lobby groups may influence the negotiating positions of states is unremarkable, as is the fact that different states may have different negotiating strengths – and it is well accepted that international law remains blind to such disparities, through its foundational acceptance of the sovereign equality of states.<sup>11</sup> These are not matters without concern – it may fairly be argued that in the context of international investment law, as elsewhere, the commitment to sovereign equality masks a reality of great inequality, and thereby perpetuates that inequality. In simple terms, poor states tend to be in weak negotiating positions, and therefore sign disadvantageous agreements which contribute to the continuation of their poverty. There are, perhaps, grounds in these concerns to question the theory behind international investment law – that it will attract foreign investment to poorer states (who would otherwise lack regulatory stability) and contribute to their development. Such questions are, however, not the primary focus of this chapter – its central concern is rather whether international investment law and arbitration itself contains structural deficiencies. To examine these questions further, it is necessary to look more closely at the system of investment dispute settlement.

## **III. INVESTMENT DISPUTE SETTLEMENT AS INTEREST BALANCING**

This section considers what impact a dispute which subsequently arises between an investor and host state might have on the 'BIT equilibrium' explored above. It proceeds from the standpoint that the dispute settlement process may itself be viewed as a further equilibrium, which involves interpretation and application of particular provisions of a BIT to determine the balance of rights between the two parties to the dispute. Viewing dispute settlement in this way is by no means uncontroversial, and the legitimacy of this perspective is also explored in the following sections. One key issue (explored particularly in subsection 3.4 below) is the extent to which the agreed upon language in the BIT constrains the parties to dispute settlement, and the extent to which it permits a range of possible meanings – to what extent the language is legitimately open to a range of adjudicative 'interpretations' and thus

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<sup>11</sup> See further eg Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004); Benedict Kingsbury, 'Sovereignty and Inequality' (1998) 9 *European Journal of International Law* 599.

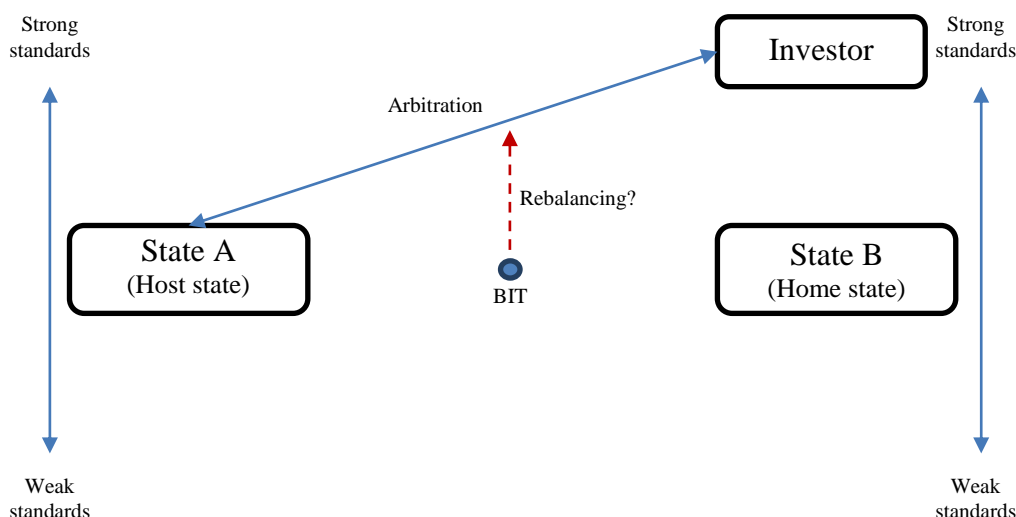


to a possible ‘rebalancing’ of interests.<sup>12</sup> This paper operates on the assumption that language is at least imperfectly constraining, leaving at least some range of possible meanings, but that this range may also be affected by more detailed or precise drafting (as discussed further in section IV below). On this basis, four features of the investment arbitral process are highlighted in this section, each of which affects the question of whether or to what extent a tribunal effects a rebalancing (or unbalancing) of the equilibrium established under a BIT.

### 3.1 The absence of the investor’s home state

The first and most notable feature of investment arbitration is that the foreign investor, but not the investor’s home state, is a party to the dispute settlement process. The interests of the investor, at most indirectly represented in the treaty negotiations, will thus be directly represented in legal argumentation, while other interests of the investor’s home state may well be unrepresented at this stage.<sup>13</sup> Figure 3 illustrates the influence this may have on the understanding of the terms of the BIT.

**FIGURE 3**



The scenario which is illustrated here draws on Figure 1, as discussed above. The BIT has been negotiated between two states which each are subject to a range of contrasting interests,

<sup>12</sup> On this issue see generally eg Duncan Kennedy, *A Critique of Adjudication* (Harvard University Press, 1997).

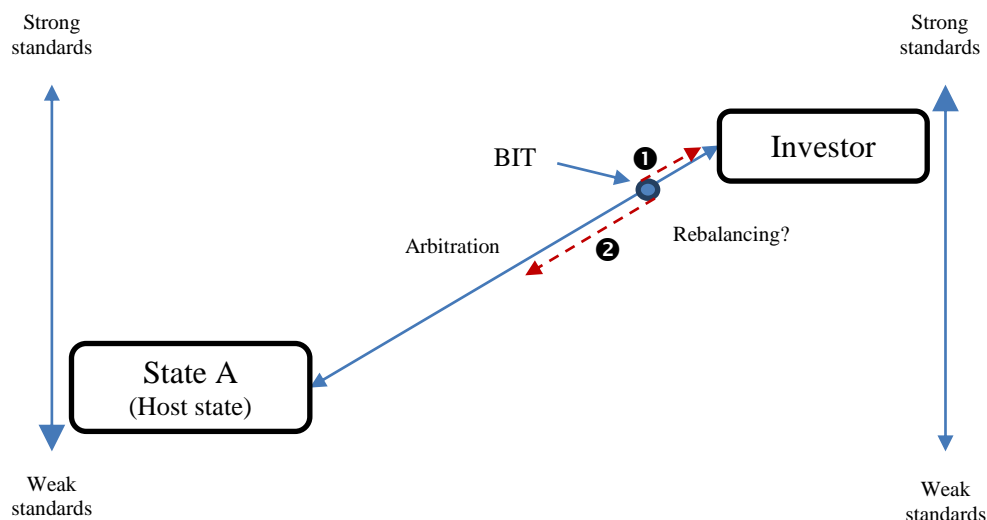
<sup>13</sup> Exceptionally, a mechanism such as that under Article 1128 of NAFTA may apply, which provides that ‘On written notice to the disputing parties, a [non-disputing state] Party may make submissions to a Tribunal on a question of interpretation of this Agreement.’ See eg *Bayview Irrigation District et al v Mexico*, Award, 19 June 2007, at [71]. In such interventions, the non-disputing state party may intervene in support of the previously negotiated treaty balance – although (as noted below) changes in their situation may alternatively lead to the adoption of a new and distinct ‘negotiating’ position. See further Gabrielle Kaufmann-Kohler, ‘Non-Disputing State Submissions in Investment Arbitration: Resurgence of Diplomatic Protection?’, in Laurence Boisson de Chazournes, Marcelo G. Kohen and Jorge E. Viñuales (eds), *Diplomatic and Judicial Means of Dispute Settlement* (Martinus Nijhoff, 2013).

either because they are likely to be both capital importers and exporters, or because the interests of potential investors (local or foreign) have been counterbalanced by those advocating greater regulatory freedom (for example, environmental or human rights lobby groups). The two states therefore have essentially agreed on an intermediate standard of protection for investors through their negotiations – the point indicating the BIT agreement between the two states falls somewhere between strong standards and weak standards of protection.

