Rodrigo Polanco, *The Return of the Home State to Investor-State Dispute Bringing back Diplomatic Protection?* Cambridge: Cambridge University Press, 2019. Pp 372. \$130.00. ISBN 9781108473385.

This book has an intriguing title and, in fact, is an intriguing book. It is based on the assumption that there is a return of the State of the investor (home State) to investor-State disputes. The author then answers the following question: does that return amount to diplomatic protection? According to Rodrigo Polanco, this book advances the idea that in order to address some of the criticisms of the ISDS [Investor-State Dispute Settlement] system, a majority of states have taken a 'normative' strategy, negotiating new investment treaties (or amending existing ones), with provisions that potentially give more control and involvement to the contracting parties, and notably the home State (p. 4).

This is the basic suggestion of the thesis. The second one is that although they give more room for the home States' intervention in investment disputes, the changes in the treaties 'are not a 'return' to diplomatic protection (p. 6). This approach is intriguing. The suggestion presented as a starting point is more than a mere assumption and, as demonstrated by the author, new treaties dealing with investment disputes actually provide the home State with an increased role in the ISDS system. But the idea that such role could reflect a comeback of diplomatic protection is not an intuitive conclusion and the negative answer given by the author to the question he thought worthwhile to ask is not surprising. So, why ask the question in the beginning and make it a subtitle of the book?

Whatever the case may be, the alleged return of the home State to investor-State disputes, already pointed out by other scholars, must be carefully presented and explained, failing which it would be seen as an exaggerated and misleading statement.¹ The book does not indulge in such excess, thanks to the quality of the research it relies on.

This book provides a wealthy source of information on the provisions dealing with investment disputes in the bilateral investment treaties (BITs), international investment Agreements (IIAs), free trade agreements, and other similar treaties concluded during the last fifteen years. If it were for that sole reason, I would recommend it to any person interested in the evolution of ISDS in general and investor-State arbitration (ISA) in particular, as it offers an invaluable perspective on the end of one paradigm and the birth of a new

1 Wolfgang Alschner, 'The Return of the Home State and the Rise of "Embedded" Investor-State Arbitration' in Shaheez Salani and Rodrigo Polanco (eds), *The Role of the State in Investor-State Arbitration* (Brill/Martinus Nijhoff 2014) 293.

one, as far as ISDS is concerned. It is not necessary to share fully the author's characterization of major features of this new world to be impressed by the investigation he has made and the accuracy of the results he presents.

The book convincingly shows that treaties concluded within the last 15 years – and model treaties drafted in the same period – include provisions which did not exist or were exceptional in the treaties of the second part of the 20th century. These provisions are aiming at preventing investment disputes, filtering claims, joint interpretation of the treaty by the contracting parties, allowing referral to domestic authorities of both contracting parties, regulating the work of international tribunals, permitting non-disputing State party interventions, and facilitating the enforcement of awards. Many of these provisions grant the home State a role that the book characterises as its return to investor-State disputes. Yet, it is not the case of all of them. The concept of 'return' implies that the home State, after being part of ISDS, first, as it were, stepped out of it and then came back, which may also explain the author's concern about a possible new role for diplomatic protection. However, to understand this minor reservation to the author's extensive notion of 'return of the home State', the statement that the home State stepped out of ISDS requires a major qualification, closely linked with diplomatic protection.

As rightly pointed out by Christoph Schreuer, in the field of ISDS, '[d]iplomatic protection was developed as a consequence of the non-availability of international remedies to individuals and corporations under traditional international law.'² However, diplomatic protection was not a very effective tool for the foreign investor alleging wrongs caused by the host State as it required the exhaustion of local remedies³ and agreement by the home State to espouse the claim of its national. Such a decision was not taken easily by the home State because of its diplomatic implications. The author accepts that this system was in great part abandoned with the rise of ISA (p. 3). However, he recalls

2 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 2007) 345–358.

3 See International Law Commission (ILC), 'Draft Articles on Diplomatic Protection 2006' (adopted at 58th Session in 2006) <http://legal.un.org/ilc/texts/instruments/english/draft_articles/g_8_2006.pdf> accessed 22 October 2019. Draft Art 14 on 'Exhaustion of Local Remedies': '1. A State may not present an international claim in respect of an injury to a national or other person referred to in draft article 8 before the injured person has, subject to draft article 15, exhausted all local remedies. 2. "Local remedies" means legal remedies which are open to an injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing the injury. 3. Local remedies shall be exhausted where an international claim, or request for a declaratory judgement related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in draft article 8.'

