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Arbitral interpretation of investment treaties: problems and remedies for the debate on "legitimacy"*

Interpretação arbitrária de tratados de investimento: problemas e soluções para o debate sobre "legitimidade"

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Abstract

The last couple of decades have seen a considerable increase in the submittal of investment claims to Arbitral Tribunals, a process which has often been linked to the "proliferation" of investment treaties. Alongside, a debate on the so-called "legitimacy" of the Investor-State dispute settlement mechanism has emerged – and prompted calls for reform – refusing, for the moment, to go away. Treaty interpretation has not been in the forefront of discussion. Authorized ("authoritative") interpretation – as performed by Arbitral Tribunals – is perhaps one of the issues of least (if any) concern. This Article explores the multiple issues arising from vesting excessive significance in authorized interpretations of Investor-State Arbitral Tribunals (in the events in which States Parties to the relevant investment treaty do not have opposing views on the construction of a conventional clause) *vis-à-vis* the distinction between authentic and authorized interpretation. Drawing on the referral to the notable cases in which this issue has arisen, this Article will present a few recommendations.

Keywords: International Arbitration. Authentic Interpretation. International Investment Law. Authoritative Interpretation. Law of Treaties

Resumo

Nas duas últimas décadas, houve um aumento considerável na apresentação de pedidos de investimento a Tribunais Arbitrais, um processo que tem sido frequentemente ligado à "proliferação" de tratados de investimento. Paralelamente, surgiu um debate sobre a chamada "legitimidade" do mecanismo de solução de controvérsias entre o investidor e o Estado - e provocou pedidos de reforma - recusando-se, por enquanto, a desaparecer. A interpretação do tratado não esteve na linha de frente da discussão. A interpretação autorizada ("autoritoria") - como realizada pelos Tribunais de Arbitragem - é talvez uma das questões de menos (ou nenhuma) preocupação. Este artigo explora as múltiplas questões decorrentes da aquisição de significância excessiva em interpretações autorizadas de tribunais de arbitragem Investidor-Estado (nos eventos em que os Estados-Partes no tratado de investimento

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relevante não têm visões opostas sobre a construção de uma cláusula convencional) *vis-à-vis* a distinção entre interpretação autêntica e autorizada. Com base no encaminhamento para os casos notáveis em que esta questão surgiu, este artigo apresentará algumas recomendações.

Palavras-chave : Arbitragem Internacional. Interpretação Autêntica. Lei de Investimento Internacional. Interpretação autorizada. Lei dos Tratados.

1 Introduction

The proliferation[1] of investment treaties has resulted in an increase in the submittal of claims to Investor-State Arbitral Tribunals[2]. In this "golden age"[3] for investment arbitration, insufficient attention has been paid to the distinctions between "authorized interpretations"[4], performed by international arbitral tribunals, and the "authentic interpretation" issued by States Parties to investment treaties.

Investment arbitration was established as, and remains, an adversarial process between – almost exclusively – an investor, national of one of the States Parties, and the other State Party. Inter-State (State to State) investment disputes are, thus, atypical[5]. Authorized interpretations performed by Investor-State Arbitral Tribunals do entail differences in significance *vis-à-vis* authorized interpretations issued by Inter-State dispute settlement mechanisms.

Not much academic debate has emerged with regard to the referred distinction[6]. The foundations of the Investor-State dispute settlement mechanism reflect a hypothesis of "opposing" or "conflicting" views of the parties to the dispute (investor *v.* State) "matching" or "mirroring" the (presumed) opposing or conflicting views of the States Parties to the investment treaty.

The overwhelming majority of these type of treaties in force do not include express provisions in relation to the exercise of authentic interpretation by States Parties. Some commentators[7] argue the absence of such express provisions is aligned with the overall goal of "depolitization" of investment disputes, considering it "allows" States Parties not to adopt a position in every single investment dispute that arises.

As a result of the current debate on the "convenience", "legitimacy" and "balance" of the Investor-State dispute settlement mechanism[8], a critical approach to the rather orthodox (and not greatly disputed) undertaking towards the authorized interpretations of Investor-State Arbitral Tribunals has become more relevant than ever. The criticism and negative narrative with regard to investment arbitration is clear and present across the globe, with notable disapproval from key players in Europe, Latin America and – most recently – North America.

This Article departs from the traditional view of authorized interpretations by Investor-State Arbitral Tribunals as a "settled matter"[9], in which the "preeminent

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[1] *See* WELLHAUSEN, Rachel L. Recent Trends in Investor-State Dispute Settlement, *Journal of International Dispute Settlement*, v. 7, n. 1, p. 117-135, Jan. 2016.

[2] *See* JOHNSON JUNIOR. Thomas; GIMBLETT, Jonathan. Gunboats to BITs: the Evolution of Modern International Investment Law. *In:* SAUVANT, Karl P. *Yearbook on International Investment Law and Policy.* Oxford: Oxford University Press, 2011. P. 649-686.

[3] The term "*golden age*" has been employed by Theodore R. Posner and Dániel Dózsa in their Article: *The Enduring Role of Diplomacy and Other Tools of State-State Dispute Resolution in a Golden Age of Investor-State Arbitration*, Weil World Arbitration Report, 2-9 (2013).

[4] The concept of "*interprétation autorisée*" or "*interpretación autorizada*" is, often, translated into English as "*authoritative interpretation*". The Author prefers to employ the terms "*authorized interpretation*", reflective of a more accurate translation of the concept. - The expression "authoritative interpretation" suggests a construction which is peremptory and definitive in nature, hence, unquestionable by States Parties.

[5] Prior to the establishment of international arbitration as the fundamental Investor-State dispute resolution mechanism (when – naturally – no "modern" bilateral investment treaties were in force), diplomatic protection (either through State-to-State negotiations or inter-State litigation) was the mean to address concerns over the "inadequate" treatment of aliens and its property.

[6] The matter was, somewhat, perceived as overcome with the inclusions –in investment treaties– of the following clauses: "*The non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Treaty*" and "*A joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal*".

[7] *See*, *inter alia*, REISMAN, W. Michael. *Opinion with respect to jurisdiction in the Interstate Arbitration initiated by Ecuador against the United States,* 2012. Available at: https://www.italaw.com/cases/documents/1498.

[8] *See*, *inter alia*, the controversy that arose on the occasion of the International Bar Association's "International Arbitration Day", which took place on 27 February 2015, as a result of The Washington Post's Article "*The Trans-Pacific Partnership clause everyone should oppose*". The matter has consistently emerged in every other forum held afterwards, including the most recent edition of the International Law Association's "International Law Weekend", which took place on 28 October 2016.