The arbitration, however, at least arguably destabilises this equilibrium, because it requires a further determination of the meaning of the BIT obligations or standards. It may be analysed as a further equilibrium involving the interpretation of the BIT, which takes place through the arbitration between State A, the host state of the investment, and the investor. The absence of State B from this balancing of interests, and the presence of the investor, means that the two arguments which will be presented to the arbitral tribunal appear to establish a new dynamic. The arbitral tribunal will be seeking to decide between a stronger standard of protection, advocated for by the investor, and a weaker standard of protection, advocated for by State A. Indeed, State A may itself adopt a position in the investment arbitration which is distinct from the position it adopted in the BIT negotiations – even if State A and State B in fact had each agreed to a BIT with strong standards of protection, State A may nevertheless dispute that when it comes to the arbitration of a particular claim arising out of those standards. Such inconsistency in the position of State A may not merely be tactical expediency; it may reflect a change in State A's perspective on investment law and arbitration between the time when the BIT is entered into and the time when the arbitration arises. Whether this is the result of changes in State A's position (it has become more of a capital importer than it expected) or a change in its internal dynamics (it has changed governments, or certain lobbying groups have grown stronger than others), the key point is that the state itself is not a static entity with fixed interests, and this may already introduce a degree of instability to the relationship negotiated through the BIT. It is, however, the presence of the investor in this dynamic which is the most novel and therefore potentially 'unsettling' feature, as it may clearly have the tendency to lead to a rebalancing – and strengthening – of the standard of protection which is applied under the treaty, as indicated in Figure 3. How much this tendency will be actuated in practice depends on a range of factors, some of which are considered in the following sections. One aspect will be the relative effectiveness of the investor compared with the state in advocating their positions through the arbitral process. While one might expect that states would have the advantage here, it is not always true that states, particularly developing states, will have access to the resources or expertise possessed by sophisticated investors and their legal advisors.

The scenario represented in Figure 3 was based on the BIT negotiation discussed above under Figure 1, but an equivalent analysis could apply to any other context. In Figure 2, for example, the terms of the BIT reflect the greater negotiating strength of State B, a capital exporting state with a strong interest in the protection of its investors. Taken to an investment arbitral tribunal, the same destabilisation might present itself. This scenario is illustrated in Figure 4.

FIGURE 4



An investor (effectively taking the position of State B, with congruent interests), may argue for even stronger standards of protection than those which were in fact agreed to by the two states. (This is marked as ‘1’ in Figure 4.) Equally, the host state (State A) may seek to revisit its argument for a lower standard of protection under the BIT in a new form, claiming that this was in fact what was agreed under the BIT. A small investor, which may lack sufficient resources to bring its claim with full effectiveness, might find an investment arbitral tribunal ultimately unmoved by its relatively poorly presented arguments as to the standard of protection it was ‘supposed’ to be entitled to under the treaty. (This is marked as ‘2’ in Figure 4.) The much acclaimed ‘independence’ of the rights of investors under the investment arbitral system comes not only with strengths (principally control over the claim) but also with weaknesses – the likelihood of success of the investor’s claim may depend on their own resources, which may have been depleted or even exhausted by improper host state treatment of their investment. The considerable costs attached to pursuing an investment arbitration may preclude some investors from seeking to vindicate their rights at all, particularly if there are doubts about the predictability of the system.

The inherent loss of home state control over the ‘meaning’ of treaty obligations in the investment arbitral process is an important part of the context and explanation for the Interpretive Note issued by the NAFTA Federal Trade Commission in 2001. In response to an evident trend toward the articulation of stricter standards by NAFTA investment tribunals, the note clarified that ‘[t]he concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens’,<sup>14</sup> thus shifting these standards back toward the public interests of the NAFTA states. Such a formal mechanism of interpretative guidance will, however, seldom be available in the context of bilateral

<sup>14</sup> NAFTA Free Trade Commission, 31 July 2001. (See eg <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en>.)

investment obligations.<sup>15</sup> In the absence of such a mechanism, the carefully negotiated balancing of interests in a BIT may become vulnerable to an irreversible rebalancing through the dispute resolution process under which the treaty obligations are interpreted and applied.

### 3.2 External influences

The second feature of investment arbitration which may affect this dynamic is the possible effect of external influences – that is, of interests outside those of the immediate parties to the arbitration. If an arbitration is carried out in secret, these influences are likely to be relatively limited. One of the most important modern trends of international investment arbitration is, however, the move towards greater transparency, as a means to address concerns of legitimacy surrounding confidential or secret decision-making over matters with potentially significant public regulatory consequences.<sup>16</sup> To describe transparency merely as a mechanism of providing greater information to those outside the system, to affect perceptions of the system, would however be to drastically under-estimate its effects on the systemic equilibrium of investment arbitration. To continue to draw on analogies from physics to inform our ‘force diagrams’, international investment arbitration may be said to suffer (or indeed benefit) from the ‘observer effect’. This term refers to the way that observation of a phenomenon may, in many circumstances, have effects which alter it – the measurement of temperature, for example, may involve introducing a thermometer which will absorb a certain amount of energy and thereby reduce the overall temperature it is measuring. Transparency in international investment arbitration may not merely reveal a previously unseen dynamic; it may significantly affect that dynamic.

The effects of transparency on international investment arbitration may be felt both in terms of direct effects on the parties to the arbitration, and also indirect effects through third parties. The fact that the host state is making its arguments ‘in public’ is particularly likely to have an impact. In Figure 4, for example, we considered the possibility that State A might argue for lower standards than were actually agreed under the BIT, potentially reducing the level of protection previously agreed for the investor. State A will, however, be less likely to do this if its arguments are public, because it would send a signal to other potential foreign investors concerning the degree of protection they may expect, partially undermining the beneficial effects of the BIT in attracting investment to the host state. If State A is a significant capital exporter as well as importer, it is also likely to be restrained in making arguments which would be convenient for the particular case – in favour of lower standards of protection – which might ultimately be to the cost of its own national investors. Various other parties may also seek to lobby State A to influence its arguments, either seeking to persuade State A to be stronger on preserving its regulatory independence or to accept the existence of high

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<sup>15</sup> But see eg *CME v Czech Republic*, Final Award, 14 March 2003, at para 87ff; U.S. 2004 Model BIT, Articles 28(2), 30(3) and 31.

<sup>16</sup> See further eg Alessandra Asteriti and Christian J. Tams, ‘Transparency and Representation of the Public Interest in Investment Treaty Arbitration’, in Stephan W. Schill (ed), *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press, 2010), pp.787-836; Stephan W. Schill, ‘Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator’ (2010) 23 *Leiden Journal of International Law* 401; Gary B. Born and Ethan G. Shenkman, ‘Confidentiality and Transparency in Commercial and Investor-State International Arbitration’, in Catherine A. Rogers and Roger P. Alford (eds), *The Future of Investment Arbitration* (Oxford: Oxford University Press, 2009), pp.5-42.

standards of investor protection and instead focus its arguments on whether the test is satisfied on the facts of the case. An investor arguing that a state has violated the applicable standards of protection through introducing particular regulation, for example, for environmental or health reasons, might similarly find that the potential damage to its business reputation which could follow from publicity concerning that form of argument would outweigh the potentially available remedies through investment arbitration. Activist groups might, in any case, seek to persuade the company of this indirectly through publicity campaigns.

What all this highlights is that the importance and potential impact of transparency in international investment law is not merely informational – it is not simply concerned with an asserted right to know about the decisions which are being made by investment arbitral tribunals, given their likely impact on public policy-making. Rather, transparency itself exposes international investment arbitration to a range of external influences, presenting further opportunities for balancing or rebalancing the competing interests. Transparency therefore may, but need not necessarily, provide a counter-balance to the distorting effects on the BIT equilibrium potentially caused by the presence of the investor and absence of the investor's home state in the dispute settlement process.