that such a rise resulted from the conclusion of bilateral treaties between a developing and a developed country, 'usually at the initiative of the latter' (p. 3). The investor was granted direct access to arbitration against the host State but this does not mean that the home State was absent. The reality is that home States did not have to be involved in individual disputes because they felt that the ISDS that they had engineered was functioning to their satisfaction. This explains the host States' reluctance as reflected in Article 2(2)(c) of the Charter of Economic Rights and Duties of States, which states that in case of nationalisation, expropriation and the like, disputes relating to compensation 'shall be settled under the domestic law of the nationalizing State and by its tribunals' failing a different agreement of all States concerned.⁴ Thus, the home State stepped out of ISDS only insofar as it ceased to intervene in individual disputes between its national investors and the respective host States. This qualification is important since articulating the research question as relating to the return of the home State implies that it is back in individual investment disputes, hence the author's interrogation relating to diplomatic protection.

The detailed analysis of recent treaties and model treaties in this book does show provisions granting the home State new tools to intervene in individual disputes. However, these provisions remain exceptional. The more significant trend seems to be toward a greater cooperation between the contracting parties in order to monitor the implementation of the treaty without having in

4 The full text of Article 2 reads:

1. Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities. 2. Each State has the right: (a) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment; (b) To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State. Every State should, with full regard for its sovereign rights, co-operate with other States in the exercise of the right set forth in this subparagraph; (c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. *In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.*

See Charter of Economic Rights and Duties of States (adopted by UN General Assembly Resolution 3281 of 12 December 1974) (emphasis added).

mind the resolution of a conflict relating to one specific investment.⁵ In this case, it seems excessive to consider a return of the home State as the concepts of home State and host State, in a technical sense, cannot apply. It is particularly so since the division between capital-exporting countries and developing countries no longer corresponds to the division between home States and host States in the usual practice of dispute settlement which existed when the ISDS system was set up. Reading the book, while at the same time keeping in mind the distinction between the new provisions which allow the home State to intervene in individual disputes and those which only allow the contracting parties to monitor together the implementation of the treaty irrespective of any specific dispute, provides a sharper analytical perspective.

Among the provisions which allow the home State to intervene in individual disputes, the author describes a number of treaties, such as the Cooperation and Facilitation Investment Agreements concluded by Brazil and several countries since 2015, which give the role of mediators to bodies either controlled or constituted by both the home State and the host State in case of dispute between an investor of one of the contracting parties and the State where the investment is made.⁶ These agreements concluded by Brazil do not provide for ISA but for the intervention of 'ombudspersons' whose role is to avoid or mitigate disputes. Should they fail to resolve the dispute, Joint Committees play a mediating function. The 'ombudspersons' are governmental entities from both the home States and the host States, and the Joint Committees are composed by representatives of both States. Rodrigo Polanco points out the ambiguity of the role of the 'ombudspersons' as well as of the Joint Committees (p. 62). To resolve disputes through consultation, negotiation and mediation is not their primary function. Their main role is to prevent the occurrence of disputes by monitoring the implementation of the treaty and it is only in case a dispute occurs that they intervene to resolve it in an amicable manner.

Few other treaties with similar solutions for preventing disputes are presented in Rodrigo Polanco's book. Yet, the Brazilian approach is particularly interesting because it comes from a country which has managed to be one of the most popular destinations in the world for foreign investment while at the same time deliberately refusing to be part of the ISDS system. Brazil has never adhered to the Convention on the Settlement of Investment Disputes between

5 See for instance, those BITs which include a clause providing for the review of the implementation of the treaty by the contracting parties on a regular basis.

6 See for instance Art 4 of the Cooperation and Facilitation of Investment Agreement Between Brazil and Mozambique (signed 30 March 2015) and the Cooperation and Facilitation of Investment Agreement Between Brazil and Angola (signed 1 April 2015), respectively, which gives to a Joint Committee appointed by the contracting parties the mission to 'seek consensus and resolve amicably any questions or conflicts regarding the investments of the Parties'.

States and Nationals of Other States (ICSID Convention), nor has it ratified even the BITs concluded in the past. It is obvious that Brazil continues to be reluctant to enter the ISDS system and that, concerned by the need to protect investment of its nationals abroad, it favours solutions giving it a role to play as a home State rather than resorting to ISA.