[9] *See*, *inter alia*, REISMAN, W. Michael. *Opinion with respect to jurisdiction in the Interstate Arbitration initiated by Ecuador against the United*

nature" of the latter (with respect to the construction of conventional clauses enshrined in investment treaties) is unquestionable. After briefly explaining the distinction between authentic interpretations and authorized interpretations – *in abstracto* –, this Article will illustrate the particular issues arising from vesting excessive significance[10] in authorized interpretations of Investor-State Arbitral Tribunals, in the events in which States Parties ("Home" and "Host" States) do not have opposing views on the construction of a particular clause. Drawing on the referral to the notable cases in which this issue has arisen, this Article will present pertinent conclusions and submit appropriate recommendations.

2 Treaty Interpretation

Customary international law on the law of treaties, as reflected on the *Vienna Convention of the Law of Treaties* (1969), codifies certain rules on treaty interpretation. Article 31 enshrines the "general rule on treaty interpretation"; Article 32 discusses the recourse to "supplementary means of interpretation"; and Article 33 crystalizes the rules on interpretation of treaties "authenticated in two or more languages".

As to the general rule on treaty interpretation (which states that a treaty shall be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose"), some of the most highly qualified publicists, have stated that such provision:

> Gives no greater weight to one particular factor, such as the text ('textual' or 'literal' approach), or the supposed intentions of the parties, or the object and purpose of the treaty ('effective' or 'teleological' approach). Placing undue emphasis on the text, without regard to what the parties intended; or on what the parties are believed to have intended, regardless of the text; or on the perceived object and purpose in order to make the treaty more 'effective', irrespective of the intentions of the parties, is unlikely to produce a satisfactory result[11].

2.1 Authentic Interpretation *vis-à-vis* Authorized Interpretation

In the realm of investment law, as opposed to other fields of public international law, only States – as original subjects of international law – may sign and be parties to investment treaties, whether these international instruments are bilateral (the substantial majority) or multilateral[12]. Consequently, for the purposes of this Article, the authentic interpretation hereby referred will be that of States Parties[13].

Authentic interpretation of a treaty is the process by which the subjects of international law that adopted and subsequently became parties to the international instrument construe a particular conventional provision thereof.

Authentic interpretation is a prerogative. Accordingly, States Parties may exercise it, at any time, as long as the treaty is in force between them. Authentic interpretation may be "collective" or "individual"[14]. The latter allows subjects of international law to make their own interpretation of a clause, "*indicating the meaning they attribute to the text of a treaty*". By contrast, "collective authentic interpretation" is the construction made by of all of the States Parties to the treaty.

Authorized interpretation is, par excellence, not authentic. An Authorized interpretation is a construction of a conventional provision made by an "impartial" international adjudicatory mechanism, in a concrete case where States Parties to the treaty have different, divergent, conflicting or opposed interpretations to an investor. Some commentators argue authorized interpretations do not "create" law, as these constructions are, *inter alia*, "*only enforceable against the parties in litigation*

States, 2012. Available at: https://www.italaw.com/cases/documents/1498.

10 Some Commentators consider that, in certain cases, the Arbitral Tribunal's decision not only has clashed with (apparent) authentic interpretations issued by States Parties, but rather prevailed. This is the case of*, inter alia, CME Czech Republic B.V. v. Czech Republic,* which will be addressed in detail below.

11 AUST, Anthony. Handbook of International Law, first edition, Cambridge: Cambridge University, 2005. *See also* SHAW, Malcom N. International Law, sixth edition, Cambridge: Cambridge University Press, 2008: "*any true interpretation of a treaty in international law will have to take into account all aspects of the agreement, from the words employed to the intention of the parties and the aims of the particular document. It is not possible to exclude completely any one of these components*".

12 Some commentators distinguish between bilateral, multilateral and "*plurilateral*" treaties. However, "*plurilateral*" treaties are, essentially, multilateral treaties with fewer States. For the purpose of this article, treaties among more than two states will be referred to as "multilateral".

13 Other subjects of international law with treaty-making capacity (e.g., international cooperation organizations), have not (and, most likely, cannot) enter into investment treaties, because of, *inter alia*,limitations on the concept of "territory".

14 Certain commentators refer to the "individual" authentic interpretation as "unilateral", *see* MAFTEI, Jana; LICUTA COMAN, Varvara. *Interpretation of Treaties*. 2012. p. 16-30. Acta Universitatis Danubius Juridica, Danubius University.

and only in the case in question"[15]. Be that as it may, collective authentic interpretations (regardless of whether it is classified as an instrument made by one or more parties of the Treaty in connection with the treaty or a subsequent agreement), do produce law.

2.2 The inherent problem with the authorized interpretations of Investor-State Arbitral Tribunals

It is worth noting that this Article does not purport to criticize Investor-State Arbitration, as the primary and one of the most effective dispute settlement mechanisms for investment controversies. Nevertheless, the problems in relation to the construction of conventional clauses by Investor-State Arbitral Tribunals arise out of the very nature of this dispute settlement mechanism. These problems are explained in detail below.

Unlike Inter-State adjudication mechanisms (e.g., the International Court of Justice), in Investor-State Arbitral Tribunals the parties to the dispute are not the same as the Parties to the treaty. These circumstances impact the fundamental distinction between authentic interpretation and authorized interpretation of a treaty.

In Inter-State disputes, States Parties to a treaty have different, divergent, conflicting or opposed authentic interpretations on a conventional clause. Thus, each of them confer to the international adjudicatory mechanism capacity to exercise and issue an authorized interpretation over their different, divergent, conflicting or opposed authentic interpretations, for the purposes of the dispute (by means of either a compromissory clause or of a separate subsequent agreement[16]).

In Investor-State Arbitration proceedings, as States Parties to the investment treaty are not the parties to the dispute (only one is, against whom the proceedings were instituted), the Arbitral Tribunal's authorized interpretation is imperfect. Although States that are party to a treaty conferred the capacity to an international adjudication mechanism for the exercise and issuance of an authorized interpretation, such capacity does not arise from different, divergent, conflicting or opposed authentic interpretations. In fact, States that are Parties to the treaty might not even disagree on the construction of a conventional clause – but only one of them[17] sits in the proceedings[18].

Investment treaties are, largely, bilateral. Multilateral investment treaties[19] are, therefore, exceptional. This fact has, likewise, effects on both the authentic interpretation of States Parties and the authorized interpretation of international arbitral tribunals. In any treaty, the "*on--going confidence in shared interpretation*" is what causes the treaty to continue in force, as the initial "will" of States Parties may be "volatile" (or change as time elapses). Bilateral treaties, moreover, require a continued "meeting of the minds", as reservations and/or conditional interpretative declarations are not applicable. Consent rests on a "common understanding" of what was agreed on each conventional clause. If the Investor-State Arbitral Tribunal's authorized interpretation of a provision does not consult the collective authentic interpretation, the consent is eroded. This problem will be addressed in detail in Section five below.

2.3 Interpretation of conventional provisions in a non-formal *stare decisis* system: is absence of *"precedent"* a myth?

