Chapter Fifteen

Non-Disputing State Submissions in Investment Arbitration: Resurgence of Diplomatic Protection?

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I. Laying the Ground: Diplomatic Protection and Investment Arbitration

It is commonplace to state that in the field of the treatment of aliens, investment arbitration has replaced the traditional mechanism of diplomatic protection.1 The establishment of a dispute settlement method allowing for

1 See generally Ben Juratowitch, “The Relationship between Diplomatic Protection and Investment Treaties”, 23(1) ICSID Review – Foreign Investment Law Journal 10 (2008); Christoph Schreuer, “Investment Protection and International Relations”, in August Reinisch and Ursula Kriebaum eds., The Law of International Relations – Liber Amicorum Hanspeter Neuhold (Eleven International Publishing: The Hague, 2007), 345–358. In its Decision on Preliminary Objections in the Diallo case, the International Court of Justice (ICJ) noted that “in contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments, such as treaties for the promotion and protection of foreign investments […] and also by contracts between States and foreign investors. In that context, the role of diplomatic protection has somewhat faded, as in practice recourse is only made to it in rare cases where treaty regimes do not exist or have proved inoperative”. Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, I.C.J., 24 May 2007, General List No. 103, at § 88. For a recent definition of diplomatic protection, see Art. 1 of the International Law Commission (ILC) Draft Articles on Diplomatic Protection of 2006, which reads: “[...] diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.” See also Art. 17 of the Draft Articles on Diplomatic Protection (2006), which stipulates that “[t]he present draft articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments”. 
the investor’s direct recourse to an independent international forum, without
the need for the home State to espouse the claim of its national against the
host State, is usually commended for depoliticising the dispute and bringing
it within the realm of law rather than of politics and diplomacy.2

The Convention on the Settlement of Investment Disputes between States
and Nationals of Other States (‘ICSID Convention’) contains the following
provision addressing the issue of diplomatic protection:

No Contracting State shall give diplomatic protection, or bring an international
claim, in respect of a dispute which one of its nationals and another Contract-
ing State shall have consented to submit or shall have submitted to arbitration
under this Convention […]3

Hence, within the ICSID framework, the rule is that there can be no dupli-
cation of an international claim brought through investor-State arbitration
by the espousal of the same claim by the home State through diplomatic
protection.4 The relationship between investor-State arbitration and diplo-
matic protection is also addressed in a number of bilateral investment treaties

2 The travaux préparatoires of the ICSID Convention, for example, explain the exclusion of
diplomatic protection in terms of the removal of the dispute from the realm of politics
and diplomacy into the realm of law. See in this regard Christoph Schreuer, “Investment
Protection and International Relations”, in August Reinisch and Ursula Kriebaum eds., The
Law of International Relations – Liber Amicorum Hanspeter Neuhold, (The Hague: Eleven
International Publishing, 2007): 345–358, at 347, with references to the drafting history of
the Convention. The ILC, in its commentary to Art. 17 of its Draft Articles on Diplomatic
Protection remarked that “[t]he dispute settlement procedures provided for in BITs and
ICSID offer greater advantages to the foreign investor than the customary international
law system of diplomatic protection, as they give the investor direct access to international
arbitration, avoid the political uncertainty inherent in the discretionary nature of diplomatic
protection and dispense with the conditions for the exercise of diplomatic protection.”

3 1965 Convention on the Settlement of Investment Disputes Between States and Nation-
als of Other States, 575 U.N.T.S. 159, 4 I.L.M. 532 (1965) (‘ICSID Convention’). For an
analysis of Art. 27 ICSID Convention, see Christoph Schreuer et al., The ICSID Conven-
“The Convention on the Settlement of Investment Disputes Between States and Nationals
of Other States”, 136 RCADI 331 (1972): 371–380. For ICSID cases discussing the prohi-
bition in Art. 27, see in particular Banro American Resources, Inc. and Société Aurifère
du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo, Award (ICSID
Case No. ARB/98/7), 1 September 2000 (excerpts); Autopista Concesionada de Venezuela,
bank.org or at http://ita.law.uvic.ca.

4 An exception is provided for the event that the host State has failed to abide by and com-
ply with the award rendered in an investor-State dispute. See the final sentence of Art. 27
ICSID Convention. In this regard, see Enron Corporation Ponderosa Assets, L.P. v. Argentine
Republic, Annulment Proceedings, (ICSID Case No. ARB/01/3), Decision on the Argentine
and was also explicitly dealt with in the abandoned draft Multilateral Investment Agreement (MAI) elaborated within the Organisation for Economic Co-operation and Development (OECD).

This paper is concerned with a specific issue in the relationship between diplomatic protection and investment arbitration. It discusses whether there is a risk that diplomatic protection, though formally excluded from investment arbitration, may return through the back door under the guise of one of the manifestations of transparency, that is the non-disputing State’s participation in arbitral proceedings. It seeks to answer this question first by addressing the current trend towards transparency in investment arbitration (II), then by reviewing the present law and practice on submissions by non-disputing States (III) and by establishing the basis and the limits for the tribunal’s authority to allow non-disputing States’ submissions, including by suggesting a rule (IV), before reaching a conclusion (V).


