

POWER AND PERSUASION IN INVESTMENT TREATY INTERPRETATION: THE DUAL ROLE OF STATES

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A key problem in the investment treaty field is that the balance of power between treaty parties and tribunals concerning the authority to interpret investment treaties is askew. In theory, treaty parties are supreme when creating the law and tribunals are supreme when applying it in particular cases. In practice, this separation is never complete. How treaty parties interpret and apply the law affects what tribunals decide in particular cases. And tribunal awards in particular cases informally contribute to the interpretation, and thus the creation, of the law. As a result, some interpretive balance exists between treaty parties and tribunals, though neither enjoys ultimate interpretive authority in all circumstances.

As investment treaties create broad standards rather than specific rules, they must be interpreted before they can be applied. Investor-state tribunals have accordingly played a critical role in interpreting, hence developing, investment treaty law. Yet their jurisprudence frequently resembles a house of cards built largely by reference to other tribunal awards and academic opinions, with little consideration of the views and practices of states in general or the treaty parties in particular.¹ This disconnect alienates treaty parties from the interpretive process, which increases prospects for dissonance between states and tribunals about interpretation and adds fuel to the growing fire about the legitimacy of investment treaty arbitration.

In an effort to recalibrate this imbalance, this article proposes an interpretive approach that draws more heavily on an important, but significantly underutilized source: the subsequent practice and agreements of treaty parties. The Vienna Convention on the Law of Treaties (Vienna Convention) provides that the treaty parties' subsequent agreements and practice shall be taken into account in interpretation, recognizing the significant and ongoing role of the parties in interpreting their treaties.² Yet investor-state tribunals have tended to shun this interpretive approach, apparently because of concerns about ensuring the equality of arms between

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¹ For example, a recent study of awards by the International Centre for Settlement of Investment Disputes (ICSID) found that 94 percent and 74 percent relied on case law and academic authorities, respectively, while only a handful relied on subsequent practice and agreements by treaty parties. Ole Kristian Fauchald, *The Legal Reasoning of ICSID Tribunals: An Empirical Analysis*, 19 EUR. J. INT'L L. 301, 328–33, 335, 351 (2008).

² Vienna Convention on the Law of Treaties, Art. 31(3)(a), (b), *opened for signature* May 23, 1969, 1155 UNTS 331 [hereinafter Vienna Convention] (entered into force Jan. 27, 1980). Subparagraphs (a) and (b) of Article 31 are quoted *infra* in text at note 94. Article 31(3)(c) requires reference to other relevant rules of international law, including custom, but this article does not address these rules because they raise distinct issues better treated at length on a separate occasion.

claimant investors and respondent states and protecting against the adoption by states of self-interested interpretations.

This divergence can be traced to states' dual role under investment treaties as treaty parties (with an interest in interpretation) and actual or potential respondents in investor-state disputes (with an interest in avoiding liability). The Vienna Convention's approach highlights the former, while investment tribunals often focus on the latter. This tension in turn implicates the proper role of investment tribunals, which simultaneously act on behalf of the treaty parties in interpreting and developing investment treaty law and on behalf of the disputing parties in arbitrating investor-state disputes. While investment treaties expressly delegate the power to resolve investor-state disputes to tribunals, any delegation of interpretive power from treaty parties to tribunals is implied and partial, rather than express and exclusive.

The clash between viewing states chiefly as treaty parties and principally as respondents causes practical and theoretical difficulties. An acute (though extreme) example of the controversies that it can create was the ruckus caused by the joint interpretive statement issued by the North American Free Trade Agreement (NAFTA)³ states under the auspices of the Free Trade Commission (FTC) in response to what they perceived as expansive interpretations adopted by several NAFTA tribunals.⁴ Beyond the regular provisions of the Vienna Convention on subsequent agreements and practice, NAFTA stipulates that the FTC, which is composed of cabinet-level representatives of the treaty parties, has responsibility for resolving "disputes that may arise regarding [the treaty's] interpretation or application" and that its interpretations are binding on NAFTA tribunals.⁵

The FTC's interpretation provoked a wide spectrum of responses by NAFTA tribunals. At one extreme, the *Pope & Talbot* tribunal viewed the interpretation as an illegitimate attempt to amend the treaty retroactively in order to interfere with an ongoing case.⁶ The tribunal asked pointed questions about the propriety of Canada's participation in the FTC's deliberations while it was a party to a dispute and how Canada's taking such a role could be squared with due process.⁷ At the other extreme, the *ADF Group* tribunal accepted the interpretation on the basis that "we have the Parties themselves—all the Parties—speaking to the Tribunal" and

³ North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 8, 11, 14, & 17, 1992, 32 ILM 289 & 605 (1993) [hereinafter NAFTA].

⁴ NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (July 31, 2001), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en>. In broad terms, the FTC interpretation "clarif[ied] and reaffirm[ed]" that (1) NAFTA does not impose a general duty of confidentiality on the disputing parties to Chapter 11 arbitrations or preclude the treaty parties from providing public access to documents submitted to, or issued by, a Chapter 11 tribunal; and (2) the minimum standard of treatment provided for in Article 1105 prescribes the customary international law minimum standard of treatment of aliens, the requirements of "fair and equitable treatment" and "full protection and security" referred to in that article do not require treatment above and beyond that minimum standard under customary international law, and a determination that there was a breach of another NAFTA provision or international agreement does not establish a breach of Article 1105. The latter interpretations were particularly controversial because they effectively overruled interpretations adopted, against the pleadings and interventions of the treaty parties, by certain Chapter 11 tribunals.

⁵ NAFTA, *supra* note 3, Arts. 1131(2), 2001(1) & (2)(c).

⁶ *Pope & Talbot Inc. v. Canada, Damages*, para. 47 (NAFTA Ch. 11 Arb. Trib. May 31, 2002), 41 ILM 1347 (2002) [hereinafter *Pope & Talbot Damages*] (holding that, "were the Tribunal required to make a determination whether the Commission's action is an interpretation or an amendment, it would choose the latter. However, for the reasons discussed below, this determination is not required.") (footnote omitted).

⁷ *Id.*, paras. 11–16. The tribunal asked how such a process could be squared with the "rule of international law that no-one shall be judge in his own cause" and the purpose of the arbitral mechanism to "assure due process before an impartial tribunal." *Id.*, para. 13. The timing of the FTC interpretation caused particular concern to the tribunal

“[n]o more authentic and authoritative source of instruction on what the Parties intended to convey in a particular provision of NAFTA, is possible.”⁸ The tribunal also rejected the argument that it was impliedly authorized to distinguish between FTC interpretations and amendments, noting that such an approach would “tend to degrade and set at naught the binding and overriding character of FTC interpretations.”⁹ In these responses, the tribunals evidenced different understandings of the role of states as both respondents and treaty parties and of the nature of their own interpretive power.

The legitimacy of the FTC’s interpretation and the reactions of various tribunals to it have proved to be fertile ground for debate.¹⁰ This incident, however, represents a specific manifestation of a more systemic (though less discussed) issue about the role states should play in the interpretation of treaties like human rights and investment treaties that create directly enforceable rights for nonstate actors. This article examines when, how, and with what limitations tribunals should take subsequent agreements and practice into account in interpreting such treaties, focusing particularly on investor-state disputes. Rather than being limited to treaties, like NAFTA, that provide for interpretive bodies such as the FTC, the analysis applies the general Vienna Convention principles on subsequent agreements and practice. I argue that, subject to certain constraints, investment treaty interpretation would generally benefit if investment tribunals took greater account of such evidence.¹¹ In making this argument, the article proceeds in three parts, working from theory to legal doctrine to practice.

because it was adopted after the tribunal reached a contrary decision on interpretation during the merits phase and was forwarded to the tribunal for consideration before the damages phase.

⁸ *ADF Group Inc. v. United States*, ICSID No. ARB(AF)/00/1, para. 177 (NAFTA Ch. 11 Arb. Trib. Jan. 9, 2003), 18 ICSID REV. 195 (2003) [hereinafter *ADF Group*]. Many, but not all, details of ICSID arbitrations are available on the ICSID Web site, <http://www.worldbank.org/icsid/>. When cases referenced below are available in print form, that source will be cited. Cases cited below for which neither a print nor another online source is given here are available on the ICSID Web site.

⁹ *ADF Group*, *supra* note 8, para. 177 (also noting the “systemic need not only for a mechanism for correcting what the Parties themselves become convinced are interpretative errors but also for consistency and continuity of interpretation, which multiple ad hoc arbitral tribunals are not well suited to achieve and maintain”).

¹⁰ See Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT’L L. 365, 397–400 (2003); Charles H. Brower II, *Investor-State Disputes Under NAFTA: The Empire Strikes Back*, 40 COLUM. J. TRANSNAT’L L. 43, 56 n.71 (2001) [hereinafter Brower II, *Empire Strikes Back*]; Charles H. Brower II, *Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105*, 46 VA. J. INT’L L. 347 (2006) [hereinafter Brower II, *FTC Notes*]; Stefan Matiation, *Arbitration with Two Twists: Loewen v. United States and Free Trade Commission Intervention in NAFTA Chapter 11 Disputes*, 24 U. PA. J. INT’L ECON. L. 451, 487–88, 494–95 (2003); William W. Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 VAND. J. TRANSNAT’L L. 1241, 1304–05 (2003); J. C. Thomas, *A Reply to Professor Brower*, 40 COLUM. J. TRANSNAT’L L. 433, 453–55 (2002); Todd Weiler, *NAFTA Investment Arbitration and the Growth of International Economic Law*, 2002 BUS. L. INT’L 158, 180–85; Todd Weiler, *NAFTA Investment Law in 2001: As the Legal Order Starts to Settle, the Bureaucrats Strike Back*, 36 INT’L LAW. 345, 346–48 (2002); Courtney C. Kirkman, Note, *Fair and Equitable Treatment: Methanex v. United States and the Narrowing Scope of NAFTA Article 1105*, 34 LAW & POL’Y INT’L BUS. 343, 381–83, 391 (2002).

¹¹ Despite the significance of this controversial issue, it has not received sustained attention or critique. Most investment treaty awards and commentaries hardly discuss appropriate interpretive approaches and, when they do, they tend to focus primarily on the “ordinary meaning” and “object and purpose” of investment treaties and the relevance of customary international law and *travaux préparatoires*. The interpretive relevance of subsequent agreements and practice is not commonly analyzed, with the notable exception of the FTC’s Notes of Interpretation. The issue, however, has received some attention in RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 34–35 (2008); ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 117–19, §2.30 (2009); GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 126–28 (2007); and Fauchald, *supra* note 1, at 328–29, 343–48.

Part I sets out the theoretical framework, examining the nature of investment treaties, the interpretive balance of power between treaty parties and tribunals, and the likelihood of strategic interactions between these actors. Part II turns to legal doctrine to consider how analysis of subsequent agreements and practice can help treaty parties and tribunals to engage in a constructive dialogue about interpretation. It examines why and how this evidence is applied in public international law, including human rights law, so as to develop a theory about its use and its limits in the investment context. Part III takes up the practical challenge of providing an illustrative list of the types of subsequent agreements and practices most readily available in the investment context. This list aims at providing a road map for states wishing to generate and plead, and tribunals wishing to identify and assess, such evidence.¹²

I. THEORETICAL FRAMEWORK: DUALITY, INTERPRETIVE POWER, AND STRATEGY

To appreciate the relevance and persuasiveness of subsequent agreements and practice of the treaty parties, we must first understand (1) the nature of investment treaties and investor rights given the dual role of states as treaty parties and respondents; (2) the interpretive balance of power created between treaty parties and tribunals charged with resolving investor-state disputes; and (3) how treaty parties and investment tribunals are likely to interact strategically. Against this theoretical framework we can then evaluate the relevant legal doctrines and case law in parts II and III below.

Dual Roles: States as Treaty Parties and Respondents

By entering into investment treaties, states act in their public international law role as treaty parties, giving them a legitimate interest in the interpretation of the treaty to which they are a party. But by consenting to investor-state arbitration, states accept a process resembling international commercial arbitration in which they are routinely cast as respondents in claims brought by investors. The authority of the investment tribunal derives from both the general grant of power by the treaty parties and the specific invocation of that grant by an investor of one treaty party (as claimant) against another treaty party (as respondent). Investment tribunals are thus required to serve the treaty parties and the disputing parties simultaneously.¹³

The nature of investment treaties. Prior to the advent of investor-state arbitration, investment disputes were brought, if at all, by the investor's home state against the host state on the basis of the diplomatic protection model of home state espousal of claims. A wrong against a foreign

¹² This article focuses on investor-state disputes arising out of bilateral and multilateral investment treaties only. It does not consider the nature of investor-state contracts or the possible impact that these may have on interpretive methods, nor does it examine state-state disputes in detail. The vast majority of investment treaties are bilateral, but some important ones are multilateral. These tend to be regional, such as NAFTA, or sectoral, such as the Energy Charter Treaty.

¹³ The treaty parties do not have exclusive power to select the arbitrators because, while the treaty parties consent to investor-state arbitration in general, investor-state tribunals are ad hoc bodies whose members are selected by the disputing parties (which includes one treaty party) and/or appointing institutions. This procedure reduces the treaty parties' control over the selection of arbitrators and increases the possibility that arbitrators will see their principals only as the disputing parties rather than also as the treaty parties. See David D. Caron, *Towards a Political Theory of International Courts and Tribunals*, 24 BERKELEY J. INT'L L. 401, 403–04 (2006) (discussing the difference between party-originated and community-originated dispute resolution).

investor was characterized as a wrong against the home state.¹⁴ The home state had complete discretion as to whether to bring a claim, how to prosecute it, and whether and when to settle.¹⁵ This model was readily understandable within the public international law framework of state-to-state rights and obligations.

Modern investment treaties are less easily categorized. Most provide for two forms of dispute resolution: treaty parties can bring arbitral claims against each other concerning the interpretation or application of the treaty; and investors can bring arbitral claims against host states for alleged treaty violations adversely affecting their investments.¹⁶ The former gives rise to interstate dispute resolution (state-state arbitration), and the latter to transnational dispute resolution (investor-state arbitration).¹⁷ Given the existence of almost no interstate arbitral disputes¹⁸ but hundreds of investor-state ones, visions of the field tend to be skewed through the lens of investor-state arbitration. Such arbitration cannot be adequately understood through the framework of either pure public international law or unadulterated international commercial arbitration.¹⁹

Viewing investment treaty arbitration solely through a public international law, state-to-state prism is unsatisfactory because investment treaties create reciprocal rights and duties for the treaty parties *and* rights for nonstate actors (investors). To increase confidence in and enforcement of those rights, states have delegated the power to resolve investor-state disputes to arbitral tribunals. If the treaty parties could agree at any time on a binding interpretation of the treaty, they could use that authority to undermine not only investors' expectations but also tribunals' dispute resolution powers. In contrast to interstate dispute resolution where states appear both as claimants *and* as respondents arguing for broad *and* narrow interpretations, in

¹⁴ *Mavrommatis Palestine Concessions (UK v. Greece)*, 1924 PCIJ (ser. A) No. 2, at 12 (Aug. 30); EDWIN M. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD, OR, THE LAW OF INTERNATIONAL CLAIMS* 354 (1919); 1 EMER DE VATTEL, *LE DROIT DES GENS OU LES PRINCIPES DE LA LOI NATURELLE*, bk. II, ch. VI, §71, at 309 (Carnegie ed. 1916) (1758). Decisions and other documents cited below of the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ) are available at the latter's Web site, <http://www.icj-cij.org>.

¹⁵ *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, Second Phase, 1970 ICJ REP. 3, 44, paras. 78–79 (Feb. 5).

¹⁶ Some treaties curtail the right of home states to exercise diplomatic protection when the investor and host state have consented to arbitration. See, e.g., Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Art. 27(1), Mar. 18, 1965, 17 UST 1270, 575 UNTS 159 [hereinafter ICSID Convention].

¹⁷ Robert O. Keohane, Andrew Moravcsik, & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT'L ORG. 457, 457–58 (2000) (defining "interstate" dispute resolution as involving disputes between states, and "transnational" dispute resolution as involving disputes between nonstate actors and states).

¹⁸ The main exception discussed in the literature is a 2003 state-state dispute between Chile and Peru that was lodged in response to an investor-state claim by a Chilean company, *Empresas Lucchetti S.A. v. Peru*, ICSID No. ARB/03/4, but later discontinued. United Nations Conference on Trade and Development [UNCTAD], *Latest Developments in Investor-State Dispute Settlement*, IIA MONITOR, No. 4, 2005, at 2 n.3.

¹⁹ ZACHARY DOUGLAS, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* 6, para. 6 (2009) [hereinafter DOUGLAS, *INVESTMENT CLAIMS*]; VAN HARTEN, *supra* note 11, at 124–36; Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 2003 BRIT. Y.B. INT'L L. 151, 152–53 [hereinafter Douglas, *Hybrid Foundations*]. Similar difficulties occurred in attempts to pigeonhole the Iran–United States Claims Tribunal as involving either public international law arbitration (because it was based on an interstate treaty) or private international law arbitration (because claims were brought by nonstate actors). See David D. Caron, *The Nature of the Iran–United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AJIL 104, 105–07, 156 (1990) (arguing that this public/private dichotomy is inadequate to explain developments like arbitration before the Iran-U.S. Claims Tribunal and ICSID tribunals).

investor-state arbitrations states appear only as respondents, which creates concern that state interpretations will amount to no more than self-serving attempts to avoid liability.

Conversely, viewing investment treaty arbitration through the framework of international commercial arbitration places a focus on the investor-state dispute, where the investor claimant and the state respondent are seen as equal disputants engaged in private dispute resolution. This approach obscures the host state's interpretive interest as a party to the treaty that created the tribunal's authority and established the standards of protection being interpreted. It also sidelines the interpretive interests of the nondisputing treaty parties, including the home state. By focusing solely or primarily on their function of impartially serving the disputing parties, tribunals may neglect their other function of serving the treaty parties. Failing to recognize the interpretive interests of the treaty parties is particularly problematic in transnational dispute resolution where the absence of some of the traditional gatekeeping functions that states enjoy in interstate dispute resolution increases the opportunity for tribunals to "assert and establish new legal norms, often in unintended ways."²⁰

These frameworks partially describe the nature of investment treaties, focusing on either the state-state treaty or the investor-state dispute, but neither adequately captures both aspects. These inadequacies have inspired recent attempts to reconceptualize investment treaty arbitration through administrative and constitutional law lenses.²¹ Although these new approaches have considerable merit, useful lessons may also be learned about the nature of investor rights and the relevance of general international law interpretive rules by considering other areas of international law that establish an analogous state duality, like human rights treaties.

The nature of investor rights. In an ongoing debate, three possibilities about whether investment treaties grant investors substantive and/or procedural rights have been mooted:²²

- (1) investment treaties grant substantive and procedural rights to the treaty parties only, but investors are permitted for the sake of convenience to enforce their states' substantive rights;
- (2) investment treaties grant substantive rights to the treaty parties only, but investors are granted the procedural right to enforce their states' substantive rights; and
- (3) investment treaties grant substantive and procedural rights to investors, giving investors a procedural right to enforce their own substantive rights.²³

²⁰ Keohane, Moravcsik, & Slaughter, *supra* note 17, at 459; *see also* VAN HARTEN, *supra* note 11, at 96–99 (discussing the lack of control by states over potential claims and arguments made by investors).

²¹ *See, e.g.*, DAVID SCHNEIDERMAN, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY'S PROMISE (2008); VAN HARTEN, *supra* note 11; Benedict Kingsbury & Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law* (New York Univ. Pub. Law & Theory Working Papers, 2009), available at http://lsr.nellco.org/nyu_plltwp/146/.

²² Treaties can grant nonstate actors substantive rights, procedural rights, neither type of right, or both types of right. For example, the Vienna Convention on Consular Relations grants substantive rights to individuals but permits international claims to be brought only by states. *LaGrand* (FRG v. U.S.), 2001 ICJ REP. 466, para. 77 (June 27). By contrast, the European Convention on Human Rights grants substantive rights to persons and permits them to bring direct claims against states before the European Court of Human Rights. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, Arts. 1–18, 34, Nov. 4, 1950, Europ. TS No. 5, 213 UNTS 221 [hereinafter ECHR].

²³ DOUGLAS, INVESTMENT CLAIMS, *supra* note 19, at 10–32, paras. 13–64; Andrea K. Bjorklund, *Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals Is Not Working*, 59 HASTINGS L.J. 241, 263–70 (2007); Douglas, *Hybrid Foundations*, *supra* note 19, at 162–64; Susan D. Franck,

The nature of investor rights could affect our understanding of the relevance of subsequent agreements and practice. If the first approach is adopted, few would contest that subsequent agreements and practice should play a role in interpretation, as the treaty parties would be interpreting their own rights and obligations only.²⁴ This is the easy case for considering the treaty parties to have broad interpretive authority. If the last approach is adopted, many would question the fairness of relying on subsequent agreements and practice in interpretation, as this method would arguably infringe on investor rights. This is the hard case for recognizing the interpretive power of treaty parties.

Without taking a position on the nature of investor rights, this article focuses on the hard case according to which investment treaties grant investors substantive and procedural rights. In my view, even if the most investor-friendly assumption about the nature of investor rights is adopted, subsequent agreements and practice of the treaty parties remain highly relevant to interpretation.²⁵ To grasp the persuasive role of this practice, we must first consider the nature of interpretive delegation and dialogue in the investment context.

