conceptualized as freedom within the limits of the law.[5] As norm creators and masters of treaties, states assume an important role in controlling the normative development of international investment law—not only when creating it, but also at later points in time when more information is available. Yet one should realistically acknowledge that there will always remain some freedom for arbitrators in interpreting investment law and in applying it to the facts of a given case.

International investment law will therefore remain a regime that is on the one hand shaped by public actors (i.e., states, which create and control more or less refined norms in a rather centralized system based on the cornerstone of consent), while on the other hand shaped by private actors (i.e., arbitrators, who enjoy interpretive powers for the resolution of concrete disputes in a decentralized system, which apart from jurisdictional consent does not require the agreement of those who are affected by a concrete decision). One of the core challenges facing the international arbitration regime today is to overcome the tensions that may result from these two different paradigms of decisionmaking.

Possible Paradigmatic Changes in the Settlement of International Investment Disputes

By Jeremy K. Sharpe[*]

In considering the question of a possible paradigm shift, I want to address a significant but underused tool in investment arbitration: non-disputing party submissions. That is, submissions by a treaty party that is not the respondent state.

This practice raises at least three important questions. First, is it legitimate for a state to seek to influence treaty interpretation in a case in which the state is not a party, given that the state itself also may act as a respondent in arbitrations under that same treaty? I believe that it is entirely legitimate for treaty parties to do so, whether or not the treaty expressly contemplates non-disputing party submissions. As Professor Crawford recently stated:

> In the context of investment treaty arbitration there is a certain tendency to believe that investors own bilateral investment treaties, not the states parties to them. . . . That is not what international law says. International law says that the parties to a treaty own the treaty and can interpret it. One might say within reason, but one might not question their application of reason as they see fit.[1]

The second question is whether this development is necessary. I believe that non-disputing party submissions are essential to maintaining interpretive coherence. Investment arbitration is inherently asymmetrical. States and investors have different interests and play different roles.[2]

[5] *Cf.* Hersch Lauterpacht, The Function of Law in the International Community 88 (Oxford University Press 2011).

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[1] James Crawford, *A Consensualist Interpretation of Article 31(3) of the Vienna Convention on the Law of Treaties*, *in* Treaties and Subsequent Practice 29, 31 (Georg Nolte ed., 2013).

[2] *See* Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AJIL 179 (2010).

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States have interests extending beyond any particular case. Many states today import and export capital; they thus have foreign investors and domestic prerogatives to protect. And capital-exporting states increasingly find themselves respondents in investment arbitration.[3]

States also are repeat players in international adjudication. States most often are respondents in investment disputes, of course. But they may also be claimants, including when espousing claims of their nationals in the ICJ.[4] When acting as a respondent, the state must be aware that the arguments it makes will likely be made against its investors. And when acting as a claimant, the state must be aware that foreign investors later will cite those arguments against it. States thus face inherent constraints on the positions they can take in their investment disputes.

State pleadings, moreover, are an important source of state practice.[5] These pleadings thus help shape the development of customary international law. It is partly for this reason that the U.S. State Department vets its arbitration submissions with some two dozen U.S. economic and regulatory agencies.

All of these factors encourage states to seek a balanced interpretation of their investment treaties. States have a long-term interest in how their agreements are interpreted.

Claimants, by contrast, are in a fundamentally different position. They generally have no interest in the long-term integrity of the investment treaty. Companies hire counsel not to promote a balanced interpretation of the BIT, but to win cases. Professor Vaughan Lowe has put it this way:

> Individuals tend to have neither the breadth of interest nor the long-term views of States. There is, accordingly, much less of a restraint upon the manner in which companies and individuals pursue their interests in international law. For example, a company claiming compensation for the violation of its rights under an investment protection treaty has every reason to pitch its claim at the highest level. It has no fear that its words will later be cited against it, because it can never find itself in a position where it is called to account for the treatment of foreign investors. This asymmetry . . . will, I suspect, distort the development of international law.[6]