See, e.g., Art. 8(4) (preferred version) of the UK Model BIT (2004), reprinted in Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law (Oxford University Press: USA, 2008), at 381, which contains a provision to the effect that “[n]either Contracting Party shall pursue through the diplomatic channel any dispute referred to the Centre unless: (a) the Secretary-General of the Centre, or a conciliation commission or an arbitral tribunal constituted by it, decides that the dispute is not within the jurisdiction of the Centre; or (b) the other Contracting Party shall fail to abide by or to comply with any award rendered by an arbitral tribunal.” A similar provision is also to be found in certain treaties entered into by Switzerland. See, e.g., Art. 9(4) of the Switzerland-Pakistan BIT (1995): “Aucune Partie Contractante ne poursuivra par la voie diplomatique un différend soumis au Centre, à moins que (a) le Secrétaire général du Centre, ou une commission de conciliation, ou un tribunal arbitral institué par le Centre ne décide que le différend ne relève pas de la compétence de ce dernier, ou que (b) l’autre Partie Contractante ne se conforme pas à la sentence rendue par un tribunal arbitral.” For a slightly different formulation, see Art. 9(4) of the Germany-Philippines BIT (1998): “Neither Contracting State shall pursue through diplomatic channels any matter referred to arbitration until the proceedings have terminated and a Contracting State has failed to abide by or to comply with the award rendered by the International Centre for Settlement of Investment Disputes.” Unless otherwise indicated, BITs referred to herein are available at http://www.unctadxi.org/templates/DocSearch____779.aspx (last accessed 3 January 2012).

See Art. C(1)(b) of the MAI Draft Consolidated Text, Doc. Daffe/MAI(98)7/REV1, which reads: “A Contracting Party may not initiate proceedings under this Article for a dispute which its investor has submitted, or consented to submit, to arbitration under Article D, unless the other Contracting Party has failed to abide by and comply with the award rendered in that dispute or those proceedings have terminated without resolution by an arbitration tribunal of the investor’s claim.” See also the commentary to this provision in MAI, “Commentary to the Consolidated Text”, Doc. Daffe/MAI(98)8/REV1, at 36. Documents related to the MAI are available at http://www1.oecd.org/daf/mai/index.htm (last accessed 3 January 2012).
II. Towards Transparency in Investment Arbitration

There is a drive towards transparency in investment arbitration nowadays. Transparency has many facets and the term is generally used as a heading covering different aspects of the conduct of arbitral proceedings. Transparency is usually understood to comprise the following main issues: (i) whether the existence of investment arbitration proceedings should be made public; (ii) whether the general public should be granted access to the record of the proceedings or parts of it (awards, orders, briefs, documentary evidence, witness statements and expert reports); (iii) whether arbitration hearings should be opened to the general public; (iv) and whether non-disputing parties should be allowed to file written submissions as *amici curiae* in the proceedings.

A few years ago, the ICSID Administrative Council amended the ICSID Arbitration Rules with effect from 10 April 2006.\(^7\) With regard to transparency, the most important innovation was ICSID Rule 37(2), which allows for the possibility that non-disputing parties file written submissions in a pending arbitration.\(^8\) The ICSID Rules are the ones most used in investor-State disputes.\(^9\) The other set of rules that often apply in investment arbitrations are the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.\(^10\) The UNCITRAL Arbitration Rules have

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\(^8\) ICSID Arbitration Rule 37(2) reads: “After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the “non-disputing party”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which: (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party submission would address a matter within the scope of the dispute; (c) the non-disputing party has a significant interest in the proceeding. The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission”.

\(^9\) According to data provided by the United Nations Conference on Trade and Development (UNCTAD), in line with past trends “the majority of cases accrue under ICSID (in total now 245 cases) and UNCITRAL (109). Other venues are used only marginally, with 19 cases at the SCC, six with the International Chamber of Commerce and four *ad hoc*. One further case was filed with the Cairo Regional Centre for International Commercial Arbitration. In six of the total of 390 cases, the applicable arbitration rules remain unknown”. See UNCTAD, *Latest Developments in Investor – State Dispute Settlement*, IIA Monitor No. 1, March 2011, at 2.

been in force since their adoption by the UN General Assembly in 1976\textsuperscript{11} and were revised in 2010.\textsuperscript{12} After the revision was completed, UNCITRAL entrusted its Working Group II on arbitration and conciliation with the task of preparing a “legal standard on the topic of transparency in treaty-based investor-State arbitration”.\textsuperscript{13} The works of the Working Group are currently ongoing.\textsuperscript{14}

In addition to the rules governing the conduct of arbitration proceedings, transparency provisions may also be contained in investment treaties. Traditionally, international investment agreements did not include transparency provisions.\textsuperscript{15} However, starting from the early 2000s, transparency began being addressed in certain treaties. Important examples are provided in the recent US\textsuperscript{16} and Canada\textsuperscript{17} Model BITs (the texts of which have been used in subsequent treaties entered into by those two countries).\textsuperscript{18}

III. Non-Disputing States in Investment Arbitration: Current Law and Practice

As was already noted, one of the aspects of transparency is the participation of non-parties in arbitration, often called non-disputing parties. One form of such participation is the one commonly referred to as \textit{amicus curiae}. The ‘friend of the court’ typically files a written submission on a topic of which it

\textsuperscript{11} On the UNCITRAL Rules, see David Caron, Lee Caplan & Matti Pellonpää, \textit{The UNCITRAL Arbitration Rules, A Commentary} (Oxford University Press: USA, 2006).


\textsuperscript{13} \textit{Ibid.}, chap. III, sect. E, § 190.


\textsuperscript{16} \textit{See US Model BIT} (2004), Arts. 28(3) and 29, reprinted in Rudolf Dolzer & Christoph Schreuer, \textit{Principles of International Investment Law}, at 409–412.


