

## State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority

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*Most investment treaties contain two dispute resolution clauses: one permitting investor-state arbitration for investment disputes and the other permitting state-to-state arbitration for disputes concerning the treaty's interpretation and/or application. Despite this duality, the potential role of state-to-state arbitration, and its proper relationship with investor-state arbitration, have largely been ignored. However, recent cases, including *Peru v. Chile*, *Italy v. Cuba*, and *Ecuador v. United States*, demonstrate the need to examine the potential and limits of this form of dispute resolution and to consider its implications for the hybridity of the investment treaty system as a whole.*

*One reaction to the re-emergence of state-to-state arbitration has been to view it as a dangerous development that threatens to infringe upon investors' rights and to re-politicize investor-state disputes. This has led some to suggest radically curtailing the scope and availability of state-to-state arbitration in favor of investor-state arbitration. This Article argues that these attempts are inconsistent with the text, object and purpose, and history of investment treaties. The co-existence of these two forms of arbitration without a clear priority mechanism reflects the system's essential hybridity and cannot be wished away. This duality helps to demonstrate that the goals of investor protection and the depoliticization of investor-state disputes are important, but not absolute.*

*Instead, the re-emergence of state-to-state arbitration represents an important step toward a new third era of the investment treaty system in which the rights and claims of both investors and treaty parties are recognized and valued, rather than one being reflexively privileged over the other. The investment treaty system has evolved from its first era, which focused exclusively on states' rights and state-to-state arbitration, to its second era, which focused primarily on investors' rights and investor-state arbitration. Instead of being an illegitimate or regressive development, the re-emergence of state-to-state arbitration represents a permissible and potentially progressive mechanism by which treaty parties can re-engage with the system in order to correct existing imbalances and help shape its development from within.*

*More generally, the co-existence of investor-state and state-to-state arbitration requires a hybrid theory about the nature of investment treaty rights and the allocation of interpretive authority. This Article argues that: investment treaty rights should be understood as being granted to investors and some states on an interdependent basis, such that either—but usually not both—may bring arbitral claims; and interpretive authority should be understood as being shared between the treaty parties, investor-state tribunals, and state-to-state tribunals. This hybrid theory has the potential to help resolve other controversial issues within the field.*

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## INTRODUCTION

The 1990s witnessed the signing of thousands of investment treaties, while the 2000s saw the launch of hundreds of investor-state arbitrations.<sup>1</sup> But a new development is on the horizon that has the potential to reshape our understanding of the field: the re-emergence of state-to-state investment treaty arbitration. This development is highly controversial because it implicates fundamental but unresolved questions about which rights have been given to investors and which rights and powers have been retained by states. This Article argues that state-to-state arbitration provides an important mechanism for treaty parties to re-engage with the investment treaty system. Moreover, the co-existence of investor-state and state-to-state arbitration requires a hybrid theory about the interdependent nature of investment treaty rights and the shared allocation of interpretive authority.

To appreciate the significance of this development for the investment treaty system's architecture, we must first understand something of the field's past. In broad brushstrokes, the modern era of investment protection can be roughly divided into two periods.<sup>2</sup> The first period is characterized by investment protections being owed and enforced on an inter-state basis under customary international law and Friendship, Commerce, and Navigation ("FCN") treaties. Claims were espoused by the investor's home state on the basis of diplomatic protection, which meant that the home state adopted the wrong against its national as a wrong against itself and pursued a claim on its own behalf. The home state had complete discretion over the commencement, prosecution, and settlement of such a claim, as well as the disposal of any damages awarded.

The second period is characterized by the rise of investor-state arbitration. During this period, states entered into Bilateral Investment Treaties ("BITs") containing a significant procedural innovation: investors were granted the right to bring arbitral claims directly against host states without requiring the permission—let alone espousal—of their home states.<sup>3</sup> Investors had discretion over the commencement, prosecution, and settlement of a claim, and damages awarded were paid directly to the investor. This development was celebrated for recognizing and protecting investors' rights and depoliticizing investor-state disputes. While the first period fo-

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1. See United Nations Conference on Trade and Development, *World Investment Report 2013: Global Value Chains: Investment and Trade for Development*, 102, 111 (2013) [hereinafter UNCTAD, *World Investment Report*].

2. See generally ANDREW NEWCOMBE & LUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* 41–46 (2009); RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 17–20 (2008); KENNETH J. VANDEVELDE, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION* 49–59 (2010).

3. "Home state" refers to the investor's state of nationality, and "host state" refers to the state in which the investment is made.

cused on states' rights and state-to-state arbitration, the second period focused on investors' rights and investor-state arbitration.

But this story oversimplifies and misrepresents reality in an important way. Investment treaties initially included state-to-state arbitration clauses modeled on FCN treaties and only later began including investor-state arbitration clauses.<sup>4</sup> Even then, investor-state arbitral clauses were generally incorporated in addition to, rather than in the place of, state-to-state arbitral provisions. As a result, most investment treaties now contain two dispute resolution clauses: one permitting investor-state arbitration for investment disputes and the other permitting state-to-state arbitration for disputes concerning the treaty's interpretation and/or application.<sup>5</sup>

Despite this co-existence, little attention has been paid to the scope of state-to-state arbitration or its relationship with investor-state arbitration. This lack of attention is understandable given the high number of investor-state claims and the relative dearth of state-to-state cases since the mid-1990s. But the times they are 'changin'. In light of their growing dissatisfaction with the investment treaty system, many states have sought to re-engage with the field in multiple ways in an effort to influence its development. As part of this process, a number of state-to-state arbitrations have been launched, including: (1) diplomatic protection claims made by home states seeking compensation on behalf of their investors; (2) interpretive disputes about the proper interpretation of investment treaties; and (3) requests for declaratory relief seeking a finding that the treaty has or has not been violated.

Why are these claims controversial? To understand what is at stake, consider the potential for state-to-state claims with respect to Argentina's 2001 economic crisis. In response to dire economic circumstances, Argentina enacted wide-ranging regulatory reforms, resulting in more than forty investor-state arbitrations being filed, many of which were brought by U.S.

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4. While the first investment treaty was signed in 1959 (Germany-Pakistan BIT), the first one to include an unqualified consent to investor-state arbitration came a decade later in 1969 (Chad-Italy BIT). See NEWCOMBE & PARADELL, *supra* note 2, at 42, 45. Until the late 1980s or early 1990s, most investment treaties did not contain strong, pre-consents to investor-state arbitration over a wide range of issues. See Jason Webb Yackee, *Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties*, 33 BROOK. J. INT'L L. 405, 423–33 (2008).

5. See, e.g., 2012 U.S. Model Bilateral Investment Treaty arts. 24, 37, 2012, available at <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> [hereinafter 2012 U.S. Model BIT]; German Model Treaty Concerning the Encouragement and Reciprocal Protection of Investments arts. 9, 10, 2008, available at <http://www.italaw.com/sites/default/files/archive/ita1025.pdf> [hereinafter 2008 German Model BIT]; Canada Model Agreement for the Promotion and Protection of Investments arts. 24, 48, 2004, available at <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf> [hereinafter 2004 Canadian Model BIT]; France Draft Agreement on the Reciprocal Promotion and Protection of Investments arts. 7, 10, 2006, available at <http://italaw.com/documents/ModelTreatyFrance2006.pdf> [hereinafter 2006 French Model BIT]; Colombian Model Bilateral Agreement for the Promotion and Protection of Investments arts. 9, 10, 2007, available at [http://italaw.com/documents/inv\\_model\\_bit\\_colombia.pdf](http://italaw.com/documents/inv_model_bit_colombia.pdf) [hereinafter 2007 Colombian Model BIT]; Indian Model Agreement for the Promotion and Protection of Investments arts. 9, 10, 2003, available at <http://www.italaw.com/sites/default/files/archive/ita1026.pdf> [hereinafter 2003 Indian Model BIT].