Interpretive Power: Delegation and Dialogue

The zone of interpretive discretion of investment tribunals may be understood as the interpretive powers explicitly or implicitly delegated to them minus the formal and informal powers retained by treaty parties to influence their interpretations, including through dialogue.²⁶

International delegation. Much has been written about why and how states delegate powers to international courts and tribunals.²⁷ International relations theory offers two principal

Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 337, 343–44 (2006). For case law on the different positions, compare *Corn Prods. Int'l v. Mexico*, ICSID No. ARB(AF)/04/01, Decision on Responsibility, paras. 166–69 (NAFTA Ch. 11 Arb. Trib. Jan. 15, 2008) (investors are granted substantive and procedural rights), and *Ecuador v. Occidental Exploration & Prod. Co.*, [2006] EWHC 345 (Comm), [2006] Q.B. 432, paras. 14–22 (same), with *Loewen Group, Inc. v. United States*, ICSID No. ARB(AF)/98/3, para. 233 (NAFTA Ch. 11 Arb. Trib. June 26, 2003), available at <http://www.state.gov/s/l/c3741.htm> [hereinafter *Loewen*], and *Archer Daniels Midland Co. v. Mexico*, ICSID No. ARB(AF)/04/5, paras. 168–80 (NAFTA Ch. 11 Arb. Trib., redacted version Nov. 21, 2007) (investors are granted procedural, not substantive rights). Similar debates occurred with respect to whether individual claims could be brought before the Iran-U.S. Claims Tribunal. See Caron, *supra* note 19, at 131–37.

²⁴ For example, Van Harten argues that, to implement the interstate bargain, “where the states parties make unanimous submissions about how the treaty should be interpreted, tribunals should adopt their view as a matter of course” and a “tribunal should be cautious about adopting interpretations in favour of investor protection that go beyond the submissions of the investor’s home state.” VAN HARTEN, *supra* note 11, at 131–32.

²⁵ Arguing for greater use of such evidence is not the same as proposing that the system of diplomatic protection and home state espousal be reintroduced. Permitting investors to bring direct claims has bypassed many of the problems with the traditional model, including home state control of claims. See Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?* 9 CHI. J. INT’L L. 471, 477–83 (2009). But the movement away from diplomatic protection does not undermine the legitimate legal interest of home states, host states, and other treaty parties in interpretation.

²⁶ Alec Stone Sweet, *Constitutionalism, Rights, and Judicial Power*, in COMPARATIVE POLITICS 217, 228–29 (Daniele Caramani ed., 2008).

²⁷ See, e.g., Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 VA. J. INT’L L. 411 (2008); Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1 (2006); Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT’L L. 631 (2005); Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 7 (2005) [hereinafter Posner & Yoo I]; Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899, 942–54 (2005); Eric A. Posner & John C. Yoo, *Reply to Helfer and Slaughter*, 93 CAL. L. REV. 957 (2005) [hereinafter Posner & Yoo II]; Richard

models, agency and trusteeship, which largely correspond to the two aims of increasing efficiency and enhancing credibility.²⁸

Principal-agent theory provides that states (as principals) delegate to courts and tribunals (as agents) tasks that states cannot achieve as efficiently themselves.²⁹ Chief among these tasks is the resolution of disputes. As the agents' legitimacy is based solely or primarily on the principals' consent, tribunals should act according to the wishes of the treaty parties; failure to do so is known as agency slack or slippage. To prevent or correct agency slack, principals usually reserve powers to control the agent by recontracting; for example, by refusing to reappoint judges or arbitrators, narrowing the court's or tribunal's jurisdiction, or substantively overruling its interpretations. Here, the principals are all of the treaty parties, not just the disputing states.

Principal-trustee theory moves the focus away from efficiency and control toward credibility and independence. According to this theory, states (as principals) delegate authority to courts and tribunals (as trustees) not just to resolve disputes but to increase the credibility of their treaty commitments by making them judicially enforceable.³⁰ Trustees are generally selected on the basis of their professional reputation and given relatively independent decision-making authority, so that their legitimacy derives from the principals' consent *and* their reputation and independence.³¹ Principals generally retain some level of control and recontracting powers

H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AJIL 247, 249 (2004); Paul B. Stephan, *Courts, Tribunals, and Legal Unification—The Agency Problem*, 3 CHI. J. INT'L L. 333 (2002). See generally Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*, LAW & CONTEMP. PROBS., Winter 2008, at 1.

²⁸ Rational choice models have been very influential in shaping our understanding of why states enter into investment treaties. See, e.g., Zachary Elkins, Andrew T. Guzman, & Beth A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 60 INT'L ORG. 811 (2006); Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639 (1998). However, questions exist about the accuracy of the assumptions made in the models, for example, whether states act rationally when entering into investment treaties. See, e.g., Republic of South Africa, *Bilateral Investment Treaty Policy Framework Review: Government Position Paper 5* (June 2009), available at <http://www.pmg.org.za/files/docs/090626trade-bi-lateralpolicy.pdf> (finding that South Africa entered into many BITs "that were not in [its] long term interest" because "the risks posed by such treaties were not fully appreciated at that time" and the "Executive had not been fully apprised of all the possible consequences of BITs"); Lauge Skovgaard Poulsen & Damon Vis-Dunbar, *Reflections on Pakistan's Investment-Treaty Program After 50 Years: An Interview with the Former Attorney General of Pakistan, Makhdoom Ali Khan*, INVESTMENT TREATY NEWS, Apr. 2009, at 3, 3–4 (discussing Pakistan's "haphazard and piecemeal" approach to signing BITs, often with no evidence of "meaningful negotiations" and "without seriously considering the implications"). On the appropriateness of applying a bounded rationality theory in the investment treaty context, see Lauge Skovgaard Poulsen, *Why Do Developing Countries Sign BITs? A Bounded Rationality Approach* (2009) (unpublished student working paper) (on file with author).

²⁹ Danner, *supra* note 27, at 42; Ginsburg, *supra* note 27, at 641–44; Posner & Yoo I, *supra* note 27, at 6–7, 14; Posner & Yoo II, *supra* note 27, at 958.

³⁰ Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, & Duncan Snidal, *The Concept of Legalization*, 54 INT'L ORG. 401, 415–18 (2000); Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000); Karen J. Alter, *Agents or Trustees: International Courts in Their Political Context*, 14 EUR. J. INT'L REL. 33, 38–39 (2008) [hereinafter Alter, *Agents or Trustees?*]; Karen J. Alter, *Delegation to International Courts and the Limits of Re-contracting Political Power*, in DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS 312, 326–29 (Darren G. Hawkins, David A. Lake, Daniel L. Nielson, & Michael J. Tierney eds., 2006); Cogan, *supra* note 27, at 416; Helfer & Slaughter, *supra* note 27, at 917, 933–34.

³¹ It is also affected by other factors, not considered in this article, such as predictability and coherence of decision making, accountability of judges, and openness of the procedure to relevant stakeholders. See generally VAN HARTEN, *supra* note 11, at 152–75; Charles H. Brower II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37, 51–57 (2003).

over trustees, though typically less than for agents because direct control would not enhance the credibility of the principals' legal commitments.

Agents characteristically have a narrower zone of discretion than trustees. Instead of functioning as either/or alternatives, however, these models represent ideal types along a spectrum with different courts situated at various points along it. In the domestic sphere, for example, systems premised on parliamentary sovereignty may create an agency relationship between legislatures and courts (where courts are empowered to enforce but not review legislative acts and legislatures may easily amend the law to overcome judicial interpretations), while systems modeled on constitutional supremacy may create a trustee relationship (where courts are authorized to review legislative acts for constitutional compliance and it is difficult for the legislature to amend the constitution to overcome judicial interpretations).³² Nevertheless, the very fact of delegation to a court or tribunal, rather than an administrative agency, suggests the existence of some trustee-like qualities.

On the international level, it is open to debate where any particular international court or tribunal does or should reside along this spectrum. Descriptively, the discretionary zone of a court or tribunal is likely to increase with factors such as the breadth and vagueness of the treaty norms, the number of treaty parties, the difficulty of amending the treaty, and the costs of withdrawal.³³ Normatively, a court's or tribunal's trustee status is enhanced where it has a strong claim to legitimacy based on reputation and independence and/or is tasked with adjudicating in the interests of a beneficiary other than the principal.³⁴

No matter whether one of these models or a hybrid is adopted, the divergence between the ideal types reflects the underlying tension between control and independence that lies at the heart of debates about the legitimacy of international delegation.³⁵ These aims have an inversely proportional relationship: the more control treaty parties exercise over international tribunals, the fewer credibility gains they will make in terms of tribunal independence, and vice versa. No perfect balance exists and the dynamic between these conflicting goals is evident in the literature, which variously describes international judicial bodies as having "bounded discretion" or "constrained independence," or as operating within a "strategic space."³⁶

³² See Stone Sweet, *supra* note 26, at 220–21, 227–28 (noting, however, that many domestic courts fall between these extremes).

³³ See Ginsburg, *supra* note 27, at 670–73; Alec Stone Sweet & Florian Grisel, *Transnational Investment Arbitration: From Delegation to Constitutionalization?* in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 118, 122 (Pierre-Marie Dupuy, Francesco Francioni, & Ernst-Ulrich Petersmann eds., 2009) (arguing that the requirement in many multilateral treaties that amendments be approved unanimously makes the zone of discretion for international courts and tribunals charged with interpreting and applying those treaties wider than that of many domestic constitutional courts).

³⁴ Alter, *Agents or Trustees?* *supra* note 30, at 39–40. Alter argues that trustees are (1) selected because of their personal reputation or professional norms (which means that they may bring some of their own authority with them, such as rational-legal authority if they are viewed as disinterested actors applying preexisting rules in a like fashion); (2) given independent authority to make decisions according to their best judgment or professional criteria; and (3) empowered to act on behalf of a beneficiary (which is particularly likely where a treaty grants rights to nonstate actors).

³⁵ Cogan, *supra* note 27, at 414.

³⁶ Ginsburg, *supra* note 27, at 632 ("international judges exercise bounded discretion in lawmaking"); Helfer & Slaughter, *supra* note 27, at 930 (even independent tribunals operate within a zone of "constrained independence"); Steinberg, *supra* note 27, at 249 (even a highly independent tribunal like the WTO Appellate Body operates within a "strategic space" bounded by "legal discourse, which could be constrained by constitutional rules, both of which are constrained by politics"); see Caron, *supra* note 13, at 411, & *infra* note 75; see also HAROLD D. LASSWELL &

Courts have multiple functions, including dispute resolution and lawmaking through interpretation.³⁷ It is possible that a tribunal might be more trustee-like with respect to some functions (such as resolving certain kinds of disputes) and more agent-like with respect to others (such as law creation), to the extent that such separation is possible. I contend that the interpretive power delegated to investment tribunals is implied and partial, rather than express and exclusive. Accordingly, investment tribunals resemble trustees when resolving investor-state disputes, but they sit between agency and trusteeship when interpreting and developing the law because they share their interpretive authority with the treaty parties.

As a matter of orthodoxy, states create international law, while international courts merely interpret and apply it. The assumption that states, and only states, make international law is reflected in the traditional doctrine of sources, which lists judicial decisions as a “subsidiary means for the determination of rules of law” rather than as a source.³⁸ In practice, however, international courts play a critical role in the development of international law because the distinction between interpreting and creating the law is a fiction.³⁹ Although their judgments are not accorded the status of formal precedent,⁴⁰ many international courts are given jurisdiction to “interpret and apply” the law, as well as to resolve particular disputes.⁴¹ This authority involves an implied delegation of some interpretive power because it requires courts to interpret broad provisions, fill gaps, and clarify ambiguities.⁴² These judicial interpretations are then routinely looked to—by states, other courts, and academics—as evidence of the content of international law.⁴³

MYRES S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY* 24–27 (1992) (discussing “authoritative decisions” as being based on a dynamic of “authority and control”).

³⁷ See MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 28–36 (1981); MARTIN SHAPIRO & ALEC STONE SWEET, *ON LAW, POLITICS, AND JUDICIALIZATION* 90–135 (2002); Caron, *supra* note 13, at 406–10; Ginsburg, *supra* note 27, at 635.

³⁸ ICJ Statute, Art. 38(1)(d); PCIJ Statute, Art. 38. As Baron Descamps stated when negotiating this provision of the PCIJ Statute, on which the ICJ Statute’s provision is based: “Doctrine and jurisprudence no doubt do not create law; but they assist in determining rules which exist. A judge should make use of both jurisprudence and doctrine, but they should serve only as elucidation.” PCIJ, Advisory Committee of Jurists, 15th mtg. (July 3, 1920), Procès-Verbaux of the Proceedings of the Committee 336 (June 16–July 24, 1920). The list of sources set out in these Statutes is often taken as the list of sources of international law more generally. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 5 (7th ed. 2008); PETER MALANCZUK, *AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 36 (7th rev. ed. 1997); 1 OPPENHEIM’S *INTERNATIONAL LAW* 24, para. 9 (Robert Jennings & Arthur Watts eds., 9th ed. 1996) [hereinafter OPPENHEIM].

³⁹ ALAN BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* 268 (2007).

⁴⁰ ICJ Statute, Arts. 38(1)(d), 59.

⁴¹ See, e.g., ECHR, *supra* note 22, Art. 32(1) (giving the European Human Rights Court jurisdiction to interpret and apply the ECHR). Numerous treaties give the ICJ jurisdiction to interpret and apply their provisions, such as the Convention on the Prevention and Punishment of the Crime of Genocide, Art. IX, Dec. 9, 1948, S. EXEC. REP. NO. 50, 98th Cong. (1984), 78 UNTS 277, and the International Convention on the Elimination of All Forms of Racial Discrimination, Art. 22, Dec. 21, 1965, S. EXEC. DOC. NO. 95-C (1978), 660 UNTS 195.

⁴² H. L. A. HART, *THE CONCEPT OF LAW* 121–50 (1961); SHAPIRO, *supra* note 37, at 28–29; Caron, *supra* note 13, at 407; Helfer & Slaughter, *supra* note 27, at 937; Alec Stone Sweet, *Path Dependence, Precedence, and Judicial Power*, in SHAPIRO & STONE SWEET, *supra* note 37, at 112.

⁴³ The wide influence of judicial interpretations helps to explain why nondisputing states are often entitled to intervene in cases before international courts that involve the interpretation of treaties to which they are a party. See, e.g., ICJ Statute, Art. 63; Christine Chinkin, *Article 63*, in *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* 1369, 1370–71 (Andreas Zimmermann, Christian Tomuschat, & Karin Oellers-Frahm eds., 2006); cf. ICJ Statute, Art. 62 (allowing states that believe they have an interest of a legal nature that may be affected by the decision in the case to request permission to intervene but leaving it to the Court to decide).

If anything, lawmaking by investment tribunals is even more problematic. Like the judgments of most international courts, investment awards are not given formal precedential status; but unlike such courts, investor-state tribunals are typically empowered simply to resolve disputes and not to interpret and apply the relevant treaties as such.⁴⁴ Nonetheless, by granting investment tribunals dispute resolution powers, treaty parties have impliedly delegated some interpretive power to them, as interpretation (and hence some level of creation) is inherent in the adjudicatory process. Since many investment awards are public, they unsurprisingly play a critical role in the development of investment treaty law, as evidenced by their citation in awards, textbooks, and pleadings.⁴⁵

Whether or not this practice of citation amounts to a de facto doctrine of precedent, tribunal awards are regularly consulted to flesh out the (often bare) bones of investment treaties.⁴⁶ This phenomenon can be explained by the concept of legalization, which defines international commitments by reference to three characteristics: obligation (whether or not a commitment is binding); precision (where the legal commitment falls on the rules-to-standards spectrum); and delegation (whether a third party, like a court or tribunal, has been granted authority to interpret and apply the law).⁴⁷ The standards/rules distinction refers to the fact that legal systems can provide information about legal requirements *ex ante* (via concrete rules enacted by legislatures or their equivalents) or *ex post* (via general standards interpreted by courts or their equivalents).⁴⁸

Investment treaties typically involve a high level of obligation and delegation, because they establish legally binding commitments and delegate enforcement power to tribunals, but a low level of precision, because the commitments themselves are broad and vague (e.g., the promise to treat investors fairly and equitably). Although imprecision is normally associated with state

⁴⁴ See DOUGLAS, INVESTMENT CLAIMS, *supra* note 19, at 3 nn.6, 7. This more limited mandate is distinct from the “interpret and apply” mandate generally given to international courts and to state-state investment tribunals. Some investment treaties specifically preclude giving awards precedential status, but others are silent on the issue. See, e.g., NAFTA, *supra* note 3, Art. 1136(1); ICSID Convention, *supra* note 16, Art. 53. The ad hoc nature of investment tribunals, coupled with the largely bilateral treaty basis, makes the system particularly ill-suited to a strict precedent doctrine.

⁴⁵ Investment tribunals are increasingly citing and distinguishing prior awards in reaching their decisions. See Jeffery P. Commission, *Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence*, 24 J. INT’L ARB. 129, 148–50 (2007) (the average number of cases cited per award has grown enormously); Fauchald, *supra* note 1, at 335 (ninety-two out of ninety-eight ICSID awards used case law as an interpretive argument). A review of the leading textbooks in the field demonstrates the extent to which academics and practitioners look to awards to explain investment treaty obligations. Pleadings filed in investor-state arbitrations are replete with argumentation based on awards, whether filed by claimant investors or respondent states.

⁴⁶ On precedent in investment treaty law, see generally Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, INVESTMENT TREATY LAW: CURRENT ISSUES III, at 147 (2009); Gabriele Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?* 23 ARB. INT’L 357 (2007); Catherine Kessedjian, *To Give or Not to Give Precedential Value to Investment Arbitration Awards?* in THE FUTURE OF INVESTMENT ARBITRATION 43 (Catherine A. Rogers & Roger P. Alford eds., 2009); Christoph Schreuer & Matthew Weiniger, *A Doctrine of Precedent?* in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1188, 1189–91 (Peter Muchlinski, Federico Ortino, & Christoph Schreuer eds., 2008); *Precedent in Investment Arbitration*, TRANSNAT’L DISP. MGMT., May 2008 (special issue).

⁴⁷ Abbott, Keohane, Moravcsik, Slaughter, & Snidal, *supra* note 30, at 401–02.

⁴⁸ For background on the distinction between rules and standards, see Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559–60 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687–89 (1976); Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT’L L.J. 333, 335, 350–52 (1999); Anne van Aaken, *International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis*, 12 J. INT’L ECON. L. 507, 515–19 (2009). There can be many reasons why treaty parties may have initially chosen standards instead of rules, but this choice is not analyzed here.

discretion,⁴⁹ when it is coupled with a high degree of obligation and delegation, the opposite is true: the body charged with interpreting and applying the standard is afforded wide discretion.⁵⁰ The net result is to shift interpretive power from the treaty parties to investment tribunals:

The more “rule-like” a normative prescription, the more a community decides *ex ante* which categories of behavior are unacceptable; such decisions are typically made by legislative bodies [here, the treaty parties]. The more “standard-like” a prescription, the more a community makes this determination *ex post*, in relation to specific sets of facts; such decisions are usually entrusted to courts [here, investment tribunals].⁵¹

This shift of interpretive power is amplified by investment tribunals’ habitual reference primarily to other arbitral awards and academic opinions when interpreting treaties, with little or no citation of state practice.⁵² Particular investment awards may then become more or less influential. According to Andrea Bjorklund: “Scholars, intergovernmental organisations, members of civil society, arbitrators, arbitration counsel—in short, the entire arbitral community—will help to establish a hierarchy of cases, and the scope and meaning of the law itself, as they both criticise and praise arbitral decisions in the development of a *jurisprudence constante*.”⁵³ As the primary creators of international law in general, and as treaty parties in particular, states might be expected to take center stage in this critique, yet they are absent from the list.⁵⁴

The resulting jurisprudence can convey the impression of a closed-circuit feedback loop between tribunals and academics, unconstrained by the discipline of the treaty parties’ practice or expectations. In view of the vagueness of investment treaty provisions, the gradual accretion of persuasive authorities will help mold the field and give its participants—investors and

⁴⁹ Abbott, Keohane, Moravcsik, Slaughter, & Snidal, *supra* note 30, at 414–15; Trachtman, *supra* note 48, at 335 n.11.

⁵⁰ Abbott, Keohane, Moravcsik, Slaughter, & Snidal, *supra* note 30, at 415; Keohane, Moravcsik, & Slaughter, *supra* note 17, at 461–62; Trachtman, *supra* note 48, at 335; van Aaken, *supra* note 48, at 519.

⁵¹ Abbott, Keohane, Moravcsik, Slaughter, & Snidal, *supra* note 30, at 413; *see also* VAN HARTEN, *supra* note 11, at 122–23; Trachtman, *supra* note 48, at 335, 350–55. UNCTAD suggests that “the increase in investment disputes has tested the wisdom of negotiating [investment treaties] with extremely broad and imprecise provisions.” UNCTAD, INVESTOR-STATE DISPUTE SETTLEMENT AND IMPACT ON RULEMAKING 92, UN Sales No. E.07.II.D.10 (2007) (“The broader and more imprecise a particular text is, the more likely that it will lead to different, and even conflicting, interpretations. This will increase not only the likelihood of a dispute arising between the investor and the host country, but also the possibility of delegating to the arbitral tribunal the task of identifying the meaning that the disputed provision should have.”).