A further potentially important 'external' influence on the dynamics of an international investment arbitration is in the form of *amicus curiae* briefs from third parties. Such formal third party interventions in investment arbitral proceedings have been much discussed, although relatively little practiced, in recent years.<sup>17</sup> Many advocates for the acceptance of *amicus* briefs by investment tribunals highlight the way that such briefs can raise arguments, issues or interests which might not otherwise be fully represented before the tribunal. What these arguments often have in mind is that *amicus* briefs may provide a counter-balance to the investor's otherwise privileged position, particularly relative to their home state. In Figure 3, for example, an *amicus* brief presented by an environmental advocacy group may oppose the tendency for the presence of the investor to 'inflate' the standard of protection, arguing instead in favour of the host state's right to regulate in its public interest. The case for permitting *amicus* briefs in international investment arbitration might, therefore, be presented not only in terms of the contribution it may make to the quality of argumentation and awards, but as a remedial measure to counterbalance the potential for destabilisation of a BIT relationship.

Such an argument is, however, ultimately only of limited persuasiveness. It is true that *amicus* briefs may, in particular circumstances, serve the role of assisting in stabilising an existing BIT relationship – for example, by supporting the arguments of a weak host state whose interests might otherwise receive inadequate representation. The difficulty, however, is that limiting *amicus* briefs to such particular circumstances would require that they be restricted to third parties who are determined to be acting contrary to existing 'unbalancing'

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<sup>17</sup> See eg ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), Rule 37(2); *Biwater Gauff v Tanzania*, Award, 18 July 2008, at [356ff]; *Vivendi Universal v Argentine Republic*, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, 19 May 2005; Tomoko Ishikawa, 'Third Party Participation in Investment Arbitration' (2010) 59 *International and Comparative Law Quarterly* 373; Alessandra Asteriti and Christian J. Tams, 'Transparency and Representation of the Public Interest in Investment Treaty Arbitration', in Stephan W. Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010), pp.787-836.

forces in the arbitral process. As analysed in Figure 4, however, those forces may destabilise the BIT relationship in either direction, depending on the circumstances.<sup>18</sup> It may be that a relatively low resourced investor engaged in dispute settlement with a host state finds that the host state is able to rebalance the standards of treatment in its own favour. The addition of *amicus* briefs arguing in favour of greater protection for host state regulatory capacities would only risk exacerbating this destabilisation. In other cases, a strong investor seeking to destabilise a BIT relationship in favour of enhanced protection may have its case further supported by *amicus* briefs seeking to represent broader industry interests.<sup>19</sup> For *amicus* briefs to provide a counter-balancing effect, a tribunal would need to consciously determine the destabilisation risk before it (whether it might have a tendency to strengthen or weaken the agreed BIT standards), and selectively open proceedings to briefs from countering interests. Although such evaluations may be possible in some cases, where the parties have an obvious disparity of means, in many cases there are strong reasons to doubt that tribunals would be willing or able to make such calculations about the risks inherent in their own proceedings, or that it would be appropriate to expect them to do so. Ultimately, the argument for *amicus* briefs may be better limited to the more modest claim that they potentially contribute further information and reasoning from which a tribunal might profitably draw in its own analysis (as well as, from the tribunal's perspective, potentially enhancing the perceived legitimacy of its decision-making).

### **3.3 The interests of the arbitrators**

The validity of the analysis above depends on characterising the investment arbitral process as a dynamic system reflecting the counterbalancing interests or 'forces' of the disputing parties. This is, of course, not an uncontroversial way to view investment arbitration, particularly from a legal point of view. Technically, arbitrators are required to render a legally 'correct' determination of the dispute between the parties (outside the uncommon context of an arbitration *ex aequo et bono*).<sup>20</sup> It might be argued that, at least theoretically, a key distinction between mediation and arbitration is that the arbitrator's job is thus not to balance the interests between the two parties, but to determine an objectively correct answer to their unresolved questions.<sup>21</sup> This section and the next examine two responses to this argument, which involve analysing two further parts of the process of investment arbitration.

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<sup>18</sup> In some circumstances *amicus* briefs may represent interests which are not held (or at least not advocated) by either of the state parties, nor by the investor – once again 'destabilising' the negotiated BIT relationship by contextualising it within a broader framework of values (for example, raising human rights or environmental concerns as a justification for host state regulation where the host state is itself unwilling to do so in either the BIT negotiations or arbitral proceedings).

<sup>19</sup> Such interventions have occurred in practice – note, for example, the U.S. Chamber of Commerce *amicus* submission in *UPS v Canada*, 20 October 2005.

<sup>20</sup> See further eg Nigel Blackaby *et al* (eds), *Redfern and Hunter on International Arbitration* (5<sup>th</sup> edn, 2009) p.227ff; Leon Trakman, 'Ex Aequo et Bono: Demystifying an Ancient Concept' (2008) 8 *Chicago Journal of International Law* 623; W. Laurence Craig, William W. Park and Jan Paulsson, *International Chamber of Commerce Arbitration* (3<sup>rd</sup> edn, 2000) p.348ff; Karyn S. Weinberg, 'Equity in International Arbitration: How Fair is "Fair"?' (1994) 12 *Boston University International Law Journal* 227, at p.242ff.

<sup>21</sup> See eg William W Park, 'Arbitrator Integrity: The Transient and the Permanent' (2009) 46 *San Diego Law Review* 629, at p.695.

The first response is to note that the arbitrators themselves are not objective mechanical decision-makers, but rather that they are themselves participants in the dynamics of international investment arbitration. Even if it is accepted that there is an objectively ‘correct’ legal answer to an investment dispute, and that arbitrators aspire to reach it, they are in the end human actors. Arbitrators do not speak *ex cathedra*, but rather they are themselves intermediaries with professional interests and approaches which may influence the outcome of the arbitration, including in respect of its balancing of competing interests or ‘forces’. This is not to suggest a ‘conflict of interests’ *per se*, but rather reflects the degree of autonomy of even party-appointed arbitrators, and the reality that arbitrators bring their own perspectives and values to the dispute settlement process.

Three forms of ‘arbitrator interest’ can be identified, each of which could contribute to the rebalancing of interests which takes place through investment arbitration. The first, and perhaps most notorious, is the suggestion that since all arbitrations are commenced by investors, arbitrators are more likely to decide in favour of investor claimants to encourage further future claims and thereby to increase the value of their professional expertise.<sup>22</sup> This would suggest an automatic rebalancing of interests in favour of stronger standards of investment protection, when compared with the terms of the BIT. But there are reasons to be cautious about such a claim. The market of work for investment arbitrators is fairly limited to begin with, and any particular decision is unlikely to have a major impact on the amount of that work. Rather, a decision which was perceived to be excessively pro-investor would be likely to have a negative effect on an individual arbitrator’s own future prospects. It is true that they might subsequently be nominated more frequently by investors, but this effect would be counter-balanced by an equivalent effect for arbitrators perceived to be more friendly to the interests of host states. The balance of power is often held by the ‘neutral’ arbitrator, typically appointed by the two party-appointed arbitrators or by an appointing authority, and selection for this position requires the nominee to appear balanced and ‘magisterial’, not to have a record of favouring any particular set of interests (although whether appointing authorities themselves have vested interests is a further important and perhaps under-analysed question for the fairness of the system). Thus, it may be argued that while investment arbitrators *as a whole* might be viewed as having an incentive to make pro-investor decisions (maximising their collective demand), *individual* arbitrators are no more likely to have a strong justification to act in favour of investor interests as they are to act in favour of host state interests, because they will reduce their own individual market value in so doing.<sup>23</sup>

A second form of arbitrator interest follows from this, and perhaps represents a more significant risk of unbalancing through international investment dispute resolution. It has long

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<sup>22</sup> See generally eg Gus Van Harten, ‘Perceived Bias in Investment Treaty Arbitration’, in Michael Waibel *et al*, eds, *The Backlash Against Investment Arbitration* (2010); Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007), at p.167ff. Empirical evidence for this proposition is further examined in Gus Van Harten, ‘Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration’, *Osgoode Hall Law Journal* (forthcoming; available at <http://ssrn.com/abstract=2149207>). See also Daphna Kapeliuk, ‘The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators’ (2010) 96 *Cornell Law Review* 47.