\textsuperscript{18} \textit{See US-Uruguay BIT} (2005), Arts. 28(3) and 29; US-Rwanda BIT (2008) (not yet entered into force), Arts. 28(3) and 29; Canada-Peru FIPA (2006), Arts. 38–39; Canada-Jordan FIPA (2009), Arts. 38–39.
has particular knowledge in order to assist the tribunal in its decision-making. An amicus can for instance be a non-governmental organisation (NGO) active in the area of human rights or the environment that has an interest in a dispute that gives rise to issues of human rights or the environment. 19

The amicus curiae can also be the so-called non-disputing State. In investment arbitrations conducted under an investment treaty, the respondent State is party to the arbitration as well as party to the treaty. The other State party to the treaty, which is the home State of the investor, is not party to the arbitration. Yet, the arbitration may well turn on the interpretation of the treaty. The State party to the treaty, which is at the same time party in the arbitration, will have its say about the interpretation while the other State party to the treaty, which is not party to the arbitration, will not be heard on the interpretation of the treaty. 20 Should that State be allowed to participate as an amicus curiae? Should it be admitted as of right or only within the discretion of the arbitral tribunal?

Several treaties allow for the participation of the non-disputing State. The best known example is the North American Free Trade Agreement (NAFTA), which includes an Article 1128 entitled ‘Participation by a Party’. This provision sets forth that “[o]n written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement”. Similar provisions are to be found in the Central American Free Trade Agreement (CAFTA), 21 in the US Model BIT (2004) 22 and in the Canadian Model BIT (2004), 23 as well is in certain recent BITs or Free Trade Agreements (FTAs) entered into by the US 24 and Canada. 25 Interestingly,

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21 See CAFTA-DR (2004), Art. 10.20.2.

22 See US Model BIT (2004), Art. 28(2).

23 See Canada Model FIPA (2004), Art. 35.


25 Canada-Chile FTA (1996), Art. G-29; Canada-Peru FTA (2008), Art. 832; Canada-Colombia FTA (2008), Art. 827(2); Canada-Jordan FIPA (2009); Canada-Panama FTA (2010), Art. 9.28(2).
a mechanism to allow the non-disputing State party to make a submission with the permission of the tribunal was already provided in the 1983 rules of the Iran-United States Claims Tribunal.26

There appear to be no reported cases brought under those recent US or Canadian BITs or FTAs that include the provisions just referred to, with the consequence that there has been no opportunity yet to test the willingness of the investor’s home State to file a non-disputing party submission in a purely bilateral context. By contrast, the use of 1128-submissions in the multilateral context of NAFTA has been the rule rather than the exception, both by the home State of the investor and by the third State (meaning the State that is neither the respondent in that particular arbitration nor the State of nationality of the claimant).27 With regard to the much younger jurisprudence of CAFTA (made up of only a handful of cases so far), States have indeed made use of the mechanism to file non-disputing party submissions, although so far this has been only the case with third States and not with the investor’s home State.28

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26 See Notes to Article 15 of the Tribunal Rules of Procedure, at § 5: “The arbitral tribunal may, having satisfied itself that the statement of one of the two Governments – or, under special circumstances, any other person – who is not an arbitrating party in a particular case is likely to assist the tribunal in carrying out its task, permit such Government or person to assist the tribunal by presenting oral or written statements.” The Tribunal Rules of Procedure are available at www.iusct.org (last accessed 3 January 2012).

27 In proceedings under NAFTA, there have been more than 50 submissions pursuant to Art. 1128, rather evenly distributed between the three contracting States. In certain cases, States have filed several 1128-submissions in the same arbitration. See, e.g., Pope & Talbot Inc. v. Canada, NAFTA/UNCITRAL, where the US filed eight 1128-submissions. In certain cases, the Tribunal itself has invited the non-disputing State parties to make submissions on particular issues. See, e.g., Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas Inc. v. United Mexican States (ICSID Case No. ARB(AF)/04/5), Concurring Opinion of Arthur W. Rovine, 21 November 2007, at § 20 (noting that “[u]nfortunately, neither Canada nor the United States filed submissions in the instant case, pursuant to Article 1128, notwithstanding invitations from the Tribunal to both governments to do so”). Many of the 1128-submissions have addressed the “fair and equitable treatment” standard under Art. 1105 NAFTA, in relation with the “international minimum standard of treatment” under customary international law, and the related question of the legal effect of the Free Trade Commission (FTC) Notes of Interpretation of 31 July 2001. Other issues covered by 1128-submissions have included, inter alia, the meaning of “in like circumstances” under Art. 1102 NAFTA or the scope of the provision on expropriation.

28 In three CAFTA arbitrations where the claimant was a US investor, the United States did not file any submission under Art. 10.20.2 CAFTA. See Railroad Development Corporation v. Republic of Guatemala, Second Decision on Objections to Jurisdiction (ICSID Case No. ARB/07/23) 18 May 2010, at § 18; Pac Rim Cayman LLC v. Republic of El Salvador, Decision on The Respondent’s Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5 (ICSID Case. No. ARB/09/12), 2 August 2010, at § 51; Commerce Group Corp.
For the purpose of this paper, only one type of non-disputing State submissions will be considered, namely those filed by the State of nationality of the investor. Views expressed by the State parties to the treaty other than the investor’s home State will not be considered, because they do not create the risk of a possible resurgence of diplomatic protection. As already stated, NAFTA provides thus far the only context in which such home State submissions have been filed.