One might be inclined to question why an authorized interpretation would be a problem, when Investor-State Arbitral Tribunals are not "required"[20] to be consistent with or cohere to prior decisions, as international investment arbitration is not a uniform legal system with "formal precedent".

The practice of Investor-State Arbitral Tribunals has evidenced (and continues to evidence) that, in spite of the absence of a conventional provision instituting

[15] Certain commentators refer to the individual authentic interpretation as "unilateral", *see* MAFTEI, Jana; LICUTA COMAN, Varvara. *Interpretation of Treaties*. 2012. p. 16-30. Acta Universitatis Danubius Juridica, Danubius University.

[16] On the general legal nature of "*subsequent agreements*" *see*, *inter alia*, SHAW, Malcom N. International Law, sixth edition, Cambridge: Cambridge University Press, 2008.

[17] Evidently, the other party to the dispute is a "*national*" of the other State (who does not have any treaty authentic interpretation capacities).

[18] For a discussion on mechanisms and procedural opportunities of the other State Party (which is not a party to the dispute) to canalize its individual authentic interpretation of a conventional clause, see Section 4 *infra*.

[19] A common example of a multilateral investment treaty in force is the *Energy Charter Treaty* (1994). Other multilateral treaties in force, also agreed in regional or sub-regional spheres, include the *Additional Protocol to the Framework Agreement on the Pacific Alliance* (2014).

[20] By means of a compulsory or mandatory provision, enshrined in either the applicable conventional law or the procedural rules applicable to the particular dispute.

formal precedent (*stare decisis*)[21], not a single of the contemporary decisions fails to refer to: (a) prior extracts from awards (*dictums*); (b) the main legal underpinnings (*ratio decidendi*) thereof; or (c) operative parts of such decisions[22].

International arbitral tribunals are not "formally" obliged to follow a prior decision in which a construction of a particular investment treaty was given. However, when Investor-State Arbitral Tribunals purport to depart from a prior decision's *rationale* – including the interpretation of a conventional clause – they nonetheless provide substantial legal explanations for that departure.

The once accurate division of States Parties to investment treaties as "capital-exporting", on the one hand, and "capital-receptor and less-developed", on the other has faded. This has to do with the proliferation of investment treaties. The initial *rationale* of these treaties serving (solely) the interests of capital-exporting States' nationals (*i.e.* resort to an international dispute settlement mechanism instead of the local courts of "uncivilized States"), has become less and less correct. Investment treaties have increasingly been concluded between States that are, simultaneously, capital-exporting States and capital-receptor States (considered as "similarly developed"). These circumstances have an impact on the construction of conventional clauses enshrined in investment treaties.

If an investor of a State Party (Home State) brings a claim against the other State Party (Host State), and a construction of a clause of the applicable investment treaty is provided by an Investor-State Arbitral Tribunal; when an investor of the latter State (no longer Host State, now Home State) brings a claim against the first State Party (and in the new dispute the relevant provision is the conventional clause that was previously interpreted by an Investor-State Arbitral Tribunal); no one would doubt that there is non-dismissible "antecedent" in relation to the construction of the conventional clause, in light of the first case. This situation would have been "unthinkable" in light of the initial *rationale* of these treaties serving (solely) the interests of capital--exporting States' nationals; the later dispute would not have been plausible.

"Antecedent" is not equivalent to "formal precedent". There is no contention in that affirmation. An antecedent, notwithstanding the above, is a not entirely irrelevant for international arbitral tribunals, in light of their continued practice.

The fact is that there would be a prior authorized interpretation of a conventional clause in the *corpus juris* or realm of international investment law. The practice indicates, in spite of the lexicon employed by the relevant provisions applicable[23] to Investor-State arbitration proceedings, that international arbitral tribunals would, undoubtedly, refer to such prior construction[24].

3 The tension between authentic interpretations and authorized interpretations in Arbitral Awards: a critical approach

A number of cases address the question of authentic interpretation of States Parties is present in international arbitral proceedings. In some of these cases[25], the dispute-settlement mechanism is – solely – State to State. Thus, the matter is outside the scope of this Article, as is a situation where States Parties to a treaty have different, divergent, conflicting or opposed authentic interpretations on a clause and, therefore, each of them confer to the international adjudicatory mechanism capacity to exercise and issue an authorized interpretation

21 *See*, *inter alia*, SCHEFER, Krista Nadakavukaren. *International Investment Law*. 2. ed. Switzerland: Edward Elgar Publishers, 2013. p. 57.

22 See, *inter alia*, CONFORTI, Benedetto; FOCARELLI, Carlo. The Law and Practice of the United Nations. 4. ed. Brill – Nijhoff, 2010. p. 178. Also see, *inter alia*, TIERSMA, Peter M. *Legal Language*. Chicago and London: The University of Chicago Press, 1999. p. 119. (Paperback edition).

23 *Inter alia*, Article 53, Section 1, of the "*Convention on the Settlement of Investment Disputes between States and Nationals of other States*" (1965), within the International Center for Settlement of Investment Disputes.

24 Beyond a matter of mere "*colleague-deference*" referrals, see e.g. *Saipem S.p.A. v. The People´s Republic of Bangladesh* (at the *Decision on Jurisdiction of March 21, 2007, paragraph 67*) and *Caratube International Oil Company LLP v. The Republic of Kazakhstan* (at the *Decision on Provisional Measures of July 31, 2009, paragraph 73*).

25 *See* AD HOC STATE-STATE ARBITRATION, Italian Republic v. Republic of Cuba (Cuba – Italy Bilateral Investment Treaty). As in any other Inter-State dispute, States Parties to a treaty (with different, divergent, conflicting or opposed authentic interpretations on a clause of a treaty) confer to the international adjudicatory mechanism capacity to exercise and issue an authorized interpretation over their different, divergent, conflicting or opposed authentic interpretations.

over their different, divergent, conflicting or opposed authentic interpretations. There is no issue, from the perspective of this Article, in those circumstances.

To the contrary, situations in which the following issues arise do present a problem with regard to the understanding of what the authentic interpretation of States Parties entails *vis-à-vis* the (imperfect) authorized interpretation of an Investor-State Arbitral Tribunal:

(i) The issue of a genuine collective authentic interpretation of States Parties, in Investor-State arbitration proceedings (where only one of them is a party to the dispute), before or after an authorized interpretation has been provided – *inter alia*, in a partial arbitral award, but prior to the conclusion of investment arbitration proceedings. [3.1]

(ii) The issue of a State Party's alleged claim of a collective authentic interpretation, in Investor-State arbitration proceedings (where such State Party to the treaty is the only non-alien party to the dispute), before or after an authorized interpretation has been provided – *inter alia*, in a partial arbitral award – but prior to the conclusion of investment arbitration proceedings. [3.2]

(iii) The issue of genuine or alleged collective authentic interpretations, after the investment arbitration proceedings have been concluded and, evidently, a final authorized interpretation has been issued for the purposes of the dispute. [3.3]

These three scenarios will be the object of this Section. Opposing or conflicting authentic interpretations by States Parties, in Investor-State arbitration proceedings (mirroring different views of the Investor, on the one hand, and Host State, on the other), before an authorized interpretation has been provided – *inter alia*, in a partial arbitral award – are not to be referred here, considering those circumstances are, precisely, the situations envisioned at the moment of the establishment of the Investor-State dispute settlement mechanism.[26]

[26] None of the bilateral investment treaties invoked in the cases referenced below include authentic or authorized interpretation clauses.