⁵² *See* Fauchald, *supra* note 1, at 328–29, 335, 343–49, 351; Kingsbury & Schill, *supra* note 21, at 2.

⁵³ Andrea K. Bjorklund, *Investment Treaty Arbitral Decisions as Jurisprudence Constante*, in INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 265, 266 (Colin B. Picker, Isabella D. Bunn, & Douglas W. Arner eds., 2008); *see also* Campbell McLachlan, *Investment Treaties and General International Law*, 57 INT’L & COMP. L.Q. 361, 379 (2008); J. Paulsson, *International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law*, TRANSNAT’L DISP. MGMT., Dec. 2006 (less notable decisions will “doubtless turn out to be subject to the same Darwinian reality: the unfit will perish”); Christoph Schreuer, *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration*, TRANSNAT’L DISP. MGMT., Apr. 2006, at 1, 17.

⁵⁴ Bjorklund appears to assume that the views of states will be communicated through their arbitration counsel, but states should have broader means of asserting their interpretive views than simply by submitting briefs in investor-state disputes. One reason their wider interpretive role tends to be sidelined is that states rarely insert themselves into the ongoing critique of investment standards, except when they are disgruntled respondents, which leads other participants in the process to view them primarily as respondents rather than also as treaty parties.

states—a sense of how these broad norms will be interpreted, which, in turn, will enhance predictability and consistency. However, the lawmaking role of tribunals is provoking strong expressions of concern, especially in the face of complaints that the dispute resolution process lacks independence, openness, and accountability, and that tribunals are not paying sufficient heed to state regulatory interests.⁵⁵

As states remain the primary creators of international law, and are capable of modifying and interpreting their own treaties, they presumptively retain any lawmaking powers not expressly or impliedly delegated. Tribunals' trustee-like status with respect to resolving disputes must not be confused with their more ambiguous status when interpreting and developing investment treaty law. As seen above, investment tribunals and treaty parties share interpretive power, and the parties can influence the tribunals in a variety of ways, including through the process of interpretive dialogue.

Interpretive dialogue. Whether investment tribunals are viewed as agents or trustees or something in between, treaty parties retain the power to influence them and their interpretations in various formal and informal ways. One way of understanding this dynamic is through the concepts of "Exit" and "Voice":

Exit is the mechanism of organizational abandonment in the face of unsatisfactory performance. Voice is the mechanism of intraorganizational correction and recuperation. Apart from identifying these two basic types of reaction to malperformance, Hirschman's basic insight is to identify a kind of zero-sum game between the two. Crudely put, a stronger "outlet" for Voice reduces pressure on the Exit option and can lead to more sophisticated processes of self-correction. By contrast, the closure of Exit leads to demands for enhanced Voice.⁵⁶

In the investment treaty context, dissatisfied states may exit by withdrawing from the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention)⁵⁷ or from individual treaties they view as problematic, or by not renewing investment treaties when they expire.⁵⁸ The higher the number of exiting states, the greater the damage to the system's credibility and viability. Some commentators have expressed concern that proinvestor awards and interpretations might cause a backlash by states,⁵⁹ yet, as

⁵⁵ See, e.g., VAN HARTEN, *supra* note 11, at 152–75; Anthony DePalma, *NAFTA's Powerful Little Secret; Obscure Tribunals Settle Disputes but Go Too Far, Critics Say*, N.Y. TIMES, Mar. 11, 2001, §3, at 1; Sarah Anderson & Sara Grusky, *Challenging Corporate Investor Rule: How the World Bank's Investment Court, Free Trade Agreements, and Bilateral Investment Treaties Have Unleashed a New Era of Corporate Power and What to Do About It* (Apr. 1, 2007), at http://www.ips-dc.org/reports/challenging_corporate_investor_rule.

⁵⁶ J. H. H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2411 (1991) (drawing on ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970)). Although Hirschman developed his theory for the marketplace, he indicated that it could be applicable to any organizational setting. *Id.* at 2411. See also Ginsburg, *supra* note 27, at 657–68; van Aaken, *supra* note 48, at 509.

⁵⁷ ICSID Convention, *supra* note 16.

⁵⁸ See generally Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579 (2005).

⁵⁹ In a seminal article, Jan Paulsson identified the precariousness of investment treaty arbitration, whose prospects may turn in future on whether states, which may not have fully grasped the implications of their new treaty obligations, "take fright and reverse tracks." Whether that happens may depend on "the degree of sophistication shown by arbitrators when called upon to pass judgment on governmental actions. *Arbitration without privacy is a delicate mechanism. A single incident of an adventurist arbitrator going beyond the proper scope of his jurisdiction in a sensitive case may be sufficient to generate a backlash.*" Jan Paulsson, *Arbitration Without Privacy*, 10 ICSID REV. 232,

of this writing, only a few states have gone so far as to exit.⁶⁰ States may be unwilling to withdraw, even when they object to certain treaty interpretations, for fear of being excluded from the regime's perceived benefits, such as possible increases in investment flows and competitive advantages for their investors.⁶¹ But this calculation depends on an ongoing assessment of pros and cons, the balance or perception of which may change over time.

Dissatisfied states may also demand greater voice, which is a metaphor for their quest to affect or amplify their control over the decision-making process.⁶² The states within the system seek to make the decision makers (here, tribunals) more responsive to their concerns so that they will not feel the need to exit the system. Exit and voice exist in a state of tension: states will have greater incentives to demand an effective voice when exit options are limited, but tribunals will have fewer incentives to act upon such demands when the threat of exit is not credible.⁶³ In a limited number of cases, exit and voice can be exercised simultaneously; for example, if a state exits a treaty that will remain in force for a set period thereafter, the state may demand greater voice in the interim.

Voice options for states occupy a spectrum from legal recontracting to political delegitimizing pressure. At the legal end, states can amend or replace existing treaties; a small, but growing number of states are taking this approach.⁶⁴ Treaty parties have used this option to reduce future tribunal discretion by such means as increasing the precision of treaty commitments, adding interpretive mechanisms like the NAFTA FTC, and clarifying their acceptance or rejection of certain interpretations.⁶⁵ These voice options require collective action. Theoretically, bilateral treaties can be renegotiated or amended more easily than multilateral ones, but the transaction costs involved in renegotiating thousands of bilateral investment treaties may be prohibitive.

At the political end, states can engage in a variety of actions aimed at influencing the conduct and perceived legitimacy of international tribunals. Voice options for interstate dispute settlement by courts like the International Court of Justice (ICJ) include ignoring decisions in the face of ineffective enforcement mechanisms, starving the court of future cases, reducing the

257 (1995) (emphasis added). On more recent concerns, see *THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY* (Michael Waibel, Asha Kaushal, Kyo-Hwa Chung, & Claire Balchin eds., 2010) [hereinafter *BACKLASH*].

⁶⁰ For example, Bolivia and Ecuador have withdrawn from the ICSID Convention, and other states (such as Nicaragua and Venezuela) have mooted doing likewise. See List of Contracting States and Other Signatories of the Convention 4, note (Jan. 7, 2010), at <http://icsid.worldbank.org/ICSID/Index.jsp>. Some countries, including Ecuador and Venezuela, have reportedly withdrawn from or sought to renegotiate a number of their investment treaties. See UNCTAD, *Recent Developments in International Investment Agreements* (2007–June 2008), IIA MONITOR No. 2, 2008, at 6. Others have suspended further negotiations of investment treaties pending reviews of their policy frameworks. See, e.g., Republic of South Africa, *supra* note 28, at 12.

⁶¹ In the trade context, for example, the exit option may not be practicable if it involves shutting the state out of vital markets. See Steinberg, *supra* note 27, at 267.

⁶² HIRSCHMAN, *supra* note 56, at 30–31; Weiler, *supra* note 56, at 2411.

⁶³ HIRSCHMAN, *supra* note 56, at 33–34, 82–86.

⁶⁴ According to UNCTAD, in 2007, “10 of the 44 new BITs (23 per cent) replaced earlier treaties.” As of the end of 2007, 121 BITs had been renegotiated, less than 5 percent of the total of 2608. UNCTAD expected “[t]his number . . . to rise further since a growing number of BITs are nearing expiry of their initial period of validity, and more countries are revising their model BITs to reflect new concerns related to environmental and social issues, including the host country's right to regulate.” UNCTAD, *supra* note 60, at 5.

⁶⁵ See UNCTAD, *supra* note 51, at 71–94; José E. Alvarez, *The Once and Future Foreign Investment Regime, in LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN* (Mahmoud Arsanjani, Jacob Katz Cogan, Robert D. Sloane, & Siegfried Wiessner eds., forthcoming 2010).

court's operating budget, and attacking the court's legitimacy.⁶⁶ In investment treaty arbitration, some of these options are unavailable or would be ineffective. Investors initiate proceedings, so states cannot starve tribunals of cases. Investment awards are backed by strong domestic enforcement mechanisms, which means that states generally ignore awards at their peril, though such enforcement has yet to be seriously tested.⁶⁷ States can, however, attack the legitimacy of particular investment tribunals or the system as a whole, either unilaterally or collectively.

The middle-ground approach between these two extremes, explored here, considers the options available for treaty parties and investment tribunals to engage in a constructive dialogue about interpretation, which would promote evolutionary and sustainable treaty interpretations without requiring legal amendments (recontracting strategies) or political attacks (delegitimizing strategies).⁶⁸ I do not claim that dialogue is a superior form of interaction but, rather, a valuable and significantly underutilized tool, particularly given current developments within the investment treaty field.⁶⁹

The notion of dialogue does not presume that treaty parties and tribunals exist on a horizontal or vertical plane of authority. "Dialogue" has been used variously to describe conversations between national courts in separate systems where there is no hierarchical relationship;⁷⁰ judicial negotiations between national and international courts that may be related horizontally or vertically or somewhere in between;⁷¹ and the back-and-forth between legislatures and courts within a single system where there is a clear hierarchical relationship.⁷² Dialogue is used here to capture the potential for treaty parties and tribunals to influence interpretation through repeated interactions.

⁶⁶ Ginsburg, *supra* note 27, at 659–68.

⁶⁷ On debates over whether Argentina is attempting to ignore awards relating to its 2000–2001 financial crisis and, if so, what the consequences will be, see generally van Aaken, *supra* note 48, at 533–34; Osvaldo J. Marzorati, *Argentina Opting Out?* TRANSNAT'L DISP. MGMT., 2005. For relevant case law, see *Sempra Energy Int'l v. Argentina*, ICSID No. ARB/02/16, Continued Stay of Enforcement (Mar. 5, 2009) (including discussion of other relevant cases), and *id.*, Termination of Stay of Enforcement (Aug. 7, 2009).

⁶⁸ Van Aaken, *supra* note 48, at 536 (preferring state-state interpretive mechanisms, like the NAFTA FTC, to full renegotiation because they are less costly and more subtle).

⁶⁹ See text at notes 76–91 *infra*.

⁷⁰ See, e.g., Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 323–26, 370–73 (1997) (encouraging judicial cross-fertilization and dialogue); Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 17 (1998) (national courts are engaging in "cross-pollination and dialogue," fostering "mutual respect and dialogue . . . among appellate courts" by building on each other's opinions); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 193 (2003) (national courts are engaging in an active and ongoing dialogue with their foreign counterparts, citing each other's decisions as persuasive authorities rather than binding precedents); Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 103–12 (1994) (discussing horizontal dialogue between national courts and vertical dialogue between international and national courts) [hereinafter Slaughter, *Typology*].

⁷¹ See, e.g., Nico Krisch, *The Open Architecture of European Human Rights Law*, 71 MOD. L. REV. 183 (2008) (describing dialogue between the European Human Rights Court and national courts of treaty parties); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 430, 466 (2003) ("dialogue may occur among international courts, between international and national courts, national governments, and international organizations, and among national courts"); Slaughter, *Typology*, *supra* note 70, at 100–01, 106–11, 123 (describing dialogue between the European Court of Justice and national courts of treaty parties); cf. Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029 (2004) (arguing that investment treaty tribunal review of national court decisions exists somewhere between dialogue and decree).

⁷² See, e.g., Richard Clayton, *Judicial Deference and "Democratic Dialogue": The Legitimacy of Judicial Intervention Under the Human Rights Act 1998*, 2004 PUB. L. 33; Tom R. Hickman, *Constitutional Dialogue, Constitutional The-*

How, then, might this interpretive dialogue work in the investment context? States, as treaty parties, would take an active role in interpreting their investment treaties, generating state practice that tribunals could take into account when interpreting investment treaties. A state could do so in numerous ways, such as by modifying its model bilateral investment treaty (BIT), formulating pleadings as a respondent, intervening in arbitrations as a nondisputing party, issuing public statements about its understanding of particular provisions, and reaching joint interpretations with the other treaty parties, including through bodies like the FTC. The available potential actions, as well as the relevant limitations (e.g., on the exercise of diplomatic protection in ICSID arbitrations), are considered below in part III.

This dialogue is ongoing. The generation of state practice should influence the interpretations issued by tribunals, but their awards are also likely to have an impact on the subsequent views and practices of the treaty parties, especially when they are persuasively reasoned, as tribunal awards affect the political status quo and resulting expectations. After a tribunal has issued an award, the treaty parties should examine its reasoning and determine whether they accept or reject particular interpretations. They should then find ways to make their views known as a matter of state practice to help influence the next case in the series. The result should be an interactive and iterative development of investment treaty law.

Giving both treaty parties and tribunals a voice in this dialogue, but neither a mandate to dictate, bolsters the legitimacy of investment treaty interpretation.⁷³ As the investment treaty system matures, we are beginning to witness an articulation of this dialogic process as a normal product of shared interpretive power rather than as a threat to the system's legitimacy. For example, in *Methanex v. United States*, the tribunal defended the propriety of the NAFTA FTC's ability to issue interpretive declarations:

If a legislature, having enacted a statute, feels that the courts implementing it have misconstrued the legislature's intention, it is perfectly proper for the legislature to clarify its intention. In a democratic and representative system in which legislation expresses the will of the people, legislative clarification in this sort of case would appear to be obligatory. The Tribunal sees no reason why the same analysis should not apply to international law.⁷⁴

ories and the Human Rights Act 1998, 2005 PUB. L. 306; Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such A Bad Thing After All)*, 35 OSGOODE HALL L.J. 75, 79 (1997) (because judicial decisions based on Canada's Charter of Fundamental Rights and Freedoms are "open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue"); Symposium, *Charter Dialogue: Ten Years Later*, 45 OSGOODE HALL L.J. 1 (2007); see also Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2001); George Williams, *The Constitutional Role of the Courts: A Perspective from a Nation Without a Bill of Rights*, 2 N.Z. J. PUB. & INT'L L. 25 (2004).

⁷³ Critics of the legitimacy of tribunal lawmaking may take some comfort in the fact that the tribunals' interpretive powers are somewhat constrained by treaty party practices and interpretations. Those concerned that treaty parties might abuse their interpretive powers in ongoing investor-state disputes may be relieved by the ability of tribunals to evaluate, not just rubber-stamp, treaty party interpretations. Cf. Hogg & Bushell, *supra* note 72, paras. 5, 8 (noting that in Canada dialogue between the legislature and the courts over the Charter of Fundamental Rights and Freedoms is used to help answer criticisms that judicial review of legislation under the Charter is illegitimate because it is undemocratic).

⁷⁴ *Methanex v. United States*, Jurisdiction and Merits, pt. IV, ch. C, para. 22 (NAFTA Ch. 11/UNCITRAL Arb. Trib. Aug. 3, 2005), available at <http://www.state.gov/s/l/c3741.htm> [hereinafter *Methanex* Final Award]. Similarly, Brower (a very prominent arbitrator) and Schill note that states sometimes react negatively to decisions and subsequently modify their actual and model BITs to make certain provisions more explicit, as occurred with the 2004 U.S. model BIT. "Such reactions by states should, however, not be read as casting doubt on the legitimacy of the entire system of investment-treaty protection and arbitration," they conclude. "They are rather part of a

To understand why such a shift in perception might be occurring, we must remember that this dialogue forms a negotiation over the interpretation of investment treaties *and* the respective interpretive powers of treaty parties and tribunals.⁷⁵ To appreciate the latter, including why tribunals might be becoming more receptive to the views of treaty parties, we must consider how the two groups are likely to interact strategically.

Strategic Interaction Between Treaty Parties and Tribunals

In the absence of significant empirical work and theoretical modeling on strategic interactions between treaty parties and investment tribunals,⁷⁶ I offer a preliminary sketch of some factors that might affect this dynamic.

Interaction by treaty parties with tribunals. Among others, two key factors are likely to affect the capability of treaty parties to interact strategically with tribunals: first, the parties' capacity to know, assess, and respond to the field's jurisprudence; and second, their ability to agree with each other.

As regards the first factor, investment treaty jurisprudence can be hard to access and assess. Nowhere is it required that all investment awards be published, though many are. These awards are proliferating, which makes it time-consuming to stay abreast of developments. There is no neat hierarchy or structure for sorting published decisions to identify seminal awards.⁷⁷ Without a strict doctrine of precedent, it takes a certain number of cases before states are likely to apprehend the jurisprudential trends. Even then, states may wish to respond but lack the budget to do so effectively.

These limitations, which may explain the slow reaction of most states to the quickly emerging investment treaty jurisprudence, must be taken into account when assessing state action and inaction.⁷⁸ However, by now the groundswell of cases and, at times, discontent seems to

dynamic that we can equally witness in the domestic realm in the interaction between the judiciary and the legislature. . . . [T]he legislature may 'correct' developments in the jurisprudence that it did not foresee or with which it does not agree." Brower & Schill, *supra* note 25, at 495–96.

⁷⁵ According to Caron, *supra* note 13, at 410–13, different actors within the system (including the parties and the adjudicators) will interact "within and against the bounded strategic space," seeking to influence particular interpretations of the law within the space and to enlarge their influence against the space.

⁷⁶ To date, there has been very little analysis of the system of international arbitration, either commercial or investment, or the strategies arbitrators, tribunals, and states within the system might employ. See generally YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1996); Walter Mattli, *Private Justice in a Global Economy: From Litigation to Arbitration*, 55 INT'L ORG. 919 (2001). Significant growth in this theoretical, empirical, and sociological research and analysis is likely in the coming years. For early examples of empirical analyses in the context of claims about bias, see Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435 (2009); Michael Waibel, *Are Arbitrators Political?* (working paper presented at panel of Brit. Inst. of Int'l & Comp. Law, 2009). For an early work employing theories about judicial politics in investment arbitration, see David Schneiderman, *Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes*, NW. J. INT'L L. & BUS. (forthcoming 2010).

⁷⁷ For example, novices cannot quickly orient themselves in the field by applying a hierarchical filter, similarly to how one looks at the decisions of the top appellate courts in a particular domestic system. This problem has been ameliorated somewhat by the recent spate of good textbooks, Internet sites, and e-mail discussion lists and reporting services in the field.

⁷⁸ For example, one could theorize that if a particular interpretation of a vague provision contravened the interests of the treaty parties, they could respond by revising or clarifying that provision in their next negotiations. But this reaction would assume awareness of the interpretation, the understanding that it was against their interests, and the ability to respond. As many states do not have a staff tracking these cases, or the funds to respond by intervening

have been sufficient to prompt many states into paying closer attention to investment treaty awards, and some states have even taken responsive actions, such as modifying their treaties in light of jurisprudential developments.⁷⁹

Second, treaty parties' capacity to interact strategically with tribunals depends on their ability to agree with each other. Whether tribunals are viewed as agents or trustees, they are accountable to two or more principals—the treaty parties. If the principals disagree on interpretation, tribunals will have wide interpretive discretion. If they agree, tribunals' zone of discretion will be reduced and the principals' capacity to direct tribunals will be enlarged.

The bilateral nature of investment treaties should make this problem less of an issue than it is with multilateral treaties. Nevertheless, the political and historical circumstances surrounding investment treaties to date have limited the possibilities for collective interpretive agreements and common practices. Investment treaties have typically been signed between developed (capital-exporting) and developing (capital-importing) states and most of the cases have been brought by investors from capital-exporting states against capital-importing states. This separation of roles has often deprived treaty parties of a commonality of interest, which hinders their ability to reach common interpretive agreements and practices.

Recent developments may be changing this phenomenon. Investors are now bringing cases against some developed states, and thanks to the global financial crisis, such claims will probably increase.⁸⁰ Today significant levels of foreign direct investment flow from (not just to) developing states and to (not just from) developed states, which makes many states hard to categorize as primarily, let alone exclusively, capital importing or capital exporting.⁸¹ The number of investment treaties between developing states is increasing and represents a significant portion of recent totals.⁸² These developments increase the prospect that at least some states will appear on both sides of the investment treaty equation and that a convergence of states' views will thus be facilitated.⁸³ Such movement can already be seen in the positions of certain key

in cases or issuing interpretations, their silence or resort to old formulations in new treaties cannot necessarily be equated with approval.

⁷⁹ See *supra* text at notes 64–65.