<sup>23</sup> Thus, ‘arbitrators sitting on three-member tribunals have far more to gain from demonstrating intellectual integrity to each other (thus enhancing positive references for future cases) than in urging disregard of the right result’ – Park (2009), *supra* n 21, at p.690.

been argued that at least some arbitrators may seek to conciliate or compromise between the competing positions which are argued before them.<sup>24</sup> Although technically required to determine the ‘right’ decision, arbitrators do have a professional interest in being perceived as ‘reasonable’ and ‘balanced’ in their determinations, as well as accurate. This suggests that it may be fair to describe investment arbitration as a dynamic process rather than a quest for an objectively correct answer. In mediating between competing parties and arguments, the arbitrator may ultimately seek to find a middle ground which gives their decision an imprimatur of reasonableness. But, as illustrated in Figure 3, the middle ground between the investor and the host state may not be the same as the established terms of the BIT agreed between the two states. As explored above, the presence of the investor but not the investor’s home state before the arbitral tribunal thus risks destabilising the equilibrium established in the BIT negotiations through a possible arbitrator’s instinct for compromise. This may be particularly the case for arbitrators with a background in general commercial arbitration or mediation, through which such instincts may have been nurtured.<sup>25</sup> Another way of expressing this possible concern is to say that some arbitrators may seek to ‘balance the interests’ of the competing parties at the level of *each individual case*. This balancing may, however, be viewed as a destabilisation of the *systemic* balance between competing interests which is struck within investment arbitration in general and in the particular treaty framework under contention in particular. A particularly sharp critical analysis of such practice may be found in the dissenting opinion of Georges Abi-Saab in the *Abaclat* arbitration<sup>26</sup>, which criticised the majority’s determination in the following terms:

The “balancing of interests” as operated by the majority award is intrinsically wrong because ... the majority award is treating [the rights of the parties] as “variables” (or rather as dependant variables), whose recognition, scope and enforceability by the Tribunal are to be determined as a function of the Tribunal’s subjective evaluation of the right balance of interests between the parties, which thus becomes, according to this logic, the parametric gauge of these rights. This is standing the legal logic on its head. A tribunal is duty bound to apply the law, i.e. to enforce rights not to put them in question, according to its own evaluation of extra-legal (or opportunity) considerations, be they its subjective representation of the interests of the parties.<sup>27</sup>

The opinion further contended that this balancing at the level of each individual case risks subverting a broader systemic balance, arguing that:

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<sup>24</sup> But see Daphna Kapeliuk, ‘The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators’ (2010) 96 Cornell Law Review 47, suggesting that empirical evidence does not support the ‘conventional wisdom’ that arbitrators reach ‘compromise’ decisions (as the vast majority of awards were for less than 40% of the claimed amount), at least in respect of repeat arbitrators. This study perhaps underestimates the difficulty of empirically examining whether compromise decisions have been reached in particular cases – for example, as claimants might (in the absence of systemic constraints such as clear professional standards applicable to counsel, or a clear risk of adverse costs awards) make speculatively large claims, but view an award of 10% of their claim as a great success. It does, however, highlight that repeat arbitrators may achieve perceptions of balance through reaching a range of decisions over a series of cases, rather than through ‘splitting the difference’ in each individual case. See further discussion in Park (2009), *supra* n 21, at p.689ff.

<sup>25</sup> See further eg Alex Mills, ‘Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration’ (2011) 14 Journal of International Economic Law 469, at p.485 and p.490.

<sup>26</sup> *Abaclat and others v Argentina*, Dissenting Opinion, Georges Abi-Saab, 28 October 2011.

<sup>27</sup> At [250].



It is at that level, the legislative or conventional level, that the balance of interests takes place, the level of establishing the rules, not of applying them, which is that of tribunals. It is not open to the Tribunal to arrogate to itself the legislative jurisdiction or power of re-examining the rules in order to revise or refashion them, in the name of a rebalancing of interests of its own, according to its will or whim. In other words, such an exercise of “balancing of interests” is clearly *ultra vires* the powers of the Tribunal.<sup>28</sup>

Related to these considerations, investment arbitrators also have a professional interest in perceptions of international investment law and dispute resolution as a functional system. An important part of the history of international investment law is the technical and sociological process of its establishment as its own distinct professional specialization, a new ‘field’ of study and work. It has emerged in recent years as not merely a particular application of general rules of public international law or procedures for commercial dispute settlement, but as a new discipline requiring specialist (and expensive) knowledge and expertise, provided and supported by an ‘epistemic community’<sup>29</sup> with its own networks, conferences and journals. An interest in promoting this sense of progress in professional development may lead an arbitrator not only to seek to make ‘balanced’ (or ‘rebalanced’) decisions in individual cases, but to strive for coherence and consistency across different investment disputes. As a result, their decision is likely to draw on other arbitral awards as precedents (themselves based at least partially on other negotiated equilibriums between other states), and will itself potentially be drawn on as a precedent in other investment disputes (including those arising under other BITs).<sup>30</sup> Apparent differences in the way that previous authorities have identified substantive obligations in international investment law might thus be explained away by identifying underlying principles, finding that ‘[t]o the extent that the case law reveals different formulations of the relevant thresholds, an indepth analysis may well demonstrate that they could be explained by the contextual and factual differences of the cases to which the standards have been applied’.<sup>31</sup> The different formulations – different ‘thresholds’ – may, however, simply be different standards agreed by different states at different times. An arbitrator may thus, by ‘contextualising’ a dispute within the broader field of investment law, shift the balance of the particular bargain struck between states, towards a (dynamic) balance which is produced by the investment arbitral community itself.<sup>32</sup> This is not to say that contextualisation in this manner is always ‘improper’ – as is argued below, in some cases this may in fact be precisely what states have intended. But it is also possible that

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<sup>28</sup> At [251].

<sup>29</sup> The term is borrowed from international relations scholarship – see eg Peter M. Haas, ‘Introduction: Epistemic Communities and International Policy Coordination’ (1992) 46 *International Organization* 1, defining (at p.3) an epistemic community as ‘a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area’.

<sup>30</sup> See further Moshe Hirsch’s contribution to this volume.

<sup>31</sup> *Saluka v Czech Republic*, Partial Award, 17 March 2006, at [291]; see further eg Schill (2009), *supra* n 5, at p.347ff.

<sup>32</sup> See further Jason Webb Yackee, ‘Controlling the International Investment Law Agency’ (2012) 53 *Harvard International Law Journal* 391, who argues that the investment arbitration system may be usefully analogised to a regulatory body (rather than a series of quasi-judicial tribunals), and that states should adopt various measures to reclaim control over this emergent ‘policymaking agency’.

the state parties to a BIT did intend to strike a particular bargain independent of developments in investment law between other states, and that an arbitrator seeking to promote coherence in international investment law as a system will understate the particularity of that agreement by drawing on distinguishable precedent.

### **3.4 Uncertainty and textual dynamism**

The analysis above has responded to the possible criticism that investment arbitration does not really involve a dynamic interest-balancing because there is a legally correct outcome to a dispute, by questioning whether the arbitral process is capable of achieving ‘objectivity’, particularly since arbitrators are themselves active participants with their own interests. A second response to such a criticism is to question whether there is any objectivity to achieve – whether there is, even in theory, a single legally ‘correct’ answer to the problem posed by an investment dispute.<sup>33</sup> Diagrammatically, this would mean that a BIT should not be represented as a single definite ‘point’ on the spectrum of standards of protection, but rather that it indicates some sort of ‘line’ or ‘region’ of possible meanings.