3.1 With regard to the first issue, referred as the situation where genuine collective authentic interpretations are presented in Investor-State arbitration proceedings, before or after the international arbitral tribunal has provided an authorized interpretation, but prior to the conclusion of the case, the notable decision is *CME Czech Republic B.V. v. Czech Republic*.

In this particular investment dispute a partial arbitral award was rendered against the Czech Republic, a State Party to the applicable investment treaty. As a result of the Czech Republic's subsequent request, both States Parties, the Czech Republic and the Kingdom of the Netherlands, entered into bilateral consultations, through the diplomatic channels, on the "meaning" of certain conventional provisions. The States Parties agreed on an interpretation and signed an international instrument entitled "*Agreed Minutes*". The Arbitral Tribunal – after being presented with the latter agreement on the authentic interpretation of treaty provisions – neither accredited nor recognized the significance of the "*Agreed Minutes*", even though the arbitral tribunal stated that it reached the "same" conclusion. Some Commentators may even suggest the Arbitral Tribunals not only neither accredited nor recognized the appropriate significance to the "*Agreed Minutes*", but assigned that instrument a "non-essential value" for the process of reaching a decision.[27]

The arbitral tribunal's assertion is controversial. However, the process of recognizing 'appropriate significance' demands "giving no greater weight to one particular factor, such as the text or object and purpose of the treaty, over the context or intentions of the parties"[28], with the understanding that "placing undue emphasis on the text, without regard to what the parties intended [in, *inter alia*, a subsequent agreement] regardless of the text; or on the perceived object and purpose

[27] See, inter alia, REISMAN, W. Michael. *Opinion with respect to jurisdiction in the Interstate Arbitration initiated by Ecuador against the United States*, 2012. Available at: https://www.italaw.com/cases/documents/1498.

[28] AUST, Anthony. *Handbook of International Law*. Cambridge: Cambridge University, 2005. *See also* SHAW, Malcom N. *International Law*. 6. ed. Cambridge: Cambridge University Press, 2008: "*any true interpretation of a treaty in international law will have to take into account all aspects of the agreement, from the words employed to the intention of the parties and the aims of the particular document. It is not possible to exclude completely any one of these components*".

in order to make the treaty more 'effective', irrespective of the intentions of the parties, is unlikely to produce a satisfactory result"[29]. The Arbitral Tribunal appears to have forgotten that the treaty – whose authorized interpretation was entrusted to it – binds two States, both of whom agreed on what conventional provisions meant and how should they be construed. When there is collective authentic interpretation, by "all" of the States Parties, there is no room for an authorized interpretation, where evidently there are no different, divergent, conflicting or opposed views between the subjects of international law for whom the treaty is in force[30]. The Arbitral Tribunal was precluded from reaching its own decision, even if, in the case under examination, the conclusion was the same.

3.2 In relation to the second issue, pertaining to a State Party's alleged claim of a collective authentic interpretation of a clause, before or after an authorized interpretation was provided – *inter alia*, in a partial arbitral award – but prior to the conclusion of investment arbitration proceedings, some reflections must, first, be addressed.

The Investor-State Arbitral Tribunal (unlike the events in which there is a genuine collective authentic interpretation of States Parties) remains "entitled" to issue an authorized interpretation if the non-alleging State Party does not positively concur in the assertion of there being a collective authentic interpretation. In addition to the above, in the event the other State Party (which is not a party to the dispute) is given a "procedural opportunity" to intervene (when the construction of a conventional clause is in question in Investor-State arbitration proceedings and there is a concrete allegation by the other State Party of a "misconstruction" by the Investor-State Arbitral Tribunal), certain consequences shall arise.

There are three noteworthy cases with regard to the second issue. The alleging State Party chose a different path in each of them. The first one is *Aguas del Tunari, S.A. v. Republic of Bolivia (ICSID Case No. ARB/02/3)*, in which the respondent alleged, before the Investor-State Arbitral Tribunal had issued an authorized interpretation, that there was a collective authentic interpretation by the States Parties. The former Republic of Bolivia (today, Plurinational State of Bolivia) argued that there was a "subsequent agreement" between the two States, on the interpretation of a conventional provision, arising from certain (three separate) statements made by the Government of the Kingdom of the Netherlands, read in conjunction with the former Republic of Bolivia's own construction of the clause. The Kingdom of the Netherlands, in response to the Investor-State Arbitral Tribunal's request, affirmed it was not of the view that the statements (some of which contradicted themselves), together with the former Republic of Bolivia's interpretation, formed a "subsequent agreement"[31]. The Investor-State Arbitral Tribunal stated that there was "no intent" for those statements to be regarded as an "agreement" and proceeded to issue an authorized interpretation of the relevant conventional clause.

The decision of the Arbitral Tribunal was correct: in absence of genuine collective authentic interpretation[32], the presumption should be that individual authentic interpretations are opposed (each one of them equivalent to the positions of the parties to the dispute) and – consequently – the Arbitral Tribunal must issue an authorized interpretation. A different matter, however, emerges with regard to the effects of the declination (to furnish express observations on its authentic interpretation) for the Kingdom on the Netherlands, a situation which will be referred – *in abstracto* – in Section 6 *infra*.

In the second case, *Empresas Luchetti, S.A. & Lucchetti Peru, S.A. v. Republic of Peru (ICSID Case No.*

[29] AUST, Anthony. *Handbook of International Law*. Cambridge: Cambridge University, 2005. *See also* SHAW, Malcom N. *International Law*. 6. ed. Cambridge: Cambridge University Press, 2008. "*any true interpretation of a treaty in international law will have to take into account all aspects of the agreement, from the words employed to the intention of the parties and the aims of the particular document. It is not possible to exclude completely any one of these components*".

[30] The question of the investor (national of the State Party, as Home State) and the other State Party (Host State), being the parties of the dispute (in the Investor-State arbitral proceedings), does not change the fact that the investor has no authentic interpretation capacities and that the international instrument whose construction is required is the applicable investment treaty (which is between two States).

[31] The Kingdom of the Netherlands rather conveyed a copy of a document entitled "*Interpretation of the Agreement on encouragement and reciprocal protection of investments*", which – in spite of its title – did not entail the legal nature of a subsequent agreement on the interpretation of the bilateral investment treaty.

[32] That is, when only one of the States Parties alleges the existence of a collective authentic interpretation, without there being a *prima facie* subsequent written agreement between the States Parties.