⁸⁰ For early discussions of the impact of the global financial crisis on potential investment treaty cases, see N. Jansen Calamita, *The British Bank Nationalizations: An International Law Perspective*, 58 INT'L & COMP. L.Q. 119 (2009); Anne van Aaken & Jürgen Kurtz, *The Global Financial Crisis: Will State Emergency Measures Trigger International Investment Disputes?* COLUM. FDI PERSP., No. 3 (Vale Columbia Center on Sustainable International Investment), Mar. 23, 2009, at <http://vcc.columbia.edu/pubs/>; see also Alvarez & Park, *supra* note 10, at 393–400 (discussing the bringing of investment treaty arbitration cases against developed countries as respondents); William S. Dodge, *Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia–United States Free Trade Agreement*, 39 VAND. J. TRANSNAT'L L. 1 (2006).

⁸¹ In 2007 foreign direct investment inflows and outflows for developed states stood at \$1248 billion and \$1692 billion, respectively, while inflows and outflows for the developing states were \$500 billion and \$253 billion, respectively. UNCTAD, WORLD INVESTMENT REPORT 2008, at 7–8 (2008).

⁸² By the end of 2007, 27 percent of the total number of bilateral investment treaties were between developing states, and many had been signed in recent years. *Id.* at 16. See generally A. Vaughan Lowe, *Changing Dimensions of International Investment Law*, in 1 COLLECTED COURSES OF THE XIAMEN ACADEMY OF INTERNATIONAL LAW 395 (Wenhua Shan, Penelope Simons, & Dalvinder Singh eds., 2008).

⁸³ Alvarez likens the position of countries that are major capital importers and exporters, like the United States and China, to that of the individual in John Rawls's original position who must decide upon a distribution of resources while under a veil of ignorance. Analogously to Rawls's thought experiment, such countries are arguably more likely to seek treaty provisions that are fair to both investors and states, as they do not know whether they will end up on the home or host state side of an investor-state dispute. Alvarez, *supra* note 65. Tensions between different domestic constituencies within the United States were starkly evident in the recent report, along with numerous

players like the United States and China, which have significant interests as both capital importers and capital exporters.⁸⁴

Interaction by tribunals with treaty parties. The individualized and ad hoc nature of investment tribunals may limit the desire and ability of arbitrators to act strategically, though this limitation is somewhat countered by the fact that many arbitrators are (or wish to be) repeat players as arbitrators or counsel.⁸⁵ The lack of a standing body comprising a relatively stable group of arbitrators also makes any strategic action on their part hard to observe.⁸⁶ Investment tribunals presumably make decisions with multiple audiences in mind—the disputing parties, the treaty parties, states as a whole, the arbitral community, and the wider public—which further complicates the analysis. Despite these limitations, I posit that tribunals are likely to have an interest in both their existence and their interpretive power.⁸⁷

By “existence,” I mean that arbitrators and tribunals have an interest in the perpetuation of the investment treaty system so that future tribunals will be constituted and investment treaty work continued.⁸⁸ Some argue that arbitrators are actually or apparently biased because of their interest in the expansion of the field, so that there will be more work for arbitrators and counsel

separate statements, on whether and how to review the 2004 U.S. model BIT. REPORT OF THE ADVISORY COMMITTEE ON INTERNATIONAL ECONOMIC POLICY REGARDING THE MODEL BILATERAL INVESTMENT TREATY (Sept. 30, 2009) [hereinafter REPORT OF THE ADVISORY COMMITTEE], available at <http://www.ipscdc.org/globaleconomy/reports?start=4>.

⁸⁴ Compare, for example, the efforts of the United States (traditionally a strong proponent of investor rights and investor-state arbitration) to revise its model BIT to provide for greater constraints on investor rights and the discretion of investor-state tribunals, with actions by China (traditionally hostile to extensive investor protections and wide-ranging investor-state arbitration) to revise its approach to investment treaties to expand the possibilities for investor rights and investor-state arbitration. See NORAH GALLAGHER & WENHUA SHAN, CHINESE INVESTMENT TREATIES: POLICIES AND PRACTICE (2009); Alvarez, *supra* note 65; Cai Congyan, *China-US BIT Negotiations and the Future of Investment Treaty Regime: A Grand Bilateral Bargain with Multilateral Implications*, 12 J. INT'L ECON. L. 457 (2009); Gilbert Gagné & Jean-Frédéric Morin, *The Evolving American Policy on Investment Protection: Evidence from Recent FTAs and the 2004 Model BIT*, 9 J. INT'L ECON. L. 357 (2006); Stephan W. Schill, *Tearing down the Great Wall: The New Generation Investment Treaties of the People's Republic of China*, 15 CARDOZO J. INT'L & COMP. L. 73 (2007); Kenneth J. Vandeveld, *A Comparison of the 2004 and 1994 U.S. Model BITs: Rebalancing Investor and Host Country Interests*, 2008–09 Y.B. INT'L INVESTMENT L. & POL'Y 283; Stephen Schwebel, *The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law*, TRANSNAT'L DISP. MGMT., Apr. 2006.

⁸⁵ On the meaning of strategic action within judicial politics, see generally Lee Epstein & Jack Knight, *Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead*, 53 POL. RES. Q. 625, 626 (2000) (according to the strategic account: (1) judges make choices to achieve certain goals; (2) judges act strategically in the sense that their choices depend on their expectations about the choices of other actors; and (3) these choices are structured by the institutional setting in which they are made); Schneiderman, *supra* note 76.

⁸⁶ There is no standing investment treaty court, so there is no single body to analyze. Judges on international courts routinely change, but they are appointed for multiple years in overlapping intervals, which allows for some consistency in approach to develop and become observable. There are no full-time investment law arbitrators, akin to tenured international judges. The treaty parties have control over some arbitral appointments, but not others. Certain individuals are repeatedly asked to serve as arbitrators, while others may participate in one or two cases only.

⁸⁷ Recognizing these strategic motivations is not the same as claiming actual or apparent bias in favor of investors or states, as the system's continuation depends on striking a balance between providing incentives for investor claimants to bring cases and giving comfort to state respondents considering whether to remain within the system.

⁸⁸ The emphasis is on the continuation of the system and the formation of future tribunals because a state cannot unilaterally withdraw its consent to arbitrate, or disband an arbitral tribunal, after an investor has accepted its offer to arbitrate. See, e.g., ICSID Convention, *supra* note 16, Art. 25(1); cf. Caron, *supra* note 13, at 414–16 (adjudicators have an interest in being retained as an adjudicator, which means they seek to maintain or increase their personal reputation; secretariats have an interest in the continuation of the institution, so they seek to promote the institution and defend its reputation and integrity).

as a group.⁸⁹ This claim must be weighed against their interest in (1) preventing a backlash by states against unreasonable interpretations, which might endanger existence or significantly curtail the field in the future; and (2) demonstrating their independence, impartiality, and legal acumen so as to increase their individual chances of future appointments or clients.⁹⁰ (Arbitrators may have an interest in increasing the size of the pie and their slice of it, but surely these interests are secondary to the pie's existence.)

By "interpretive power," I mean that tribunals have an interest in asserting and increasing their interpretive authority, which can be evidenced by a range of factors, such as jurisdictional creep, the development of the notion of a *de facto* body of precedents, and resistance to the idea of shared interpretive authority. The prospect that treaty parties will exit the field threatens the existence of tribunals, while treaty parties' demands for increased voice compromises tribunals' interpretive power. Accordingly, whereas the relationship for states between exit and voice is inversely proportional (i.e., the lower the prospect of exit, the higher the calls for voice and vice versa), the opposite should be true for tribunals. Where there is a credible threat that treaty parties will exit the system (threatening existence), tribunals will have a greater incentive to accommodate them by offering enhanced voice (compromising interpretive power) and vice versa.⁹¹ (Shared interpretive power may be less attractive than exclusive interpretive power, but should surely be more attractive than no interpretive power.)

On the basis of the factors outlined above, we can see why investment tribunals may have previously enjoyed a wide zone of discretion in lawmaking, and why treaty parties may now be more actively asserting their authority to rein in that discretion. Considering the explicit delegation of dispute resolution powers, and the implied and partial delegation of interpretive power, treaty parties cannot expect to exercise complete control over tribunals as agents. Nor, however, can tribunals expect complete independence in lawmaking as trustees, given the limited and shared nature of their interpretive authority. Any renegotiation of interpretive power is thus likely to be achieved by actual and threatened exit and/or various forms of voice, including legal recontracting, political delegitimizing attacks, and, the focus of this article, dialogue.

II. LEGAL DOCTRINE: THE RELEVANCE OF SUBSEQUENT AGREEMENTS AND PRACTICE

One (but by no means the only) way that treaty parties and tribunals can strike a better balance when it comes to interpreting and developing investment treaty law is by increasing the possibilities for constructive dialogue between treaty parties and tribunals. Even though the Vienna Convention requires tribunals to consider subsequent agreements and practice in

⁸⁹ For example, Van Harten notes that because arbitrators are not tenured, they are dependent on the lodging of future claims by investors if there is to be continuing work for them in the field. He contends that this circumstance results in an appearance of proinvestor bias because it is in the arbitrators' interests to rule broadly on jurisdictional issues and favorably to investors on merits and damages to increase the likelihood of future claims. VAN HARTEN, *supra* note 11, at 172. For an interesting account of strategic considerations made by the arbitrators in the *Loewen* case, see the discussion of an interview with the U.S.-appointed arbitrator (Abner Mikva) in Schneiderman, *supra* note 76.

⁹⁰ Brower & Schill, *supra* note 25, at 489–95 (arguing that there are many formal and informal mechanisms to ensure that arbitrators are independent and impartial, including arbitrators' self-interest); Susan D. Franck, *The Role of International Arbitrators*, 12 ILSA J. INT'L & COMP. L. 499, 516–18 (2006) (analyzing various market forces that may make it possible to remedy arbitrator misconduct and provide guidance as to the appropriate role of international arbitrators). See also empirical evaluations of arbitrator bias, *supra* note 76.

⁹¹ *Cf.* HIRSCHMAN, *supra* note 56, at 83–86.

treaty interpretation, the question remains whether international law requires a one-size-fits-all approach to interpretation or permits significant tailoring of interpretive rules to fit certain treaties, such as those creating rights for nonstate actors.⁹² In exploring this question, this part turns first to reliance on subsequent agreements and practice under general public international law before focusing on human rights and investment treaties.

Treaty Interpretation in Public International Law

As a matter of treaty and customary international law, treaty parties can provide an authentic interpretation of a treaty through subsequent agreements and practice.⁹³ Article 31(3) of the Vienna Convention states that treaty interpretation *shall* take into account, together with the treaty's context, "(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; [and] (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."⁹⁴

Although numerous examples can be found of reliance by international courts and tribunals on subsequent agreements and practice in treaty interpretation, as discussed below, this source of interpretive evidence has been somewhat underanalyzed and underutilized. The tide may be beginning to turn, however, for the International Law Commission has recently decided to focus on the relevance of such evidence in its project on treaties over time as an important mechanism for dealing with the requirements of stability and change in the law of treaties.⁹⁵

The meaning of subsequent agreements and practice. A subsequent agreement turns on the fact of an agreement between the treaty parties, not its form.⁹⁶ The agreement need not be in binding or treaty form but must demonstrate that the parties intended their understanding to constitute an agreed basis for interpretation.⁹⁷ Such agreements may be more or less formal, ranging from a jointly signed document to a series of acts or communications from which an

⁹² The International Law Commission (ILC) considered, but decided against, including a specific provision in the draft Vienna Convention about treaties that created individual rights. See Report of the International Law Commission on the Work of Its Eighteenth Session, para. 33, [1966] 2 Y.B. Int'l L. Comm'n 172, 177, UN Doc. A/CN.4/SER.A/1966/Add.1 [hereinafter 1966 ILC Report].

⁹³ The interpretive rules in Article 31 of the Vienna Convention are generally accepted as reflecting customary international law. See *Avena (Mex. v. U.S.)*, 2004 ICJ REP. 12, 37–38, para. 83 (Mar. 31); *Golder v. United Kingdom*, 18 Eur. Ct. H.R. (ser. A), para. 29 (1975). Decisions of the Court are available at <http://www.echr.coe.int>.

⁹⁴ Vienna Convention, *supra* note 2, Art. 31(3)(a), (b). On subparagraph (c) of Article 31(3), see *supra* note 2. See generally Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT'L & COMP. L.Q. 279 (2005); McLachlan, *supra* note 53.

⁹⁵ See *Treaties over Time in Particular: Subsequent Agreement and Practice*, in ILC, Report on the Work of Its Sixtieth Session, Annex A, UN GAOR, 63d Sess., Supp. No. 10, UN Doc. A/63/10 (2008); *Treaties over Time*, in ILC, Report on the Work of Its Sixty-first Session, UN GAOR, 64th Sess., Supp. No. 10, at 353, UN Doc. A/64/10 (2009). For a recent example of scholarship on subsequent practice in the trade sphere, see Alexander M. Feldman, *Evolving Treaty Obligations: A Proposal for Analyzing Subsequent Practice Derived from WTO Dispute Settlement*, 41 N.Y.U. J. INT'L L. & POL. 655 (2009).

⁹⁶ RICHARD K. GARDINER, TREATY INTERPRETATION 216–20 (2008).

⁹⁷ For example, Mustafa Yasseen, who was chairman of the Drafting Committee for the Vienna Convention, later wrote: "It is above all not necessary that an interpretive agreement be clothed with the same form as that of the treaty it concerns, however solemn and important this treaty may be. The interpretive agreement may be in simplified form, may be realized by an exchange of notes or even by concordant oral declarations." Mustafa Yasseen, *L'interprétation des traités d'après la Convention de Vienne*, 151 RECUEIL DES COURS 1, 45 (1976 III), *trans.* & *quoted in* United States, Post-Hearing Submission of Respondent 4 (July 20, 2001), *Methanex Final Award*, *supra* note 74; see also *Kasikili/Sedudu Island (Bots./Namib.)*, 1999 ICJ REP. 1045, para. 63 (Dec. 13).

agreement can be inferred. The more informal the basis, the greater the overlap with subsequent practice.⁹⁸

Under Article 31(3)(b), tribunals look for a “concordant, common and consistent” sequence of acts or pronouncements about a treaty that “is sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation.”⁹⁹ Subsequent practice may include executive, legislative, and judicial acts.¹⁰⁰ It can be between the parties or internal within one party, provided that it is known by the other parties.¹⁰¹ Not every treaty party has to have engaged in a common practice, so long as all assent or acquiesce to it.¹⁰²

Interpretive weight of subsequent agreements and practices. The Vienna Convention requires, rather than permits, recourse to subsequent agreements and practice, treating them as a primary, rather than a secondary, source of interpretation.¹⁰³ According to the ICJ, endorsing the position of the International Law Commission, a subsequent agreement “represents an *authentic interpretation* by the parties which *must be read into the treaty* for purposes of its interpretation.” The importance of subsequent practice is also “obvious” because it “constitutes *objective evidence* of the understanding of the parties as to the meaning of the treaty,” and “[r]ecourse to it as a means of interpretation is well-established in the jurisprudence of international tribunals.”¹⁰⁴ The exact meanings of “authentic interpretation” and “objective evidence” are unclear. Some conclude that such interpretations are binding, while others treat them as highly persuasive,¹⁰⁵ though it is not clear that much daylight separates the two.

No clear distinction between interpretations and amendments. Commentators differ over the desirability, and even the possibility, of distinguishing between interpretations, which clarify

⁹⁸ GARDINER, *supra* note 96, at 219, 222.

⁹⁹ Appellate Body Report, Japan—Taxes on Alcoholic Beverages, at 12–13, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted Nov. 1, 1996) (quoting, 1st quote, IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 137 (2d ed. 1984)); *see also* GARDINER, *supra* note 96, at 225; ARNOLD D. MCNAIR, THE LAW OF TREATIES 424 (1961).

¹⁰⁰ GARDINER, *supra* note 96, at 228.

¹⁰¹ *Id.* at 239; MCNAIR, *supra* note 99, at 427 (observing that “when one party in some public document such as a statute adopts a particular meaning, circumstances can arise[,] particularly after the lapse of time without any protest from the other party, in which that evidence will influence a tribunal”).

¹⁰² 1966 ILC Report, *supra* note 92, at 222, para. 15 (wording designed to “avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice”); GARDINER, *supra* note 96, at 227, 235–39; MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 431 (2009) (requiring “active practice of some parties” that has been “acquiesced in by the other parties; and no other party will have raised an objection”).

¹⁰³ Vienna Convention, *supra* note 2, Art. 31(3) (“There *shall* be taken into account, together with the context . . .”) (emphasis added). Unlike a treaty’s negotiating history, this evidence is not a subsidiary means of interpretation relevant only to confirming existing interpretations or resolving ambiguous or obscure provisions. *Id.*, Art. 32. Such agreements play a primary role in interpretation, in the same way as side agreements made in connection with the treaty’s conclusion. *Id.*, Art. 31(2); GARDINER, *supra* note 96, at 204–08.

¹⁰⁴ Kasikili/Sedudu Island, *supra* note 97, at 1075–76, para. 49 (quoting 1966 ILC Report, *supra* note 92, at 221–22, paras. 14–15 (emphasis added)).

¹⁰⁵ On bindingness, *see, for example*, GARDINER, *supra* note 96, at 32 (“That the agreement of the parties on an interpretation trumps other possible meanings seems obvious enough, given the nature of a treaty as an international agreement between its parties.”); OPPENHEIM, *supra* note 38, at 1268, para. 630; VILLIGER, *supra* note 102, at 429. On persuasiveness, *see, for example*, Interpretation of the Air Transport Services Agreement of 6 February 1948 (Italy v. U.S.), 16 R. Int’l Arb. Awards [RIAA] 75, 99 (1965) [hereinafter Italy-U.S. Award] (noting that the subsequent practice of treaty parties is not “in itself decisive for the interpretation of the disputed text; it can however serve as additional evidence as regards the meaning to be attributed to the text”); International Status of South West Africa, Advisory Opinion, 1950 ICJ REP. 126, 135–36 (July 11).

the meaning of the text, and amendments, which change that meaning. Most accept that interpretations and amendments are situated on a spectrum: the difference between them is usually one of degree, but as they approach either end can become one of type. The rules/standard distinction may also be relevant to determining this difference, as standards leave wider room than rules for interpretations falling short of amendments.

An argument can be made for drawing a strict distinction between the two: when a supposed interpretation clearly departs from the text, it would be binding only if it were made by those with the power to amend the treaty and/or in accordance with the amendment procedure.¹⁰⁶ Such amendments would presumptively have prospective effect only because they would reflect a change in the treaty, unlike interpretations, which presumptively have prospective and retrospective effect because they reflect what the parties intended the existing treaty to mean.¹⁰⁷

In practice, however, the international community has not drawn such a strict division, even when a treaty provides for amendment.¹⁰⁸ International courts and tribunals have accepted as interpretations subsequent agreements and practices that have departed from the treaty parties' original intention and/or the plain words of the treaty, whether multilateral or bilateral.¹⁰⁹ Although emphasizing that treaty terms should be interpreted "in good faith in accordance with the[ir] ordinary meaning," the Vienna Convention also provides that they must be interpreted in context, which includes subsequent agreements and practice, and that a "special meaning shall be given to a term if it is established that the parties so intended."¹¹⁰

¹⁰⁶ There is some basis for this argument in the drafting history of the Vienna Convention. The original ILC draft contained Article 38, concerning the modification of treaties by subsequent practice. The Committee of the Whole deleted the article in response to various objections, including that it would be difficult to distinguish which interpretations would fall under this provision and which under the equivalent of Article 31(3)(b), that permitting modifications by contrary practice might undermine the principle of *pacta sunt servanda*, and that such modifications might lead to changes even though states had not gone through their internal constitutional procedures for approving treaties and their amendment. See 1966 ILC Report, *supra* note 92, at 236, para. 1; 1 UN CONFERENCE ON THE LAW OF TREATIES, OFFICIAL RECORDS 207–15, UN Doc. A/CONF.39/11, UN Sales No. E.68.V.7 (1968).

¹⁰⁷ See *Access to German Minority Schools in Upper Silesia*, Advisory Opinion, 1931 PCIJ (ser. A/B) No. 40, at 19 (May 15) (interpretations by courts have retrospective effect); *Yasseen*, *supra* note 97, at 47 (interpretations by treaty parties have retrospective effect).

¹⁰⁸ ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 265 (2d ed. 2007) ("[I]f both parties want to amend . . . a treaty, they can of course do so. . . . [S]hould [an amendment clause] not be suitable, the parties can simply ignore it and amend the treaty in any way they can agree on."); GARDINER, *supra* note 96, at 243–45; OPPENHEIM, *supra* note 38, at 1254, para. 624 ("A treaty may also be amended by an oral agreement, or by a tacit agreement evidenced by the subsequent practice of the parties."); SINCLAIR, *supra* note 99, at 138; VILLIGER, *supra* note 102, at 429.

¹⁰⁹ The most famous example is the interpretation of Article 27(3) of the UN Charter, which requires nonprocedural votes in the Security Council to be passed by "an affirmative vote of nine members including the concurring votes of the permanent members." In practice, the international community has accepted that a nonprocedural vote may be passed by an affirmative vote of nine members without a veto by any permanent members. While clearly departing from the original intention and text, this interpretation was affirmed by the ICJ in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 ICJ REP. 16, 22, para. 22 (June 21). See also, e.g., *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.)*, para. 64 (Int'l Ct. Justice July 13, 2009) ("[S]ubsequent practice . . . can result in a departure from the original intent on the basis of a tacit agreement between the parties . . ."); *Interpretation of the Air Transport Services Agreement of 27 March 1946 (Fr. v. U.S.)*, 16 RIAA 5, 60–68 (1963) [hereinafter *U.S.-France Award*] (subsequent practice under a bilateral treaty is relevant to interpretation and may amount to an amendment of the treaty); *Italy-U.S. Award*, *supra* note 105, at 99–101 (the parties' interpretation of a treaty could be established with a shorter period of continuity than customary international law, though the situation would be different if the practice amounted to an amendment); *Location of Boundary Markers in Taba (Egypt v. Israel)*, 20 RIAA 3 (1988).