companies.<sup>6</sup> These claims involved certain common issues, such as whether Argentina's actions were justified under the U.S.-Argentina BIT's essential security clause or customary international law's necessity defense. In spite of these similarities, each case was litigated separately at great cost, imposing considerable time and financial burdens on the already troubled Argentine government. The results were wildly inconsistent, with some tribunals interpreting these exceptions widely and permitting the defense, and others interpreting them narrowly and rejecting the defense.<sup>7</sup>

How might this scenario have played out differently? Could the United States have brought a diplomatic protection claim on behalf of its investors as a class in order to ensure consistent results? What if some of its investors objected? Argentina argued that the treaty's essential security clause was self-judging and it could well have suspected that the United States agreed given that the United States had made the same argument with respect to a similarly worded FCN clause and had amended its Model BIT to clarify this point.<sup>8</sup> However, the United States had little incentive to reach an interpretive agreement in these cases because doing so might undercut its investors. Could Argentina have forced the United States to provide an interpretation by bringing a state-to-state interpretive claim? More radically, could Argentina have precluded the avalanche of investor-state claims by preemptively bringing a claim against the United States seeking a declaration that it was not liable?

These scenarios bring both the potential and the controversy of state-to-state claims to life. One reaction to the re-emergence of state-to-state arbitration has been to view it as a dangerous development that threatens to infringe upon investors' rights and to re-politicize investor-state disputes. A chief proponent of this view is Professor Michael Reisman, who argues that the "central achievement" of modern BITs is the separation and insulation of investor-state claims from "the caprice of sovereign-to-sovereign polit-

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6. William W. Burke-White, *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 199, 200 (2008). A current list of over fifty claims can be found at Investment Treaty Arbitration, RESPONDENT STATE, [http://www.italaw.com/cases-by-respondent?field\\_case\\_respondent\\_tid=34&=Apply](http://www.italaw.com/cases-by-respondent?field_case_respondent_tid=34&=Apply) (last visited Oct. 2, 2013).

7. *Compare* *Cont'l Cas. Co. v. Arg. Republic*, ICSID Case No. ARB/03/9, Award, ¶¶ 189–230 (Sept. 5, 2008), *with* *Enron Corp. & Ponderosa Assets, L.P. v. Arg. Republic*, ICSID Case No. ARB/01/3, Award, ¶¶ 322–45 (May 22, 2007) [hereinafter *Enron v. Argentina*, Award]. *See also* *CMS Gas Transmission Co. v. Arg. Republic*, ICSID Case No. ARB/01/8, Award, ¶¶ 304–94 (May 12, 2005) [hereinafter *CMS v. Argentina*, Award]; *Sempra Energy Int'l v. Arg. Republic*, ICSID, Case No. ARB/02/16, Award, ¶¶ 325–97 (Sept. 28, 2007) [hereinafter *Sempra Energy v. Argentina*]; *Enron Corp. & Ponderosa Assets, L.P. v. Arg. Republic*, ICSID Case No. ARB/01/3, Decision on Application for Annulment of Argentine Republic, ¶¶ 347–405 (July 30, 2010) [hereinafter *Enron v. Argentina*, Annulment].

8. Unlike the U.S.-Argentina BIT, on which many of the claims arising out of the financial crisis were based, later U.S. Model BITs clarify that the essential security clause is self-judging. *Compare* Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. XI, Nov. 14, 1991, 31 I.L.M. 124, *with* 2004 U.S. Model Bilateral Investment Treaty, art. 18(2), *and* 2012 U.S. Model BIT, *supra* note 5, art. 18(2). The United States also submitted pleadings on this issue under virtually identical clauses in its FCN treaties. *See* Burke-White, *supra* note 6, at 207.

ics.”<sup>9</sup> According to Reisman, investment treaties create a dual-track jurisdictional regime with different disputes assigned exclusively to each track.<sup>10</sup> Investor-state tribunals have wide jurisdiction to interpret and apply the substantive provisions of investment treaties. State-to-state tribunals have limited jurisdiction over residual issues, such as the failure of a state to pay an investor-state award.<sup>11</sup>

This Article takes a different view and argues that attempts to radically curtail the scope and availability of state-to-state arbitration in favor of investor-state arbitration are inconsistent with the text, object and purpose, and history of investment treaties. The co-existence of these two forms of arbitration without a clear priority mechanism is a reality of investment treaties that reflects the system’s essential hybridity and that cannot be wished away. This duality helps to demonstrate that the goals of investor protection and the depoliticization of investor-state disputes are important, but not absolute. In developing a novel and more nuanced account of the scope of state-to-state arbitration, which better reflects the text, object and purpose, and history of investment treaties, this Article advances two broader claims.

First, the re-emergence of state-to-state arbitration represents an important step toward a new third era of the investment treaty system in which the rights and claims of both investors and treaty parties are recognized and valued, rather than one being reflexively privileged over the other. The investment treaty system has evolved from its first era, which focused exclusively on states’ rights and state-to-state arbitration, to its second era, which focused primarily on investors’ rights and investor-state arbitration. Instead of being an illegitimate or regressive development, the re-emergence of state-to-state arbitration represents a permissible and potentially progressive mechanism by which treaty parties can re-engage with the system in order to correct existing imbalances and shape its development from within.

Second, the co-existence of state-to-state and investor-state arbitral mechanisms requires a new theoretical framework that can capture the hybrid nature of the investment treaty system.<sup>12</sup> The first era was dominated by a public international law paradigm focused exclusively on the treaty parties. The second era was dominated by an international commercial arbitration paradigm focused primarily on the investor-state disputing parties. In developing a hybrid theory that accounts for both, I argue that: (1) investment treaty rights should be understood as being granted to investors and home states on an interdependent basis, such that either—but usually not both—

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9. *Ecuador v. United States*, Expert Opinion with Respect to Jurisdiction of Professor W. Michael Reisman, 20–21 (Perm. Ct. Arb. Apr. 4, 2012) [hereinafter Reisman Opinion].

10. *Id.* at 4.

11. *Id.*

12. Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT’L L. 45, 92 (2013) [hereinafter Roberts, *Clash of Paradigms*].

may bring arbitral claims; and (2) interpretative authority should be understood as being shared between the treaty parties, investor-state tribunals, and state-to-state tribunals.

This Article proceeds in three parts. Part I introduces the phenomenon of state-to-state arbitration, providing a typology of claims and giving examples from existing practice. Part II examines and ultimately rejects the restrictive approach to interpreting state-to-state arbitral clauses. Part III develops a hybrid theory that would permit state-to-state claims with respect to diplomatic protection, interpretive disputes, and requests for declaratory relief. Consistent with my call for the system to move towards a new third era, this hybrid approach recognizes that both investors and treaty parties have important—and sometimes conflicting—interests and that the key to the investment treaty system’s sustainability lies in finding mechanisms to accommodate the interests of both entities instead of systematically privileging one.

## I. INTRODUCING A TYPOLOGY OF STATE-TO-STATE CLAIMS

Most investment treaties provide that one treaty party can bring an arbitral claim against another treaty party concerning “disputes” (or, sometimes, “differences,” “divergences,” “matters,” or “questions”) about the “interpretation *or* application” or the “interpretation *and* application” of the treaty.<sup>13</sup> The U.S. Model BIT provides a typical formulation:

[A]ny dispute between the Parties concerning the interpretation or application of this Treaty, that is not resolved through consultations or other diplomatic channels, shall be submitted on the request of either Party to arbitration for a binding decision or award by a tribunal in accordance with applicable rules of international law.<sup>14</sup>

“Interpretation” concerns the determination of the meaning of particular treaty provisions, while “application” concerns whether particular actions or measures taken by a treaty party violate the treaty’s requirements. Many cases will involve both elements.

