Rodrigo Polanco. ***The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?*** Cambridge: Cambridge University Press, 2019. Pp. 342. £95.00. ISBN: 9781108473385.

Since the early 2000s, an increasing number of states have sought to reassert control over their investment treaties. This rebalancing has occurred in response to arbitral awards or investor claims, which have been seen as curtailing states' legitimate regulatory space.[1] This trend has also spawned its own academic literature.[2] In *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?*, Rodrigo Polanco intervenes in these debates by focusing on 'innovations in treaty-making that provide for a larger role for the investor's home state' in investment disputes (at 4). Polanco's core argument is that the developments he identifies do not represent 'a "return" to diplomatic protection' in the traditional sense but, rather, are part of a wider 'return of the states in order to regain control as "masters" of the investment treaties, aiming to minimize risks in the interpretation of those agreements in potential future disputes with foreign investors' (at 6, 308). In this view, 'the home state may have more interests in common with the host state than with its national investors', with both home and host states sharing the interest of 'minimizing … [their] exposure to ISDS' (at 6, 10, 308). Accordingly, 'a home state would be willing to intervene in investment disputes only if its own public interests are affected; and these do not necessarily coincide with the interests of its investors' (at 6).

Polanco's claims about how investment treaties are evolving to provide for a greater degree of involvement by home states draws on a dataset he compiled of all publicly available investment treaties concluded in the past 15 years (at 8).[3] The selected time period is appropriate because, as Polanco notes, it is in the last 15 years that states have experimented with a wide range of treaty-drafting reforms, given concerns about protecting regulatory space. Also, appropriately, Polanco is not rigid with the cut-off date,

[1] For example, the 2001 Notes of Interpretation, issued by the Free Trade Commission of the North American Free Trade Agreement (NAFTA) 1992, 32 ILM 296 (1993), directly responded to interpretations contained in several early NAFTA awards. See generally P. Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (2013), at 64–72. Similarly, the 2004 US Model Bilateral Investment Treaty (BIT) contained a wide range of reforms, which were partly motivated by early claims under NAFTA and are often regarded as the beginning of an era of rebalancing investment treaties. See generally Vandevelde, 'A Comparison of the 2004 and 1994 U.S. Model BITs: Rebalancing Investor and Host Country Interests', in K.P. Sauvant (ed.), *Yearbook of International Investment Law and Policy 2008–2009* (2009) 283. For a sense of the most recent developments, see United Nations Conference on Trade and Development (UNCTAD), 'Taking Stock of IIA Reform: Recent Developments', UNCTAD IIA Issues Note 3, June 2019. Echandi, 'Bilateral Investment Treaties and Investment Provisions in Preferential Trade Agreements: Recent Developments in Investment Rule-making', in K. Yannaca-Small (ed.), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (2nd edn, 2018) 3; see also Alschner, 'The Return of the Home State and the Rise of "Embedded" Investor-State Arbitration', in S. Lalani and R. Polanco Lazo (eds), *The Role of the State in Investor-State Arbitration* (2014) 293, at 296–297, 305 (arguing that many of the control mechanisms utilized by states were already present in NAFTA, signed in 1992, due to that agreement involving bidirectional investment flows, although the later surge in investor-state arbitrations led to such control mechanisms proliferating).

[2] See especially A. Kulick (ed.), *Reassertion of Control over the Investment Treaty Regime* (2016); S. Hindelang and M. Krajewski (eds), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (2016). A number of chapters within the following collections also address the topic: J.E. Kalicki and A. Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (2015); S. Lalani and R. Polanco Lazo (eds), *The Role of the State in Investor-State Arbitration* (2014).