A review of the publicly available record of cases under NAFTA shows that, in a total of 19 cases where the investor’s home State filed one or more submissions under Article 1128, in only two instances did the non-disputing State endorse the position of the claimant, i.e. of its own national against the foreign State. In the other 17 out of 19 cases, the national State of the investor sided with the latter’s opponent. Even in those two cases where the home State (in both instances, the United States) took a position supporting its own national, it did so only on certain issues, whereas on other debated questions of interpretation it sided with the respondent State.

Thus, in Marvin Feldman v. Mexico, on the question of standing under 1117(1) NAFTA, the United States expressed the view, which was favourable to the Claimant, that the treaty did not bar a claim by a natural person who was both a citizen of the United States and a permanent resident (but not a citizen) of Mexico. However, on the different issue of whether the three-
year limitation period for “making a claim” under Article 1117(2) NAFTA required a claimant to simply deliver a notice of intent or to actually submit the claim to arbitration, the United States favoured the latter interpretation, thus endorsing Mexico’s view.\textsuperscript{32}

Similarly, in \textit{Metalclad Corporation v. Mexico}, the United States, as the Claimant’s State of nationality, addressed several issues in its 1128-submission. On the first question whether the actions of local governments, including municipalities, were subject to the NAFTA standards, the United States submitted an affirmative response, thus siding with the Claimant.\textsuperscript{33} On the second issue addressed in its submission, i.e. the meaning of the term “tantamount to expropriation” in Article 1110 NAFTA, the United States opined that such phrase was not intended to create a new category of expropriation. While cautiously submitting that its conclusion was “consistent with the positions taken by both the disputants in the case”,\textsuperscript{34} the opinion in fact leaned more towards an interpretation disfavouring the Claimant.\textsuperscript{35}

These findings demonstrate that there is no risk of a resurgence of diplomatic protection in the NAFTA context, but rather the opposite phenomenon is more likely. The explanation may be that NAFTA is a limited environment in which each State is more likely to identify with the State rather than with the investor. This is presumably so because the non-disputing State is often itself a respondent and therefore seeks to preventively protect its own position. The aim of the three NAFTA States when making submissions as non-disputing parties appears to promote a balanced and long-term interpretation of the treaty, rather than to support their national investor in that specific case, or in the words of Meg Kinnear—at that time General Counsel in Canada’s Trade Law Division—in a letter addressed to the tribunal in \textit{Pope & Talbot Inc. v. Canada}:

\begin{quote}
The role of the NAFTA Parties as disputing parties, capital exporters, recipients of investments of other Parties and as sovereign states with a clear interest in the proper operation of the Agreement, transcends the merits of specific cases.\textsuperscript{36}
\end{quote}

\textsuperscript{32} Ibid., at §§ 13–18.

\textsuperscript{33} \textit{Metalclad Corporation v. United Mexican States}, Submission of the Government of the United States (ICSID Case No. ARB(AF)/97/1), 9 November 1999, at §§ 3–8.

\textsuperscript{34} Ibid., at § 9.

\textsuperscript{35} See ibid., at § 14, for the conclusion that “NAFTA claimants may not seek damages under Article 1110 for actions beyond those contemplated in the customary international law concepts of direct and indirect expropriation”.

Can these observations drawn from NAFTA practice be transposed to the BIT context? As already mentioned, there is no practice so far of non-disputing State submissions made pursuant to a provision in a BIT. There have, however, been a limited number of cases where, despite the absence of a provision in the treaty, the home State was asked or allowed to file a submission.

In *Aguas del Tunari v. Bolivia*, the arbitral tribunal wrote to the government of the Netherlands—the home State of the investor—with regard to statements made by the government before the Dutch parliament concerning jurisdiction under the Netherlands-Bolivia BIT. In its letter, the Tribunal was mindful not to trigger the Netherlands’ diplomatic protection and limited its request to seeking comments on “specific documentary bases” on which the government had relied to provide its response to the parliament:

> The Tribunal recognizes the obligation of the Netherlands under [Article 27 of] the ICSID Convention to not provide diplomatic protection to its nationals in the case of investment disputes covered by the Convention. In this sense, the Tribunal wishes to emphasize that it does not seek the view of the Netherlands as to the Tribunal’s jurisdiction in this matter, rather it seeks only to secure the comments of the Netherlands as to specific documentary bases for written responses which the Dutch government provided to parliamentary questions. [...] the Tribunal is also of the view that such questions must be specific and narrowly tailored, aimed at obtaining information supporting interpretative positions of general application rather than ones related to a specific case. It is the opinion of the Tribunal that it possesses the authority to seek this information under Rule 34 of the ICSID Arbitration Rules.

In the end, the Tribunal found the information thus obtained unhelpful and “made no use of this document in arriving at its decision”.

*CME v. Czech Republic* is an example of a somewhat different scenario. After the Tribunal had issued a partial award, the Czech Republic requested “consultations” with the Netherlands, as provided in the Netherlands-Czech Republic BIT, with a view to resolving certain issues of interpretation and application of the treaty arising from the Tribunal’s partial award. As a result of this procedure, the two contracting States issued “agreed minutes” containing a “common position” on the interpretation of the BIT. When the

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37 The Tribunal characterised its request as “the first inquiry of a non-disputing State party to a BIT” (*Aguas del Tunari v. Bolivia* Decision on Respondent’s Objections to Jurisdiction (ICSID Case No. ARB/02/3), 21 October 2005, at § 258).