This lack of a definite meaning for the standards established under a BIT could be either unintentional or intentional. Unintentional uncertainty is a product of the well-known phenomenon of linguistic indeterminacy, which recognises that words may have, at least to some extent, a ‘penumbra’ of unclear application.<sup>34</sup> States may strive to determine exact standards of treatment, but the form of their agreement may not have a precise meaning – most obviously, for example, where states use terms like ‘fair’, or ‘equitable’. Two states may agree on a BIT containing a fixed formula of words, but nevertheless disagree on what those words would mean in particular practical cases. When these meanings are interpreted by a third party (the arbitral tribunal), a further possible meaning may be generated. This analysis highlights that there is necessarily at least a degree of dynamism in the dispute settlement process through the process of interpretation – examined further in the following section.

Intentional uncertainty in the standards of treatment defined under a BIT might take one of three forms. First, the two states might intend that the standard of treatment be defined in a loose way to allow it to be dynamic. Rather than determining a single specific meaning at a point in time, states may agree that their agreement should be an evolving standard, which may change in light of alterations in context or conditions. Second, and building further on this point, the two states may intend that the obligations defined under the BIT track broader developments in standards of treatment in international investment law (conceived as a ‘multilateral regime’). Rather than the treaty attempting to define the obligations in its own right, it may deliberately intend to invoke the practice of other states and the precedent of other investment arbitral tribunals in interpreting the meaning of similar or identical words. In so doing, it may be accepting a further degree of dynamism, perhaps tracking ‘both customary international law and the minimum standard of treatment of aliens it incorporates’,

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<sup>33</sup> This is, of course, an infamous subject of jurisprudential dispute – see eg Ronald Dworkin’s ‘right answer’ thesis, discussed inter alia in *Taking Rights Seriously* (1978).

<sup>34</sup> See further generally eg Timothy A.O. Endicott, ‘Linguistic Indeterminacy’ (1996) 16 *Oxford Journal of Legal Studies* 667.

considered to be ‘constantly in a process of development’.<sup>35</sup> Third, the two states may recognise that they would be unable to reach agreement on an exact definition of the standards of protection, but nevertheless consider the advantages of establishing a BIT as outweighing this lack of control over the terms of their agreement. Viewed in this way, the states are effectively delegating a power to the arbitral tribunal to determine the meaning of the BIT, accepting that the arbitral tribunal is exercising a constrained law-making function in so doing.<sup>36</sup> An alternative view of such situations, however, is that unless states have *clearly* agreed to limitations on their regulatory capacities, arbitral tribunals should be expected to exercise deference to state policy decisions, and thus find difficult cases in favour of host states – applying a limited ‘standard of review’.<sup>37</sup> For example, in *S.D. Myers v. Canada*, the tribunal found that its determinations ‘must be made in light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders’.<sup>38</sup> This approach, however, still requires a delimitation point – now determining when ‘clear agreement’ has been established, and where there is sufficient doubt to necessitate deference.

### 3.5 Conclusions

From this final perspective in particular there may be nothing necessarily objectionable in the further balancing process carried out through investment arbitration – it may simply reflect a deferral of difficult questions by states to a tribunal which is able to make more fact-sensitive decisions; analogous to the domestic law balance between legislative and judicial law-making and dispute-settlement. Other perspectives analysed above may suggest, however, that the rebalancing of the BIT equilibrium which takes place in an investment dispute might be subject to critical concern. While there are various influences which suggest the possibility of a destabilisation of the BIT relationship either in favour of stronger or weaker standards of protection, perhaps the greatest concerns arise out of the presence of the investor (and absence of their home state) as a party to the arbitral process, particularly where a highly resourced investor is in a dispute with a developing state – concerns which may only partially be addressed by greater transparency or openness to third party submissions.

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<sup>35</sup> *ADF Group v United States of America*, Award, 9 January 2003, at [179].

<sup>36</sup> See further Yackee (2012), *supra* n 32, and the contribution to this volume by Anne van Aaken.

<sup>37</sup> See further eg Caroline Henckels, ‘The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration’ (2013) 4 *Journal of International Dispute Settlement* (forthcoming; available at <http://ssrn.com/abstract=2192389>); Rahim Moloo and Justin Jacinto, ‘Standards of Review and Reviewing Standards: Public Interest Regulation in International Investment Law’, in *Yearbook of International Investment Law and Policy* (Oxford University Press, 2012; available at <http://ssrn.com/abstract=2036243>); Caroline E Foster, ‘Adjudication, Arbitration and the Turn to Public Law “Standards of Review”’: Putting the Precautionary Principle in the Crucible’ (2012) 3 *Journal of International Dispute Settlement* 525; Stephan W Schill, ‘Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review’ (2012) 3 *Journal of International Dispute Settlement* 577; William W Burke-White and Andreas Von Staden, ‘Private Litigation in the Public Law Sphere: The Standard of Review in Investor-State Arbitrations’ (2010) 35 *Yale Journal of International Law* 284; Yuval Shany, ‘Toward a general margin of appreciation doctrine in international law?’ (2005) 16 *European Journal of International Law* 907.

<sup>38</sup> *S.D. Myers, Inc. v Canada*, Partial Award, 13 November 2000, at [263]; see also eg *Saluka Investments BV (The Netherlands) v the Czech Republic*, Partial Award, 17 March 2006, at [305].

#### IV. TREATY INTERPRETATION AND INTEREST BALANCING

This section considers one of the key practical implications of the analysis set out above. At the heart of the issues examined in this chapter is the question of how an arbitral tribunal determines and applies the standard of treatment which governs the relationship between the investor and the host state. In essence, this is a question of treaty interpretation – how the tribunal identifies the meaning of the obligation or obligations set out in the BIT.<sup>39</sup> In practice, this involves application of certain well-established rules on treaty interpretation, largely as set out in the Vienna Convention on the Law of Treaties (‘VCLT’). Although the VCLT treaty interpretation rules are commonly taken to suggest a hierarchy of primary and supplementary rules of interpretation (as considered further below), many arbitral tribunals have tended to approach the question more flexibly and holistically,<sup>40</sup> noting a range of (primary and supplementary) considerations simultaneously before reaching a conclusion.

As is well known, ascertaining the meaning of the terms of a treaty can involve asking two subtly but importantly distinct questions. First, what did the parties mean or intend to mean by the words to which they have agreed? Second, what do the words which the parties have agreed to mean? The first question asks what the *subjective* meaning of the treaty is – the meaning (whether static or dynamic) which most closely maps onto what the parties themselves intended. The second asks what the *objective* meaning of the treaty is – the meaning which would be apparent to a bystander. There is, of course, nothing unique to treaty interpretation about this issue or these two perspectives – contract law has long struggled with the balance between subjective and objective contractual interpretation, and it is equally well known that a central difficulty in statutory interpretation is balancing parliamentary intention or original meaning against textual approaches. In reality, a balance of subjective and objective elements is almost always desirable – determining a ‘pure’ subjective meaning is near if not actually impossible, and a purely objective meaning risks decontextualising and distorting the actual agreement, delegitimising the dispute resolution process by holding the parties to a bargain they have not themselves made. The question, then, is how this balance can and ought to be struck.

In international law, the VCLT rules on treaty interpretation permit consideration of both subjective and objective elements, and investment arbitral tribunals may thus permissibly place emphasis on different sources and elements. Textually, however, the VCLT tends to give priority to an objective rather than subjective approach, which may be explained or justified on the basis that:

The search for a common intention is likely to be both elusive and unnecessary. Elusive, because the contracting parties may never have had a common intention:

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<sup>39</sup> See generally J Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* (Oxford University Press, 2012); Michael Waibel, ‘International Investment Law and Treaty Interpretation’, in Hofmann and Tams (eds), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* (Nomos Publishers, 2011; available at <http://ssrn.com/abstract=1930725>); Ole Kristian Fauchald, ‘The Legal Reasoning of ICSID Tribunals – An Empirical Analysis’ (2008) 19 *European Journal of International Law* 301; Christoph Schreuer, ‘Diversity and Harmonization of Treaty Interpretation in Investment Arbitration’ (2006) 3 *Transnational Dispute Settlement* 1.