[3] To be clear, the book covers both investment treaties and investment chapters within wider free trade agreements. For the purposes of this book review, I will use the expression 'investment treaties' to refer to both of these. Rodrigo Polanco does not specify the exact dates that his empirical study covers (at 8).

and, where particular provisions have their origins in earlier treaties, he considers those. Notwithstanding the use of a partly empirical methodology, much of the book involves traditional '"rules-based"' legal analysis of treaty provisions and relevant arbitral awards (at 7). Certain parts of the book also have a historical focus in order to give a sense of how diplomatic protection was traditionally used by states to protect their nationals' interests prior to the existence of investor-state arbitration, including through the establishment of binational claims commissions or mixed arbitral tribunals (Chapter 1).

Polanco's choice to focus on home states is well made. The literature discussing attempts to rebalance the investment treaty regime has tended to focus on host states and on changes to substantive standards of treatment. That said, Polanco is not the first to suggest that greater home state involvement is an important part of the wider move by states to exercise control over the interpretation and application of investment treaties in order to protect their regulatory autonomy.[4] Also, the basic idea that home and host states may have increasingly convergent interests, centred on preserving adequate regulatory space, has already been developed in some literature.[5]

In my view, one of the most useful aspects of *The Return of the Home State to Investor-State Disputes* is the detailed analysis of the mechanisms that enable the home state to participate in investor-state disputes, whether jointly with host states (Chapter 4) or unilaterally (Chapter 5).[6] The mechanisms covered in these chapters include: provisions enabling the treaty parties, by agreement, to filter particular kinds of sensitive investor claims, especially concerning taxation measures; provisions concerning the treaty parties' ability to adopt joint interpretations of investment treaties, either in the abstract or through provisions enabling the referral of certain interpretative issues to the treaty parties during investor-state arbitrations; provisions enabling the referral of particular questions concerning taxation or financial measures to specialist domestic agencies of both treaty parties during an investor-state arbitration; and non-disputing party submissions by the home state. While some of these mechanisms have been addressed by prior literature,[7] Polanco's book provides us with an overall picture of the wide

[4] See especially Alschner, *supra* note 1.

[5] A standard explanation is that such converging interests are due to investment flows becoming bidirectional and traditional capital exporters being exposed to investor-state arbitrations. See, e.g., Roberts, 'Triangular Treaties: The Extent and Limits of Investment Treaty Rights', 56 *Harvard International Law Journal* (2015) 353, at 360–361; Kulick, 'Reassertion of Control: An Introduction', in A. Kulick (ed.), *Reassertion of Control over the Investment Treaty Regime* (2016) 3, at 7, 11–12.

[6] In Chapter 3, Polanco addresses investment treaty provisions that enable home state involvement, often jointly with the host state, in the prevention or management of investor-state disputes prior to formal dispute settlement proceedings. For example, he reviews treaties that create ombudsperson institutions or joint committees of the treaty parties with an explicit role in relation to dispute settlement as well as provisions in many investment treaties that enable the treaty parties to jointly review the implementation of the agreement (at 59–73).

[7] See, e.g., Kaufmann-Kohler, 'Non-Disputing State Submissions in Investment Arbitration: Resurgence of Diplomatic Protection?', in L. Boisson de Chazournes, M.G. Kohen and J.E. Viñuales (eds), *Diplomatic and Judicial Means of Dispute Settlement* (2013) 307; van Aaken, 'Delegating Interpretative Authority in Investment Treaties: The Case of Joint Administrative Commissions', in J.E. Kalicki and A. Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (2015) 21; Methymaki and Tzanakopoulos, 'Masters of Puppets? Reassertion of Control through Joint Investment Treaty Interpretation', in A. Kulick (ed.), *Reassertion of Control over the Investment Treaty Regime* (2016) 155; Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States', 104 *American Journal of International Law* (2010) 179.

variety of mechanisms that often exist alongside each other and that may even interact.[8] Here, as elsewhere in the book, Polanco's review of investment treaties is comprehensive. His detailed analysis reveals variations that exist within the different types of control mechanisms and distinguishes well-established trends from provisions that are only found in a small number of treaties. Polanco also usefully shows how the control mechanisms have often been diffused through the treaty making of a small number of states, especially the USA, Canada and Mexico, based on their initial experience with such control mechanisms in the North American Free Trade Agreement (NAFTA) (for example, at 91–93, 111–112, 114–115, 142–147).[9] All of this makes Polanco's findings persuasive: readers are not presented only with those treaties with which the author happens to be familiar.