ARI3/03/04), after the investor had filed a claim for international investment arbitration, the Republic of Peru instituted proceedings against the Republic of Chile (Inter-State dispute resolution mechanism), prior to the issuance of an authorized interpretation by the Investor-State Arbitral Tribunal. The Republic of Peru requested the suspension of the Investor-State arbitral proceedings until the Inter-State arbitral proceedings were concluded, but the Investor-State Arbitral Tribunal moved forward. The Inter-State arbitral proceedings were, afterwards, discontinued. Certain commentators disqualify the actions of the State Party (the Republic of Peru) as a mere attempt to "politicize" an investment dispute[33]. This is a rather simplistic assertion.

Inter-State arbitration is a legitimate dispute settlement mechanism in international law. If the other State Party (against whom the proceedings were instituted) does not object to the jurisdiction of the Arbitral Tribunal – and wants to obtain an authorized interpretation too – an Investor-State Arbitral Tribunal hearing a (parallel) dispute between an investor of that State Party and the other State Party, should accord the appropriate deference to the implications of an authorized interpretation being requested by the two States Parties to the investment treaty (in light of their different, divergent, conflicting or opposed authentic interpretations), over its own authorized interpretation for the separate dispute. There is nothing "political" in seeking to find additional assurances on the common understanding, when the meeting of the minds is in question. The so-called "two-track" system – a commentator's construction – cannot serve as an excuse to invalidate or ignore the fact that the investment treaty binds the States Parties and is their mutual comprehension on what are the international conventional obligations thereof agreed what gives rise to subsequent breaches to an investor. Put it in another way, if the States Parties agree that a particular situation or set of facts are not, without reasonable doubt, encompassed under a conventional clause (and, therefore, an authorized interpretation on their different, divergent, conflicting or opposed authentic interpretations is solicited), the Investor-State Arbitral Tribunal should not move forward with the separate proceedings. Moreover, if the States Parties concur on the affirmation that an investor's claim is not encompassed in their common understanding or "intent" of the conventional clause[34], a subsequent authorized interpretation has no further room. A provision addressing these circumstances, to date, missing from both the majority of investment treaties and applicable procedural rules.

The third case is *Chevron Corp. and Texaco Petroleum Co. v. Republic of Ecuador*, in which Investor-State Arbitral Tribunal issued an authorized interpretation of a provision of the applicable bilateral investment treaty, in a partial award. The Republic of Ecuador then instituted proceedings against the United States of America – *Republic of Ecuador v. United States of America (PCA Case No. 2012-5)* –. The Republic of Ecuador's claim was that the Investor-State Arbitral Tribunal had erred in its construction of the conventional clause, because the collective authentic interpretation was different[35]. The Inter-State arbitration claim was dismissed on the basis of lack of jurisdiction[36]. Nevertheless, the Republic of Ecuador's actions were highly criticized because – in some commentators' views[37] – the submittal of a

[33] See ORECKI, Marcin. *State-to-State Arbitration pursuant to Bilateral Investment Treaties*: the Ecuador-US Dispute, 2013. Available at: http://www.youngicca-blog.com/wp-content/uploads/2013/02/State_to_State_Marcin_Orecki_10_02_201.pdf. *See also* REISMAN, W. Michael. Opinion with respect to jurisdiction in the Interstate Arbitration initiated by Ecuador against the United States, 2012. Available at: https://www.italaw.com/cases/documents/1498.

[34] That is, if the States Parties agree that the claim of an investor should be dismissed.

[35] The Republic of Ecuador's initial claim comprised an affirmation of the Investor-State's Arbitral Tribunal having issued an authorized interpretation that was not in accordance with the collective authentic interpretation of States Parties. Prior to instituting proceedings against the United States of America, the Republic of Ecuador requested (through the diplomatic channels) an individual authentic interpretation of the United States of America with regard to the relevant conventional clause, stating that "*if such a confirming note* [was] *not forthcoming or otherwise the Illustrious Government of the United States does not agree with the interpretation of Article 11.7 of the Treaty by the Government of the Republic of Ecuador, an unresolved dispute must be considered to exist between the Government of the Republic of Ecuador and the Government of the United States of America concerning the interpretation and application of the Treaty*".

[36] *See* Department State of the United States of America – Office of the Legal Adviser –, *U.S.-Ecuador BIT: Ecuador v. United States*, available at: http://www.state.gov/s/l/c53491.htm. "*On June 28, 2011, the Republic of Ecuador instituted arbitral proceedings against the United States concerning the interpretation and application of the Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, August 27, 1993, pursuant to Article VII of the Treaty. In an award dated September 29, 2012, the Arbitral Tribunal, by majority, dismissed the case for lack of jurisdiction, 'due to the absence of the existence of a dispute falling within the ambit of Article VII of the Treaty*'".

[37] *See*, *inter alia*, REISMAN, W. Michael. *Opinion with respect to jurisdiction in the Interstate Arbitration initiated by Ecuador against the United States*, 2012. Available at: https://www.italaw.com/cases/docu-

claim for the purpose of "re-construing" a treaty provision (after an authorized interpretation was previously issued by an Investor-State Arbitral Tribunal in separate proceedings), violated the principle of *res judicata* and, ultimately, defeated the purpose of Investor-State arbitration. Those concerns are shared to a certain extent.

Although it is clear that choosing the "means" by which the States Parties may agree on a collective authentic interpretation rests entirely on the parties' will, instituting arbitration proceedings against the other State Party (to force it to state its authentic interpretation) fails to acknowledge that the latter is a prerogative (and not an obligation). This is particularly true when such State Party objects to the jurisdiction of the Arbitral Tribunal on the basis of absence of will with regard to an authorized interpretation being imposed upon them. Consequently, this particular case differs from the previously referred situation, in which the Republic of Peru instituted proceedings against the Republic of Chile. It should be noted, however, that such circumstances are, again, different from the issue of the effects of the declination (to furnish express observations on its authentic interpretation), for the State Party that was not a party to the dispute but was given a procedural opportunity to do so.

Finally, as to the third issue (genuine or alleged collective authentic interpretations, after the investment arbitration proceedings have been concluded and, evidently, a final authorized interpretation has been issued for the purposes of the dispute), some considerations are to be presented. To date, there is no case in which a State Party to an investment treaty has instituted proceedings against the other State Party (before an international adjudicatory mechanism[38] and after Investor-State arbitration proceedings have been formally concluded[39]) for the purposes of obtaining a new authorized interpretation of the previously interpreted conventional clause.