¹¹⁰ Vienna Convention, *supra* note 2, Art. 31(1), (3), (4).

The most common justification for such deference is that “the parties to the treaty are their own masters,”¹¹¹ which strikes a clear chord with principal-agent theories about the relationship between treaty parties and tribunals. But the nature of the treaty might also be relevant. When the treaty involves the rights and obligations of the treaty parties only, courts and tribunals might adopt a no-harm, no-foul policy, as all of the relevant rights holders have agreed to the amending interpretation.¹¹² Whether tribunals would or should be as deferential when the treaty creates rights for nontreaty parties is less clear.

Treaty Interpretation in Human Rights Treaties

Treaties that grant rights to nonstate actors, such as human rights and investment treaties, do not share the symmetry between those who hold the rights and those who can interpret them. The treaty parties may still be the masters of the treaty, but one cannot assume no harm, no foul in accepting their interpretations of nonstate actors' rights. In that case, should courts and tribunals always follow treaty parties' interpretations as agents, assess them altogether independently as trustees, or find some interpretive balance in between?

It is generally accepted that treaties that confer *benefits* on nonstate actors can be revoked or modified by the treaty parties at will.¹¹³ But should the position be different if the treaty grants *rights* to nonstate actors? The starting presumption is that the interpretive principles of the Vienna Convention apply to all state-state treaties.¹¹⁴ Authorities agree that the application of these interpretive principles may vary in the context of treaties like human rights treaties that create nonstate actor rights, but claims that some of these rules can be entirely dispensed with because of the nature of such treaties are highly controversial.¹¹⁵

The European Court of Human Rights (European Court or Court) is the longest-standing regional human rights court and has developed a highly sophisticated jurisprudence. I focus on this Court's approach to the relevance of subsequent agreements and practice because the European Convention on Human Rights (ECHR) grants substantive rights to persons and permits

¹¹¹ VILLIGER, *supra* note 102, at 429.

¹¹² Where the parties appear to have so agreed for a period of time, through their actions or words, but one has then changed its mind, the previous agreement may work like an estoppel as to the interpretation of the agreement. *See, e.g.*, Temple of Preah Vihear (Cambodia v. Thailand), 1962 ICJ REP. 6, 32–33 (June 15); Legal Status of Eastern Greenland, 1933 PCIJ (ser. A/B) No. 53, at 68–69 (Apr. 5).

¹¹³ Air services treaties, for instance, affect whether commercial airlines may fly between countries, but they can be readily revoked or modified. *See* U.S.–France Award, *supra* note 109, at 60–67; Italy–U.S. Award, *supra* note 105, at 99–101. Similar points could be made in relation to treaties dealing with the use of force, refugees, trade, and the environment.

¹¹⁴ Vienna Convention, *supra* note 2, Art. 1; AUST, *supra* note 108, at 7.

¹¹⁵ For example, the evolutionary approach to interpreting human rights treaties can be understood as a particular application of the Vienna Convention's object-and-purpose test, *see* VILLIGER, *supra* note 102, at 427–28, whereas claims that the Vienna Convention's general approach to reservations should not be applied to human rights treaties are highly contentious. *Compare* *Belilos v. Switzerland*, 132 Eur. Ct. H.R. (ser. A), para. 60 (1988), *Loizidou v. Turkey*, Preliminary Objections, 310 Eur. Ct. H.R. (ser. A), paras. 96–98 (1995), and UN Human Rights Committee, General Comment No. 24 (52), UN Doc. CCPR/C/21/Rev.1/Add.6 (1994), with ILC, Preliminary Conclusions on Reservations to Normative Multilateral Treaties Including Human Rights Treaties, in Report on the Work of Its Forty-ninth Session 56, UN GAOR, 52d Sess., Supp. No. 10, UN Doc. A/52/10 (1997), Observations on General Comment No. 24 (52), in Report of the Human Rights Committee, Annex VI, at 131, 135, UN GAOR, 50th Sess., Supp. No. 40, UN Doc. A/50/40 (1995) (statements of the United States and the United Kingdom), and Observations of States Parties Under Article 40, Paragraph 5, of the Covenant, in Report of the Human Rights Committee, Annex VI, at 117, UN GAOR, 51st Sess., Supp. No. 40, UN Doc. A/51/40 (1996) (statement of France).

them to enforce those rights directly before the Court, analogously with the most investor-friendly account of investor rights.¹¹⁶ Differences between investment treaties and the ECHR, and investment tribunals and the European Court, qualify this analogy and are considered below, but most suggest that the Court is more trustee-like than investment tribunals, which, if anything, should make it less receptive to subsequent agreements and practice.¹¹⁷

Instead, although the European Court has never articulated a normative theory about whether and when it is appropriate to rely on subsequent agreements and practice, it has implicitly gravitated toward an interpretive dialogue with the treaty parties. The Court thus can serve as a model of an international court that strikes a balance between being a simple agent (which is completely deferential to the views and actions of the treaty parties) and a pure trustee (which makes decisions altogether independently of the treaty parties). Whether or not investment tribunals should strike exactly the same balance, the Court's practice offers a thought-provoking comparison that allows us to reflect upon assumptions and arguments made in the investment field.

The use of subsequent agreements and practice. The European Court has expressly endorsed the application of Articles 31–33 of the Vienna Convention to the ECHR.¹¹⁸ It has not refused to rely on subsequent agreements and practice on the basis that, because the treaty grants rights to nonstate actors, the treaty parties can be viewed only as actual or potential respondents seeking to avoid liability. While the Court has had little occasion to consider subsequent agreements on interpretation, it routinely looks to subsequent practice in interpreting how broad rights should be applied in particular circumstances.

In addition to relying on pleadings by the applicant and the respondent state, the Court permits other treaty parties to intervene, affirming their interest in the ECHR's interpretation.¹¹⁹ In no case have all the treaty parties intervened, but one or more have done so in many. The Court often makes extensive references to such interventions, sometimes ruling in favor of the proposed interpretation and at other times against.¹²⁰

¹¹⁶ See text at notes 22–25 *supra*. Human rights and investment treaties can also create state-to-state rights and obligations, as well as opportunities for interstate dispute resolution. This article does not consider the nature of these rights or dispute resolution mechanisms, or whether they exist independently of or interdependently with the substantive and procedural rights granted to nonstate actors.

¹¹⁷ See text at notes 130–35 *infra*.

¹¹⁸ See, e.g., *Golder*, *supra* note 93, para. 29; *Banković v. Belgium*, Admissibility, 2001–XII Eur. Ct. H.R. 333, para. 55 (Grand Chamber). On the application of the Vienna Convention's interpretive principles by the Inter-American Court and Commission of Human Rights, see "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights), Advisory Opinion, Inter-Am. Ct. H.R. (ser. A) No. 1, para. 33 (Sept. 24, 1982) (recognizing the applicability of the Article 31–33 principles of interpretation); *Santana v. Venezuela*, Case 0453/01, Inter. Am. C.H.R., Report No. 92/03, paras. 77–78, OEA/Ser.L/V/II.118 (2003) (same). The European Court's approach on interpretations seems generally consistent with the approach of other human rights bodies, but it appears to make more extensive reference to subsequent practice than other such courts and treaty bodies. One reason may be that historically the parties to the Convention have been a relatively small group that were all established representative democracies operating within a framework of regional integration. Though now, with forty-seven treaty parties, this explanation seems less compelling.

¹¹⁹ See ECHR, *supra* note 22, Art. 36(1), (2) (the home state of the applicant may intervene as of right and the Court is empowered to permit interventions by other treaty parties and interested persons, including nongovernmental organizations).

¹²⁰ See, e.g., *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989) (intervention by the Federal Republic of Germany in support of the applicant, a German national, whose claim was successful in part); *Saadi v. Italy*, App. No. 37201/06 (Eur. Ct. H.R. Feb. 28, 2008) (intervention by the United Kingdom in support of Italy, whose defense was unsuccessful).

Given the nature of the rights involved, the Court relies primarily on internal practice of states (such as domestic legislation and practices) rather than external practice between states (such as interstate communications and complaints). As subsequent practice must evidence an agreement to be relevant to interpretation, the Court assesses the treaty parties' practices as a whole, not just those of the respondent state. Such practices are important in understanding how to interpret and apply broad rights and, even where these practices initially diverge, they sometimes evolve to create a consensus about the nature or extent of certain rights.¹²¹

The European Court has looked to this evidence to confirm both broad and narrow interpretations of the Convention.¹²² In *Tyrer v. United Kingdom*, the Court considered whether judicial corporal punishment of juveniles amounted to degrading punishment. Corporal punishment was prohibited in the United Kingdom, with the exception of the Isle of Man where the incident occurred, and was not permitted in the vast majority of the other treaty parties. In finding that such punishment was prohibited as degrading, the Court stated:

The Court must also recall that the Convention is a living instrument which . . . must be interpreted in the light of present-day conditions. In the case now before it *the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.*¹²³

Conversely, in the *Banković* case, the Court had to determine whether it had jurisdiction to hear a claim by Yugoslav nationals about NATO's airstrikes on Yugoslavian territory, when the Federal Republic of Yugoslavia was not a party to the ECHR. Article 1 of the ECHR provides that the treaty parties must secure the Convention's rights and freedoms for "everyone within their jurisdiction." The Court reasoned that the treaty parties had not acted as though the ECHR applied to extraterritorial military actions, including by not having sought to derogate from their ECHR obligations under Article 15 to ensure that the provisions did not apply. This subsequent practice was relevant in finding that the ECHR did not apply to such military actions:

The Court finds State practice in the application of the Convention since its ratification to be indicative of a lack of any apprehension on the part of the Contracting States of their extra-territorial responsibility in contexts similar to the present case. Although there have been a number of military missions involving Contracting States acting extra-territorially since their ratification of the Convention (*inter alia*, in the Gulf, in Bosnia and Herzegovina and in the FRY), *no State has indicated a belief that its extra-territorial actions involved an exercise*

¹²¹ This sort of emerging consensus overlaps with the Court's preference for an evolutionary approach to rights. The difference between the use of subsequent agreements and practice and evolutionary approaches to human rights treaties is controversial. See GARDINER, *supra* note 96, at 242–43.

¹²² There are clearly differences between the two examples cited below, including that one concerns a substantive right and the other a jurisdictional question. My point is not that the circumstances are equivalent but that the European Court has used subsequent practice both to widen and to narrow potential understandings of the ECHR.

¹²³ *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A), para. 31 (1978) (emphasis added). According to Ovey and White, the European Court has engaged in similar comparative surveys as a guide to the scope of the rights guaranteed in many areas, including laws relating to vagrancy, respect for family life, various aspects of criminal procedure, and the age of criminal responsibility. CLARE OVEY & ROBIN WHITE, JACOBS AND WHITE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS 49 (4th ed. 2006); see also GEORGE LETSAS, A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 123 (2008).

*of jurisdiction within the meaning of Article 1 of the Convention by making a derogation pursuant to Article 15 of the Convention.*¹²⁴

The Court has also suggested that it might accept de facto amendments as interpretations by subsequent practice. In *Soering v. United Kingdom*, the Court considered that the abolition of the death penalty by most treaty parties could have established their agreement to override the ECHR's explicit wording permitting executions resulting from a court sentence.¹²⁵ The Court ultimately found that, because the parties had adopted an additional optional protocol on the death penalty, they had demonstrated the intention that any such prohibition be effected through the normal amendment process.¹²⁶ However, in *Öcalan v. Turkey*, the Court affirmed that "an established practice within the member States could give rise to an amendment of the Convention."¹²⁷

Limitations on the use of such interpretive evidence. The most significant limitation on the use of subsequent agreements and practice is that the European Court appears to treat such evidence as highly persuasive rather than binding. This position allows the Court to play a gate-keeping function, as it is significantly guided, but not constrained, by the treaty parties' views. In this way, the Court strikes a balance between agency and trusteeship when it comes to developing interpretations of the Convention, though it tends more toward the latter.

The use of subsequent agreements and practice may well vary according to the nature of the rights involved. Human rights treaties establish the protection of fundamental rights and freedoms, including *jus cogens* rights (such as the prohibition on torture) and nonderogable rights (such as the right to life). *Jus cogens* norms cannot be amended by subsequent practice except for the emergence of a subsequent *jus cogens* norm. Nonderogable norms cannot be derogated from even in times of emergency. In view of these features, one might expect human rights courts to take a restrictive approach to the relevance of subsequent agreements and practice to the interpretation of these rights.

The object and purpose of human rights treaties might also affect the relevance of subsequent agreements and practice. In some contexts, these two interpretive approaches might combine to produce results neither would achieve alone. For example, the European Court's tendency to refer to subsequent practice by most (but not all) of the treaty parties to support evolutionary interpretations of the ECHR likely reflects a combined desire to develop the treaty progressively while not straying too far from state practice and consent.¹²⁸ In other contexts, the object and purpose of human rights treaties might limit the use of subsequent agreements and practice, particularly where these seek to narrow rather than broaden an established ECHR right or interpretation.

The Court has been unclear on when it will accept de facto amendments as interpretations by subsequent practice. Although it suggested an openness to this approach in *Soering* and

¹²⁴ *Banković*, *supra* note 118, para. 62 (emphasis added).

¹²⁵ *Soering*, *supra* note 120, para. 103.

¹²⁶ *Id.*

¹²⁷ *Öcalan v. Turkey*, App. No. 46221/99, para. 163 (Eur. Ct. H.R. May 12, 2005) (Grand Chamber) (quoting *id.*, Chamber judgment of Mar. 12, 2003, para. 191).

¹²⁸ Controversially, in *Öcalan*, the Court considered (but did not ultimately decide) whether the practice of the vast majority of member states with respect to the death penalty might de facto amend the ECHR with respect to all of the member states, including those that had not yet signed or ratified the relevant protocol. *Id.*, paras. 163–65.

Öcalan, the Court has suggested elsewhere that subsequent practice could not be used to create new rights and obligations.¹²⁹

Relevance to investment treaty interpretation. Given the assumed structural similarity between investment treaties and human rights treaties like the ECHR,¹³⁰ the willingness of the Court to consider the subsequent practice of treaty parties provides a useful vehicle for reflecting upon the investment field. Yet the clear differences between human rights and investment treaties signal the need for caution in drawing analogies. Many, but not all, of these factors suggest that the Court is closer to the trustee end of the spectrum than investment tribunals, making its continued openness to engaging in a dialogue with treaty parties all the more interesting.

Substantively, the ECHR establishes fundamental human rights and freedoms and, as suggested above, the relevance of subsequent practice might vary depending on the normativity of the provisions concerned. As a matter of customary international law, by analogy, the perceived relevance of state practice often diminishes as the normativity of the obligation increases, such that customs on highly normative issues like human rights are often recognized despite significant contrary practice.¹³¹ Similarly, one would expect the European Court to be more likely to view restrictive practices as breaches of treaty norms, rather than to treat them as evidence of the treaty parties' interpretations of those norms.¹³²

Structurally, human rights treaties deal primarily with the treatment by a state of its own nationals and residents, whereas investment treaties concern the treatment by one state of another treaty party's nationals, so that investor-state disputes always involve the interests of at least two states. The investor's home state should have an interest in how the treaty is applied to its nationals, which would reduce the likelihood of its agreeing to unreasonable interpretations. This interest must, however, be weighed against the home state's other interests in interpretation and foreign policy more broadly, which means that home states will not always support their nationals. In the human rights context, by contrast, many cases do not involve the direct interests of two or more states. In the absence of policing by the home state, human rights courts might feel the need to take a more active role in patrolling subsequent agreements and practice to ensure against unreasonable interpretations.

Institutionally, various design features enhance the trustee-like powers of the European Court by widening its interpretive zone of discretion. In particular, amendment is difficult

¹²⁹ *Cruz Varas v. Sweden*, 201 Eur. Ct. H.R. (ser. A), para. 100 (1991) ("Subsequent practice could be taken as establishing the agreement of Contracting States regarding the interpretation of a Convention provision but not to create new rights and obligations which were not included in the Convention at the outset.") (citations omitted).

¹³⁰ In drawing this structural analogy, I am not arguing that the two regimes are substantively similar or structurally identical, or that human rights norms should be applied in the investment context. On the relationship between human rights and investment treaties, see generally HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION, *supra* note 33; UNCTAD, *Selected Developments in IIA Arbitration and Human Rights*, IIA MONITOR No. 2, 2009. On the limits of substantive human rights analogies, see VAN HARTEN, *supra* note 11, at 136–41.

¹³¹ Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law*, 95 AJIL 757, 764–66 (2001).

¹³² The European Court's approach to the excesses of certain antiterrorist legislation since September 11, 2001, is an example of this approach. See *Saadi*, *supra* note 120.

because it requires the unanimity of forty-seven treaty parties, while withdrawal may be practically impossible by virtue of the ECHR's nesting within a web of other treaties and institutional structures.¹³³

Although the Court may be more trustee-like than investment tribunals in general, two factors point in the other direction.¹³⁴ Substantively, human rights treaties usually grant rights to all persons within a state's jurisdiction, whereas investment treaties grant rights to qualifying investors only. As the promise of investor protection might induce investments, there may be a greater likelihood of detrimental reliance in the investment context than in the human rights sphere (though such reliance may also occur in the latter context, for example, with interpretations narrowing free speech). Structurally, the ECHR is multilateral, whereas most investment treaties are bilateral, which may explain why subsequent agreements are unlikely to be found in the human rights context (because of the difficulty of reaching a multilateral agreement) and why common subsequent practice may be so persuasive (because of the number and proportion of nondefending states involved).¹³⁵

Regardless of these differences, the main point is that the European Court of Human Rights exemplifies a transnational court that engages in dialogue with treaty parties about interpreting nonstate actors' rights, even when that Court evidences many trustee-like characteristics. The existence of directly enforceable nonstate actor rights does not translate into a complete abdication of the treaty parties' interpretive rights, nor can the treaty parties direct the Court on interpretation as a mere agent.

Treaty Interpretation in Investment Treaties

What, then, should the position be in the investment field? By creating individually enforceable rights, investment treaties require some balance to be struck between the treaty parties' interest in interpretation and the investors' interest in being able to rely on a stable legal framework. The interpretive principles of the Vienna Convention presumptively apply to investment treaties,¹³⁶ but have the rules on subsequent agreements and practice been explicitly or implicitly excluded or modified?

¹³³ For example, members of the European Union and the Council of Europe are expected to be or become parties to the ECHR, making the consequences of withdrawal from the ECHR dramatic. See Stone Sweet & Grisel, *supra* note 33, at 122 (the ECHR's amendment provisions make the Court's zone of discretion wider than that of many domestic constitutional courts).

¹³⁴ Differences between the backgrounds of people appointed to the European Court and investment tribunals, and their methods of appointment, may also influence their interpretive approaches. The Court is a permanent body made up of judges, usually with a human rights background, elected by the treaty parties for set terms. Permanency should help to establish and protect these judges' independence, though their public international law backgrounds and the appointment process arguably make them more considerate of treaty party views. Arbitrators on investment tribunals are not selected solely by the treaty parties and many have a background primarily in international commercial arbitration rather than public international law. These factors may make these arbitrators less familiar with or concerned about public international law interpretive approaches, such as the relevance of subsequent agreements and practices of treaty parties. On arbitrators' backgrounds, see Schneiderman, *supra* note 76.

¹³⁵ Conversely, finding a subsequent agreement or common practice should be easier in a bilateral investment treaty context, while the proportional weight of the respondent state's practice will be greater, which might make tribunals more cautious about relying on such evidence.

¹³⁶ AUST, *supra* note 108, at 7. A recent study of ICSID decisions found references to Articles 31–33 of the Vienna Convention in thirty-five of ninety-eight decisions. Fauchald, *supra* note 1, at 314.

Explicit exclusion or modification of interpretive rules. Investment treaties do not expressly exclude the relevance of subsequent agreements and practice; most are silent on the issue, while some expressly provide for subsequent interpretive agreements by creating bodies like the NAFTA FTC. Such express provisions can modify the Vienna Convention's interpretive principles, either by widening the treaty parties' interpretive powers (for example, by making interpretive agreements binding or seeking to eliminate any distinction between interpretations and amendments)¹³⁷ or by restricting them (for example, by expressly drawing a distinction between interpretations and amendments or not permitting interpretations in ongoing disputes).¹³⁸

When an investment treaty specifically incorporates rules on subsequent agreements and practice, these form part of the treaty's general regulatory framework. Investors take their investment rights, and tribunals take their adjudicatory powers, subject to the interpretive rights reserved by the treaty parties.¹³⁹ This is not a case of giving unqualified rights and later infringing them; rather, the rights granted were qualified in the first place. Such a framework substantially reduces concerns about detrimental reliance by investors or prejudicing the adjudicatory power of tribunals, but it does not necessarily rule out all the implied limitations considered below.