38 *Ibid.*. The full text of the letter from the Tribunal to the Government of the Netherlands is reproduced as Appendix IV to the Decision on Respondent’s Objections to Jurisdiction.


40 Netherlands-Czech Republic BIT (1991), Art. 9.

41 *CME v. The Czech Republic*, Final Award, UNCITRAL, 14 March 2003, at §§ 87–93.
Tribunal rendered its final award, it took the “agreed minutes” into account as supporting its holdings. The arbitral proceedings were conducted under the UNCITRAL Rules. Thus, the prohibition of diplomatic protection in the ICSID Convention was not applicable, nor was diplomatic protection addressed in the BIT.

In *SGS v. Pakistan*, the non-disputing Swiss State, in a letter addressed to ICSID, voiced its disagreement about the Tribunal’s narrow interpretation of the umbrella clause contained in Article 11 of the Switzerland-Pakistan BIT. The Swiss authorities wondered “why the Tribunal has not found it necessary to enquire about their view on the meaning of Article 11 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)”. The letter was sent after the decision on jurisdiction had been rendered and thus had no influence on the outcome of the arbitration.

Similarly, the United States intervened before the annulment committee in *Siemens v. Argentina*. This instance is different from the examples discussed so far in that the dispute was brought under the Germany-Argentina BIT, and thus the United States were not a party to the treaty at issue. The United States felt nevertheless “compelled” to intervene in view of the possible “repercussions” for other cases involving US investors. The US submission addressed the interpretation of Articles 53 and 54 of the ICSID Convention, and was a response to Argentina’s suggestion that the United States shared its position on the interpretation of these articles. With regard to the *ad hoc*

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46 The US stated that “[w]hile the United States would not normally seek to make an unsolicited submission in an ICSID proceeding in which it is not a party, we feel compelled to do so in this case… [The interpretation of Articles 53 and 54 ICSID Convention] has repercussions for cases well beyond the present one, including a number of disputes by U.S. investors against Argentina”. *Ibid.*, at 1.
committee’s authority to accept such submission, the United States invoked the amended ICSID Rule 37(2) on *amicus curiae* briefs, and alternatively Article 44 ICSID Convention, which had been used as legal basis for accepting *amicus* submissions under prior ICSID practice. Interestingly, Argentina’s subsequent response, while disagreeing on the substance of the US interpretation of the relevant provisions of the ICSID Convention, did not take issue with the Tribunal’s authority to accept the US submission.

The most recent illustration of a home State submission is provided by *Eureko v. Slovak Republic*. In this UNCITRAL case, the Tribunal was confronted with the debated issue of the ‘intra-EU jurisdictional objection’, that is, the objection that the Tribunal lacked jurisdiction to hear a dispute between a European investor and a EU Member State, on the grounds that the underlying BIT was terminated (or the arbitration offer in the treaty had lapsed) as a result of the Respondent’s accession to the EU. The Tribunal wrote to the Netherlands’ Ministry of Economic Affairs inviting it to express a position on issues involving the Tribunal’s jurisdiction. The Dutch government provided observations on whether the BIT was in force and “legally valid” despite the Slovak Republic’s accession to the EU. In a subsequent letter to the Tribunal, the Dutch government attached a “[n]ote verbale” that it had received from the Slovak Ministry of Foreign Affairs bearing on the alleged termination of the BIT. In its award, the Tribunal acknowledged the input from the Netherlands as “helpful”, although it spelled out that it “has not found it necessary to rest any part of its decision upon the ostensible attitude of either Party to these arbitration proceedings—still less upon that of the Government of the Netherlands or of the European Commission—to the question of the status of the BIT or the existence, continuation or extent of the jurisdiction of the Tribunal.”

As is evident from this last quotation, the tribunal in *Eureko* also received observations from the European Commission, which filed an *amicus curiae* brief on the intra-EU BIT issue. *Eureko* is not the only example of such

47 Ibid.
51 Ibid., at §§ 155–163.
52 Ibid., at §§ 164–166.
53 Ibid., at § 217.
54 Ibid., at §§ 219 (emphasis added).
55 Ibid., at § 26, 30, 31, 33, 37, 41, 151–153, and esp. 175–211.
participation by the European Commission in investment arbitration proceedings. In three ICSID cases (AES v. Hungary, Electrabel v. Hungary, and Micula v. Romania), the European Commission filed an application as a non-disputing party invoking ICSID Rule 37(2), and the tribunals granted the Commission’s request.

IV. Basis and Limits of a Non-Disputing State’s Submission

The cases discussed above, in which tribunals were confronted with a home State submission in the absence of an explicit provision in the treaty à la Article 1128 NAFTA, raise several questions: What is the basis for the tribunal’s authority to accept such submissions? Should such submissions be admitted as a matter of right of the non-disputing State or only within the tribunal’s discretionary powers? And what should the scope of such submissions be? Answers to these questions are particularly needed when one considers that out of the almost 3,000 existing BITs, only a very small minority contain an express clause allowing non-disputing State submissions.