There is a second reason why non-disputing party submissions are so critical. We now have hundreds of investment arbitration awards that are not directly opposable to a particular state but that may be cited against that state in its investment disputes. Sir Daniel Bethlehem has posed the following question, albeit in a related context:

> What does one do if you are the UK or some other indirectly interested state in such circumstances, both to protect your own interests and to ensure that the development of the law stays on a sensible track? These statements or determinations are not directly opposable to you, but they nonetheless form part of a growing body of dispositive legal principles that in many cases is of very variable quality.[7]

This, I believe, is one of the central challenges in investment arbitration today. Formally, arbitration decisions are not binding precedent. Yet they are routinely cited for persuasive

[3] Indeed, claimants in 2013 brought 27 claims against developed states, 19 claims against developing states, and 11 claims against states with economies in transition. *See* UNCTAD, *Recent Developments in Investor-State Dispute Settlement (ISDS)*, IIA Issues Note No. 1, at 2 (Apr. 2014).

[4] *See, e.g.*, Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. 15 (July 20).

[5] *See* Canadian Cattlemen v. United States, NAFTA/UNCITRAL, U.S. Reply on Preliminary Issue (stating U.S. position).

[6] Vaughan Lowe, International Law 24 (2007).

[7] Daniel Bethlehem, *The Secret Life of International Law*, 1 Cambridge J. Int'l & Comp. L. 23, 31–32 (2012).

authority, including against states that were not party to the dispute and that had no role in the underlying case. How do states protect themselves from bad ''precedent''?

A key answer, I believe, is through greater use of non-disputing party submissions. These submissions allow tribunals to hear from other treaty parties on questions of treaty interpretation. This helps ensure that the treaty is interpreted in a manner consistent with the views of all treaty parties, not just the claimant and respondent state. This should lead to better arbitral decisions and provide greater clarity and predictability for investors and states alike.

Finally, how much weight should tribunals afford these submissions? Article 31(3) of the Vienna Convention on the Law of Treaties states that any subsequent agreement between the parties regarding the interpretation of the treaty, or any subsequent practice in the application of the treaty that establishes the parties' agreement regarding its interpretation, ''shall be taken into account, together with the context.'' This determination requires looking for the concordant, common, and consistent view of the treaty parties—including views expressed in pleadings and non-disputing party submissions.[8] If the tribunal finds a concordant, common, and consistent view of the treaty parties, that should be considered the authentic interpretation of the treaty.[9]

It is not the place, I would submit, for a tribunal to assess whether the states parties' collective view constitutes an interpretation, modification, or amendment of the treaty. As Judge Simma has observed, ''there is really no possibility for a third party to distinguish between acts of interpretation, modification or amendment of a treaty in the absence of a declaration or some other means of clarification provided by the parties to the treaty themselves.''[10] A tribunal that fails to take account of the treaty parties' statements concerning the meaning of the treaty risks exceeding its delegated authority and usurping the rights of the treaty parties.

Investment tribunals have approached these issues differently. Some tribunals have shown great skepticism of non-disputing party submissions. This is particularly troubling when the tribunal is applying customary international law, which requires the tribunal to evaluate state practice and *opinio juris*. One recent tribunal appears to have ignored the submissions of four treaty parties. Instead, the tribunal offered its own interpretation of customary international law that was not grounded in state practice and *opinio juris*.

This approach risks a return to the 1950s and 1960s, when certain arbitral tribunals ignored the applicable law in favor of their preferred rules of decision.[11] These awards did much to discredit international arbitration in many parts of the world.

Over the ensuing decades, we have seen a true paradigm shift. Just over a decade ago, it could be said that:

> Arguably, the international community overall is closer now than at any time in history to a consensus on (1) the utility of international arbitration as a proper substitute for

[8] *See* Ian Sinclair, The Vienna Convention on the Law of Treaties 137 (2d ed. 1984) (''The value of subsequent practice will naturally depend on the extent to which it is concordant, common and consistent.'').