Implicit exclusion or modification of interpretive rules. As in the human rights field, the relevance of subsequent agreements and practice is not implicitly excluded simply because investment treaties grant rights to nonstate actors. In fact, many investment treaties contain provisions impliedly affirming the treaty parties' interest in interpretation and/or the relevance of

¹³⁷ Some treaties, like NAFTA, provide that interpretations issued by such an interpretive body "shall be binding" on investment tribunals. See, e.g., NAFTA, *supra* note 3, Art. 1131(2); United States, Treaty Concerning the Encouragement and Reciprocal Protection of Investment, Art. 30(3) (2004), available at <http://www.state.gov/documents/organization/117601.pdf> [hereinafter 2004 U.S. Model BIT]; Canada, Agreement for the Promotion and Protection of Investments, Arts. 40(2), 51 (2004), available at <http://ita.law.uvic.ca/> [hereinafter 2004 Canada Model BIT]. Some treaties seek to prevent tribunals from deciding whether an agreement represents a permissible interpretation or an impermissible amendment. See 2004 U.S. Model BIT, Art. 30(3) ("A joint decision of the Parties . . . declaring their interpretation of a provision of this Treaty shall be binding on a tribunal . . ."). This wording seems intended to circumvent the controversial *Pope & Talbot* decision that, even though interpretations issued by the FTC are binding, tribunals have the power to determine whether an alleged interpretation is really an amendment. Compare *Pope & Talbot Damages*, *supra* note 6, para. 47, quoted in note 6 *supra*, with *ADF Group*, *supra* note 8, para. 177, quoted in text at note 9 *supra*.

¹³⁸ For example, the now-shelved 2007 draft Norwegian model BIT proposed creating a joint committee (similar to the NAFTA FTC) that could (1) amend the treaty, subject to ratification, acceptance, or approval by the parties; and (2) issue interpretations, subject to the need to (a) bear in mind that the power should not be used to undermine the amendment provisions, and (b) refrain from adopting interpretations of provisions subject to existing investor-state arbitrations. See Norway, Agreement for the Promotion and Protection of Investments, Arts. 14(2), 23(4), 33(1) (2007), available at <http://ita.law.uvic.ca/>; see also Damon Vis-Dunbar, *Norway Shelves Its Proposed Model Bilateral Investment Treaty*, INVESTMENT TREATY NEWS, June 2009, at 7.

¹³⁹ See *Methanex* Final Award, *supra* note 74, pt. IV, ch. C, para. 20 (finding that the power of the FTC to issue binding interpretations was "clear beyond peradventure (and any investor contemplating an investment in reliance on NAFTA must be deemed to be aware of it)"). Consider also, by analogy, the *Channel Tunnel* arbitration, where the treaty provided that the states and concessionaires could appoint arbitrators, but the "arbitrators appointed by the Concessionaires shall not participate in that part of any decision relating to the interpretation or application of the Treaty." *Channel Tunnel Group Ltd. v. France*, Partial Award on Jurisdiction, para. 76 (Perm. Ct. Arb. Jan. 30, 2007) (emphasis omitted), Oxford Rep. Int'l Inv. Claims, No. 58 (2007). After a dispute arose, the concessionaires argued that a narrow interpretation of this provision was "warranted on grounds of equality of arms" because "it cannot seriously be envisaged that the Parties would have elaborated a dispute resolution mechanism excluding the Concessionaires' arbitrators from decisions having a direct impact on the Concessionaires." *Id.*, para. 81 (quoting, 2d quote, from claimants' submission on an article of the treaty). In rejecting this argument, the tribunal found that the concessionaires took their treaty rights subject to other treaty provisions, including that their appointed arbitrators could not participate in decisions on interpretation or application of the treaty. *Id.*, paras. 86–90.

their subsequent agreements and practice. For example, some investment treaties provide that they shall be interpreted in accordance with international law, which includes the Vienna Convention if the states are parties to it and, otherwise, the equivalent customary rules on interpretation.¹⁴⁰ Some permit nondefending treaty parties to intervene in arbitrations, recognizing their interest in making submissions on the treaty's interpretation and application.¹⁴¹ And many provide that treaty parties should seek to resolve disputes about interpretation or application by agreement before submitting disputes to state-state arbitration.¹⁴²

Nevertheless, that various treaties contain such provisions does not mean that the treaty parties' interpretive interests are absolute. To understand how conflicts between treaty parties' interpretive interests and investors' reliance interest might arise, and might be resolved, it is helpful to distinguish between three issues: scope, reasonableness, and timing.

Where treaty party interpretations enlarge, or at least do not restrict, the scope of investor rights, investors are unlikely to challenge them before tribunals regardless of their timing or reasonableness, because the investor's reliance interest and the treaty parties' interpretive interest do not really conflict. However, where treaty parties seek to restrict the scope of investor rights through subsequent agreements or practices, such interpretations are likely to be contested, leading to an interpretive dialogue between tribunals and treaty parties. There seems to be little basis for the claim that interpretations may only widen, not narrow, investor rights.¹⁴³ Instead, the perceived relevance and persuasiveness of the treaty parties' interpretation will likely depend on a combination of its reasonableness and timing.

The reasonableness of an interpretation should not be likened to an on/off switch but to a spectrum ranging from the most reasonable, to the most unreasonable, with varying degrees in between.¹⁴⁴ Where the treaty parties' subsequent agreements and practices affirm the *most*

¹⁴⁰ See, e.g., NAFTA, *supra* note 3, Art. 1131(1); 2004 U.S. Model BIT, *supra* note 137, Art. 30(1); 2004 Canada Model BIT, *supra* note 137, Art. 40(1).

¹⁴¹ See, e.g., NAFTA, *supra* note 3, Art. 1128; 2004 U.S. Model BIT, *supra* note 137, Art. 28(2); 2004 Canada Model BIT, *supra* note 137, Art. 35.

¹⁴² See, e.g., 2004 U.S. Model BIT, *supra* note 137, Art. 37(1); United Kingdom, Agreement for the Promotion and Protection of Investments, Model Text 2005, Art. 9, *as amended* (2006), *reprinted in* CAMPBELL MCLACHLAN, LAURENCE SHORE, & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 379 (2007); India, Agreement for the Promotion and Protection of Investments, Art. 10 (2003), *available at* <http://ita.law.uvic.ca/>; France, Draft Agreement on the Reciprocal Promotion and Protection of Investments, Art. 10 (2006), *available at* <http://ita.law.uvic.ca/>; Germany, Treaty Concerning the Encouragement and Reciprocal Protection of Investments, Art. 9 (2008), *available at* <http://ita.law.uvic.ca/>; Sri Lanka, Agreement for the Promotion and Protection of Investments, Art. 9, *reprinted in* MCLACHLAN, SHORE, & WEINIGER, *supra*, at 427.

¹⁴³ If treaty parties are allowed to reduce the scope of investor rights through amendment and withdrawal, why not through interpretation? Some might argue that, by analogy with human rights treaties, restrictive interpretations are impermissible, as contrary to the object and purpose of promoting investment. But the normative nature of human rights and investment obligations differs, rendering this substantive analogy questionable, and strong arguments exist that the object and purpose of investment treaties is both broader and more balanced than simply promoting investment. See DOLZER & SCHREUER, *supra* note 11, at 32–33; DOUGLAS, INVESTMENT CLAIMS, *supra* note 19, at 84–85, para. 150; VAN HARTEN, *supra* note 11, at 136–41. Compare SGS Société Générale de Surveillance S.A. v. Philippines, ICSID No. ARB/02/6, Jurisdiction, para. 116 (Jan. 29, 2004) (it is legitimate to resolve uncertainties in favor of protecting investors because the object and purpose of investment treaties is to promote and protect investment), with Saluka Invs. B.V. v. Czech Republic, Partial Award, para. 300 (UNCITRAL Arb. Trib. Mar. 17, 2006), *available at* <http://ita.law.uvic.ca/> [hereinafter *Saluka* Partial Award] (a balanced approach to interpretation is required because protecting foreign investments is not the sole aim of investment treaties but, rather, is a necessary element alongside the overall aim of encouraging investment).

¹⁴⁴ 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. As a starting point, the reasonableness of an interpretation

reasonable interpretation, investment tribunals should readily accept them. The treaty parties' interpretation does not do any real work in this case because it is simply supporting what is already seen as the best interpretation. Investors might have hoped for a more favorable interpretation, but they cannot credibly complain of reasonably relying upon another, more likely interpretation.

In other cases, the treaty parties' subsequent agreements and practices will affirm one of a variety of *reasonable* interpretations. Since, as seen above, many investment treaty provisions contain vague standards, investors may find it difficult to make a credible claim to have relied upon one interpretation as more reasonable than another. The treaty parties' interpretation is likely to prevail because the investor was on notice that the treaty might be interpreted in various reasonable ways, including this one. A more difficult case, however, is where the treaty parties endorse *a reasonable* interpretation of the investment treaty, but not the *most reasonable* interpretation. Here, the relative strengths of the interpretations should be weighed against the timing of the treaty parties' interpretation, as discussed below.¹⁴⁵

The most difficult scenario is where the treaty parties endorse an interpretation that appears to be *unreasonable*, that is, an interpretation that falls outside the range of reasonable textual readings and is better characterized as a de facto amendment. Some argue that unreasonable interpretations must be treated as amendments and enacted de jure, not de facto.¹⁴⁶ Yet this strict position sits uncomfortably with the general acceptance of treaty parties' adopting reasonable and unreasonable interpretations and departing from the amendment processes by agreement.¹⁴⁷ In the absence of direct authority on whether a different rule should apply to investment treaties, it might be helpful to consider by analogy the power of treaty parties to revoke and modify investment treaty provisions and rights granted to third states.

Often lurking behind the argument that treaty parties cannot adopt de facto amendments via interpretations is the assumption that, once given, investor rights cannot be withdrawn or changed. This assumption is incorrect. Investor rights can be altered through various means, including interpretation, amendment, withdrawal, and termination.¹⁴⁸ As parties invest in the knowledge that their treaty protections may change, they cannot legitimately expect that their treaty rights will be absolute and irrevocable.

is usually judged according to the other interpretive factors set out in Articles 31–33 of the Vienna Convention. Importantly, this article assumes that there may be more than one reasonable interpretation of a provision.

¹⁴⁵ For the impact of timing, see text at notes 155–66 *infra*.

¹⁴⁶ This argument was made by some who criticized the FTC's Notes of Interpretation as an impermissible amendment. See, e.g., Alvarez & Park, *supra* note 10; Brower II, *Empire Strikes Back*, *supra* note 10; Brower II, *FTC Notes*, *supra* note 10; Park, *supra* note 10.

¹⁴⁷ See *Methanex* Final Award, *supra* note 74, pt. IV, ch. C, paras. 20–21 (“Methanex cites no authority for its argument that far-reaching changes in a treaty must be accomplished only by formal amendment rather than by some form of agreement between all of the parties. . . . Article 39 of the Vienna Convention on the Law of Treaties says simply that “[a] treaty may be amended by agreement between the parties”. No particular mode of amendment is required and many treaties provide for their amendment by agreement without requiring a re-ratification.”); text at notes 108–09 *supra*. Investment treaties do not contain any provisions that appear to give investors a procedural right to have their substantive rights amended according to a particular process only.

¹⁴⁸ As a general rule, a treaty may be terminated or one party may withdraw in conformity with the provisions of the treaty or at any time by consent of all of the treaty parties, and the treaty parties may amend the treaty, either according to the treaty's terms or simply by agreement. See Vienna Convention, *supra* note 2, Arts. 39, 54. Many investment treaties contain provisions on termination, withdrawal, duration, and amendment.

This treaty analysis differs from a similar analysis under domestic contract law, probably because of the importance of sovereign powers when dealing with states rather than private parties. Most contract laws recognize that *A* and *B* can create a contract that confers rights on *C* and, subject to a contrary contractual term, *A* and *B* may not revoke or modify *C*'s rights without *C*'s consent if *C* has accepted the right or, in some jurisdictions, relied upon it.¹⁴⁹ This commercial approach might underscore assumptions that treaty parties should not be able to revoke or modify investor rights after the investor has accepted them (for example, by bringing a claim) or relied upon them (for example, by investing).

Yet this contract analysis is not generally transplanted into treaty law. Whether a treaty right is granted to a third party and whether it is irrevocable are different questions, and each depends on the intention of the treaty parties. Consider, by analogy, treaties that create rights for third states: the treaty parties remain presumptively free to modify or revoke the third state's rights unless "it is established that the right was intended not to be revocable or subject to modification without the consent of the third State."¹⁵⁰ This account establishes the opposite presumption to that created by contract law, as the treaty parties presumptively retain the power to modify the third party's right without consent,¹⁵¹ a reflection of the deference given when dealing with sovereigns rather than private parties.¹⁵²

Investor rights are granted within the treaty's general regulatory framework, which includes the right of treaty parties to interpret, amend, and revoke those rights. As international law does not draw strict distinctions between informal interpretations and formal amendments,¹⁵³ the logical starting presumption should be that if treaty parties are entitled to modify and revoke investor rights through amendment and withdrawal, subject to some limitations, they should also be entitled to do so through interpretation, subject to certain constraints.¹⁵⁴ The question then becomes what limitations are appropriate.

¹⁴⁹ See, for the United States, 17A AM. JUR. 2D *Contracts* §§450–51 (2009) (acceptance and reliance); RESTATEMENT (SECOND) OF CONTRACTS §311 (1981) (same); for England, *Contracts (Rights of Third Parties) Act, 1999*, c. 31 (acceptance and reliance); for various civil law systems, COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, Art. 5.2.5, at 604 (Jan Kleinheisterkamp & Stefan Vogenauer eds., 2009) (discussing acceptance under these systems).

¹⁵⁰ Vienna Convention, *supra* note 2, Art. 37(2); see also 1966 ILC Report, *supra* note 92, at 230, para. 4 (this formulation was intended to balance two interests: that states not be "discouraged from creating rights in favour of third States . . . by the fear that they might be hampering their freedom of action in the future," and that those rights have "a measure of solidity and firmness"). On whether these or analogous rights might be subject to other limiting doctrines, such as estoppel, legitimate expectations, or good faith, see text at notes 160–66 *infra*.

¹⁵¹ See VILLIGER, *supra* note 102, at 495 ("[Article 37(2)] stipulates a presumption in favour of revocation or modification without consent of the third State."). This provision also establishes the opposite presumption to that created by treaties that confer obligations on third parties, where it is presumed that the third party must consent to changes unless the contrary intention is established. See Vienna Convention, *supra* note 2, Art. 37(1); CHRISTINE CHINKIN, *THIRD PARTIES IN INTERNATIONAL LAW* 34, 42 (1993).

¹⁵² This conclusion is consistent with domestic law: the law may grant rights to particular persons, but that does not prevent the legislature from changing the law subsequently. For example, a tax code may set out certain tax advantages for selling investment properties and a buyer may purchase an investment property in the hope of selling that property, with those tax advantages, at a later date. The buyer's reliance would not prevent the tax code from being changed subsequently to revoke those tax advantages, as the buyer acted with knowledge that the tax laws might change before his or her right was crystallized. But the analysis may be different if the right had already been crystallized, for example, by the buyer's having sold the property prior to the change in the law. See generally BEN JURATOWITCH, *RETROACTIVITY AND THE COMMON LAW* 1–13 (2008).

¹⁵³ See *supra* text at notes 108–09.

¹⁵⁴ *In re Jaworzina* (Polish-Czechoslovakian Frontier), Advisory Opinion, 1923 PCIJ (ser. B) No. 8, at 37 (Dec. 6) ("[I]t is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it."); SINCLAIR, *supra* note 99, at 136.

Tribunals can be expected to set a relatively high threshold for establishing the treaty parties' agreement on de facto amendments.¹⁵⁵ A strong argument can also be made for imposing timing constraints to create an appropriate balance between treaty parties' interpretive interests and investors' reliance interest. Amendment, withdrawal, and termination provisions generally have prospective effect only and are often subject to time lags to ensure some stability for investors.¹⁵⁶ These constraints recognize that treaty parties can modify their obligations, but notice is essential to minimize detrimental reliance. Imposing similar limits on unreasonable interpretations would help protect investor expectations, particularly in ongoing disputes.

Like reasonableness, timing is best understood on a spectrum, this one ranging from very early to very late. The critical points along this time frame relate to whether the treaty parties' interpretation was adopted before or after the investment was made, the alleged breach occurred, and the claim was filed. But why does timing matter and how does it interact with reasonableness?

Timing matters for at least three reasons. First, timing helps determine the applicable law. Absent a specific provision to the contrary, the framework of investment treaty law is not frozen at the point of investment. As a general rule, the substantive and procedural laws applicable in investment treaty arbitrations will be those from the time of the alleged breach and the filing of the claim, respectively.¹⁵⁷ Interpretations, however, unlike amendments and withdrawals, are assumed to have prospective and retrospective effect,¹⁵⁸ which creates a dilemma if unreasonable interpretations are adopted after an alleged breach or the claim's filing.

Second, timing may affect investors' reasonable expectations. If an interpretation is adopted by the treaty parties prior to the making of investments, for example, it should help to mold the reasonable expectations of investors. But if an interpretation is adopted at a late stage, investors may have detrimentally relied upon other, more reasonable interpretations. Here, the retrospective effect of the interpretation may again be problematic.

Third, timing is likely to affect whether the states are perceived to be acting primarily in their capacity as treaty parties or as respondents. When states adopt an interpretation early on, there is a good chance that they will be perceived as acting legitimately as treaty parties trying to create an appropriate regulatory balance between investment rights and sovereign prerogatives. When treaty parties enter into an interpretive agreement after an alleged breach or filing of a claim, there is a fair risk that the interpretation will be viewed skeptically, as an attempt to influence an ongoing case in which one is a respondent.

Timing is important but not determinative by itself. I propose that the persuasiveness of treaty party interpretations should be understood as a function of their timing and reasonableness. Broadly speaking, the earlier and more reasonable the interpretation, the more likely it

¹⁵⁵ In practice, this means that de facto amendments may be more likely to be accepted on the basis of a subsequent agreement of the parties than on subsequent practice alone. *Cf.* text at notes 106–09 *supra*.

¹⁵⁶ For example, many investment treaties impose a notice period on termination and withdrawal (often one year), provide that their substantive provisions continue beyond termination or withdrawal for a certain period after an investment was made (often ten to twenty years), and require amendments to take effect after a time lag (often ninety days). UNCTAD, *BILATERAL INVESTMENT TREATIES 1995–2006: TRENDS IN INVESTMENT RULEMAKING* 20–21 (2007).

¹⁵⁷ DOLZER & SCHREUER, *supra* note 11, at 38–45; DOUGLAS, *INVESTMENT CLAIMS*, *supra* note 19, at 328–43.

¹⁵⁸ *See supra* note 107.

is to be consistent with or have molded reasonable investor expectations; the later and less reasonable the interpretation, the more likely it is to have undermined reasonable investor expectations, resulting in detrimental reliance.

To capture this general dynamic, I am simplifying the timing and reasonableness spectra to reasonable/unreasonable and early/late, recognizing that views will vary about where exactly to locate these cutoff points. Taking these factors together, we are presented with four broad scenarios. In the easy scenario an interpretation is both reasonable and offered early, representing the most sympathetic case for the treaty parties' interpretive interest. In the hard scenario an interpretation appears unreasonable and is offered late, representing the most sympathetic case for the investor's reliance interest. In the middle scenarios, where the interpretation offered is either early but unreasonable or late but reasonable, sympathies are likely to be more divided and may depend on the exact trade-off between the two.

In terms of the middle scenarios, views will probably differ on how reasonable an interpretation must be, and how early it must be offered, for it to be persuasive. An unreasonable interpretation (i.e., a *de facto* amendment) might be persuasive if it was adopted at a time when it should have influenced investors' reasonable understandings of their rights, and would thus have reduced the possibility for detrimental reliance. This result is more likely if the interpretation precedes the investment or the alleged breach. Conversely, a reasonable interpretation may be persuasive, even if adopted after the alleged breach or filing of the claim, when it endorses one of any number of reasonable interpretations that an investor could have predicted as likely or possible.

As for the hard scenario, the question becomes whether any limitation should be placed on the power of treaty parties to adopt late and unreasonable interpretations. I suggest that, by analogy with amendments, late and unreasonable interpretations should be permitted but, as they change the legal framework, they should presumptively have prospective effect only. Where the treaty imposes other constraints, such as time lags on the application of amendments, there is a strong argument that similar constraints should also apply to *de facto* amendments. This approach would limit the application of unreasonable interpretations in current cases without preventing the use of earlier *or* more reasonable interpretations. It would also be consistent with international law's presumption against the retroactive application of treaties.¹⁵⁹ Time will tell if states and tribunals adopt this balance between the treaty parties' interest in interpretation and the investors' interest in stability.