Such situation would, undoubtedly, present complex questions with respect to, *inter alia*, good faith. It would present an additional, perhaps lesser significant, concern on *res judicata*, because, as the parties to the dispute would not be the same and the question presented before the international adjudicatory mechanism would differ from the original proceeding. This does not mean the matter possesses or presents no complexities. It may even impair considerably the Investor-State dispute resolution mechanism. Consequently, the act of raising the existence of alleged or genuine collective authentic interpretations should occur before the Investor-State arbitral proceedings have formally concluded. Towards that aim, States Parties are free to pursue whichever mean they deem appropriate, not limited to consultations and negotiations (through the appropriate diplomatic channels, though enshrined in a subsequent agreement), but also encompassing the commencement of parallel Inter-State dispute resolution mechanisms (as long as the other State concurs in the aim of seeking an authorized interpretation).

Although – as discussed in Section 4 *infra* – some procedural mechanisms allow for the eventual "canalization" of authentic interpretations of States Parties in Investor-State arbitration proceedings, such provisions fall short on assigning concrete procedural consequences to the occurrence of circumstances in which States Parties (concurring on the affirmation that an investor's claim is not encompassed in their common understanding or intent of the conventional clause), convey such binding statement[40] to the Investor-State Arbitral Tribunal.

4 Procedural mechanisms to canalize authentic interpretations in international arbitration proceedings[41]

Intrinsically linked to the discussion on an authorized interpretation of a conventional clause (when the States Parties to the treaty have no different, divergent, conflicting or opposed authentic interpretations and where the practice of international arbitral tribunals

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[38] The notion of "*international adjudicatory mechanisms*", naturally, excludes political means for the settlement of disputes (which may or may not be public), such as direct Inter-State negotiations and/or consultations through the diplomatic channels.

[39] By means of the issuance of a procedural order or a final award, which – thus – excludes the rendering of partial awards (however prominent or significant they may be, *inter alia*, liability awards).

[40] On their authentic interpretation.

[41] It is worth noting that some of the procedural mechanisms which are presented in this Section were "*incorporated*" after some of the awards were rendered within the cases referred in Section 3 *supra*. These circumstances have no impact on the reflections thereby offered nor on the observations hereby referred.

excludes omissions to refer to prior decisions), is the question of the mechanisms by which a genuine collective authentic interpretation may be conveyed to the Arbitral Tribunal.

Some of the most recent conventional investment regimes[42] incorporate provisions expressly allowing the other State Party (Home State), which is not a party to the dispute) to present written or oral submissions before the Arbitral Tribunal "on the interpretation" of the international instrument[43].

Likewise, certain procedural rules[44] applicable to Investor-State arbitration proceedings, enshrine mechanisms for "non-disputing parties" (which are often described as "persons or entities", thus, encompassing a broader scope than just the other State Party) to file written submissions, contingent upon the meeting of certain conditions. Similarly, certain rule-modification proposals (unsuccessfully) attempt to deal with this issue.[45]

Both types of provisions: (a) are optional not compulsory and (b) although they reference the particular "value"[46], they do not assign a legal consequence to the latter. These circumstances have a reflection on "what" is conveyed to the Investor-State Arbitral Tribunal: an individual authentic interpretation of the State Party (Home State) that conflicts with that of the other State Party (Host State) will have, inevitably, a different assessment than a collective authentic interpretation[47] – or even an individual authentic interpretation of the State Party (Home State) that coincides with that of the other State Party (Host State).

The first situation (submission of a different individual authentic interpretation by the State Party, which is not a party to the dispute), will have no impact on the investment arbitration proceedings and on the authorized interpretation that the Investor-State Arbitral Tribunal should issue, consistent with what has been presented throughout this Article. The second situation (submission of a genuine collective authentic interpretation or an individual authentic interpretation that coincides with that the State Party which is a party to the dispute) should preclude the issuance of an authorized interpretation by the Investor-State Arbitral Tribunal in the sense of moving forward with the proceedings. As has been previously suggested and indicated in this Article, this is, precisely, the type of provision that investment treaties and applicable procedural rules are lacking.

5 Silence by the other State Party and/or non-submittal of observations reflective of authentic interpretation

Evidently, if the State Party (Host State, which is a party to the dispute) has no claim about the investment treaty being potentially interpreted in an "inconsistent

42 *See*, *inter alia*, Article 10.20, Section 2, of the *United States – Colombia Trade Promotion Agreement* (2006), which is the most recent free trade agreement –with an Investment Chapter– that has entered into force for the United States of America. *See also* Article 10.20, Section 2, of the *Additional Protocol to the Framework Agreement on the Pacific Alliance* (2014), as an example of a non-bilateral free trade agreement (including an Investment Chapter) that has recently entered into force.

43 In the Author's view, the mere absence of express provisions in relation to authentic interpretation by States Parties do not preclude, under international law, the exercise of such prerogative by those original subjects of international law. As a prerogative of States Parties, an authentic interpretation can be exercised, at any moment (as long as the treaty is in force), by means deemed most appropriate. An express provision to that end does not change the interpretation's legal nature as a States Parties' prerogative (unless, of course, the lexicon employed reflects imperative language towards that end). Nevertheless, in the realm of international investment law – considering certain deficiencies contained in the cases referred in Section 3 *supra* –, the inclusion of such provisions was aimed at an illustrious – and not entirely useless – purpose. However, such clauses (see *infra* note 45) fall short on assigning concrete (and required) procedural consequences.

44 See, *inter alia*, Article 37, Section 2, of the *Rules of Procedure for Arbitration Proceedings (Arbitration Rules)* of the International Center for Settlement of Investment Disputes (2006).

45 By way of example, ICSID's on-going rule-amendment process contemplates the possibility for a non-disputing State Party to a treaty to issue (and convey) a unilateral interpretation of a conventional clause in the course of an arbitration in which the relevant treaty has been invoked against the other State Party. Nevertheless, the current draft article (Proposal Rule 49: "Participation of Non-disputing Treaty Party") fails to provide the procedural consequences (as well as the legal value) of such *intervention vis-à-vis* the specific arbitration proceedings.

46 Some of the ordinary conventional clauses that do provide a clarification on the "*value*" read as follows: "*a joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal*" or an "*interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section*". Evidently, they fall short on assigning concrete procedural consequences to the occurrence of those circumstances (beyond the value thereby referred).

47 Such as the one that arises from "*a joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal*".

manner" with the collective authentic interpretation; or if the relevant "materials"[48] of the case (not just some of the proceedings) are not public and the State Party (Host State, which is a party to the dispute) did not request[49] the authentic interpretation of the other State Party (which is not a party to the dispute), the latter should be relieved of any adverse construction of the relevant treaty clause.

But, what should happen when all of the relevant materials of the case are public (the other State Party being, thus, aware of the commencement of the proceedings) and a potential misinterpretation of a conventional clause (by means of an authorized interpretation) is plausible in such case, but the other State Party chooses not to file a written observation (or otherwise communicate the authentic interpretation). Similarly, what should happen when that State Party (which is not a party to the dispute) is invited by the Investor-State Arbitral Tribunal to submit written observations but chooses not to furnish them or otherwise communicate the authentic interpretation?