Another valuable aspect of these chapters is that they engage in a thorough analysis of how the various control mechanisms have been used in practice. For example, on non-disputing party submissions, Polanco analyses how home states have used this mechanism in disputes under NAFTA and the Dominican Republic–Central America–United States Free Trade Agreement,[10] the contexts where submissions have been most common, as well in other instances where he was able to identify non-disputing party submissions by home states. He demonstrates that, while home states could use this mechanism to advocate for an interpretation favouring their investor's case in a particular dispute, in practice, they are not doing so. Rather, home states use these submissions to express their general views on the correct interpretation of the agreement, and most such submissions favour the position of the host state (at 173–195).[11]

Given his argument that we are not witnessing a return of diplomatic protection in the investment treaty regime, Polanco had to engage with various aspects of the regime that exhibit elements of diplomatic protection. For example, he analyses several instances in which the USA withdrew trade benefits from Argentina or voted against loans to the latter country within multilateral development banks, after lobbying by US investors over Argentina's failure to pay investment treaty awards (at 205–211). Likewise, the use of diplomatic means by home states to facilitate the settlement of a dispute between its investors and a host state, including in the shadow of a potential investor-state arbitration claim, is considered in light of a range of publicly known examples of this occurring (at 225–230). Like the few others who have considered this topic, Polanco suggests that there are likely more such diplomatic efforts occurring than is publicly known, and investor-state arbitration complements, rather than replaces, informal diplomatic efforts to influence investor-state disputes (at 230).[12] Polanco also analyses interstate adjudication as a possible means of diplomatic protection. Some of this does not shed much new light (for example, the analysis of diplomatic protection cases concerning investments at the International Court of Justice, which curiously draws on textbooks in its discussion of the cases) (at 240–244).

[8] On the point that it is important to appreciate the complementary effect of these various mechanisms in embedding investor-state arbitration within the wider relationship of the treaty parties, see Alschner, *supra* note 1, at 296–297, 327–328.

[9] NAFTA, *supra* note 1. Alschner, *supra* note 1, at 301–302, has also suggested that the control mechanisms introduced in NAFTA were incorporated by the NAFTA parties into their subsequent investment treaties and picked up by some other states in their treaty making.

[10] NAFTA, *supra* note 1, Art. 1128. Dominican Republic–Central America–United States Free Trade Agreement 2004, 43 ILM 514 (2004), Art. 10.20(2).

[11] A similar conclusion was reached looking at non-disputing party submissions within a shorter time period and only in the NAFTA context by Kaufmann-Kohler, *supra* note 7, at 314–315.

[12] See Gertz, Jandhyala and Poulsen, 'Legalization, Diplomacy, and Development: Do Investment Treaties De-Politicize Investment Disputes?', 107 *World Development* (2018) 239; Gertz, 'Commercial Diplomacy and Political Risk', 62 *International Studies Quarterly* (2018) 94.

Polanco's detailed treatment of interstate investment arbitration is a more significant contribution (at 246–273). While there is already a literature on this topic, which is incorporated into the book's discussion,[13] Polanco's analysis should nevertheless be of interest to anyone considering interstate investment arbitration. His detailed consideration of variations among dispute settlement provisions in investment treaties and of the questions involved in the potential interaction of interstate and investor-state arbitration is likely to prove useful for readers. Polanco's basic position is that state-state dispute settlement provisions in investment treaties should not be construed restrictively, and interstate arbitration has an important role to play as a control mechanism. Nevertheless, in considering procedural solutions to coordinate state-state and investor-state arbitration, Polanco is concerned to protect investors' interests (at 266–273).