[9] *See* Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points*, 33 Brit. Y.B. Int'l L. 203, 223 (1957) (observing that a consistent state practice ''must come very near to being conclusive as to how the treaty should be interpreted''); Patrick Daillier et al., Droit International Public 277 (8th ed. 2009) (''The expression 'authentic interpretation' designates that which is furnished directly by the parties, as opposed to an unauthentic interpretation, which is given by a third party.'') (author's translation).

[10] Bruno Simma, *Miscellaneous Thoughts on Subsequent Agreement and Practice*, *in* Treaties and Subsequent Practice 46, 46 (Georg Nolte ed., 2013).

[11] *See* Charles N. Brower & Jeremy K. Sharpe, *International Arbitration and the Islamic World: The Third Phase*, 97 AJIL 643 (2003) (discussing cases).

> national court litigation of international investment and commercial disputes, (2) the basic procedures required for fair and effective international dispute resolution, (3) the role that states must play in creating an international and national legal environment that fosters effective arbitration, and (4) the need for a reciprocally supporting relationship between national courts and arbitral tribunals.[12]

If this more progressive paradigm is to be maintained, states must continue to perceive the benefits of international arbitration, both for their foreign investors and for themselves. A key way to ensure continued state support for investment arbitration is to afford states the opportunity to make their views known on treaty interpretation questions, and then to give those views appropriate consideration and effect. To ignore or second-guess the treaty parties could seriously undermine the existing paradigm.

Interpretational Methods as an Instrument of Control in International Investment Law

By Anne van Aaken[*]

Investor-state dispute settlement (ISDS) is much discussed and criticized.[1] It is under pressure also in policymaking, e.g., in the Transatlantic Trade and Investment Partnership, in Australia, Indonesia, and some South American countries. Some states want to discard ISDS altogether, but throwing out the baby with the bathwater is never optimal. Thus, more fine-grained proposals should be considered.

ISDS delegates interpretational power from states to arbitrators to an unusual extent: it is the most far-reaching delegation of interpretation in international law. Many international investment agreements (IIAs) are broadly and vaguely formulated (especially the European ones); there is in principle no exhaustion of local remedies; there are no diplomatic considerations since investors do not need their home states to take up their case; and it is well-enforced in comparison with other areas of international law. States have several means at their disposal to control this delegation if they want to retain more control over the interpretation of their treaties. Proposals for reform can be grouped in three broad areas: institutional control (''Who?''), controlling substantive law (''What?''), and controlling interpretational methods (''How?''). Institutional reform proposals include, for example, appeal mechanisms, standing investment courts, appointment mechanisms for arbitrators, joint commissions of states,[2] alternative dispute settlement mechanisms, and binding authoritative interpretations by states. Control of substantive law focuses on the mode of formulating IIAs (using standards (broadly formulated terms, concretized *ex post* in a dispute), rules (more precise norms), or principles)[3] as well as the substantive content of the treaties. The more vaguely formulated a treaty is,

[12] *Id.* at 647.

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[1] For an overview of the recent discussion, see *Reform of Investor-State Dispute Settlement: In Search of a Roadmap* (special issue), 11 Transnat'l Disp. Mgmt. (2014).

[2] Anne van Aaken, *Delegating Interpretative Authority in Investment Treaties: The Case of Joint Commissions*, 11 Transnat'l Disp. Mgmt. (2014).

[3] For an application to IIAs, see Anne van Aaken, *International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis*, 12 J. Int'l Econ. L. 507 (2009). *See also* Federico Ortino, *Refining the Content and Role of Investment 'Rules' and 'Standards': A New Approach to International Investment Treaty Making*, 28 ICSID Rev. 152 (2013), as well as the remarks of Friedrich Rosenfeld, *supra* at 191.