Silence is strange to good faith. Good faith is a well-known and well-established principle of international law, reflected in the *Vienna Convention of the Law of Treaties* (1969). For a State Party to remain silent when other State Party (in a bilateral treaty), raises a question on the common understanding of what was agreed or what was encompassed on a conventional clause (in light of a specific and substantial concern over a misconstruction of the provision) is both unnatural and anomalous. A *continued* meeting of the minds is essential to prevent the erosion of consent.

Some commentators suggest that remaining silent in those circumstances is perfectly acceptable in light of the goal of "depolitization" of disputes (which, in their view, is almost a *carte blanche* for relieving the State Party – that is not a party to a dispute – from everything that binds it under the investment treaty in force). This is not a reasonable assertion when a situation like the above-referred occurs, in which the stability of consent and/or of the common understanding is in question.

The goal of depolitization of disputes cannot be achieved successfully without an "on-going confidence in shared interpretation", together with effectively addressing the concern of an authorized interpretation colliding with the collective interpretation of the States Parties. As mentioned before in this Article, an authorized interpretation by an Investor-State Arbitral Tribunal that does not reflect or is compatible with the genuine collective interpretation of the States Parties not only diminishes the investment treaty itself, but – *in fact* – brings politics back to the realm of international investment law.

The so-called "stability" of the Investor-State dispute settlement mechanism cannot ignore or clash with the actual stability of the treaty – which is the basis, foundation, *raison d'être* and legal underpinning of the Investor-State dispute settlement mechanism. Silence, when a procedural opportunity is given to the other State Party[50], should entail concrete consequences, as it may affect such stability.[51]

Silence from the other State Party (which is not party to the dispute), when all of the relevant materials of the case are public and when there is a clear and present concern over the misinterpretation of a conventional clause (by means of an authorized interpretation); or when such State Party is invited by the Investor-State Arbitral Tribunal to submit written observations but chooses not to furnish them (or otherwise communicate the authentic interpretation); should make very difficult for that State Party to elude acquiescence when the circumstances described in paragraph 5 of Section 2.3 of this Article occur.

[48] The term "*materials*" is employed by, amongst others, the International Center for Settlement of Investment Disputes, to refer to Requests for Arbitration, Statements of Defense, Memorials and Counter-Memorials, Procedural Orders, Expert Opinions, Witness Statements, Awards and all other relevant documents pertaining to a case.

[49] The State Party's request may be submitted (to the other State Party, which is not a party to the dispute) via the Investor-State Arbitral Tribunal or, in parallel, by virtue of the exercise of its prerogatives as an original subject of international law, directly, through diplomatic channels.

[50] Which is not a party to the dispute.

[51] It is well known that, under general international law, investors (natural or juridical persons) do not have *ius standi* as they do not entail the legal nature of subjects of international law. Under certain conventional regimes of the realm of international investment law (e.g. ICSID or the Iran – United States Claims Tribunal) they do, however, have (limited) *ius standi* by virtue of States Parties' will (as expressed in the relevant treaty). The authentic interpretation of States Parties, thus, has a considerable impact on the role investors may play on the basis of that same treaty.

6 The absence of provisions on the consequences of collective authentic interpretations submittals and silence

As evidenced in Section 4 *supra*, the current available procedural mechanisms to canalize authentic interpretations in international arbitration proceedings fall short on assigning concrete procedural consequences to the occurrence of those circumstances[52]. The event in which a genuine collective authentic interpretation is submitted, or the situation in which an individual authentic interpretation (that coincides with that of the State Party which is a party to the dispute) is conveyed, should – without any space for doubt – preclude the issuance of an authorized interpretation by the Investor-State Arbitral Tribunal. If the States Parties concur on the affirmation that an investor's claim is not encompassed in their common understanding or intent of the conventional clause[53], a subsequent authorized interpretation has no further room. This means, in relation to the Investor-State Arbitration proceedings, that the claim should be dismissed.

As discussed, this is, precisely, the type of provision that investment treaties and applicable procedural rules lack. Section 7 *infra*, will present an appropriate recommendation that aims to propose a concrete remedy to these problematic circumstances.

In accordance with this Article's prior discussion[54] a continued meeting of the minds is essential to prevent the erosion of consent in bilateral treaties. Under the understanding that silence is strange to good faith, in the event a situation corresponding to the description of paragraph 5 of Section 2.3[55] *supra* occurs, and:

The other State Party (which is not party to the dispute) remained silent when all of the relevant materials of the case were public (and there was a clear and present concern over the misinterpretation of a conventional clause, by means of the authorized interpretation of the Investor-State Arbitral Tribunal), or

The other State Party (which is not party to the dispute) remained silent when the Investor-State Arbitral Tribunal extended an invitation for it to submit written observations on its authentic interpretation (or otherwise failed to communicate the authentic interpretation of the relevant conventional clause, when there was a clear and present concern over the misinterpretation of a conventional clause, by means of the authorized interpretation of the Investor-State Arbitral Tribunal).

Acquiescence should be a strong presumption, with the highest possible threshold on eventual circumvention. Consequently, Section 7 *infra*, will – likewise – present an appropriate recommendation to this regard.

7 Conclusions and final remarks[56]: the recommended remedies

The current debate on the convenience, legitimacy and balance of the Investor-State dispute settlement mechanism, naturally, encompasses an enormous number of concerns from "key players" across the globe. As long as the Investor-State dispute settlement mechanism continues to be based and established through conventional means, authorized interpretations performed by Investor-State Arbitral Tribunals, in the circumstances and scenarios which have been the object of this Article, remain relevant[57].

With regard to treaty law *vis-à-vis* the (imperfect) authorized interpretation of Investor-State Arbitral Tribunals, the "on-going confidence in shared interpretation" has been cited as crucial for the international instrument to continue in force, considering the will of States Parties may be volatile or prone to change.

[52] With regard to the continuation of the Investor-State arbitration proceedings.

[53] That is, if the States Parties agree that the claim of an investor should be dismissed.

[54] *See* Section 5 *supra*.

[55] An investor of a State Party brings a claim against the other State Party and a construction of a clause of the applicable investment treaty is provided by an Investor-State Arbitral Tribunal. At a later time, the investor of the latter State (no longer Host State, now Home State) brings a claim against the first State Party and the new dispute revolves around the same conventional clause that was previously interpreted by an Investor-State Arbitral Tribunal.

[56] Evidently, this Article did not purport to refer or consider issues related to the interpretation of contracts between an investor and an entity or organ of the State (or the State itself). Such matters were and remain outside the scope of the scrutiny hereby undertaken.

[57] Evidently, the matter was not overcome with the inclusions – in investment treaties – of the following clauses: "*The non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Treaty*" and "*A joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal*".

As bilateral treaties require to a greater extent[58] than multilateral Parties a continued meeting of the minds or common understanding on what was agreed on each conventional clause, if an Investor-State Arbitral Tribunal's authorized interpretation of a provision does not consult the collective authentic interpretation the consent erodes.