<sup>40</sup> See eg Ole Kristian Fauchald, ‘The Legal Reasoning of ICSID Tribunals – An Empirical Analysis’ (2008) 19 *European Journal of International Law* 301.

only an agreement as to a form of words. Unnecessary, because the rules for the interpretation of international treaties focus on the words and meaning and not the intention of one or other contracting party<sup>41</sup>

An objective approach to treaty interpretation is particularly present in the requirement that a treaty should be interpreted ‘in accordance with the ordinary meaning to be given to the terms of the treaty’ (Article 31(1)) – the meaning to be determined is the ‘ordinary’ meaning which would be perceived by a bystander, although this is counterbalanced by an acknowledgement that states can, if they intend to do so, give a ‘special meaning’ (Article 31(4)) to a term.

Subjective interpretive elements are perhaps most obviously present in the permissible reliance on any *travaux préparatoires* of the BIT negotiations as a ‘supplementary means of interpretation’ (Article 32). Although Article 32 is often viewed as setting restrictive conditions for its application – that it may only be drawn on where Article 31 ‘leaves the meaning ambiguous or obscure’, or ‘leads to a result which is manifestly absurd or unreasonable’ – Article 32 also specifies that it may be applied ‘in order to confirm the meaning resulting from the application of article 31’, which logically implies that it can be drawn on in every case. If supplementary means of interpretation may be used to confirm the ordinary meaning, then they must equally be able to challenge that meaning, even if preference should be given to Article 31 if the application of Article 32 still leaves the meaning ambiguous. In practice, it has been pointed out that:

courts and tribunals interpreting treaties regularly review the *travaux préparatoires* whenever they are brought to their attention; it is mythological to pretend that they do so only when they first conclude that the term requiring interpretation is ambiguous or obscure<sup>42</sup>

Further subjective elements of interpretation may be considered to be present in the form of the contemporaneous or subsequent joint practice or interpretative declarations of the state parties (such as those made by the NAFTA Free Trade Commission on 31 July 2001<sup>43</sup>), which are taken to indicate a clarifying agreement between the state parties as to the meaning of their treaty (Article 31(2), (3)(a) and 3(b)).<sup>44</sup> In some cases subsequent practice or declarations may, however, alter rather than clarify the existing relationship.<sup>45</sup> The additional temporal dimension raised by subsequent agreement or practice introduces a possible conflict not only between objective and subjective meanings (the ‘ordinary meaning’ being displaced by a subsequent ‘special meaning’) but also a potential conflict between subjective meanings (the ‘*travaux* meaning’ being replaced by a new ‘special meaning’). While for many treaties

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<sup>41</sup> *Czech Republic v European Media Ventures SA* [2007] EWHC 2851 (Comm), at [17].

<sup>42</sup> *Malaysian Historical Salvors, SDN, BHD v Government of Malaysia*, Decision on the Application for Annulment, 16 April 2009, at [57].

<sup>43</sup> <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en>; <http://www.state.gov/documents/organization/38790.pdf>.

<sup>44</sup> See further eg *The Canadian Cattlemen for Fair Trade v United States of America*, Award on Jurisdiction, 28 January 2008, at [181]-[189]; *Methanex Corporation v United States*, Award, 3 August 2005, at part II, Chapter B, at [19]-[21].

<sup>45</sup> See generally Georg Nolte (ed), *Treaties and Subsequent Practice* (Oxford University Press, 2013); see also the chapter by Martins Paparinskis in this volume.

these conflicts may not raise significant problems – states themselves would clearly be bound by their agreement<sup>46</sup>, whether it is characterised as an interpretation or modification<sup>47</sup> – in the context of international investment law a modification of the agreement between two states may be particularly problematic for third parties (investors) who have relied on the prior terms of the treaty. Given that third party reliance is central to the purpose of investment treaties (as discussed further below), there is a strong argument that such declarations should therefore generally not be given retrospective effect, even if they purport to be an interpretation rather than a modification of the existing agreement.<sup>48</sup> This question mirrors the dispute over whether the NAFTA Free Trade Commission’s 2001 ‘interpretation’ was indeed a lawful interpretation or an amendment, and whether it ought to apply retrospectively or only prospectively.<sup>49</sup>

Other elements of treaty interpretation in the VCLT might be more subjective or objective, depending on the approach taken. The requirement to interpret a treaty ‘in the light of its object and purpose’ (Article 31(1)), for example, which is often central to the approach of investment arbitral tribunals, might be subjective if the object and purpose of the treaty is identified subjectively, based on evidence presenting the actual intentions and goals of the parties, but might be objective if it is determined based on the perceived intentions apparent in the treaty itself, or on a general understanding of the purpose of investment treaty law. Whether application of this methodology tends to preserve or potentially distort the bargain between the state parties thus depends on the interpretation (and application) of the rules of treaty interpretation themselves – an (under-analysed) ‘meta-interpretive’ problem. The complexity and lack of clarity surrounding this process have sometimes led tribunals to an over-simplistic identification of the object and purpose of a BIT, perhaps under-appreciating the possibility that a BIT aims to establish an equilibrium between competing interests rather than to pursue a single policy goal.<sup>50</sup>

The ability for a tribunal to take into consideration ‘any relevant rules of international law applicable in the relations between the parties’ (Article 31(3)(c)) when interpreting the treaty could similarly work in (at least) two ways. If it involved taking account of another treaty between the two states, it could likely aid in determining their subjective intentions. If, on the other hand, it were used to interpret the meaning of a treaty in light of customary international law, or a multilateral treaty, it would be more likely to determine the meaning of

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<sup>46</sup> Including their agreement on whether the modified obligations should apply retrospectively or only prospectively.

<sup>47</sup> A subsequent agreement modifying the terms of a treaty which did not comply with the formal requirements to be an amendment of the treaty, but which nevertheless could not be considered merely an interpretation, would be likely to be viewed as giving rise to an estoppel.

<sup>48</sup> See further eg Mahnouch H. Arsanjani and W. Michael Reisman, ‘Interpreting Treaties for the Benefit of Third Parties: The “Salvors’ Doctrine” and the Use of Legislative History in Investment Treaties’ (2010) 104 *American Journal of International Law* 597; but see also Anthea Roberts, ‘Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States’ (2010) 104 *American Journal of International Law* 179, arguing that third party reliance should not generally constrain the freedom of states to modify the terms of their treaty, but suggesting a presumption against non-retroactivity for ‘unreasonable’ interpretations (although disclaiming that ‘It is beyond the scope of this article to set out the various factors that could or should be considered in establishing what amounts to a “reasonable” interpretation.’ (at n 144)).

<sup>49</sup> See further eg *Pope & Talbot v Canada*, Award in Respect of Damages, 31 May 2002.

<sup>50</sup> See further eg Waibel (2011), *supra* n 39.

the treaty in the sense in which an objective bystander would view it, which may or may not correspond with the subjective intentions of the state parties.<sup>51</sup>

In the particular context of international investment law, these two approaches to treaty interpretation map directly onto the concerns analysed above regarding the balancing or rebalancing of interests through investment arbitration. The more that a BIT is interpreted subjectively, the more likely it is that the arbitral tribunal will preserve the original negotiated balance of interests which the state parties to that BIT intended. The more that a BIT is interpreted objectively, the greater the risk that the tribunal will destabilise that balance, potentially in favour of either the investor or host state, as its act of ‘interpretation’ in reality identifies a ‘new’ meaning for the text. This could include interpretative approaches which rely on arbitral precedents based on BITs between different states but with similarly worded obligations, as is common practice,<sup>52</sup> as well as approaches which seek to interpret investment obligations in light of other rules of international law applicable between the state parties. Such approaches, supported by those who view international investment law as an emerging or existing regime, might well be what states intend (having agreed that the terms of the treaty should be given a dynamic contextual meaning), but if not they risk elevating values of systemic coherence over fidelity to state party intentions, and therefore raise concerns of a decontextualised interpretation which rebalances the actual agreement reached between the particular state parties to the BIT.