These state-to-state clauses are “absolutely orthodox”<sup>15</sup> from a public international law perspective, providing what appears to be an “all-encompassing formulation” intended to cover the full range of disputes that might

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13. United Nations Conference on Trade and Development, *Dispute Settlement: State-State* 4–5, 13, U.N. Doc. UNCTAD/ITE/IIT/2003/1 (2003) (emphasis added) [hereinafter UNCTAD, *Dispute Settlement*].

14. 2012 U.S. Model BIT, *supra* note 5, art. 37(1).

15. Frank Berman, *The Relevance of the Law on Diplomatic Protection in Investment Arbitration*, in 2 INVESTMENT TREATY LAW: CURRENT ISSUES 67, 72 (Federico Ortino et al. eds., 2007).

arise under investment treaties.<sup>16</sup> They were derived from virtually identical provisions in FCN treaties, where they were understood to permit a broad range of direct claims for violations suffered by a state and diplomatic protection claims for violations suffered by a state's nationals.<sup>17</sup>

However, has the inclusion of investor-state arbitral clauses impliedly curtailed the scope of state-to-state arbitral clauses or vice versa? These two types of arbitration involve different disputing parties (state-to-state versus investor-state) and different mandates (interpretation and/or application of the treaty versus adjudication of investment disputes), but the potential for overlap is real. This becomes clear when we consider the types of state-to-state claims that have been and could be filed. These claims can be divided into three categories: diplomatic protection claims, pure interpretive disputes, and requests for declaratory relief.

First, a home state may bring a diplomatic protection claim on behalf of its investors for a treaty violation. For example, in *Italy v. Cuba*, Italy brought a claim on behalf of itself and several Italian investors alleging violations of the Cuba-Italy BIT.<sup>18</sup> Italy contended that it had “double standing” to bring a direct claim (to vindicate its own substantive rights) and a diplomatic protection claim (to vindicate the rights of Italian nationals that had invested in Cuba).<sup>19</sup> Cuba argued that the existence of an investor-state arbitration clause in the treaty prevented Italy from bringing a diplomatic protection claim. The tribunal rejected Cuba's argument but ultimately held that Italy's direct claim failed because its claim on behalf of its nationals failed.<sup>20</sup>

Such diplomatic protection claims raise a host of questions. Do investment treaties grant substantive rights to investors, to home states, or to both? Does the existence of an investor-state arbitral clause preclude diplomatic protection claims under state-to-state arbitral clauses? Does the existence of an actual investor-state claim preempt a state-to-state claim and vice versa? Should a state-to-state award bind a future investor-state tribunal? These sorts of diplomatic protection claims are likely to be somewhat controversial when the interests of investors and home states align, as ap-

16. UNCTAD, *Dispute Settlement*, *supra* note 13, at 14.

17. See, e.g., *Electronica Sicula S.p.A. (ELSI)* (U.S. v. It.), 1989 I.C.J. 15, 41–42, ¶¶ 48–49.

18. Republic of It. v. Republic of Cuba, Sentence préliminaire, [Interim Award] (Ad Hoc Arb. Trib. Mar. 15, 2005), available at [http://italaw.com/sites/default/files/case-documents/ita0434\\_0.pdf](http://italaw.com/sites/default/files/case-documents/ita0434_0.pdf) [hereinafter *Italy v. Cuba*, Interim Award]; Republic of It. v. Republic of Cuba, Sentence finale [Final Award] (Ad Hoc Arb. Trib. Jan. 15, 2008), available at [http://italaw.com/sites/default/files/case-documents/ita0435\\_0.pdf](http://italaw.com/sites/default/files/case-documents/ita0435_0.pdf) [hereinafter *Italy v. Cuba*, Final Award].

19. *Italy v. Cuba*, Interim Award, *supra* note 18, at ¶¶ 24–25; see also Michele Potestà, *International Decision: Republic of Italy v. Republic of Cuba, Interim Award*, 106 Am. J. Int'l L. 341, 342 (2012) [hereinafter Potestà, *Italy v. Cuba*].

20. Michele Potestà, *State-to-State Dispute Settlement Pursuant to Bilateral Investment Treaties: Is there Potential?*, in *INTERNATIONAL COURTS AND THE DEVELOPMENT OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF TULLIO TREVES 753* (Nerina Boschiero et al. eds., 2013) [hereinafter Potestà, *State-to-State Dispute Settlement*].

peared to occur in *Italy v. Cuba*. When these interests diverge, for instance, if a home state brings or settles a diplomatic protection claim against the wishes of its investors, they are likely to be deeply controversial.

Second, a home or host state can seek a pure interpretation of the investment treaty. Two examples exist in the field. The first is *Peru v. Chile*, which began after Chilean investors initiated arbitration against Peru in *Lucchetti v. Peru*.<sup>21</sup> Peru considered that the *Lucchetti* dispute predated the entry into force of the Peru-Chile BIT and, accordingly, fell outside the scope of the treaty. After failing to reach an interpretive agreement on the point with Chile, Peru launched a state-to-state claim seeking an interpretation.<sup>22</sup> Peru then sought a suspension of the *Lucchetti* case on the basis that the claimant's request was the subject of a concurrent state-to-state arbitration that had interpretive authority.<sup>23</sup> The *Lucchetti* Tribunal refused to suspend the proceedings, without providing reasons, and Peru did not subsequently press its claim against Chile.<sup>24</sup>

The second example is *Ecuador v. United States*, which began after Ecuador disagreed with the *Chevron v. Ecuador* Tribunal's interpretation about whether the U.S.-Ecuador BIT's "effective means" clause created an obligation equal to or more demanding than customary international law.<sup>25</sup> Ecuador sought an interpretive agreement on the point, but the United States refused to respond. Ecuador then launched a state-to-state arbitration seeking an interpretation,<sup>26</sup> to which the United States objected on the basis that there was no concrete dispute between the parties.<sup>27</sup>

The Tribunal's award has not been publicly released, but the majority reportedly dismissed the claim because (1) there was no concrete dispute with practical consequences between Ecuador and the United States, as opposed to between Ecuador and U.S. investors; and (2) there was no dispute because the United States, by remaining silent, had not put itself in "positive opposition" to Ecuador's interpretation.<sup>28</sup> The dissent reportedly concluded that the dispute had practical consequences because it would clarify legal relations between Ecuador and the United States, and, as the treaty

21. See *Empresas Lucchetti, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Award (Feb. 7, 2005) [hereinafter *Lucchetti v. Peru*]; see also ¶ 7 (discussion of *Peru v. Chile*).

22. Luke Eric Peterson, *ICSID Tribunal Declines to Halt Investor Arbitration in Deference to State-to-State Arbitration*, INVEST-SD: INVESTMENT LAW AND POLICY WEEKLY NEWS BULLETIN, Dec. 19, 2003, available at [http://www.iisd.org/pdf/2003/investment\\_investsd\\_dec19\\_2003.pdf](http://www.iisd.org/pdf/2003/investment_investsd_dec19_2003.pdf).

23. *Lucchetti v. Peru*, *supra* note 21, at ¶ 7.

24. *Id.* at ¶ 9.

25. *Chevron Corp. (U.S.) v. Ecuador*, PCA Case No. 34877, Partial Award on the Merits, ¶¶ 242–44 (Perm. Ct. Arb. 2010) [hereinafter *Chevron v. Ecuador*].

26. *Ecuador v. United States*, PCA Case No. 2012-5, Request for Arbitration, ¶ 1 (Perm. Ct. Arb. 2011) [hereinafter *Ecuador v. United States*].

27. *Ecuador v. United States*, *supra* note 26; Respondent's Memorial on Jurisdiction, at 15–36.