To answer these questions, a distinction must be drawn between investment treaty arbitrations initiated under the ICSID Convention and arbitrations initiated under different rules. ICSID Rule 37(2) speaks of a ‘person or entity’ filing a non-disputing party submission. The initial proposal for the amendment of Rule 37 contained clearer language by referring to a ‘person or State’. In spite of this difference in terms, the wording finally adopted

56 AES Summit Generation Limited and Aes-Tisza Erömü Kft v. Republic of Hungary, Award, (ICSID Case No. ARB/07/22) 23 September 2010, at §§ 3.18–3.22, and 8.2 (noting that “[t]he Tribunal also acknowledges the efforts made by the European Commission to explain its own position to the Tribunal and has duly considered the points developed in its amicus curiae brief in its deliberations”).
58 Ioan Micula, Viorel Micula, SC European Food SA and SC Starmill Srl, SC Multipack Srl v. Romania, (ICSID Case No. ARB/05/20) (merits phase pending). The EC submission was filed after the Decision on Jurisdiction of 24 September 2008 was rendered.
60 See the treaties quoted above in footnotes 21–25.
was not meant to rule out States\textsuperscript{62} and is broad enough to encompass non-disputing State submissions.\textsuperscript{63} A reading to the contrary pursuant to which a tribunal is entitled to accept a submission by an NGO, but not by a non-disputing State, would lead to awkward results.\textsuperscript{64}

A \textit{caveat} is, however, necessary. Among the factors that the arbitral tribunal must consider when deciding whether to allow a filing by a non-disputing party, Rule 37(2) mentions the fact that “the non-disputing party submission would assist the Tribunal in the determination of a \textit{factual} or legal issue related to the proceeding”.\textsuperscript{65} The reference to a submission on facts, rather than solely on points of law, raises some concerns. All provisions modelled around Article 1128 NAFTA allowing for a non-disputing State submission restrict such intervention to questions of interpretation of the treaty. If one reviews the practice under NAFTA, the standard \textit{incipit} of the vast majority of the 1128-submissions underscores that the non-disputing State “takes no

\textsuperscript{62} See also Aurélia Antonietti, “The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules”, 21 ICSID Review – Foreign Investment Law Journal 427 (2006), at 435 (noting that “[t]he legal nature of the “third party” allowed to file a written submission raised concerns since some commentators found the wording “person or State,” as first suggested in the Working Paper, too restrictive. It is now trusted that the wording “person or entity,” as adopted in the final text, answers those concerns. It follows that the non-disputing party can be a natural person, a juridical person, an unincorporated NGO or a State.”)


\textsuperscript{64} It may be added that the fact that an \textit{amicus curiae} may be a State, rather than an NGO, is not an unknown scenario in international adjudication. The rules of procedure and evidence of the International Criminal Tribunal for the former Yugoslavia, for example, contain a provision entitled ‘Amicus Curiae’, which allows the Chamber “to invite or grant leave to a State, organization or person to appear before it and make submissions on any issue specified by the Chamber” (Rule 74 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, available at www.icty.org (last accessed 3 January 2012) (emphasis added)). Further, within the WTO context, the Appellate Body in one instance asserted authority to accept an \textit{amicus curiae} brief from a WTO member State (Morocco). See Appellate Body Report, \textit{EC-Sardines}, WT/DS231/AB/R, 26 September 2002, at §§ 153–170, and 314 (noting, at § 164, that “[a]s we have already determined that we have the authority to receive an amicus curiae brief from a private individual or an organization, a fortiori we are entitled to accept such a brief from a WTO Member, provided there is no prohibition on doing so in the DSU”).

\textsuperscript{65} ICSID Arbitration Rule 37(2) (emphasis added).
position on how the interpretative position it offers... applies to the facts of the case".66

This raises the question “whether there is a broader scope for non-disputing parties (amicus) to participate in an arbitration than is offered to non-disputing NAFTA States under NAFTA Article 1128".67 Home State submissions do pose risks that NGO submissions do not raise. If the investor’s home State were allowed to file a submission beyond matters of interpretation of the treaty to which it is a party, and to address the facts in dispute, there would be a serious argument that Article 27 of the ICSID Convention is being breached. A home State submission defending a position on factual issues in aid of its own national would de facto equate, or at least come very close, to diplomatic protection.

In order to avoid this risk, a tribunal faced with a non-disputing State request should construe Rule 37(2) in light of Article 27 of the ICSID Convention, which is a mandatory treaty provision not susceptible to being derogated from by a rule of procedure.68 Thus, it may authorise a submission of a non-disputing State, provided the submission is restricted to questions of treaty interpretation. The nature of Article 27 of the ICSID Convention as a mandatory provision provides clear authority for the tribunal to adopt such a restriction. The tribunal’s discretion in the assessment of the principle and scope of amici requests under Rule 37(2) as well as the tribunal’s residual powers under Article 44 of the ICSID Convention reinforce this authority, if need be.

While this conclusion provides an affirmative answer to the question as to the authority for tribunals to accept submissions (and, if needed, to restrict their scope), it leaves unanswered the further question asked at the outset of this paragraph: In the absence of a provision in the investment treaty similar

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66 See Pope & Talbot Inc. v. Canada, Submission of the United States of America, UNCITRAL/ NAFTA, 7 April 2000 (emphasis added). Almost identical language is invariably found in other 1128-submissions.

67 Meg Kinnear, Transparency and Third-Party Participation in Investor-State Dispute Settlement, Paper presented at the Symposium Co-Organised by ICSID, OECD and UNCTAD entitled “Making the Most of International Investment Agreements: A Common Agenda”, (Paris: 12 December 2005), at 9. This concern was also raised by Mexico in its 1128-submission in the Methanex case, in which an investor-State tribunal was for the first time faced with an amicus curiae request by NGOs. Arguing that NAFTA did not allow such submissions, Mexico contended that “[i]f amicus curiae submissions were allowed, amici would have greater rights than the NAFTA Parties themselves, because of the limited scope of Article 1128 submissions.... such a result was clearly never intended by the NAFTA Parties”. See Methanex Corporation v. United States, Submission by Mexico, NAFTA/UNCITRAL, 10 November 2000, at §§ 4–7.