Another question Polanco understandably engages with, given his overall topic, is why we do not see more home state involvement on behalf of investors in investor-state disputes. The explanations in this regard are not surprising, but they are competently developed. For example, Polanco highlights that home states' interests can diverge from those of their investors, due to wider foreign policy considerations or because of the home state's interest in supporting interpretations that protect policy space (284–289). Likewise, the book includes a solid analysis of the legal restrictions on diplomatic protection that may exist once consent has been given for a dispute to be submitted to investor-state arbitration, which covers restrictions arising under the ICSID Convention,[14] other arbitral rules, investment treaties and possible implied restrictions (at 215–222). Another explanation is that it is not always easy to identify who the home state is because of the use of complex corporate structuring by multinational enterprises, often in order to gain investment treaty protection (at 275–284). A further question in this regard, which admittedly would be difficult to pinpoint, might be to consider whether home states are less likely to weigh in on an investor's behalf where the link between the two is tenuous – for example, because the home state is being used as a nationality of convenience by the investor.

While Polanco discusses numerous options for home states to become involved in investor-state disputes and assert control over investment treaties, several related issues are left to one side. For example, the book might have offered a perspective on the thorny issue of whether home states can settle their investors' claims against a host state without investors' consent.[15]

[13] See, e.g., Roberts, 'State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority', 55 *Harvard International Law Journal* (2014) 1; Kulick, 'State-State Investment Arbitration as a Means of Reassertion of Control: From Antagonism to Dialogue', in A. Kulick (ed.), *Reassertion of Control over the Investment Treaty Regime* (2016) 128; Potestà, 'Towards a Greater Role for State-to-State Arbitration in the Architecture of Investment Treaties?', in S. Lalani and R. Polanco Lazo (eds), *The Role of the State in Investor-State Arbitration* (2014) 249.

[14] Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965, 575 UNTS 159, Art. 27.

[15] See, e.g., Roberts, *supra* note 5, at 395–399 (suggesting this is possible, although the home state may be liable for expropriation of the investor's claim under domestic law); Paparinskis, 'Investment Treaty Arbitration and the (New) Law of State Responsibility', 24 *European Journal of International Law* (2013) 617, at 644–646 (noting various answers to this question depending on one's view of the nature of investors' rights under investment treaties). Note that the issue of settling a claim after a wrongful act has occurred, which involves loss of the right to invoke responsibility, is different from the possibility of providing consent, prior to an act occurring, as a circumstance precluding wrongfulness. For consideration of the latter issue in relation to investment law, see Paparinskis, 'Circumstances Precluding Wrongfulness in International Investment Law', 31 *ICSID Review – Foreign Investment Law Journal* (*ICSIDR*) (2016) 484, at 488–491. The possibility of waiver or consent by an investor's home state is briefly noted in Kulick, *supra* note 5, at 22–24.

Also, Polanco excludes withdrawal from investment treaties from his study as this primarily concerns host states (at 6). However, there is an important question of home states potentially agreeing with host states to terminate investment treaties jointly, including through an agreement to terminate or amend a survival clause to prevent the filing of future investor claims after termination occurs.[16] The conceptual question underlying these issues is whether, as Anthea Roberts has suggested, home states, or the treaties parties acting jointly, should be understood as being in a public law relationship with investors, and thus retaining certain powers to alter investors' rights over time.[17] Another issue that might have been addressed in Polanco's book is the development of a framework for understanding the concepts of delegation, and independence of and state control over, international tribunals, as some other literature on the topic of rebalancing investment treaties has done.[18]