28. Jarrod Hepburn & Luke Eric Peterson, *US-Ecuador Inter-State Investment Treaty Award Released to Parties; Tribunal Members Part Ways on Key Issues*, INVESTMENT ARB. REP. (Oct. 30, 2012), available at [www.iareporter.com/articles/20121030\\_1](http://www.iareporter.com/articles/20121030_1).

parties could only be in agreement or dispute about an interpretation, failure to confirm agreement amounted to a dispute.<sup>29</sup>

Interpretive disputes also raise difficult questions. Can a state bring an interpretive claim while an investor-state arbitration is ongoing or after an investor-state award has been issued? Must the investor-state tribunal defer jurisdiction or stay its consideration of an ongoing case pending resolution of the state-to-state case or vice versa? Will a state-to-state award be binding with respect to existing or future investor-state tribunals? Does an interpretive award by a state-to-state tribunal differ in precedential authority from an award by an investor-state tribunal that involves interpretation?

Third, home or host states can bring a claim for declaratory relief on an issue that has arisen or may arise in an investor-state claim. Such declaratory claims could permit common issues of law or fact, such as liability and defenses, to be determined by a single forum, in a manner resembling representative and class actions.

A precedent exists for this type of claim in the North American Free Trade Agreement (“NAFTA”) context. NAFTA includes trade and investment protections and permits state-to-state claims and investor-state claims. In the *In the Matter of Cross-Border Trucking Services* case, Mexico brought a state-to-state claim seeking a declaration that the United States had breached its national treatment and most-favored-nation treatment obligations with respect to Mexico and potential Mexican investors by failing to lift a moratorium on processing applications by Mexican-owned trucking firms.<sup>30</sup> The United States argued that Mexico could not make a claim on behalf of unidentified Mexican investors.<sup>31</sup> However, the panel upheld Mexico’s claim.<sup>32</sup>

Despite the outcome in the state-to-state case, the United States failed to lift the moratorium. Cámara Nacional del Autotransporte de Carga (“Canacar”) subsequently brought an investor-state claim on behalf of various Mexican trucking companies seeking damages.<sup>33</sup> Canacar sought to piggyback on the *In the Matter of Cross-Border Trucking Services* opinion, claiming that liability had already been “definitively determined.”<sup>34</sup> The *Canacar v. United States* arbitration has not progressed to date, so the tribunal has not had to rule on whether the earlier state-to-state claim precludes the later investor-

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29. *Id.*

30. *In re Cross-Border Trucking Services (Mex. v. U.S.)*, Case No. USA-MEX-98-2008-01, North America Free Trade Agreement Chapter 20 Arb. Trib. Panel Decision, Final Report, ¶ 2, (Feb. 6, 2001), available at [http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA\\_Chapter\\_20\\_USA/ub98010e.pdf](http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_20_USA/ub98010e.pdf).

31. *Id.* at ¶¶ 147, 283.

32. *Id.* at ¶¶ 295–97.

33. *CANACAR v. United States*, Notice of Arbitration, United Nations Commission on International Trade Law and NAFTA (Chapter 11), ¶ 1 (Apr. 2, 2009) [hereinafter *Canacar v. U.S.*], available at <http://www.state.gov/documents/organization/121599.pdf>.

34. *Id.* at ¶ 4B.

state claim or whether the investor-state tribunal would be bound by determinations of the state-to-state tribunal.

Requests for declaratory awards raise significant issues. Can a home state seek a declaration that the host state has violated its treaty obligations, without identifying particular investors that have been harmed or seeking compensation on their behalf? Can a host state seek a declaration that it did not violate the treaty and thereby pre-empt investor-state claims or force them to be resolved on a class-wide basis? Would the state-to-state award operate as *res judicata* or a collateral estoppel, preventing re-litigation of certain issues in future investor-state cases? How should the interests of investors in being able to litigate their own case be weighed against the interests of states in wanting to streamline costs and promote consistency?

Stepping back from these specifics, the broader issue is what should be made of these state-to-state claims. Are they permissible as a matter of law? Are they advisable as a matter of policy? In Part II, this Article evaluates attempts to restrictively interpret the scope and availability of state-to-state arbitration in favor of investor-state arbitration. This approach treats state-to-state arbitration as an illegitimate threat to the goals of investor protection and the depoliticization of investor-state disputes. However, as this Article demonstrates, attempts to radically restrict the scope of state-to-state arbitration in this way are inconsistent with the text, object and purpose, and history of investment treaties.

## II. REJECTING THE RESTRICTIVE APPROACH

In a recent expert report in *Ecuador v. United States*, Reisman argues forcefully that the scope of state-to-state arbitration should be narrowly construed in favor of investor-state arbitration.<sup>35</sup> This Article focuses on Reisman's report because: the issue of state-to-state arbitration is so new that there have been very few scholarly contributions on the subject; there is little case law to work with because most state-to-state cases have not resulted in awards or publicly available awards; and Reisman is a highly respected academic, expert, and arbitrator whose views are taken very seriously within the field.

Reisman contends that investment treaties create two arbitration tracks, with each assigned a distinct jurisdiction: *ratione personae* (personal jurisdiction) and *ratione materiae* (subject matter jurisdiction).<sup>36</sup> The *ratione personae* limitations are not controversial because they are expressly provided for in the treaties: one form of arbitration is investor-state and the other is state-to-state. Reisman's attempt to imply significant *ratione materiae* limitations

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35. Reisman Opinion, *supra* note 9, at 4.

36. *Id.*

is controversial, however, because such limitations are not expressly provided in the treaties.<sup>37</sup>

Reisman explains that “the central jurisdictional feature of the [U.S.-Ecuador] BIT’s dual-track jurisdictional regime is its assignment of a different range of disputes *exclusively* to each of the tracks.”<sup>38</sup> In keeping with the object and purpose of investment treaties—which he defines as facilitating private investment—the treaty parties “replaced the traditional resort to espousal by the investor’s home State” with investor-state arbitration in order to legalize and depoliticize investment disputes.<sup>39</sup> Accordingly, “the interpretation of substantive rights and guarantees in the [U.S.-Ecuador] BIT is reserved for the investor-state jurisdictional track under Article VI once that process has been engaged.”<sup>40</sup>

Reisman reasons that significant limitations on state-to-state arbitration are necessary because investment treaties, like human rights treaties, create rights for third-party beneficiaries.<sup>41</sup> “The [U.S.-Ecuador] BIT is part of a species of treaties for the benefit of third parties in which there is special concern that interpretation by one or both of the States-parties not undermine the rights and expectations of the third-party beneficiaries.”<sup>42</sup> In order to protect investors’ rights, investor-state tribunals “must insist on their *exclusive competence* to interpret and apply the law to the specific factual situations of the cases before them.”<sup>43</sup>

This restrictive approach is unpersuasive, however. Textually, there is nothing in the ordinary language of investment treaties that suggests that states, *sub silentio*, agreed to radically limit their arbitration rights. Investor-state arbitration is generally inserted in addition to, rather than in the place of, state-to-state arbitration.<sup>44</sup> The right of states to bring state-to-state claims was not precluded. Investor-state claims were not given priority over, or expressly insulated from, state-to-state claims.

Unlike investor-state clauses, state-to-state arbitral provisions are typically drafted in a plenary fashion, referring to disputes about the interpretation or application of the treaty in general without excluding matters that

37. See *id.* at 13 (“I will examine the *ratione materiae* implications of the *ratione personae* limitations of the [U.S.-Ecuador] BIT in light of the circumstances of this case.”).

38. *Id.* (emphasis added).

39. *Id.* at 14 (emphasis added).

40. *Id.* at 4 (emphasis added).

41. *Id.* at 14–15.

42. *Id.* at 4.

43. *Id.* at 4, 14–15 (emphasis added).