The hardest scenario is where the treaty parties adopt an unreasonable interpretation after a claim has been filed and expressly make it retroactive. Here, the tension between their roles as treaty parties and respondents becomes stark. International law generally contains a presumption—not a prohibition—against retroactivity. Yet permitting unreasonable, retroactive interpretations would strike a clear blow to the credibility of investment treaty commitments and reduce the role of investment tribunals to mere agency, precisely in the circumstance in which tribunals have the strongest claim to trustee-like status in resolving specific investor-state

¹⁵⁹ See Vienna Convention, *supra* note 2, Art. 28; VILLIGER, *supra* note 102, at 384. This presumption would probably apply only where the amending interpretation serves to diminish rather than enhance the investor's rights. The presumption against retroactivity in many domestic laws is more easily overcome where the change in law is to the advantage of an individual. See JURATOWITCH, *supra* note 152, at 115–18, 195–97, 223–24. This is consistent with the approach taken to nonretroactivity of criminal laws in the human rights field. See, e.g., International Covenant on Civil and Political Rights, Art. 15(1), Dec. 16, 1966, 999 UNTS 171; ECHR, *supra* note 22, Art. 7(1).

disputes. Although views will differ on how best to resolve this clash, and it may depend on the precise facts and wording of the treaty, I expect that investment tribunals will develop and/or apply other principles, such as estoppel, legitimate expectations, or good faith more generally, to curb extreme actions that appear to be an abuse of treaty parties' interpretive rights.

Although treaty law affirms the presumptive right of treaty parties to modify third-state rights without consent, the literature contains some suggestion that this might be qualified where the third state has detrimentally relied upon these rights.¹⁶⁰ Estoppel is established as a general principle of international law in relations between states, though its exact contours remain uncertain, but it is less clear how it might apply to general relations between states and investors.¹⁶¹ One of the difficulties with applying estoppel in this context is that it requires clear and unambiguous conduct or representations leading to detrimental reliance.¹⁶² Treaty parties have not represented that investor rights will never be revoked, amended, or interpreted—indeed, as sovereigns instead of private parties, the treaty parties presumptively retain these powers—so that detrimental reliance based on these rights alone cannot establish an estoppel. Arguably, however, the treaty parties have represented that the law at the time of breach and filing should be the applicable law, which prevents them from then seeking to rely on later, unreasonable interpretations. Any more specific or narrowly focused representations should also be considered, as they may present a better basis for estoppel than a general change in the treaty parties' interpretations.

As for the doctrine of legitimate expectations, it is not an established general principle of international law, but it may be more appropriate than estoppel for mediating general relations between the governed and those who govern. Legitimate expectations form part of the substantive law of investment treaty law, and are usually invoked under the concept of “fair and equitable treatment,” but it is not clear whether a substantive treaty doctrine intended to protect against domestic acts by one treaty party can be used to protect against unreasonable interpretations of the treaty itself agreed by all treaty parties.¹⁶³ One problem with attempting to develop a general international law principle of legitimate expectations is that not all states recognize the doctrine and, even when they do, disputes exist over whether it protects procedural expectations only (given the general sovereign right of states to change their laws and policies) or whether it can also protect substantive expectations in narrow circumstances (such as when a specific representation is made to a narrow class).¹⁶⁴ Some investment tribunals have recognized the limited nature of this doctrine, while others have tended to overdraw it and related

¹⁶⁰ See OPPENHEIM, *supra* note 38, at 1263, para. 626.

¹⁶¹ See BROWNLIE, *supra* note 38, at 153, 643–44 (setting out a test for estoppel but also warning that “estoppel in municipal law is regarded with great caution, and that the ‘principle’ has no particular coherence in international law”); MALCOM N. SHAW, INTERNATIONAL LAW 102–03, 517–19 (6th ed. 2008). On estoppel in investment treaty law generally, see NEWCOMBE & PARADELL, *supra* note 11, at 526–28, §10.27.

¹⁶² See Temple of Preah Vihear, *supra* note 112, at 32–33; Pope & Talbot Inc. v. Canada, *supra* note 6, Interim Award, para. 111 (June 26, 2000), available at <http://ita.law.uvic.ca/> (citing D. W. Bowett, *Estoppel Before International Tribunals and Its Relation to Acquiescence*, 1957 BRIT. Y.B. INT'L L. 176, 202).

¹⁶³ On legitimate expectations in investment treaty law generally, see DOLZER & SCHREUER, *supra* note 11, at 133–40; NEWCOMBE & PARADELL, *supra* note 11, at 279–89, §6.26.

¹⁶⁴ See, e.g., PAUL CRAIG, EU ADMINISTRATIVE LAW 635–37 (16 Collected Courses of the Academy of European Law, bk. 1, 2006) (citing a European Court of Justice case to the effect that “[w]hilst the protection of legitimate expectations is one of the fundamental principles of the Community, economic operators cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretion will be maintained,” Case C-402/98, ATB v. Ministero per le Politiche Agricole, 2000 ECR I-5501); SØREN J. SCHØNBERG, LEGITIMATE EXPECTATIONS IN ADMINISTRATIVE LAW (2000).

doctrines, treating them as akin to freezing the regulatory framework at the time of investment.¹⁶⁵

The principle of good faith, which is generally recognized under international law, is closely related to other doctrines, including estoppel, legitimate expectations, and abuse of rights.¹⁶⁶ Views will differ on how such a general principle might be applied in these specific circumstances. Given the powers retained by states as treaty parties, it would seem an overreach to find that any late or self-interested interpretation was an abuse of the principle of good faith, though this doctrine might be helpful in extreme cases involving late and unreasonable interpretations.

However one ultimately comes down on the hardest scenario, the most important point to note is that it is the exception, not the rule. Lack of agreement about how to deal with the most exceptional case cannot be used to justify failure to examine subsequent agreements and practice in the vast majority of cases, especially given the shared nature of interpretive authority between treaty parties and tribunals.

III. ROAD MAP: INTERPRETIVE DIALOGUE IN INVESTMENT ARBITRATION

Thus far, this article has argued for a dialogue on interpreting investment treaties between treaty parties and tribunals that could be held, in part, under the framework on subsequent agreements and practice of the Vienna Convention. The nature of investment treaties and investor rights justifies treatment by investment tribunals of subsequent agreements and practice as highly persuasive evidence, rather than as inherently suspect or necessarily binding. To date, treaty parties have not made the most of asserting their interpretive power and investment tribunals have tended to overlook or undervalue state practice in interpretation. Treating such evidence as highly persuasive encourages investment tribunals to give serious consideration to the views and actions of treaty parties, while allowing them to play some gatekeeping functions in hard cases.

The previous section described a methodology for assessing interpretations of investment treaties. The next section outlines the types of subsequent agreements and practices most readily available in the investment context, and notes points of caution and limitation where required. The list is illustrative rather than exhaustive and some suggestions may be more practical, and some more controversial, than others. The list aims at providing a guide for states wishing to generate and plead, and tribunals seeking to find and evaluate, such practice.

Evidence of Subsequent Agreements and Practice

Subsequent agreements about interpretation. Other than the example of the NAFTA FTC and its interpretive statement, few treaty parties have reached explicit interpretive agreements

¹⁶⁵ Compare *Saluka* Partial Award, *supra* note 143, para. 305 (“No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged.”), with *Occidental Exploration & Prod. Co. v. Ecuador*, paras. 190–91 (London Ct. Int’l Arb. July 1, 2004), available at <http://ita.law.uvic.ca/>, and *Técnicas Medioambientales Tecmed, S.A. v. Mexico*, ICSID No. ARB(AF)/00/2, para. 154 (May 29, 2003), 43 ILM 133 (2004) [hereinafter *Tecmed* Award].

¹⁶⁶ See OPPENHEIM, *supra* note 38, at 38, para. 12 n.7.

and few tribunals have relied on such agreements.¹⁶⁷ This relative dearth is unfortunate, particularly considering the vagueness of many investment treaty provisions, as such agreements represent the most direct way for treaty parties to engage in an interpretive dialogue with tribunals.

According to some commentators, interpretive agreements are seldom available because investment treaties “rarely create a mechanism through which [treaty parties] may make binding subsequent interpretative decisions.”¹⁶⁸ But express mechanisms are not necessary, as public international law presumptively allows treaty parties to reach subsequent agreements on interpretation.¹⁶⁹ Although not required, formal mechanisms like the FTC should be encouraged because they put investors on clear notice about the nature of the interpretive powers retained by the treaty parties.¹⁷⁰ For example, formal mechanisms can provide that the treaty parties’ interpretive agreements are binding or simply persuasive.¹⁷¹

Some tribunals accept the possibility of interpretive agreements but significantly limit the ability to find them in practice by adopting overly stringent legal tests. In *Aguas del Tunari v. Bolivia* (Netherlands-Bolivia BIT), the tribunal refused to rely on common views expressed by Bolivia in the arbitration and the Netherlands government in parliamentary statements relating to the same arbitration because “[t]he coincidence of several statements does not make

¹⁶⁷ Fauchald, *supra* note 1, at 333. On attempts to reach interpretive agreements under other treaties, see *Nat’l Grid PLC v. Argentina*, Jurisdiction, para. 85 (UNCITRAL June 20, 2006), available at <http://ita.law.uvic.ca/> (noting that, “after the decision on jurisdiction in *Siemens* [A.G. v. Argentina, ICSID No. ARB/02/8, Jurisdiction (Aug. 3, 2004), 44 ILM 138 (2005)], the Argentine Republic and Panama exchanged diplomatic notes with an ‘interpretative declaration’ of the [most-favored-nation] clause in their 1996 investment treaty to the effect that, the MFN clause does not extend to dispute resolution clauses, and that this has always been their intention”); William W. Burke-White, *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, in BACKLASH, *supra* note 59, at 407, 431 (“senior officials in the Argentine government have indicated a desire to reach an agreement with the U.S. publicly clarifying the self-judging nature” of a particular clause in the U.S.-Argentine BIT (citing a statement by Osvaldo Guglielmino, then procurador del tesoro de la nación argentina, American Univ. Washington College of Law, Oct. 24, 2007)).

¹⁶⁸ See, e.g., McLachlan, *supra* note 53, at 372.

¹⁶⁹ See text at notes 93–94 *supra*.

¹⁷⁰ Despite the initial furor over the FTC’s Notes of Interpretation, most NAFTA tribunals have now accepted these interpretive directions, partly because NAFTA expressly empowered the FTC to issue binding interpretations, which put investors on notice of this interpretive power. See, e.g., *Methanex* Final Award, *supra* note 74, pt. II, ch. B, paras. 11–25, & pt. IV, ch. C, paras. 9–27; *Loewen*, *supra* note 23, paras. 125–29; *ADF Group*, *supra* note 8, paras. 175–86; *Mondev Int’l Ltd. v. United States*, ICSID No. ARB(AF)/99/2, paras. 99–125 (NAFTA Ch. 11 Arb. Trib. Oct. 11, 2002), 42 ILM 85 (2003). It could be argued that including such a formal mechanism operates to exclude recourse to informal agreements, but this argument must be assessed in the context of the particular treaty.

¹⁷¹ On bindingness, see, for example, note 137 *supra*. On persuasiveness, see, for example, *Netherlands-Czech Republic BIT*, Art. 9, Apr. 24, 1991, available at http://www.uncitad.org/sections/dite/ia/docs/bits/czech_netherlands.pdf (“Either Contracting Party may propose the other Party to consult on any matter concerning the interpretation or application of the Agreement. The other Party shall accord sympathetic consideration to and shall afford adequate opportunity for such consultation.”). In *CME v. Czech Republic*, the latter called for consultations with the Netherlands after the partial award was issued because of concern over certain interpretations that it believed were inconsistent with the treaty. As a result of these meetings, the two states reached “common positions” on three issues, which they recorded in Agreed Minutes. The tribunal rightly rejected the Czech Republic’s argument that these Agreed Minutes were binding on the tribunal, but it is questionable whether the tribunal gave due consideration to these agreed positions in its final award. *CME Czech Republic B.V. v. Czech Republic*, Final Award, paras. 87–93, 198, 216–26, 437, 504 (UNCITRAL Mar. 14, 2003), available at <http://ita.law.uvic.ca/>.

them a joint statement” and “there was no intent that these statements be regarded as an agreement.”¹⁷² The intention of the treaty parties is an important factual question, but joint statements and actions are not required.¹⁷³

Some object to the use of interpretive agreements because they “may reduce the transparency of the treaties, in the sense that investors cannot trust that the treaty constitutes the final regulatory framework.”¹⁷⁴ Yet since investment treaties create broad standards, they must be interpreted before they can be applied, and tribunals and treaty parties share this interpretive power. Far from undermining the regulatory framework, the possibility of interpretive agreements forms part of the framework against which investor rights are granted. Where a range of plausible interpretations exists, subsequent agreements can also help to clarify treaty obligations, and thus increase transparency.

Others object that “a mechanism whereby a party to a dispute is able to influence the outcome of judicial proceedings, by issuing an official interpretation to the detriment of the other party, is incompatible with the principles of a fair procedure and is hence undesirable.”¹⁷⁵ But a respondent state cannot issue a subsequent agreement on interpretation alone. If the interpretation is reasonable, investors are unlikely to be able to prove detrimental reliance in ongoing cases. If it is unreasonable, tribunals might be inclined to limit its application to prospective situations, which would help to protect investor expectations in current disputes.

Subsequent practice about interpretation. In addition to express agreements, treaty parties may evidence their agreement on interpretation through a variety of practices.

Respondent pleadings represent the most obvious (and controversial) form of subsequent practice. Pleadings by one treaty party alone cannot constitute evidence of an agreement, but where a respondent state makes general submissions about treaty interpretation and these are supported by the other treaty parties, they may evidence agreement.¹⁷⁶

Some tribunals and commentators have refused to rely upon common respondent pleadings, without giving any justification. For example, the tribunal in *Gas Natural SDG v. Argentina* dismissed the possibility in a footnote, simply stating: “We do not believe . . . that an argument made by a party in the context of an arbitration reflects practice establishing agreement between the parties to a treaty”¹⁷⁷

Others dismiss such pleadings on the basis of unconvincing arguments. For example, some contend that “[u]nilateral assertions” about interpretation by respondent states have “limited

¹⁷² *Aguas del Tunari v. Bolivia*, Respondent’s Objections to Jurisdiction, ICSID No. ARB/02/3, para. 251 (Oct. 21, 2005), 20 ICSID REV. 450 (2005). The tribunal went on to consider whether these statements amounted to subsequent practice evidencing an agreement. *Id.*

¹⁷³ *Methanex* Final Award, *supra* note 74, pt. II, ch. B, para. 20 (“From the ICJ’s approach in the *Kasikili/Sedudu Island* case, it appears that no particular formality is required for there to be an ‘agreement’ under Article 31(3)(a) of the Vienna Convention.”).

¹⁷⁴ See, e.g., Fauchald, *supra* note 1, at 332.

¹⁷⁵ DOLZER & SCHREUER, *supra* note 11, at 35. This concern was also expressed by the *Pope & Talbot* tribunal, see *supra* notes 6–7, and in the expert opinion of Robert Jennings of September 6, 2001, discussed in *Methanex* Final Award, *supra* note 74, pt. IV, ch. C, para. 5.

¹⁷⁶ It is open to debate whether consideration of pleadings should be limited to pleadings by other treaty parties on the same treaty or extend to include pleadings by treaty parties relating to identical or similar provisions in other treaties. If the latter approach were adopted, one would need to be careful to consider differences in contexts that might limit the usefulness of such pleadings, in spite of the similarity of the provisions.

¹⁷⁷ *Gas Natural SDG S.A. v. Argentina*, ICSID No. ARB/03/10, Jurisdiction, para. 47 n.12 (June 17, 2005), available at <http://www.asil.org/pdfs/GasNat.v.Argentina.pdf>.

value” because they are “likely to be perceived as self-serving and as determined by the desire to influence the tribunal’s decision in favour of the state offering the interpretation.”¹⁷⁸ Yet pleadings made by all treaty parties in different cases are not truly “unilateral” and dismissing such evidence out of hand fails to recognize respondents’ dual roles.

Another example is the refusal to consider home state pleadings on the basis that it would reintroduce diplomatic protection by the back door:

[W]hat the State of nationality of the investor might argue in a given case to which it is a party [and to which the specific investor is not a party] cannot be held against the rights of the [specific] investor in a separate case to which the [specific] investor is a party. This is precisely the merit of the ICSID Convention in that it overcame the deficiencies of diplomatic protection where the investor was subject to whatever political or legal determination the State of nationality would make in respect of its claim.¹⁷⁹

This criticism is misconceived: even though investors’ claims no longer rise and fall with their home states’ interests, as they did under the diplomatic protection model, that does not mean that pleadings by home states in other cases cannot provide persuasive evidence of agreed treaty interpretations.¹⁸⁰

While these perfunctory rejections might be unconvincing, there are good reasons for treating common pleadings of respondent states with caution. When states submit pleadings, they are wearing their respondent hats more clearly than at any other time. The legitimate concern arises that they might be adopting expedient interpretations to avoid liability in particular cases rather than considered interpretations that they would wish to have general application.¹⁸¹ Nevertheless, some states clearly recognize the importance of adopting interpretations that they are content to stand behind in other contexts, which leads them to take actions such as requiring pleadings to be approved by numerous government departments before filing.¹⁸²

In addition, that pleadings are self-interested and might be motivated by the particular case would not be enough to render them irrelevant, as similar pleadings¹⁸³ and

¹⁷⁸ DOLZER & SCHREUER, *supra* note 11, at 34.

¹⁷⁹ *Enron Corp. v. Argentina*, ICSID No. ARB/01/3, Jurisdiction, para. 48 (Jan. 14, 2004), available at <http://ita.law.uvic.ca/> [hereinafter *Enron* Jurisdiction]; see also *id.*, Jurisdiction (Ancillary Claim), para. 37 (Aug. 2, 2004) [hereinafter *Enron* Ancillary Claim].

¹⁸⁰ See *supra* note 25.

¹⁸¹ *Brower II*, *supra* note 31, at 74–82.

¹⁸² For a discussion of the U.S. approach to these issues, see Barton Legum, *Representing States—A US Perspective*, 6 *ARB. & ADR (Int’l B. Ass’n Newsletter)*, June 2001, at 46, 47 (“Government counsel . . . needs not only to identify the winning argument, but also to ensure, through detailed discussions with his or her colleagues in other interested agencies, that that argument properly balances the interests of the US Government. Our arguments must achieve the right result not only in the case at hand but also in other, hypothetical cases that might arise in the future.”); Barton Legum, *The Difficulties of Conciliation in Investment Treaty Cases: A Comment on Professor Jack C. Coe’s “Toward a Complementary Use of Conciliation in Investor-State Disputes: A Preliminary Sketch,”* MEALEY’S INT’L ARB. REP., Apr. 2006, at 23 n.2 (in investment disputes, decisions by the U.S. government are made by an interagency group including representatives from the Departments of State, Commerce, Justice, the Interior, and the Treasury; the U.S. Trade Representative; and the state, local, or federal agency whose acts are at issue).

¹⁸³ Self-interested pleadings are considered relevant evidence for interpretation in other contexts. See, e.g., International Law Association, Committee on the Formation of Customary (General) International Law, *Final Report* 14 (2000), available at <http://www.ila-hq.org/> (state practice includes “pleadings before international tribunals”); BROWNIE, *supra* note 38, at 24 (“Pleadings before the International Court contain valuable collations of material and, at the least, have value as comprehensive statements of the opinions of particular states on legal questions.”); 1 INTERNATIONAL COMMITTEE OF THE RED CROSS, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* at xxxii (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) (defining state practice to include “pleadings

statements¹⁸⁴ are accepted as relevant state practice in other contexts. The weight to be given to pleadings will depend on their nature and context. Pleadings are likely to have the most effect when they clearly set out the state's general interpretive views and are supported by, or at least do not conflict with, other subsequent practice.¹⁸⁵

Interventions by nondisputing treaty parties form another obvious kind of subsequent practice. Tribunals and commentators generally appear more comfortable relying on interventions than respondent pleadings, probably because intervening states are not attempting to avoid liability in that case and are more likely to limit their observations to general interpretive points.¹⁸⁶ Where interventions by all of the other treaty parties support interpretations by the respondent state, this subsequent practice constitutes good evidence of an agreement on interpretation and thus should be given considerable weight.¹⁸⁷

Two objections are raised about relying on interventions, though neither is persuasive. First, interventions may increase the likelihood that home states will exercise diplomatic protection. When the investment or institutional treaty limits the right of diplomatic protection,¹⁸⁸ home

before international tribunals"). For example, the ICRC study places weight on state pleadings in *Legality of the Threat or Use of Nuclear Weapons*, despite the clear self-interest of both nuclear and non-nuclear states. *Id.* at 148, 152, 243–49, 252–53, 258. Some states have argued for the same approach to be taken to pleadings in the investment context. See, e.g., Sean D. Murphy, Contemporary Practice of the United States, 95 AJIL 887–89 (2001) (discussing this argument by the United States in *Methanex* and *Pope & Talbot*); *Enron* Ancillary Claim, *supra* note 179, para. 34 (Argentina's argument). But see *Empresas Lucchetti, S.A.*, *supra* note 18, Annulment, Dissenting Opinion of Sir Franklin Berman, para. 9 (Aug. 13, 2007) (discussing the relevance of pleadings).

¹⁸⁴ Self-interested statements routinely form the basis of customary international law and customary interpretations of treaty provisions. The Hull rule and *Caroline* test are examples par excellence of self-interested statements made in connection with a particular dispute that have been treated as relevant evidence of state practice. The Hull rule, requiring compensation for expropriation to be "full, prompt and adequate," was named after U.S. Secretary of State Cordell Hull, who set out this position in correspondence with the Mexican government after Mexico nationalized U.S. oil companies in 1938. See VAN HARTEN, *supra* note 11, at 91 n.120. The *Caroline* test, requiring that the "necessity of . . . self-defence [be] instant, overwhelming, and leaving no choice of means, and no moment for deliberation," was formulated in 1841 after the British destroyed the steamboat SS *Caroline*. Letter from Daniel Webster, U.S. secretary of state, to Henry Fox, British minister in Washington (Apr. 24, 1841), quoted in 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 412 (1906).