Towards the end of the book, Polanco asks whether the claims commissions and mixed arbitral tribunals of the 19th and early 20th centuries yield any lessons for current debates over standing investment tribunals (at 292–305). Although this historical comparison is original, the insights it generates are not developed in great detail. For example, Polanco notes that claims commissions were often seen as being biased in favour of home states, although the reality was somewhat more nuanced, and this debate 'could help to inform the future implementation' of standing investment court systems that have been accused by some of being biased in favour of states (and against investors) (at 296). Beyond discussing the question of bias in relation to claims commissions, Polanco does not really draw out what this means for current debates (at 296–301). Another lesson Polanco identifies from the claims commissions experience is that treaty drafters must recognize that the political will to support a standing tribunal – for example, by appointing members or providing funding – may fade over time (at 301–302). As Polanco himself notes, contemporary developments in international adjudication, such as the USA's blocking of appointments to the World Trade Organization's Appellate Body, also highlight this point.[19] Despite the insights generated by Polanco's historical comparison not being developed in great detail, this aspect of the book marks up an interesting and under-explored line of inquiry for current debates over the reform of investor-state arbitration.

In concluding, Polanco raises the concern that 'more than striking a balance between both sides of the system with the purpose of respecting both state sovereignty and investment protection, home and host states seems to be more interested in "damage control"' and specifically limiting the potential for their liability in future investment treaty disputes and widening their regulatory freedom (at 310). He notes that behind the idea of the 'right to regulate' lies 'an important risk that states use that "extra" space not for legitimate regulatory purposes, or even in violation of individual rights' (at 310).[20] The book concludes by suggesting that, '[i]nstead of pointing out the different treatment that this [investment treaty arbitration] implies for

[16] See, e.g., Roberts, *supra* note 5, at 403–405, 411–414; Voon, Mitchell and Munro, 'Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights', 29 *ICSIDR* (2014) 451. Note also that, while Polanco addresses joint interpretations by the treaty parties, amendments are not analysed.

[17] Roberts, *supra* note 5, at 374–375, 396–397, 408–409, 411–413.

[18] Kulick, *supra* note 5, at 17–21; Roberts, *supra* note 7, at 185–191; van Aaken, 'Control Mechanisms in International Investment Law', in Z. Douglas, J. Pauwelyn and J.E. Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (2014) 409, at 410–415.

[19] Polanco rightly highlights that recent European Union investment treaties that include standing investment tribunals do not include a mechanism that would explicitly resolve the situation where one of the treaty parties refuses to make nominations to the relevant tribunal or blocks the decision of the treaty body needed to make appointments to the tribunal (at 296).

[20] Polanco also briefly suggests that we might 'consider that states have the "duty" and not a "right" to regulate. A "duty" implies that a state has to regulate when needed, and shall refrain from it when unnecessary' (at 310). Others who have approached the investment regime from the perspective of human rights law have considered the relevance of a state's duty to regulate arising from the latter. See L.W. Mouyal, *International Investment Law and the Right to Regulate: A Human Rights Perspective* (2016), at 114–129.

foreign investors in relation to domestic investors, perhaps we should also consider recognizing for domestic investors, citizens and groups within the host state the same opportunities to file complaints about how their government treats them' (at 312). In my view, these final remarks are not entirely convincing. The final suggestion that we should focus on realizing equivalent mechanisms to investment treaty arbitration for all domestic actors raises more questions than it answers. If the aim is to promote government accountability to all stakeholders, arguably resources would be better devoted to improving existing justice and administrative systems within states.[21] Developing an intrusive international mechanism, similar to investment treaty arbitration, whereby all domestic stakeholders could file complaints against their own state, would involve a huge transfer of decision-making power upwards to the international level.[22] It would face serious objections, for example, given the greater democratic legitimacy of domestic governance.[23] Also, such a proposal hardly seems politically feasible given the current climate of declining support for international governance. Additionally, Polanco's concern that states might abuse their increased regulatory space is, in my view, overstated, given certain factors that may limit such abuse. For example, the fact that the mechanisms enabling treaty parties to prevent particular kinds of claims being adjudicated upon by an investor-state tribunal, or to provide a determination that binds a tribunal, must be exercised jointly, through agreement of both treaty parties, is likely to prevent some abuse. Also, for those claims left to tribunals to decide, many obligations and exceptions within newer investment treaties are drafted to protect only legitimate regulatory measures, meaning that measures that are, for example, arbitrary or discriminatory are unlikely to survive adjudicatory scrutiny.[24]