44. By way of contrast, the 1969 Chad-Italy BIT included investor-state arbitration but eliminated state-to-state arbitration, providing instead that disputes between the treaty parties were to be resolved diplomatically. See Potestà, *State-to-State Dispute Settlement*, *supra* note 20, at 753 n.1; Accord entre le Gouvernement de la République Italienne et le Gouvernement de la République du Chad en Vue de Protéger et de Favoriser Les Investissements de Capitaux [Agreement between the Government of the Italian Republic and the Government of the Republic of Chad with the Aim of Protecting and Promoting Capital Investments] art VII, 1969, reprinted in 1 INVESTMENT TREATIES (Int’l Ctr. for Settlement of Inv. Disputes ed., 2013).

might arise before an investor-state tribunal.<sup>45</sup> If the treaty parties had intended to substantially hollow out the state-to-state arbitral clause, there would likely have been some reference to this in the text. A minority of state-to-state arbitral clauses include narrow, subject-matter carve-outs,<sup>46</sup> thus further undermining the assumption that the treaty parties intended other far more significant carve-outs to be implied.

Reisman argues that his approach does not render state-to-state arbitration an empty set as such tribunals could still hear disputes about the non-enforcement of investor-state awards or the treaty's invalidity, termination, and suspension.<sup>47</sup> Broad agreement exists on the former point.<sup>48</sup> However, it is hard to see that issues like invalidity, termination, and suspension are exclusively inter-state issues. These issues could easily come up before an investor-state tribunal, which means that the tracks are not truly separate. If these issues were also excluded because of the potential for overlap, state-to-state arbitration would become a virtually empty set, despite its all-encompassing textual formulation.

In terms of object and purpose, Reisman argues that the dual track theory goes to the "essential objects and purposes" of investment treaties, which legalized and depoliticized investor-state disputes "in order to facilitate private investment."<sup>49</sup> However, the goals of investment protection and the depoliticization of investment disputes are not absolute, nor are they capable of resolving all interpretive doubts or justifying radical restrictions that have no textual basis. Some tribunals have concluded that, as investment treaties were intended to protect foreign investment, all uncertainties should be resolved in favor of investors.<sup>50</sup> As investment treaties tend to be short, vague,

45. See 2012 U.S. Model BIT, *supra* note 5, art. 37; 2008 German Model BIT, *supra* note 5, art. 9; 2004 Canadian Model BIT, *supra* note 5, art. 48; 2006 French Model BIT, *supra* note 5, art. 10; 2007 Colombian Model BIT, *supra* note 5, art. 10; 2003 Indian Model BIT, *supra* note 5, art. 10.

46. For instance, the U.S.-Cameroon BIT excludes disputes arising under certain export credit, guarantee, or insurance programs from state-to-state arbitration. Treaty Concerning the Reciprocal Encouragement and Protection of Investments, U.S.-Cameroon, art. VIII(1), Feb. 26, 1986, S. TREATY DOC. NO. 99-22 (1986) [hereinafter U.S.-Cameroon BIT]. Similarly, the 2012 U.S. Model BIT and the U.S.-Rwanda BIT exclude disputes about certain labor and environmental provisions from state-to-state arbitration. 2012 U.S. Model BIT, *supra* note 5, art. 37(5); Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Rwanda, art. 37(5), Feb. 19, 2008, S. TREATY DOC. NO. 110-23 (2008).

47. Reisman Opinion, *supra* note 9, at 14.

48. Even treaty regimes that expressly limit states' right to engage in diplomatic protection after an investor-state claim has been filed usually carve this out as an exception. See, e.g., Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 27, Mar. 18, 1965, 17 U.S.T. 1290, 575 U.N.T.S. 192 [hereinafter ICSID Convention].

49. Reisman Opinion, *supra* note 9, at 14.

50. For example, in *SGS v. Philippines*, the Tribunal found that the treaty was intended to "create and maintain favorable conditions for investments," and thus it was "legitimate to resolve uncertainties in its interpretation so as to favor the protection of covered investments." *SGS Société Générale de Surveillance S.A. v. Republic of the Phil.*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, ¶ 116 (Jan. 29, 2004), 8 ICSID Rep. 518 (2005); see also *Ecuador v. Occidental Exploration & Production Co. (No.2)*, 2 Lloyd's Rep. 360, ¶ 28 (2007).

and full of gaps, adopting a general interpretive presumption in favor of investor protection results in a heavily skewed analysis that overly stacks the deck in favor of investors' interests.<sup>51</sup>

Investment tribunals are increasingly recognizing that investment protection is a significant policy objective, but one that must be weighed against the ongoing regulatory interests of host states. According to the *Saluka v. Czech Republic* Tribunal, for instance:

The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations. That in turn calls for a *balanced approach* to the interpretation of the Treaty's substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations.<sup>52</sup>

Instead of adopting interpretive presumptions in favor of investment protection or state sovereignty,<sup>53</sup> a balanced approach that weighs the rights and interests of both investors and treaty parties is needed.<sup>54</sup>

The depoliticization of investment disputes should likewise be understood as an important—but not an absolute—goal.<sup>55</sup> Most investment treaties *enable* investors to bring investor-state claims but do not *disable* treaty parties from bringing state-to-state claims. Permitting investors to bring arbitral claims allows most investment disputes to be resolved directly between the affected investor and host state, without requiring the involve-

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51. See Michael Waibel, *International Investment Law and Treaty Interpretation*, in INTERNATIONAL INVESTMENT LAW AND GENERAL INTERNATIONAL LAW: FROM CLINICAL ISOLATION TO SYSTEMIC INTEGRATION? 29, 39–40 (R. Hofmann & Christian J. Tams eds., 2011) (describing this interpretive approach as cavalier); GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 139 (2007) (“Because investment treaties use such broad language to define core concepts, the presumption in favor of investor protection systematically favors and expansive approach to jurisdiction or, in the case of standards of review, to state liability.”).

52. *Saluka Investments BV (Neth.) v. Czech Republic, UNCITRAL, Partial Award*, ¶ 300 (Mar. 17, 2006), available at [http://www.pca-cpa.org/showfile.asp?fil\\_id=105](http://www.pca-cpa.org/showfile.asp?fil_id=105) [hereinafter *Saluka v. Czech Republic*] (emphasis added).

53. *See Mondev Int'l Ltd. v. United States, ICSID Case No. ARB(AF)/99/2, Award*, ¶ 43 (Oct. 11, 2002) [hereinafter *Mondev v. United States*] (rejecting use of extensive or restrictive approach to interpretation).

54. *See El Paso Energy Int'l Co. v. Argentine Republic, ICSID Case No. ARB/03/15, Decision on Jurisdiction*, ¶ 70 (Apr. 27, 2006) [hereinafter *El Paso v. Argentina*] (“[A] balanced interpretation is needed, taking into account both State sovereignty and the State’s responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow.”).

55. *See* Martins Paparinskis, *Limits of Depoliticisation in Contemporary Investor-State Arbitration*, in 3 SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW 271–82 (James Crawford ed., 2010) (discussing the complexity and over-use of the concept of diplomatic protection).

ment of the home state or subjecting the host state to legal and diplomatic pressure. However, investment treaties did not make investor-state arbitration the sole dispute resolution mechanism, nor did they make investor-state arbitration hierarchically superior to or immunized from state-to-state arbitration.

The goal of encouraging the depoliticization of disputes does not justify stripping states of all of their rights as treaty parties, particularly those rights that are expressly contained in the treaty. Reisman reasons that:

In treaties made to provide benefits to third parties and, especially, to induce them to adjust their actions in reliance on the effective provision of those benefits, the stability of those expectations is also critical to the fulfillment of the objects and purposes of the treaties concerned.<sup>56</sup>

Investors have an interest in stability and being able to enforce their rights, but investment treaties also permit state-to-state arbitration in recognition of the fact that treaty parties have an ongoing interest in the interpretation and application of their treaties. The co-existence of investor-state and state-to-state arbitration reflect the complex balance investment treaties strike between the interests of investors, home states, and host states—a balance not accurately captured by a singular focus on investors' rights and interests.