Consequently, this Article affirmed in the event a collective authentic interpretation (by all of the States Parties) was presented – where (evidently) no different, divergent, conflicting or opposed views between the subjects of international law for whom the treaty is in force exist[59] – the Arbitral Tribunal should be precluded from issuing an authorized interpretation. Absent a genuine collective authentic interpretation[60], however, the presumption should be that individual authentic interpretations are opposed[61] and, consequently, the Arbitral Tribunal must issue an authorized interpretation.

Under the premise of Inter-State arbitration being a legitimate dispute settlement mechanism in international law and considering States Parties are free to pursue whichever means they deem appropriate for reconciling their different, divergent, conflicting or opposed authentic interpretations, they may engage not only in consultations and negotiations (through the appropriate diplomatic channels, though conveying a subsequent agreement), but in parallel Inter-State dispute resolution mechanisms[62]. An Investor-State Arbitral Tribunal hearing the dispute between an investor of that State Party and the other State Party, should accord the appropriate deference to the implications of an authorized interpretation being requested by the two States Parties to the investment treaty (in light of their different, divergent, conflicting or opposed authentic interpretations), over its own (imperfect) authorized interpretation for the separate dispute. In accordance with Section 3 *supra*, seeking to find additional assurances on the common understanding – when the meeting of the minds is in question – is far from "political".

Thus, an *a contrario* perception cannot invalidate or ignore the fact that an investment treaty binds the States Parties, and it is their mutual comprehension on "what are" the agreed international conventional obligations that gives rise to (eventual) subsequent breaches to an investor. If the States Parties agree that a particular situation or set of facts are not, without reasonable doubt, encompassed under a conventional clause (and, therefore, an authorized interpretation on their different, divergent, conflicting or opposed authentic interpretations is solicited), the Investor-State Arbitral Tribunal should not move forward with separate proceedings. Moreover, if the States Parties concur on the affirmation that an investor's claim is not encompassed in their common understanding or intent of the conventional clause[63], a subsequent authorized interpretation has no room. The relevant part of the claim (or, eventually, the entire claim if circumstances so provide), must be dismissed.

As the current available procedural mechanisms to canalize authentic interpretations in international arbitration proceedings fall short on assigning concrete procedural consequences to the occurrence of those circumstances[64], this Article recommends the inclusion of a provision[65] reflective of the following *rationale*, aiming at offering a remedy in the debate on the convenience, legitimacy and balance of the Investor-State dispute settlement mechanism:

"No claim may be submitted to arbitration under this Section or be considered by an Arbitral Tribunal established under this Section, if the Parties, by writ-

58 Considering that, *inter alia*, reservations or conditional interpretative declarations (as some of the most prominent international law mechanisms) are not applicable – like is the case in multilateral treaties.

59 Naturally, on the basis of the collective authentic interpretation differing and opposing the views or position of the investor (as party to the dispute).

60 That is, when only one of the States Parties alleges the existence of a collective authentic interpretation, without there being a *prima facie* subsequent written agreement between the States Parties.

61 Which means that the opposing or conflicting views of the Investor, on the one hand, and Host State, on the other, match or mirror opposing or conflicting the States Parties' individual authentic interpretations.

62 In accordance with Section 3 *supra*, the submittal of a claim to Inter-State Arbitration must occur prior to the formal conclusion of the Investor-State arbitration proceedings. Likewise, the other State must concur in the aim of seeking an authorized interpretation (and not object to the jurisdiction of the Inter-State Arbitral Tribunal).

63 That is, if the States Parties agree that the claim of an investor should be dismissed.

64 And, likewise, the ordinary conventional clauses referred in *supra* note 46.

fall short on assigning concrete procedural consequences to the occurrence of those circumstances (beyond the value thereby referred).

65 This provision is drafted and envisioned for bilateral investment treaties. Nevertheless, it may very well be incorporated – *mutatis mutandis* – in institutional or *ad hoc* procedural rules, although (it is acknowledged that) such process may be more complex.

ten binding arrangement, agree that the claim should be dismissed".

Considering that the continued meeting of the minds is essential to prevent the erosion of consent in bilateral treaties. Under the understanding that silence is strange to good faith, in the event a situation corresponding to the description of paragraph 5 of Section 2.3 *supra* occurs – in accordance with Section 6 *supra* – acquiescence should be a strong presumption, with the highest possible threshold on eventual elusion. Consequently, this Article recommends the inclusion of a provision[66] reflective of the following *rationale*, aiming at offering a remedy in the debate on the convenience, legitimacy and balance of the Investor-State dispute settlement mechanism:

> In any arbitration conducted under this Section, at the request of any party, an Arbitral Tribunal shall so notify the non-disputing Party with a view to invite it to furnish oral or written submissions regarding the interpretation of this Treaty. If the non-disputing Party declines to submit such observations or does not otherwise furnish observations regarding the interpretation of this Treaty, the non-disputing Party shall be presumed, for the purposes of this Treaty, to have acquiesced to the interpretation of this Treaty.

As a final reflection, it should be noted that major "concern" over what States Parties might or not engage in (or do), after these inclusions take place[67], should be completely absent from the discussion[68]. Such personal perceptions are not a juridical matter – rather a question of political expediency – and, as such, the conjectures or speculations on a supposed "*disturb to arbitration guarantees*"[69] are not appropriate.

Likewise, it is worth mentioning that this Article's recommendations are not to be read as "*advocacy for diplomatic protection*"[70]. Rather, they purport to address a concern on the possibilities of misconstruction of conventional clauses by Investor-State Arbitral Tribunals occurring[71] (under the very specific circumstances or scenarios addressed as problematic), while distancing themselves from the so-called "destructive criticism" (which, unfortunately, prevails in the ordinary approach of the subject-matter). Accordingly, this Article's proposal of concrete alternatives (recommendations) aims to strengthen the Investor-State dispute settlement mechanism.

In this "golden age" for investment arbitration, where the proliferation of investment treaties is expected to continue, the linked increase in the submittal of claims is likewise forecasted to grow, and the convenience, legitimacy and balance of the Investor-State dispute settlement mechanism will continue to be central in the debate, arbitral interpretation is at a crossroads. Would the problem be maintained or would the remedy be embraced?

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[66] *Id.*

[67] By means of, *inter alia*, the adoption and subsequent entry into force of an amendment to the relevant investment treaty, or the conclusion and ratification of a new investment treaty.

[68] Likewise, as a non-legal matter, it should be absent from an Investor-State Arbitral Tribunal's reasoning.

[69] See REISMAN, W. Michael. Opinion with respect to jurisdiction in the Interstate Arbitration initiated by Ecuador against the United States, 2012. Available at: https://www.italaw.com/cases/documents/1498

[70] Nor for a "re-politization" of international investment disputes (consonant with Section 3 supra).

[71] In due consideration of the cases referred in Section 3 supra, when these circumstances have occurred, deficiencies have arisen.

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