68 On the relationship between the ICSID Convention and the Arbitration Rules, see Christoph Schreuer et al., The ICSID Convention: A Commentary, at 682–683.
to Article 1128 NAFTA, should non-disputing State submissions as of right be admitted in ICSID proceedings or is the arbitral tribunal granted a margin of discretion to refuse the filing of such submissions? The wording of Rule 37(2) (“the Tribunal may allow a person or entity . . . [i]n determining whether to allow such a filing . . .”) indicates that the arbitral tribunal enjoys discretion to refuse a non-disputing State submission.

How should the tribunal exercise its discretion? One obvious answer is that it should refuse submissions beyond matters of treaty interpretation, which refers us back to the question just discussed about the scope of the non-disputing State’s interpretation. A further answer is that, as a rule, a tribunal should allow submissions from non-disputing States on treaty interpretation. Their value will be evident in most cases due to the fact that the home State may bring an unknown perspective on the interpretation of the treaty (including access to the travaux préparatoires which may not be otherwise available to the tribunal), thus avoiding one-sided interpretations limited to the respondent State’s contentions.

The same is not true when ICSID jurisdiction is based on a contract or on a domestic law as opposed to a treaty. The usefulness of a submission by the investor’s home State would then be largely reduced, if not entirely eliminated (unless the question of interpretation concerns the ICSID Convention itself). Here, the discretion of ICSID tribunals to refuse a home State’s submission would be broader.

Let us now turn to investment treaty arbitrations conducted under rules other than ICSID (UNCITRAL and SCC being the two most important ones in this context). The framework here appears somewhat different. First, unlike ICSID, those rules do not contain any express provision on amicus curiae briefs. So long as no such rule is incorporated, the authority to grant leave to a non-disputing State to file a submission will necessarily have to be found in the tribunal’s residual powers. Second, those rules are silent on the issue of diplomatic protection. This is not surprising considering that both
the UNCITRAL and the SCC Rules were elaborated for commercial arbitration and were only later used for investor-State disputes.

Given the lack of a provision equivalent to Article 27 ICSID Convention, the home State’s room for manoeuvre in attempting to espouse the claim of its national appears wider in these arbitrations than in ICSID proceedings. One way to avoid such an interference would be to insert a provision in the investment treaty containing the offer of consent to UNCITRAL or SCC arbitration. As already noted, there are a number of BITs which address diplomatic protection. Certain BITs, which provide only for consent to ICSID, simply restate or slightly rephrase the content of Article 27 ICSID Convention in the text of the treaty (which per se is not necessary). Other BITs, however, which provide for both ICSID and UNCITRAL arbitration, contain a more general provision prohibiting the two contracting States from giving diplomatic protection to their nationals. Under this last pattern, followed for example by a significant number of Italian BITs, the prohibition of

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74 See above at footnote 5.

75 For observations on the difference between the formulations used in such BIT provisions and the wording of Art. 27 ICSID Convention, see Ben Juratowitch, *The Relationship Between Diplomatic Protection and Investment Treaties*, 23(1) ICSID Review – Foreign Investment Law Journal 10 (2008), at 16–22; Christoph Schreuer et al., *The ICSID Convention: A Commentary*, at 426.

76 The following BITs entered into by Italy contain references to both ICSID and UNCITRAL arbitration, along with this (or similarly worded) clause: “Both Contracting Parties shall refrain from negotiating through diplomatic channels any matter relating to any arbitration procedure or judicial procedures that may have been instituted until these procedures have been concluded, and one of the Contracting Parties has failed to comply with the ruling of the Arbitration Tribunal or the judgment of the court of law within the terms prescribed by the ruling or the judgment, or any other terms that derive from international or internal law applicable to the case at issue.” See Italy-Turkey BIT (1995), Art. 8(4); Italy-Angola BIT (2002), Art. 9(4); Italy-Argentina BIT (1990), Art. 8(9); Italy-Bangladesh BIT (1990), Art. 9(3); Italy-Bolivia BIT (1990), Art. 9(3); Italy-Bosnia and Herzegovina BIT (2001), Art. 9(4); Italy-Democratic Republic of Congo BIT (2006), Art. 10(4)(b); Italy-Croatia BIT (1996), Art. 9(6); Italy-Egypt BIT (1989), Art. 9(3) (which was at issue in *Waguih Elie George Siag and Clarinda Vecchi v. Egypt*, Decision on Jurisdiction, (ICSID Case No. ARB/05/15), 11 April 2007, where the Tribunal noted (at § 198) that “[u]nder Article 9(3) of the BIT the avenue of diplomatic protection is specifically excluded while the arbitration is in progress”); Italy-Ethiopia BIT (1994), Art. 9(4); Italy-Hungary BIT, Art. 9(3); Italy-India BIT (1995), Art. 9(4); Italy-Kazakhstan BIT (1994), Art. 9(4); Italy-Lithuania BIT (1994), Art. 9(4); Italy-Libya BIT (2000), Art. 9(4); Italy-Mongolia BIT (1993), Art. 9(3); Italy-Morocco BIT (1990), Art. 8(3); Italy-Nicaragua BIT (2004), Art. 10(5); Italy-Peru BIT (1994), Art. 9(4); Italy-Tanzania BIT (2001), Art. 8(7); Italy-United Arab Emirates BIT (1995), Art. 9(3); Italy-Venezuela BIT (2001), Art. 8(9); Italy-Vietnam BIT (1990),
diplomatic protection would thus come into play whatever arbitration rules are chosen by the claimant.