[21] See, e.g., Yilmaz Vastardis, 'Justice Bubbles for the Privileged: A Critique of the Investor-State Dispute Settlement Proposals for the EU's Investment Agreements', 6 *London Review of International Law* (2018) 279, at 280, 295–297 (making this kind of argument in relation to investor-state dispute settlement mechanisms).

[22] Because Polanco makes this suggestion as a concluding comment, he does not expand upon the proposed design of such a mechanism nor how it would relate to existing individual complaint procedures under human rights treaties.

[23] Although writing with investor-state arbitration as his focus, rather than a mechanism that would be available to a broader range of domestic actors, David Schneiderman has frequently highlighted that the former mechanism disempowers domestic democratic decision-making and has thus advocated a loosening of international restrictions. See, e.g., Schneiderman, 'Against Constitutional Excess: Tocquevillian Reflections on International Investment Law', 85 *University of Chicago Law Review* (2018) 585. In addition to democratic legitimacy, there are other reasons why domestic-level decision-makers may be better placed to make certain kinds of determinations – for example, given their familiarity with local circumstances or subject-specific expertise. I summarize these arguments in Paine, 'Standard of Review: Investment Arbitration', in H. Ruiz Fabri (ed.), *Max Planck Encyclopedia of International Procedural Law* (2019), paras 6–11.

[24] For example, to fall within the police powers exception recognized in expropriation annexes (and, thus, not constitute an expropriation), a measure must be, *inter alia*, 'non-discriminatory' and 'designed and applied to protect legitimate public welfare objectives', and consideration will typically be given to 'the extent to which the measure … interferes with distinct, reasonable investment-backed expectations' and 'the character of the measure'. European Union–Canada Comprehensive Economic and Trade Agreement (CETA) (signed 30 October 2016, not yet in force), Annex 8-A, paras 2-3, available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf. Similarly, general exceptions provisions, which might be invoked by a respondent state, are subject to important qualifications such as that, to fall within such an exception, measures must not be applied in a manner that constitutes arbitrary or unjustifiable discrimination or a disguised restriction on international trade, and, additionally, the measure must be shown to meet the relevant nexus with one of the listed policy aims, such as that it is 'necessary' to protect human or animal health. *Ibid.*, Art. 28.3.

These criticisms of particular aspects of Polanco's argument and analysis should not detract from the many merits of his book. *The Return of the Home State to Investor-State Disputes* should be of interest to anyone attempting to understand, or who are themselves involved in, the numerous changes occurring in the investment treaty regime. While there is currently much focus on the potential development of a multilateral investment court, Polanco's book highlights that many of the mechanisms through which states might exercise control over the investment treaty regime do not depend on the choice between arbitration and a standing tribunal. Polanco's focus on home states, which is often an overlooked category of actor, demonstrates that, whether acting unilaterally or jointly with host states, the former are crucial players in the ongoing rebalancing of the investment treaty regime. Polanco's overall thesis – that we are not witnessing a return of diplomatic protection but, rather, something new, where states are seeking to protect regulatory autonomy and home and host states' interests increasingly overlap – is convincing and supported by much evidence. Particularly because of its comprehensive review of recent treaty-making patterns, this book provides important insight into how the investment treaty regime has been transforming in recent years and where it might be heading.

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doi:10.1093/ejil/chaa024

* This review was largely completed while I was a Senior Research Fellow at the Max Planck Institute Luxembourg for Procedural Law, and I wish to acknowledge the support provided by the Institute.