A brief review of the history of investment protection helps to support this theory. When investor-state arbitration provisions were first added to these treaties, they were new and untested. It was not then clear, for instance, that a host state's entry into an investment treaty would later be interpreted to constitute binding consent to investor-state arbitration which an investor could accept by bringing a claim, without the need for a subsequent arbitration agreement. Jan Paulsson's 1995 article on "Arbitration Without Privity" was seminal precisely because it suggested this construction,<sup>57</sup> which in turn permitted the tremendous growth in investor-state arbitration. It would be surprising if states had gutted their right to bring claims by replacing an established form of dispute resolution with an untested one.

There are good reasons why treaty parties (and investors) might want the option of diplomatic protection left on the table even when investor-state arbitration is permitted. When the injured investors are individuals or small companies, these investors may welcome their case being brought by their home state to avoid the burden and expense of bringing a direct claim themselves.<sup>58</sup> In addition, a home state claim could make sense for class actions,

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56. Reisman Opinion, *supra* note 9, at 15.

57. Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV.-FOREIGN INV. L. J. 232, 256 (1995).

58. Berman, *supra* note 15, at 71-72.

particularly where the injuries are individually small but collectively large.<sup>59</sup> And a state-to-state claim might be attractive when individual investors fear retaliation or discrimination by a host state if they were to launch an investor-state arbitration.<sup>60</sup>

Negotiating histories for investment treaties are rarely available or helpful, as most treaties were negotiated bilaterally from a model text and various vexing issues were not addressed.<sup>61</sup> However, Kenneth Vandeveld, a former negotiator of U.S. investment treaties, explains that the United States sought the inclusion of investor-state arbitration to “provide investors with a remedy that would not *depend* upon the involvement of the investor’s government in the dispute.”<sup>62</sup> But, “[a]t the same time, the BITs *eliminate none of the remedies previously available*” and, in particular, investment treaties “provide in addition for state-to-state arbitration of disputes arising out of the interpretation or application of a BIT, *should the investor’s state wish to become involved in a particular dispute.*”<sup>63</sup>

This negotiating perspective confirms that the express inclusion of investor-state arbitration was not thought to imply the exclusion of state-to-state arbitration. It also casts the aim and absoluteness of depoliticization in a different light. Home states may have favored the inclusion of investor-state arbitration to avoid becoming embroiled in *every* investor-state dispute. It does not follow that home states intended to *preclude* themselves from involvement in *any* investor-state disputes. The politicization of the system is significantly reduced because investors can bring claims directly without being subject to political whims in *every* case. That does not mean that the home state may *never* pursue state-to-state arbitration in connection with a particular investor or investment.

A treaty regime may provide that a home state may no longer engage in diplomatic protection after its investor brings an investor-state claim, as is specified by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”).<sup>64</sup> However, such a clause does not exist in most investment treaties and, even where it exists, it does not preclude other types of state-to-state claims, such as interpretive disputes.<sup>65</sup> The assumption that the goal of this provision was only, or even primarily, to protect foreign investors is also doubtful; it was also about freeing the home state from becoming embroiled in disputes and

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59. See *id.*; Benjamin Juratowitch, *The Relationship between Diplomatic Protection and Investment Treaties*, 23 ICSID REV.—FOREIGN INV. L.J. 10, 33 (2008).

60. See Berman, *supra* note 15, at 71–72; Juratowitch, *supra* note 59, at 33.

61. DOLZER & SCHREUER, *supra* note 2, at 33–34; CAMPBELL MCLACHLAN ET AL, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES §§ 1.43, 3.70 (2008).

62. KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE 163 (1992) (emphasis added).

63. *Id.* at 163–64 (emphasis added).

64. ICSID Convention, *supra* note 48, art. 27.

65. See *infra* notes 209 and 271.

protecting the host state from unwelcome diplomatic pressure and gunboat diplomacy.<sup>66</sup> For instance, Ibrahim Shihata, the longest-serving Secretary-General of the International Centre for Settlement of Investment Disputes (“ICSID”), stressed that depoliticization was intended to protect less powerful host states from abuses of diplomatic protection by more powerful home states.<sup>67</sup> To the extent that depoliticization was a goal intended to protect home and host states, either state could waive that interest by bringing or responding to a claim. While such claims might sometimes be in tension with an investor’s interest in depoliticization, this does not show that the investor’s interests should prevail. Rather, it demonstrates the complex and sometimes conflicting goals of investment treaties.<sup>68</sup>

The subsequent success of investor-state arbitration has limited the need for state-to-state arbitration as a matter of practice but has not precluded it as a matter of law. This was recognized by the United States in the *Ecuador v. United States* case. Citing the state-to-state dispute settlement provisions in FCN treaties, which it described as “nearly identical” with and “precursors” to state-to-state clauses in modern investment treaties, the United States confirmed that these clauses were included because:

“It is in the interest of the United States to be able to have recourse to . . . [State-to-State dispute settlement] in case of *treaty violation*.” Thus, while U.S. investors have principal responsibility for resolving investment disputes through investor-State arbitration, [the state-to-state arbitral clause] serves as a mechanism for the State of the investor to address concrete cases involving treaty violations.<sup>69</sup>

In terms of diplomatic protection claims, the general consensus is that the right of an individual to bring a direct claim co-exists with the right of their home state to espouse a claim. Article 16 of the International Law Commission’s (“ILC”) Draft Articles on Diplomatic Protection expressly left open the possibility for parallel claims to be brought by individuals and their

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66. VANDELDELDE, *supra* note 62, at 163.

67. Ibrahim Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA*, 1 ICSID REV.–FOREIGN INV. L. J. 1, 11–12 (1986); see also Sergio Puig, *Emergence and Dynamism in International Organizations: ICSID, Investor-State Arbitration, and International Investment Law*, 44 GEO. J. OF INT’L L. 531, 550–52 (2013).

68. Vandeveldelde makes this point clear. On the one hand, he explains that negotiators sought inclusion of investor-state arbitration clauses because they would “ensure[ ] investors of a neutral mechanism for settlement of investment disputes that is wholly insulated from the political relationship between the investor’s government and the host government.” Kenneth J. Vandeveldelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT’L L.J. 201, 258 (1988). On the other hand, he concludes that “[a]t the same time, the BITs eliminate none of the traditional remedies” as investors may still “pursue espousal of the claim by their own governments” and the “BITs also provide for state-to-state arbitration of disputes arising out of the interpretation or application of the agreement.” *Id.*; see also VANDELDELDE, *supra* note 62, at 163.