This said, the overwhelming majority of BITs are silent on diplomatic protection. This raises the question whether the investor’s home State would be allowed to interfere with an ongoing investor-State arbitration by filing a non-disputing party submission which goes beyond treaty interpretation. This should not be the case. Even if an arbitration is conducted outside the framework of the ICSID Convention, there is no reason to allow for a broader scope of non-disputing party submissions beyond questions of interpretation of the treaty, simply because the applicable arbitration rules do not provide an express equivalent to Article 27 of the ICSID Convention. To allow the investor’s home State to run in aid of its national in an ongoing arbitration by pleading the facts in dispute would be contrary to the obligation to respect the investor-State arbitration dispute settlement framework which the State has undertaken when entering into the BIT. It would frustrate the object and purpose of the investor-State dispute settlement mechanism by introducing an ‘element’ of diplomatic protection which is alien to that.77 Or in the words of Judge Bennouna’s preliminary report on diplomatic protection:

> In consenting to arbitration, the parties to a dispute waive all other remedies. In this way, both the demand of the host State that local remedies be exhausted and the exercise of diplomatic protection by the State of nationality are put aside. In other words, where the right of the individual is recognized directly under international law (the bilateral agreements referred to above), and the individual himself can enforce this right at the international level, the “fiction” [on which the traditional idea of diplomatic protection rests] no longer has any reason for being.78

The investor-State dispute settlement mechanism involves a balance: the potential respondent State accepts to arbitrate with a private entity and as a trade-off it is relieved from the risk of being exposed to diplomatic protection

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77 See also Ben Juratowitch, “The Relationship between Diplomatic Protection and Investment Treaties”, 23(1) (2008) ICSID Review – Foreign Investment Law Journal 10, at 21–22 (expressing the view that “[e]ven where diplomatic protection is not explicitly excluded by a treaty, as a matter of practicality, one would still expect a State, in the exercise of its discretion, not to initiate diplomatic protection in a case in which a treaty remedy was available to the investor. One might further expect that a State would be estopped under customary international law from initiating a diplomatic protection action concerning rights covered by an investment treaty to which it was party where the relevant investor and the host State had both consented to arbitration”).

by the investor’s home State. To combine elements of the latter mechanism with the procedural framework of the former would disrupt such balance and must thus be deemed inadmissible. As a consequence, tribunals sitting under arbitration rules other than ICSID should exercise their procedural powers in such a fashion as to accept non-disputing State submissions on treaty interpretation but not beyond.

The non-disputing State’s role is among the issues which are being considered by the UNCITRAL Working Group within the elaboration of a standard on transparency.79 In this context, the adoption of a rule on non-disputing State submissions would contribute to clarifying the legal position and increase the predictability of the arbitration process. To mark the difference between regular amici curiae and non-disputing State parties, it may be preferable to draft a separate provision devoted to the latter. Such rule should be formulated so as to limit the home State’s submission to questions of treaty interpretation along the lines of NAFTA Article 1128, while leaving the arbitral tribunal the power to refuse submissions which exceed such limits. A possible rule could read as follows:

In arbitrations arising under an investment treaty, the Tribunal shall grant a request by a non-disputing State party to such treaty to make a submission to the Tribunal limited to questions of interpretation of the treaty. The Tribunal may define the scope of the questions of treaty interpretation which the non-disputing State’s submission may cover.

The Tribunal shall ensure that the non-disputing State submission does not disrupt the proceedings or unduly burden or unfairly prejudice the disputing

parties. It shall give the disputing parties an opportunity to present their observations on the non-disputing State submission.

V. Conclusion: Limiting Non-disputing State Submissions to Treaty Interpretation as a Safeguard against the Resurgence of Diplomatic Protection

This contribution has attempted to highlight the interplay between non-disputing State submissions in investment arbitration and the possible ensuing dangers of the resurgence of diplomatic protection. The analysis of State practice under NAFTA has provided a clear picture showing that there is currently no risk of such a resurgence in a limited regional setting such as NAFTA.

In the larger context of investor-State arbitration, one must distinguish between ICSID and other arbitrations. In the former, Article 27 of the Convention protects against ‘interventionist’ attitudes of home States. The protection will, however, only be effective if ICSID Arbitration Rule 37(2) is read to limit non-disputing State submissions to treaty interpretation matters. Although other arbitration rules contain no provision equivalent to Article 27, the procedural powers of the arbitrators should be exercised in the same manner as in ICSID arbitration.

As a result, whatever forum is chosen by the investor for the resolution of its dispute with the host State, there should be no room for the investor’s home State exercising diplomatic protection. To allow the investor’s home State to come to the aid of its national in an ongoing arbitration would disrupt the carefully balanced framework of the investor-State dispute settlement mechanism. It would bring back the politicized atmosphere which is the consequence of a direct confrontation between two sovereigns that in the past led to friction between capital-importing and capital-exporting States, and which the investor-State dispute settlement mechanism precisely aims at avoiding (irrespective of which arbitration rules are chosen). An amicus curiae should exactly be that, a ‘friend of the court’; it should not be a friend of one of the two parties.80 Home State submissions should thus be welcomed by tribunals as a useful contribution towards a better decision-making process, provided they are limited to questions of treaty interpretation. Allowing a wider scope would, on the contrary, be at variance with the general objective underlying investment arbitration.