An immediate response to these concerns might, therefore, be to favour more subjective treaty interpretation techniques – placing a significant focus on any evidence which might reveal the actual intentions of the state parties to the agreement, such as joint practice, any contemporaneous statements by the parties, or the treaty *travaux préparatoires*.<sup>53</sup> Such evidence is, however, often in short supply, particularly evidence precise enough to justify an exact determination of BIT standards of treatment.<sup>54</sup> It may be that in practice such evidence

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<sup>51</sup> See further eg Martins Paparinskis, ‘Investment treaty interpretation and customary investment law: Preliminary remarks’, in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011); Campbell McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 *International and Comparative Law Quarterly* 279.

<sup>52</sup> See eg *Enron v Argentina*, Decision on Jurisdiction, 3 August 2004, finding (at [47]) a presumption that ‘the interpretation of a bilateral treaty between two parties in connection with the text of another treaty between different parties will normally be the same, unless the parties express a different intention’; similarly, *Berschader v The Russian Federation*, Award, 21 April 2006, holding (at [97]) that ‘While such case law and practice is in no way binding upon the Tribunal or the parties, the Tribunal must, nonetheless, be entitled to consider and take into account the conclusions of other arbitral tribunals who have addressed similar issues with respect to similar treaties and identically worded provisions’. See further Stephan W. Schill’s contribution to this volume.

<sup>53</sup> See eg *Austrian Airlines v The Slovak Republic*, Final Award, 9 October 2009, [105]-[108], [132], [137] (contrast the Separate Opinion of Charles N. Brower, at [4]); *The Canadian Cattlemen for Fair Trade v United States of America*, Award on Jurisdiction, 28 January 2008, at [77], [100]-[104], [157]-[158], [168]; *Bayview Irrigation District et al v Mexico*, Award, 19 June 2007, at [95], [106]; *Inceysa Vallisoletana v El Salvador*, Award, 2 August 2006, [192]-[200].

<sup>54</sup> The tribunal in *Aguas del Tunari, S.A. v Bolivia*, Decision on Jurisdiction, 21 October 2005, for instance, invited the parties to submit evidence of the BIT’s interpretation and practice, but subsequently observed (at [274]) that the ‘sparse negotiating history ... offers little insight into the meaning of the aspects of the BIT at issue, neither particularly confirming nor contradicting the Tribunal’s interpretation’. The court in *Czech Republic v European Media Ventures SA* [2007] EWHC 2851 (Comm) similarly found (at [31]) that ‘the contextual material throws no clear light on the proper interpretation of the disputed terms’. In *The Canadian*



will frequently not exist, because states simply did not reach that level of agreement in negotiating a BIT – as analysed above, they may be intentionally (or unintentionally) deferring the crystallisation of the meaning of their negotiated treaty to subsequent instances of dispute resolution. It may also be that, when it comes to a dispute, states find themselves in disagreement over the meaning of the text – although that is not to say that either state will necessarily be adopting the position favoured by the claimant investor, and it is also not to deny the utility of the tribunal asking for the views of the investor’s home state as to the meaning of the treaty text. One means for states to regain control over the process of interpretation of a BIT might be for states themselves to engage in dispute resolution in such situations, as permitted by many BITs, through a compromissory clause. A recent example of a (failed) attempt at such action is the ‘dispute’ between Ecuador and the United States, arising out of the Ecuador/Chevron global litigation saga.<sup>55</sup> States seeking to impose greater control over the balance of interests struck in their investment relationships might also consider preparing and publishing more material setting out the negotiating history of a BIT in an effort to facilitate a more subjective approach to its interpretation. The 2004 publication of NAFTA Chapter 11 negotiating history by Canada and the United States may be understood in this light, as an effort (somewhat analogous to the 2001 NAFTA Federal Trade Commission Interpretive Note, as discussed above) to restore state control over the balancing of interests in investment disputes.<sup>56</sup>

The interests of states in publishing such records is counter-balanced by the fact that the *travaux* may alternatively be retained by states unpublished, and brought out only as and when they support a position taken by the state in a dispute. However, the inability for a private investor to access unpublished *travaux* may prejudice their ability (and that of a tribunal) to genuinely ascertain the meaning of the negotiated agreement between the BIT state parties. This leads on to a more general point concerning the validity of an interpretative methodology which favours subjective elements. It is a key feature of a BIT that it is designed to be relied on by third parties – investors – who have not participated directly in the formation of the text, and therefore lack access to its ‘subjective’ meaning.<sup>57</sup> Indeed it is often (although not uncontroversially) argued that investment treaties have the effect of ‘conferring or creating direct rights in international law in favour of investors’.<sup>58</sup> If too much

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*Cattlemen for Fair Trade v United States of America*, Award on Jurisdiction, 28 January 2008, the tribunal found (at [158]) in relation to aspects of the NAFTA negotiating history that ‘it is not fruitful to try to infer too much ... as the drafting appears to be inconsistent and in many places not clearly or fully developed’.

<sup>55</sup> See further eg [http://www.pca-cpa.org/showpage.asp?pag\\_id=1455](http://www.pca-cpa.org/showpage.asp?pag_id=1455); note also Michele Potestà, ‘Republic of Italy v. Republic of Cuba’ (2012) 106 *American Journal of International Law* 341.

<sup>56</sup> On the background to this see further eg *Pope & Talbot v Canada*, Award in Respect of Damages, 31 May 2002.

<sup>57</sup> Arsanjani and Reisman (2010), *supra* n 48; see also eg *HICEE B.V. v The Slovak Republic*, Partial Award, 23 May 2011, at [122]-[140], in which the tribunal placed significant weight on the fact that the materials relied on were ‘a formal public document, preserved on the Parliamentary record, and thus accessible by any Dutch investor conducting due diligence into the status of his proposed investment’ (at [140], footnote omitted).

<sup>58</sup> *Occidental Exploration & Production Company v Republic of Ecuador* [2005] EWCA Civ 1116 (U.K.), at [18]; see also *Corn Products International v Mexico*, Decision on Responsibility, 15 January 2008, finding (at [168]-[169]) that ‘It is now clear that States are not the only entities which can hold rights under international law; individuals and corporations may also possess rights under international law’ and that ‘In the case of Chapter XI of the NAFTA, the Tribunal considers that the intention of the Parties was to confer substantive rights directly upon investors. That follows from the language used and is confirmed by the fact that Chapter XI confers procedural rights upon them’. In *Corn Products*, the tribunal in fact suggested (although not without



emphasis were placed on the subjective meaning of a BIT it might therefore undermine its effectiveness as a mechanism to increase investor confidence and thereby encourage capital flows. This argument suggests the adoption of a more objective approach to treaty interpretation (excluding the efficacy of *travaux* in practice), unless the *travaux* have been publically available since before the decision to invest, and thus do not raise fairness issues with respect to investor expectations. This perhaps supports the more traditionalist conclusion ‘that the text of the treaty is deemed to be the authentic expression of the intentions of the parties; and its elucidation, rather than wide-ranging searches for the supposed intentions of the parties, is the proper object of interpretation’.<sup>59</sup> Such analysis may suggest that if states wish to ensure that the interpretation of the provisions of their BIT closely maps the intentions of their subjective agreement, the most appropriate way to do so would be through the adoption of more detailed and clearer BIT obligations, providing greater textual guidance to arbitrators (and indeed there are perhaps signs that this is occurring in practice) – although this of course offers limited assistance with respect to existing BITs.