69. *Ecuador v. United States*, *supra* note 26, Respondent’s Memorial on Jurisdiction, at 26–27.

home states.<sup>70</sup> The Commentary notes that “the customary international law rules on diplomatic protection and the rules governing the protection of human rights are *complementary*.”<sup>71</sup> The Second Rapporteur, John Dugard, viewed the possibility of direct claims by individuals as a policy reason that might discourage home states from exercising diplomatic protection, rather than as a legal barrier preventing such claims. The home state was not:

Obligated to abstain from exercising th[e] right [of diplomatic protection] when the individual enjoy[ed] a remedy under a human rights or foreign investment treaty. In practice, a State will no doubt refrain from asserting its right of diplomatic protection when the injured national pursues his international remedy. Or it [might] . . . join the individual in asserting his right under the treaty in question. But in principle a State is not obliged to exercise such restraint, as its *own* right was violated when its national is unlawfully injured.<sup>72</sup>

General rules about diplomatic protection can be superseded by particular treaty provisions,<sup>73</sup> but investment treaties typically permit investor-state arbitration without ruling out diplomatic protection claims. For instance, in *Italy v. Cuba*, Italy brought a direct claim against Cuba (to vindicate its own substantive rights) and a diplomatic protection claim (to vindicate the interests of Italian nationals that had invested in Cuba).<sup>74</sup> The Tribunal rejected Cuba’s argument that the existence of an investor-state arbitration clause in the treaty prevented Italy from bringing a diplomatic protection claim.<sup>75</sup> Some investment treaties also expressly contemplate damages awards in

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70. *Draft Articles on Diplomatic Protection with Commentaries*, in Rep. of the Int’l Law Comm’n, 58th Sess., May 1–June 9, July 3–Aug. 11 2006, art. 16, U.N. Doc. A/61/10; GAOR, 61st Sess., Supp. No. 10 (2006) [hereinafter ILC Draft Articles on Diplomatic Protection with Commentaries].

71. *Id.* (emphasis added).

72. John R. Dugard, Special Rapporteur, *First Rep. on Diplomatic Protection*, Int’l Law Comm’n, ¶ 443, U.N. Doc. A/CN.4/506 (Mar. 7, 2000).

73. See ILC Draft Articles on Diplomatic Protection with Commentaries, *supra* note 70, art. 17.

74. See *Italy v. Cuba*, Interim Award, *supra* note 18, at ¶¶ 24–25; Potestà, *Italy v. Cuba*, *supra* note 19, at 342.

75. See *Italy v. Cuba*, Interim Award, *supra* note 18. Attempts to limit the broader applicability of this case based on peculiarities with the dispute resolution clause are unconvincing. Reisman argues that the *Italy v. Cuba* case has limited utility in analyzing most investment treaties because the underlying BIT does not create separate jurisdictional tracks for investor-state and state-to-state arbitration. Reisman Opinion, *supra* note 9, at ¶¶ 36–37. In fact, Article 9 of the underlying BIT gives the investor a right to initiate investor-state arbitration, and Article 10 gives the treaty parties the right to initiate state-to-state arbitration. See *id.* The quirk of that treaty is that investor-state tribunals appear to be established by the same mechanism as state-to-state tribunals, so the arbitrators are selected by the treaty parties rather than the disputing parties. See *id.* That does not mean, however, that the case must then be run as a state-to-state arbitration. Accordingly, the treaty still creates two jurisdictional tracks. See *id.*

state-to-state claims,<sup>76</sup> which supports the assumption that diplomatic protection claims are permitted.<sup>77</sup>

In terms of interpretive disputes, the idea that the investor-state clause has supplanted the state-to-state clause is even less persuasive given the differing mandates of investor-state and state-to-state tribunals. Investor-state tribunals are responsible for adjudicating a particular investment dispute rather than interpreting and applying the treaty in general. Although this task will likely involve some interpretation of the treaty, the tribunals are not given general interpretive authority. Nor are interpretive decisions by investor-state tribunals binding on the treaty parties or given precedential status in future cases. At most, decisions are binding on the investor and respondent state in the particular case being decided and are persuasive in future cases.

The problem with this setup is that the treaty parties may disagree with tribunals' interpretations, and the interpretation of different tribunals may conflict, creating uncertainty over the treaty parties' continuing obligations. In these circumstances, either or both treaty parties may have an interest in resolving the interpretive ambiguities. As a matter of general international law, the treaty parties may do this by reaching an agreement on interpretation, which is then treated as an "authentic interpretation."<sup>78</sup> When they fail to agree, the treaty parties have created a mechanism for resolving their disagreements: arbitration before a state-to-state tribunal empowered to issue a binding award.

The argument that investor-state arbitration trumps state-to-state arbitration seems to be derived from two flawed assumptions. The first is that investment treaties create rights or benefits for investors that cannot be abridged by the treaty parties unless they have expressly reserved themselves that right. For instance, Reisman argues that "treaties for the benefit of third parties" require "special concern that interpretation by one or both of the States-parties not undermine the rights and expectations of the third-party beneficiaries."<sup>79</sup> The only exception he would allow is where the treaty

76. For instance, the 2012 Canada-China investment treaty contemplates that a successful claimant state would be "entitled to receive compensation of equivalent value to the arbitral tribunal's award." Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments, Can.-China, art. 15(8), Sept. 19, 2012, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-text-chine.aspx?lang=eng&view=d> [hereinafter Canada-China FIPA].

77. See Luke Eric Peterson, *A Closer Look at the Dispute Settlement Provisions of the China-Canada Investment Treaty, Including Its State-to-State Mechanism*, 5 IA REP. 19 (2012).

78. According to the International Court of Justice ("ICJ"), endorsing the position of the International Law Commission, a subsequent agreement "represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation." *Kasikili/Sedudu Island (Bots. v. Namib.)*, 1999 I.C.J. 1045, 1075-76 ¶ 49 (Dec. 13) (quoting Rep. of the Int'l Law Comm'n, 18th Sess. (1966) 2 Y.B. Int'l L. Comm'n 221, 221-22 ¶ 14, U.N. Doc. A/CN.4/SER.A/1966/Add.1 (discussing Draft Articles on the Law of Treaties)).

79. Reisman Opinion, *supra* note 9, at 15.

parties expressly put investors on notice of their interpretive rights, as occurs with NAFTA's Free Trade Commission ("FTC").<sup>80</sup>

However, as this Article will demonstrate in Part III.A, any rights granted to investors must be understood in their context, which means that they must be interpreted in light of the treaty as a whole and against the backdrop of general international law. Investment treaties expressly reserve the treaty parties' right to engage in state-to-state arbitrations about the treaty's interpretation and application, while general international law reserves the treaty parties' right to reach subsequent agreements on interpretation.<sup>81</sup> These limitations are part and parcel of the treaty regime and thus qualify investors' rights *ex ante* rather than unfairly abridging them *ex post facto*. These limits shape the expectations of investors as opposed to undermining them.

The second flawed assumption is that over-lapping arbitral tracks would create havoc for the system by paralyzing investor-state arbitrations and permitting collateral attacks on investor-state awards. The United States warns that states could unilaterally seek a preferred interpretation of the treaty, before, during, or after an investor-state case and that this would add "tremendous uncertainty to the final and binding nature of investor-State awards."<sup>82</sup> Reisman likewise argues that in order to safeguard the integrity of the investment treaty system states should not be allowed to bring claims concerning the treaty's substantive obligations and, in any event, such awards would have no effect on investor-state awards or tribunals.<sup>83</sup>

If the initiation of state-to-state arbitration could "paralyze" existing investor-state arbitrations, and if state-to-state awards undermined existing investor-state awards, significant systemic concerns might be justified.<sup>84</sup> However, as this Article will demonstrate in Part III.B, whether and when overlapping investor-state and state-to-state claims can be brought, how they should be coordinated, and what effect an award in one would have on the other are open questions where multiple, more moderate, positions are possible. Allowing state-to-state arbitrations in some circumstances is not equivalent to allowing them in all circumstances; giving state-to-state awards some effect is not equivalent to allowing them to trump in all circumstances.

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80. *Id.* at 16–17.

81. Vienna Convention on the Law of Treaties arts. 1, 31(3), May 23, 1969, 1155 U.N.T.S. 311, [hereinafter VCLT].

82. Ecuador v. United States, *supra* note 26, Respondent's Memorial on Jurisdiction, at 5.

83. Reisman Opinion, *supra* note 9, at 29. These arguments tend to undermine each other. If an interpretation by a state-to-state tribunal would have no effect, why would the existence of a state-to-state arbitration threaten the integrity of the system?