Other solutions aiming at preventing investment disputes are the object of interesting analysis in this book, even if they appear to turn on the author's perhaps somewhat questionable assumption that many investment disputes could be avoided if foreign investors were to adopt more responsible behaviour. Following the approach advocated, among others, by the International Institute for Sustainable Development (IISD),⁷ Rodrigo Polanco suggests that in order to prevent investment disputes home States should promote policies, some of them being presented as based on principles of international law, e.g. that their nationals implement abroad corporate responsibility with respect to corruption, human and labour rights and environment protection. His assumption is that 'conflicts are less likely to happen between host states and "responsible" investors' (p. 55). One may object that such an approach is at odds with the very concept of investment protection by implying that good investors actually do not need protection as they will not suffer the risk of unlawful expropriation, unfair and inequitable treatment and other breaches of international law. Leaving this comment apart, such policies to be reflected in the domestic law of the contracting parties appear so far in very few treaties but are dealt with, in some fields such as corruption, in a significant number of national laws⁸ and international instruments.⁹ They do not address individual disputes but are part of the legal background of the investment.

It is also the case of most of the provisions of the treaties which contemplate a joint interpretation of their text by the contracting parties. Such mechanisms for interpretation are intended to apply in abstract terms, with no relation to an individual dispute and thus cannot be seen as an example of the return of the home State. When the contracting parties are jointly considering problems

7 The book refers expressly to the IISD Model International Agreement on Investment for Sustainable Development (April 2005, rev April 2006) (IAISD) and to the South African Development Community (SADC) Model Bilateral Investment Treaty (July 2012), both generated with the support of the International Institute for Sustainable Development (IISD) (p 56).

8 See for example in the United States: Foreign Corrupt Practices Act of 1977, as amended, 15 USC §§ 78dd-1, et seq; and in Canada: Corruption of Foreign Public Officials Act (SC 1998, c 34).

9 See for example OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (signed 17 December 1997, entered into force 15 February 1999); United Nations Convention Against Corruption (adopted 31 October 2003) UN Res 58/4; Inter-American Convention Against Corruption (B-58) (adopted 29 March 1996).

of interpretation of a treaty, there is no home State and no host State, exactly as if they were negotiating the treaty, each of them having a vocation to be either the home State or the host State. However, the book shows that some treaties provide for the possibility of authoritative interpretation by the contracting parties or a body constituted by representatives of each State in pending arbitral procedures, referred to as 'Intra-Arbitral-Interpretation' (pp. 113–131). Even if this is the case in relatively few treaties, it is probably one of the more fascinating parts of the book. This is obviously a return of the home State and a significant change of perspective in ISA, in particular when the treaty allows for the interpretation of any of its provisions. Indeed, in the traditional system of investment arbitration, the investor and the host State debate the interpretation of the treaty through their respective lawyers to allow the arbitrators to provide an interpretation which is supposed to serve as basis for their decision. The home State is absent from this debate. When it contributes to it directly or indirectly through a body where it is represented, the home State is really back. It has been suggested that joint interpretation in the course of a specific procedure may raise difficult problems of due process and retroactive application of a new authoritative interpretation of the treaty which may be characterized as a rule of law.¹⁰ Due process is not a serious issue as the tribunal may ask the parties to comment on the new interpretation of the treaty before taking any decision and must in fact use such possibility in order to respect due process. Retroactive application of the new interpretation is a red herring as well, since interpretation as such cannot be retroactive: it defines the meaning of a provision. If this provision was differently interpreted before, the new interpretation is supposed to be only a better interpretation of the same law. There is however no change in the law, it is the mere view on the law of the new interpreter, which explains the existing contradictions between approaches taken by different arbitral tribunals.

The true danger is elsewhere. It has been pointed out that in cases of direct or indirect interpretation by the contracting parties in pending arbitration procedures, one of the parties to the dispute may influence the final decision by its contribution to the official interpretation.¹¹ It is certainly true, and the situation is worse for the investor which can only hope that the home State will fight for its position in the arbitration, contrary to the host State which is fight-

10 Gabrielle Kaufmann-Kohler, 'Interpretive Powers of the Free Trade Commission and the Rule of Law' in Frédéric Bachand (ed), *Fifteen Years of NAFTA Chapter 11 Arbitration*, IAI Series No 7 (JurisNet, LLC 2011) 187–189.

11 Kate Parlett, 'Diplomatic Protection and Investment Arbitration' in Rainer Hofmann and Christian Tams (eds), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* (Nomos 2011) 110–111.

ing for itself. The hopes of the investor may be disappointed. The home State may well privilege its future interest as a potential host State under the treaty, its diplomatic relations with the host State and many other factors, unknown to the investor, which will determine its position.

The book provides for a few other examples of provisions of recent treaties allowing the intervention of the home State in individual disputes, together with the host State. That may be the case, *inter alia*, of provisions relating to the filtering of claims, to technical referrals to domestic authorities or of the intervention of both States in the constitution of arbitral tribunals. The home State may also intervene unilaterally through non-disputing State party intervention when allowed. Several other examples are presented with a rich analysis (pp. 178–186).