¹⁸⁵ Whether the state's general views were being set out could be determined, for example, by looking at how the pleadings are formulated or by the issuance by a state of a statement that its pleadings reflect its general interpretive views (which might give tribunals more reason to take notice of interpretations proffered and states greater pause in making opportunistic arguments). For example, in *Sempra Energy International v. Argentina*, the tribunal noted that "Counsel representing the State in arbitration proceedings have the duty to put forward all the arguments they deem appropriate to defend their position, but a tribunal could not presume that each of those arguments constitutes the expression of a unilateral act that obligates the State" in the absence of express intention to do so. *Sempra Energy Int'l*, *supra* note 67, Objections to Jurisdiction, para. 146 (May 11, 2005) [hereinafter *Sempra* Jurisdiction].

When pleadings are supported by other evidence of the treaty parties' views, such as interventions and model BITs, they should be given greater weight than when they are not supported by, or conflict with, other practice. For example, in *Enron v. Argentina*, the tribunal stated that a relevant "decision of the United States Supreme Court should probably have more weight for the purpose of the United States' views on indirect ownership than that expressed in arbitrations by counsel for that government." *Enron* Ancillary Claim, *supra* note 179, para. 39 (citing *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003)).

¹⁸⁶ Fauchald, *supra* note 1, at 348.

¹⁸⁷ Some tribunals afford interventions significant weight, such as the *ADF v. United States* tribunal, which noted that the respondent state's interpretation had been accepted by the other NAFTA treaty parties during interventions in that and other cases. See *ADF Group*, *supra* note 8, para. 179. Others have given interventions little deference, such as the *Pope & Talbot* tribunal, which noted the unanimous agreement of the treaty parties on a matter of interpretation, before rejecting the interpretation without any discussion of the weight to be given to these submissions. *Pope & Talbot Inc. v. Canada*, *supra* note 6, Merits of Phase 2, para. 79 (Apr. 10, 2001), available at <http://ita.law.uvic.ca/>.

¹⁸⁸ See, e.g., ICSID Convention, *supra* note 16, Art. 27(1).

states should not seek to advance their investors' claims directly through interventions, but they should have an opportunity to express general views on interpretation, even if doing so might indirectly affect their investors' claims. This approach conforms with treaties like NAFTA that permit interventions by nondisputing states on questions of interpretation.¹⁸⁹

Second, some express concern that intervening states might support restrictive interpretations of investor rights because of their interest as actual or potential respondents in other cases.¹⁹⁰ Treaty parties, however, must weigh their competing interests as home states desiring protection for their nationals and potential respondents wishing to avoid liability at all stages of engagement, from negotiating the treaty to considering whether to amend or terminate it. This balance is not unique to interpretation. Nor do states appear solely concerned about preventing future liability; if they were, most would simply withdraw from their investment treaties.

There are good precedents for formal intervention by nondisputing parties in investor-state disputes on matters of interpretation. Although some investment treaties expressly provide for such interventions,¹⁹¹ the right should arguably be generally implied. In one case, *Aguas del Tunari*, the tribunal requested documentary bases for the Dutch government's statements before parliament concerning jurisdiction under the Netherlands-Bolivia BIT.¹⁹² In another, *SGS Société Générale de Surveillance v. Pakistan* (Switzerland-Pakistan BIT),¹⁹³ Switzerland complained to the ICSID Secretariat that the tribunal had failed to seek its interpretive views before reaching a controversial interpretation of the BIT umbrella clause:

[T]he Swiss authorities are wondering why the Tribunal has not found it necessary to enquire about their view on the meaning of Article 11 [the umbrella clause] in spite of the fact that the Tribunal attributed considerable importance to the intent of the Contracting Parties in drafting this Article and indeed put this question to one of the Contracting Parties (Pakistan). . . . [T]he Swiss authorities are alarmed about the very narrow interpretation given to the meaning of Article 11 by the Tribunal, which not only runs counter to the intention of Switzerland when concluding the Treaty but is quite evidently neither supported by the meaning of similar articles in BITs concluded by other countries nor by academic comments on such provisions.¹⁹⁴

Subsequent practice is not limited to pleadings or interventions in investment disputes but can include other public statements by the treaty parties. Such statements have the advantage

¹⁸⁹ NAFTA, *supra* note 3, Art. 1128.

¹⁹⁰ See, e.g., Schreuer & Weiniger, *supra* note 46, at 1201.

¹⁹¹ See, e.g., NAFTA, *supra* note 3, Art. 1128.

¹⁹² *Aguas del Tunari*, *supra* note 172, paras. 47, 249–63 (relying on ICSID Rule 34, available at ICSID Web site, *supra* note 8). Conscious of the prohibition in Article 27 of the ICSID Convention against provision of diplomatic protection by the home state, the tribunal emphasized that it did not “seek the view of the Netherlands as to the Tribunal’s jurisdiction” but, rather, sought “only to secure the comments of the Netherlands as to specific documentary bases” for its responses in parliament, reminding the Netherlands that it was interested in “interpretative positions of general application rather than ones related to a specific case.” *Id.*, para. 258.

¹⁹³ *SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID No. ARB/01/13, Jurisdiction (Aug. 6, 2003), 42 ILM 1290 (2003).

¹⁹⁴ Note on the Interpretation of Article 11 of the Bilateral Investment Treaty Between Switzerland and Pakistan, attached to the Letter of the Swiss Secretariat for Economic Affairs to the ICSID Deputy-Secretary General (Oct. 1, 2003), reprinted in MEALEY’S INT’L ARB. REP., Feb. 2004, §E-05-040227-IIIIX, quoted in TODD WEILER, INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 341 (2005); see also DOLZER & SCHREUER, *supra* note 11, at 34.

of being general in their application and not tied to the facts of specific disputes. A state could include a place for such statements on its Web site, perhaps where it lists its investment treaties, or appropriate statements could be recorded in the state's yearbook of international law.¹⁹⁵ Such statements could be facilitated in other ways; for example, ICSID could arrange for conferences where treaty parties could discuss these issues and make formal statements, which could then be posted on ICSID's Web site.

While the statements of one state alone will not create an agreement on interpretation, they may be persuasive when the other treaty parties agree with, or acquiesce in, these interpretations.¹⁹⁶ Some tribunals have refused to consider interpretations, even if shared by all of the treaty parties, where they evidence the treaty parties' current understanding of the treaty rather than their original understanding.¹⁹⁷ This approach is not justified, since states do not lose their treaty party status after a treaty is signed and, as the ICJ recently affirmed, "subsequent practice . . . can result in a departure from the original intent on the basis of a tacit agreement between the parties."¹⁹⁸ Tribunals seem generally more open to considering statements made by states during the negotiation of a treaty than after its adoption, probably because they believe that states act more like treaty parties in its formative stage but are more motivated by their actual or potential respondent status thereafter. This temporal division, however, misses the continuing duality of states as treaty parties and actual or potential disputants.

Clarifications and explanations in the treaty parties' model BITs are another example of subsequent practice from which an agreement on interpretation may be inferred. As a model BIT represents the "set of norms that the relevant state holds out to be both reasonable and acceptable as a legal basis for the protection of foreign investment in its own economy," these clarifications and explanations fairly evidence a state's general understanding of treaty terms and cannot be dismissed as opportunistic attempts to avoid liability in a particular case.¹⁹⁹ Evidence from one treaty party alone will not establish an agreement, but such evidence can be relevant in investor-state disputes on the basis of the terms of the model BIT, regardless of whether the respondent or a nondisputing treaty party formulated the model.²⁰⁰ In limited circumstances, an updated model BIT may also be relevant to the interpretation of investment treaties based on previous model BITs or ones with slightly different language.²⁰¹

¹⁹⁵ See, e.g., Statement by the Swiss Foreign Office, 1980 ANNUAIRE SUISSE DE DROIT INTERNATIONAL 178 (setting out the Swiss government's position on the relationship between fair and equitable treatment and the minimum standard of treatment under customary international law), cited in NEWCOMBE & PARADELL, *supra* note 11, at 268, §6.21 n.173.

¹⁹⁶ See *supra* text at notes 101–02.

¹⁹⁷ See, e.g., *Sempra Energy Int'l*, *supra* note 67, Award, paras. 385–86 (Sept. 28, 2007); *Enron*, *supra* note 179, Award, para. 337 (May 22, 2007).

¹⁹⁸ Dispute Regarding Navigational and Related Rights, *supra* note 109, para. 64.

¹⁹⁹ Douglas, *Hybrid Foundations*, *supra* note 19, at 159.

²⁰⁰ Consider a bilateral investment treaty based on the U.S. model BIT. If the United States were the home state, the respondent state could cite provisions of the U.S. model BIT with which it agrees, while the claimant could cite provisions evidencing disagreement between the treaty parties. If the United States were the host state, then it could cite its model BIT to demonstrate that its arguments are supported by its general interpretive approach, while the claimant could use these terms to show any opportunistic arguments being made in the case.

²⁰¹ A state may modify its model BIT to clarify its understanding of the original provision or to depart from a previous understanding. The same holds true for modifications between model BIT language and the actual investment treaty adopted. No hard-and-fast rule can be applied; the issue must be interpreted in the particular context. How a state characterizes its change provides useful evidence of its intention but cannot be determinative, or else it paves the way for disingenuous characterizations.

The influence of model BITs in shaping investment treaty jurisprudence will be enhanced if the author state takes a proactive approach to updating and explaining its model, including by adopting revisions to endorse or reject important developments in case law. The United States, for example, besides arguing for certain interpretations before tribunals as a respondent or an intervener, modifies its model BIT to confirm or reject specific jurisprudence, which helps to crystallize certain de facto precedents and stall or prevent the formation of others.²⁰² Although several investment tribunals have referred to the 2004 U.S. model BIT as evidence supporting their interpretations,²⁰³ few have analyzed it under Article 31(3)(b) of the Vienna Convention or referred to other states' model BITs.²⁰⁴ These factors suggest that the full interpretive potential of this evidence is not being realized and that current practices might be overly reliant on U.S. views.

Internal practices of treaty parties can also serve as an example of subsequent practice that might evidence an agreement on interpretation. Campbell McLachlan suggests that "the hybrid character of investment treaties, which gives the prime role in enforcement to private investors, leaves little room for subsequent inter-State practice in their application."²⁰⁵ But international law permits reference to intra- as well as interstate practice, as evidenced in the human rights context,²⁰⁶ and internal practices carry especial weight in dealing with treaties that concern treatment by a state of persons within its own territory.

As an agreement based on the internal practice of one treaty party alone cannot be found, care must be taken to find common internal practices or evidence that the other treaty parties support that of one treaty party. Some tribunals, albeit not many, have relied on the internal practices of one or more treaty parties, for example, in statements made at the time of ratification or in judicial decisions, to evidence their individual or collective understanding of certain treaty provisions.²⁰⁷

²⁰² For example, the 2004 U.S. Model BIT, *supra* note 137, incorporates some tests from tribunal awards with which it agrees (such as in the definition of investment) and modifies other provisions so as to reject approaches taken by certain tribunal awards (such as in revisions to the provisions on expropriation and the minimum standard of treatment following various NAFTA cases). *See generally* Alvarez, *supra* note 65; Gagné & Morin, *supra* note 84; Vandeveld, *supra* note 84; Schwebel, *supra* note 84. For recent discussions of whether and how to review the 2004 U.S. Model BIT, see REPORT OF THE ADVISORY COMMITTEE, *supra* note 83.

²⁰³ *See, e.g.*, Pan Am. Energy LLC v. Argentina, ICSID No. ARB/03/13, Preliminary Objections, para. 108 (July 27, 2006), available at <http://ita.law.uvic.ca/>; CMS Gas Transmission Co. v. Argentina, ICSID No. ARB/01/08, para. 368 (May 12, 2005), 44 ILM 1205 (2005) [hereinafter *CMS Gas Award*]; *Enron* Jurisdiction, *supra* note 179, para. 46; El Paso Energy Int'l Co. v. Argentina, ICSID No. ARB/03/15, Jurisdiction, para. 80 (Apr. 27, 2006), 21 ICSID REV. 541 (2006).

²⁰⁴ A recent study of ICSID awards found only one instance in which a tribunal considered an argument based on a model BIT other than that of the United States, and in that case the tribunal rejected the argument. *See* Fauchald, *supra* note 1, at 348 n.250, citing *Siemens*, *supra* note 167, para. 106 (considering but rejecting an argument concerning the German model BIT in interpreting the Argentina-Germany BIT).

²⁰⁵ McLachlan, *supra* note 53, at 372.

²⁰⁶ *See supra* text at notes 120–21.

²⁰⁷ *See, e.g.*, Bayview Irrigation Dist. No. 11 v. Mexico, ICSID No. ARB(AF)/05/1, para. 106 (NAFTA Ch. 11 Arb. Trib. June 19, 2007) (finding that an interpretation was supported by internal practice of each of the NAFTA parties, including the U.S. Statement of Administrative Action submitted to Congress in connection with NAFTA, the report on NAFTA prepared prior to the approval of that treaty by the Mexican Senate, and the Canadian Statement on Implementation of NAFTA). Numerous awards have referred to internal practice setting out one treaty party's understanding of certain provisions at the point of ratification, such as explanations given by the U.S. executive when seeking ratification by the U.S. Senate. *See, e.g.*, *CMS Gas Award*, *supra* note 203, paras. 362, 369; *Generation Ukraine Inc. v. Ukraine*, ICSID No. ARB/00/9, paras. 15.4–15.7 (Sept. 16, 2003), 44 ILM 404 (2005); *CMS Gas Transmission Co. v. Argentina*, *supra* note 203, Jurisdiction, para. 82 (July 17, 2003), 42 ILM 788

States cannot invoke provisions of their domestic law to justify a failure to comply with their treaty obligations.²⁰⁸ However, as in the human rights context, evidence of common domestic measures may suggest that the treaty parties did not understand the broadly worded investment protections to prohibit such conduct. Respondents often do not provide evidence of whether the contested measure represents a common internal approach of the treaty parties and, accordingly, tribunals have rarely looked at this issue. One exception is *ADF Group v. United States*, in which the claimant argued that U.S. measures requiring certain domestic content and performance were per se unfair and inequitable.²⁰⁹ In rejecting this submission, the tribunal noted the uncontested U.S. argument that similar measures were common to the NAFTA states, which demonstrated the treaty parties' understanding that such measures were not per se prohibited.²¹⁰

Using common internal practices of the treaty parties (or, in the case of customary standards, states as a whole) as a reference point may impose discipline and restraint, which in turn would encourage tribunals to adopt more realistic standards for assessing government conduct. Here, the approach circles back to some of the administrative and constitutional law critiques of investment treaty arbitration.²¹¹ When defining the requirements for certain standards, such as fair and equitable treatment, some tribunals have adopted idealized standards of perfect governmental conduct and regulation divorced from any real consideration of state practice.²¹² Scrutiny of the internal practices of the treaty parties or states as a whole would demonstrate that these standards are unrealistic and inappropriate for use as the threshold for review.²¹³ In

(2003); *Feldman v. Mexico*, ICSID No. ARB(AF)/99/1, para. 181 (NAFTA Ch. 11 Arb. Trib. Dec. 16, 2002), 42 ILM 625 (2003); *Mondev*, *supra* note 170, para. 111. Some tribunals have referred to domestic judicial decisions of treaty parties as relevant practice. See, e.g., *Enron Ancillary Claim*, *supra* note 179, paras. 38–39 (referring to a decision of the U.S. Supreme Court on direct and indirect ownership that it found inconsistent with the position taken by Argentina in that case and by the United States in other cases, which demonstrated a lack of agreement on interpretation. See *Dole Food Co.*, *supra* note 185).

²⁰⁸ Vienna Convention, *supra* note 2, Art. 27.

²⁰⁹ *ADF Group*, *supra* note 8.

²¹⁰ *Id.*, para. 188. The tribunal also noted that “domestic content and performance requirements in governmental procurement are by no means limited to the NAFTA Parties. To the contrary, they are to be found in the internal legal systems or in the administrative practice of many States.” *Id.*

²¹¹ See *supra* note 21.

²¹² See, e.g., *Metalclad Corp. v. Mexico*, ICSID No. ARB(AF)/97/1, para. 76 (NAFTA Ch. 11 Arb. Trib. Aug. 30, 2000), 40 ILM 36 (2001) (introducing a requirement for transparency and defining it as “the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters. Once the authorities of the central government of any Party . . . become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws.”); *Teemed Award*, *supra* note 165, para. 154 (finding that fair and equitable treatment, “in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.”).

²¹³ See Zachary Douglas, *Nothing if Not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex*, 22 ARB. INT'L 27, 28 (“The *Teemed* ‘standard’ is actually not a standard at all; it is rather a description of perfect public regulation in a perfect world, to which all states should aspire but very few (if any) will ever attain.”);

this way, common internal practices may prove instrumental in establishing the appropriate standards for assessing governmental conduct.²¹⁴

Limitations on the Analysis

Although subsequent agreements and practice are valuable interpretive means, their availability as evidence is limited. As shown by the practice cited above, the NAFTA states in general, and the United States in particular, have the best record of asserting their views on the meaning of investment treaty obligations and providing a check on what they perceive as overly broad interpretations adopted by arbitral tribunals. A short reflection on why this is so will point to some of the limits of relying on subsequent agreements and practice more generally.

NAFTA is unusual because all the parties have been respondents under the treaty, nationals of all have brought claims under the treaty, and claims have been brought between developed states. In the case of a bilateral investment treaty when only one state is ever sued, sufficient practice of both states relevant to the interpretation of the treaty is harder to find. Similarly, when one state has only defended cases, and the other has only had nationals bring claims, the treaty parties might lack enough commonality of interest to reach agreements on interpretation. Current developments, however, suggest that states will increasingly have interests as both home and host states, which might pave the way for more interpretive agreements in the future.²¹⁵

Several specific innovations under NAFTA make subsequent practice and agreements either more likely or more visible. These include provision for the FTC to make binding interpretations and for nondisputing parties to intervene in cases, which should stimulate subsequent practice and agreements. They also include provisions that enhance the availability of awards, pleadings, and interventions, which make such practice and agreements more transparent. Moreover, because all of the documents are in English, they are readily understood worldwide. Other states are now adopting some of these innovations in their model BITs, so that similar developments can be expected under other treaties.²¹⁶

The United States has been particularly influential because of steps it has taken to engage with the developing case law, such as by providing a detailed and updated model BIT and intervening in cases. Following the myriad of cases in sufficient detail to understand the issues and rulings and to intervene or amend one's model BIT in response to specific cases takes considerable time and money. This may be problematic for all states, but is particularly so for those that are not routinely involved in investment disputes (as a home or host state) or lack sufficient funds to monitor and respond to ongoing developments. Given budgetary and time constraints, arbitrators should be cautious about assuming that a state's failure to intervene, make statements, or amend its model BIT signals that it approves of the case law that has been developed.²¹⁷

Saluka Partial Award, *supra* note 143, para. 304 (criticizing some formulations of the fair and equitable test as imposing "inappropriate and unrealistic" obligations if "taken too literally").

²¹⁴ See VAN HARTEN, *supra* note 11, at 143–49; Kingsbury & Schill, *supra* note 21, at 6.

²¹⁵ See *supra* text at notes 80–84.

²¹⁶ See *supra* text at note 79.

²¹⁷ See *supra* text at notes 77–78.

IV. CONCLUSION

In *Sempra Energy International v. Argentina*, the tribunal stated that “interpretation is not the exclusive task of States. It is also the duty of tribunals called upon to settle a dispute, particularly when the question is to interpret the meaning of the terms used in a treaty.”²¹⁸ In fact, interpretation is not the exclusive task of either treaty parties or investment tribunals. By delegating power to investment tribunals to resolve investor-state disputes, treaty parties have impliedly delegated some interpretive authority to those tribunals. Yet the interpretive balance between treaty parties and tribunals created by investment treaties is upset if either body dictates to, or ignores, the other.

Means exist, and should be more frequently employed, to foster a constructive dialogue between investment tribunals and treaty parties about interpretation. To date, treaty parties have not generally coordinated or asserted their interpretive power, while investment tribunals have tended to overlook or undervalue state practice in interpretation. This article offers a theory of interpretive delegation and dialogue in the investment context, demonstrating how a constructive dialogue can occur, in part, through the use of the treaty parties’ subsequent agreements and practice. The advocated methodology aims at creating a better interpretive balance of power between treaty parties and tribunals so as to promote more legitimate and sustainable investment treaty interpretations.

In analyzing these issues, this article plays into broader debates that go well beyond the confines of investor-state arbitration. It requires us to consider the nature of interpretive power in treaties like human rights treaties that create rights for nonstate actors and delegate enforcement to international courts and tribunals. It asks us to examine the applicability of Vienna Convention interpretive rules in different areas of international law, questioning whether common principles of interpretation can and should exist. And, in drawing comparisons between different treaty regimes, it implicates international law debates about coherence and fragmentation, as well as raising questions about the appropriateness and limits of intradisciplinary analogies. As the scope and judicialization of international law increase, these debates seem likely to assume greater importance.

²¹⁸ *Sempra* Jurisdiction, *supra* note 185, para. 147.