Beyond any available evidence of the parties’ subjective understanding of their BIT agreement, taking a more subjective or objective approach may also affect the tribunal’s evaluation of other means of identifying the meaning of the treaty text. A tribunal taking a more subjective approach might, for example, seek evidence of the practice of the parties contemporaneous to the formation of the BIT under dispute, or even of the similar practice of other states at that time, in order to attempt to better place themselves in the mind-set of the negotiating states.<sup>60</sup> Such practice may be taken not only to explain the intention behind particular words which have been included in the treaty underlying the dispute, but also to indicate an intentional exclusion of words which were used in other similar contexts. As one tribunal described the argument:

The relevant interpretation ... is that which arises from the intention of the State expressed in the provisions of some treaties and omitted from the provisions of other treaties signed by the same State; this comparative exercise makes it possible to establish the value of silence vis-à-vis that of words, arguing that if a treaty includes a certain provision but a subsequent or simultaneous treaty does not, this constitutes a presumption that the recognition of the rights concerned is not intended.<sup>61</sup>

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ambiguity) that this was always the case even under the traditional rules of diplomatic protection, concluding (at [170]) that ‘It has long been the case that international lawyers have treated as a fiction the notion that in diplomatic protection cases the State was asserting a right of its own’, finding instead (at [173]) that ‘when a State claimed for a wrong done to its national it was in reality acting on behalf of that national, rather than asserting a right of its own’. But for an opposing view see eg *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico*, Award, 21 November 2007, holding (at [169]) that ‘the investor may bring the host State to an international arbitration in order to request compensation, but the investor will be in reality stepping into the shoes and asserting the rights of the home State’.

<sup>59</sup> *Methanex Corporation v United States*, Award, 3 August 2005, at part II, Chapter B, [22].

<sup>60</sup> See eg *Austrian Airlines v The Slovak Republic*, Final Award, 9 October 2009, [57], [60], [134]; *Berschader v The Russian Federation*, Award, 21 April 2006, at [145]-[147], [155]-[158], [199]-[205]; *Aguas del Tunari, S.A. v Bolivia*, Decision on Jurisdiction, 21 October 2005, at [289]-[314], but concluding (at [314]) that ‘the BIT practice of the Netherlands and Bolivia is necessarily of limited probative value to the task of interpreting the BIT between the Netherlands and Bolivia’.

<sup>61</sup> *Camuzzi International v The Argentine Republic*, Decision on Objections to Jurisdiction, 11 May 2005, at [128].

A tribunal more focused on identifying the objective meaning of the treaty text is unlikely to view this type of analysis as necessary or valuable, but will rather simply focus on interpretation of the words actually used by the parties in the BIT.

There is, of course, not a ‘correct’ answer to these interpretive dilemmas and complexities. Treaty interpretation inevitably involves both subjective and objective elements, and there is an inherent risk of distorting the original agreement between the state parties, but also a strong policy argument in favour of identifying that meaning from the point of view of a bystander because a BIT is intended to be relied on by third parties. The purpose of this analysis is not to advocate for any particular approach, but to highlight the significance of these questions of treaty interpretation for the underlying balance of interests established in the BIT and *potentially* destabilised through the dispute resolution process – the rules on treaty interpretation are, in practice, a critical form through which this contest of interests is played out.

## V. CONCLUSIONS

This chapter has sought to contribute to analysis of the fairness and legitimacy of international investment arbitration through an examination of the way it balances and rebalances the competing interests at stake. It has presented investment treaty negotiation and investment dispute resolution as two dynamic systems which reach a form of equilibrium through the treaty text and through the arbitral award. The question of the fairness of international investment law is thus translated into the question of whether the process of investment arbitration inappropriately destabilises the agreement reached between states in favour of any particular interests.

Four main conclusions may be highlighted from the analysis above. First, while it is of course true that a potentially destabilising effect is caused by the presence of the investor and the absence of the investor’s home state in the arbitral process, it is not true that this effect will always operate in favour of increasing standards of protection and limiting state regulatory discretion. A relatively weak investor may find that without the support of the resources of their home state they are unable to successfully counter the host state’s efforts to ‘read down’ those standards. This feature of investment arbitration is, therefore, one that requires cautious and context-sensitive analysis. Similarly and consequentially, third party interventions through *amicus* briefs will not necessarily have a counter-balancing effect on the perceived distortion caused by the investor’s direct role in the dispute resolution process – such briefs may be valuable in terms of the additional information or arguments they provide to the tribunal, but caution should be exercised before attributing them with any remedial ‘fairness’ effects.

The second conclusion of the analysis in this chapter is to highlight the importance of transparency not merely as an informational device – ensuring that the workings of investment law and arbitration are visible – but as an influence on the dynamics of the arbitral process. Simply put, the arguments presented by both states and investors are likely to be affected if they must be advocated in public. This will not necessarily increase or decrease the level of destabilisation of the investment agreement, as exposure to external interests may

lead to a further unbalancing, but in at least some cases these external interests will tend to limit the possibility that the parties will adopt extreme and distorting positions. Host states will, for example, be wary of arguing publically that they believe investment protection standards do not significantly restrict their regulatory capacities, as this is likely to reduce any investment-enhancing effects of the agreements which the state has signed.

A third conclusion is that concerns which have been expressed that arbitrators themselves have an interest in the growth of the investment dispute resolution system which is likely to lead them to favour the interests of investors may be overstated. It is true that investment arbitrators *collectively* may have such an interest. However, each arbitrator individually has a greater interest in maximising their market value. This may lead some arbitrators to be regularly sympathetic to investors or host states, but for most it will manifest itself in an effort to be (or at least to appear) moderate. This may, however, raise a greater concern – that arbitrators, perhaps particularly those with a commercial background, may seek to adopt an intermediate position under which each party feels they have not entirely ‘lost’. Such a practice is likely to raise concerns that the arbitral process is indeed dynamically rebalancing the standards of protection agreed by the state parties to the BIT, rather than attempting to identify and apply those standards. In some cases, it may well be that states are intending to create such dynamism, through consciously agreeing to unclear standards and delegating the authority to clarify the meaning and application of those standards to tribunals. There may, however, be a temptation for arbitrators to (self-empoweringly) exaggerate these intentions.

The fourth conclusion presented by the analysis in this chapter is that the rules on treaty interpretation provide one critical form in which this contest of interests is played out. In particular, treaty interpretation can involve asking two distinct questions – the objective question of what the terms of the treaty mean, and the subjective question of what the state parties to the treaty intended those terms to mean. The relative influence given by an arbitral tribunal to these two inquiries impacts directly on the extent to which the tribunal will strive to preserve the original bargain between the state parties, and the extent to which the decision will present a dynamic rebalancing of that bargain. How this balance should be struck is inherently difficult and problematic, because a tribunal is torn between its obligations to respect the subjective sovereign agreement between the state parties to the BIT, and the reality that the BIT is designed to be relied on by third parties (investors) who are, for example, unlikely to have access to *travaux préparatoires*, but will rather depend on their ‘objective’ perceptions of the BIT text.

The popularity of international investment law and arbitration as a subject of academic study is not only attributable to its growing practical importance, but also to its complexity. The analysis presented in this chapter suggests that this complexity has perhaps tended to be understated by those who have presented criticisms of the fairness of the system. This is not to say that those criticisms are without import, or that fundamentally important questions of fairness do not arise – such questions continue to go to the heart of the legitimacy of a system of privatised dispute resolution which increasingly constrains the exercise of state regulatory authority. In order for these questions to be fully addressed, the complex dynamics of the interest balancing in international investment law and arbitration require and deserve continued critical attention.