As already mentioned, Rodrigo Polanco does not believe that this new involvement of the host State in ISDS amounts to a revival of diplomatic protection since the new mechanisms ‘are not triggered unilaterally by the home state or do not focus directly on the purpose of implementing state responsibility.’ Yet, he suggests that ‘they have the potential to advance positions that are favourable for its national investors’ (p. 307). This is less sure.

The distinction between a home State and a host State is a relative one. No State is, any longer, either a home State or a host State *in abstracto*. On the contrary, each State is potentially home State or a host State and acquires in turn one of the two qualities with respect to one or several investments. The author is aware of this evolution (p. 311) but keeps short of drawing the full consequences thereof.

Much of interest can be found in *Italy v Cuba*¹² for those thinking about the return of the home State in investment dispute through diplomatic protection. This case is the only publicly known recent case where a home State used the inter-State arbitration provision of an IIA to formally espouse the claims of investors under this IIA before an adjudicative mechanism. Italy was invoking both its own subjective rights under the treaty as well as the right to diplomatic protection enjoyed by its nationals. Rodrigo Polanco makes interesting critical comments of the majority of the Tribunal’s decisions with respect to the nationality of the investors and the requirement of exhaustion of local remedies (pp. 253–257).

As a conclusion, beyond recommending this book for being well documented and sustaining an interesting thesis and several proposals worthy of

12 An ad hoc Tribunal issued a majority interim award in this case on 15 March 2005 and a final majority award on 15 January 2008. For an analysis of these decisions see Michele Potestà, ‘Republic of Italy v Republic of Cuba’ (2002) 106 AJIL 341.

discussion, it must be praised for its optimism and its constructive approach. At a time when more and more voices predict that the end is nigh for investment arbitration, the author is convinced that a more active role of the home State, allowed by an increasing number of investment treaties, would suffice to resolve most of the current problems that ISDS is facing, including ISA. According to Rodrigo Polanco, the home State could contribute 'to help to prevent investment disputes, to provide more clarity about the interpretation of treaty provisions, to regulate the work of arbitrators, or to assist in the enforcement of ISDS awards' (pp. 306–307). This approach is indisputably refreshing as it suggests that a better cooperation between the host State and the home State may eradicate the causes of the overwhelming criticisms of ISDS. This is probably enough for being labelled as naïve by those who think that the worst case is always the more realistic forecast. Yet, Rodrigo Polanco is not naïve. Based on a deep and well documented study, he exposes also the limits of his suggested solutions. However, as an optimist, he apparently prefers to see the glass half full rather than to add his voice to those who apparently think that any writing about ISDS and investment arbitration should be inspired by Garcia Marquez's *Chronicle of a Death Foretold*.

The present dire situation of investment arbitration is lucidly analysed in the book (pp. 46–52). Criticisms against the system itself are clearly distinguished from criticisms against its functioning, although this distinction is somewhat artificial. It is a fact that the legitimacy of the system is challenged as such by those who cannot accept that foreign investors may have a more favourable treatment than nationals of the host State. But some aspects of its functioning are always used to sustain such general challenge: lack of transparency, 'nationality planning' which allows an investor to rely on a treaty without any effective business activity in the home State, contradictory interpretations of treaties, absence of appellate proceedings and lack of independence and impartiality of the arbitrators illustrated inter alia by the double hat practice. The EU Commission's Concept Paper for investment protection of 5 May 2015,¹³ in the course of the Transatlantic Trade and Investment Partnership (TTIP) negotiations, is a striking example of the use of some present or supposed characteristics of ISDS as a justification to express a frontal opposition to the essence of the system by recommending

that foreign investors are treated in a non-discriminatory fashion, while benefiting from no greater rights than domestic investors and to replace

13 European Commission's Concept Paper, 'Investment in TTIP and Beyond – The Path for Reform' (5 May 2015) (emphasis added).

the ISDS system with a new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured, the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives.¹⁴

The core of the concept of investment protection as it exists today is that the foreign investor should be more protected than domestic investors. To deny it amounts to bringing back the Calvo doctrine or to Article 2 (2) (c) of the Charter of Economic Rights and Duties of States. If foreign investors cease to be better protected than domestic investors, ISDS is no longer necessary.

There is a danger that the ISDS system may disappear if it is not politically acceptable. Some of the trends of recent treaties, brilliantly analysed by Rodrigo Polanco, may avoid that fate by improving such acceptability.

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¹⁴ European Parliament Resolution of 8 July 2015 Containing the European Parliament's Recommendations to the European Commission on the Negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (adopted 8 July 2015) 2014/2228(INI), sec S.2(xv) (emphasis added).