84. See Reisman Opinion, *supra* note 9, at 31 ("If Ecuador's application is allowed in this case, there is nothing to prevent it and similarly situated states from raising such an application at any time during the investor-state arbitration, in effect paralyzing those arbitrations.")

Instead of swinging to the opposite extreme by stating that the scope of state-to-state arbitration remains unaffected by the inclusion of investor-state arbitration clauses, a better reading of the text, object and purpose, and history of investment treaties suggests a hybrid approach that recognizes and coordinates the rights and interests of investors and treaty parties instead of simply favoring one.

### III. DEVELOPING A HYBRID THEORY

This Article contends that, subject to appropriate constraints, state-to-state arbitration represents a permissible and potentially progressive means for states to re-engage with the investment treaty field. As is clear from the text and history of investment treaties, investors have the right to launch investor-state arbitrations about investment disputes just as treaty parties have the right to initiate state-to-state arbitrations about interpretation and application. The resulting hybridity reflects the object and purpose of investment treaties and can be managed in practice.

#### A. *Moving Towards a Third Era*

Both the purposes of investment treaties and the evolution of the investment treaty field support the need to revitalize state-to-state arbitration.

##### 1. *The Purposes of Investment Treaties*

To understand the field's evolution, it is necessary to first understand its multifaceted purposes. Investment treaties are intended to provide investment protection in order to encourage investment promotion.<sup>85</sup> Investor protection is important to investors and their home states because it creates favorable conditions for investing abroad, thereby enhancing opportunities to maximize returns. Investor protection is also important to host states that receive foreign investment along with their citizens, but they value it as a means to the end of promoting foreign investment and thereby development rather than as an end in and of itself. Investment treaties typically contain obligations to protect investors and investments but not obligations to promote investment. However, investment promotion is the system's *raison d'être* as it explains why host states agree to bind themselves.

The goals of investment protection and promotion are important but not absolute.<sup>86</sup> Instead, they must be weighed against the needs of states to maintain a meaningful degree of sovereignty, both as host state regulators

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85. See, e.g., 2012 U.S. Model BIT, *supra* note 5, Preamble; 2008 German Model BIT, *supra* note 5, Preamble; 2004 Canadian Model BIT, *supra* note 5, Preamble; 2006 French Model BIT, *supra* note 5, Preamble; 2007 Colombian Model BIT, *supra* note 5, Preamble; 2003 Indian Model BIT, *supra* note 5, Preamble.

86. See, e.g., 2012 U.S. Model BIT, *supra* note 5, Preamble (“Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of

and as treaty parties. Host states have an interest in providing investor protection in order to promote investment, but they must weigh this economic welfare goal against a variety of other economic and non-economic welfare goals, such as national security, environmental protection, health and safety regulation, protection of the economy, and wealth redistribution through taxation. No state protects property to the exclusion of all other interests, so a myopic focus on this goal is inappropriate. Instead, maintaining regulatory autonomy represents an important aspect of state sovereignty.

The relationship between investment protection and state sovereignty is inversely proportional. The broader the protections granted to foreign investors, the narrower the sovereignty retained by states and vice-versa. States have accepted some constraints on their sovereignty by entering into investment treaties that (1) impose substantive obligations on them to protect foreign investors (investor protection) and (2) create procedural mechanisms that permit investors to bring investor-state arbitral claims to enforce those obligations (depoliticized dispute resolution). However, these goals are qualified by express and implied constraints, imposed both by the treaties and by general international law, which are aimed at retaining a meaningful measure of sovereignty for home and host states acting individually and the treaty parties acting collectively.

Investment treaties impose *express* substantive or procedural limitations on the goals of investor protection and depoliticized dispute resolution. Substantively, many treaties exempt actions taken to maintain or restore international peace and security, or to protect a state's essential security interests.<sup>87</sup> Some treaties clarify that non-discriminatory regulatory actions that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, rarely or never constitute

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internationally recognized labor rights[.]""); see also *Saluka v. Czech Republic*, *supra* note 52, at ¶ 300; *Mondev v. United States*, *supra* note 53, at ¶ 43; *El Paso v. Argentina*, *supra* note 54, at ¶ 70.

87. See, e.g., 2012 U.S. Model BIT, *supra* note 5, art. 18; 2004 Canada Model BIT, *supra* note 5, art. 10(4); 2007 Colombian Model BIT, *supra* note 5, art. II(3); 2003 Indian Model BIT, *supra* note 5, art. 12(2); Japan-Singapore New-Age Economic Partnership Agreement, Japan-Sing., art. 4, Jan. 13, 2002 [hereinafter Japan-Singapore BIT], available at <http://www.mofa.go.jp/region/asia-paci/singapore/jsepa-1.pdf>; Comprehensive Economic Cooperation Agreement Between the Republic of India and the Republic of Singapore, India-Sing., art. 10.01(2), June 5, 2005 [hereinafter India-Singapore BIT], available at [http://www.commerce.nic.in/trade/international\\_ta\\_framework\\_ceca.asp](http://www.commerce.nic.in/trade/international_ta_framework_ceca.asp); New Zealand-China Free Trade Agreement, N.Z.-China, art. 201(1), Apr. 7, 2008 [hereinafter New Zealand-China FTA], available at <http://www.chinafta.govt.nz/1-The-agreement/2-Text-of-the-agreement/index.php>.

indirect expropriations.<sup>88</sup> Others provide exceptions clauses for environmental protection and health and safety measures.<sup>89</sup>

Procedurally, most investment treaties grant treaty parties the right to bring state-to-state claims concerning the interpretation and application of their treaties. Many investment treaties expressly provide that the treaty parties may reach agreements on interpretation that bind investor-state tribunals.<sup>90</sup> Some give the treaty parties the first opportunity to agree on whether particular defenses are applicable, while others make certain exceptions self-judging or not subject to arbitral review.<sup>91</sup> Free Trade Agreements (“FTAs”) often expressly provide that the treaty parties may amend the treaty, without imposing any limitations.<sup>92</sup> FTAs typically permit any treaty party to terminate with six months’ notice,<sup>93</sup> while investment treaties usually permit termination subject to longer notice periods and survival clauses.<sup>94</sup>

General international law also imposes *implied* limitations on these goals. As investment treaties do not create self-contained regimes,<sup>95</sup> public inter-

88. See, e.g., 2012 U.S. Model BIT, *supra* note 5, arts. 12, 13, Annex B; Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, Annex B, U.S.-Uru., Nov. 4, 2005, available at [http://www.ustr.gov/sites/default/files/uploads/agreements/bit/asset\\_upload\\_file748\\_9005.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/bit/asset_upload_file748_9005.pdf); Australia-United States. Free Trade Agreement, Austl.-U.S., Annex 11-B, May 18, 2004, 118 Stat. 919, available at [www.dfat.gov.au/trade/negotiations/us.html](http://www.dfat.gov.au/trade/negotiations/us.html) [hereinafter Australia-U.S. FTA]; 2004 Canadian Model BIT, *supra* note 5, Annex B.13(1).

89. See, e.g., Malaysia-Japan Economic Partnership Agreement, Malay.-Japan, art. 10, Dec. 13, 2005, available at <http://www.mofa.go.jp/region/asia-paci/malaysia/epa/content.pdf>; India-Singapore BIT, *supra* note 87, art. 54; Korea-Singapore Free Trade Agreement, Sing-S. Kor., arts. 10.7(4), 10.12, 10.18, 2005, available at <http://www.worldtradelaw.net/fta/agreements/korsingfta.pdf>; 2004 Canadian Model BIT, *supra* note 5, art. 10; Panama-Taiwan Free Trade Agreement, Pan.-Taiwan, art. 20.02, Aug. 21, 2003 [hereinafter Panama-Taiwan FTA], available at [http://www.sice.oas.org/trade/panrc/pan\\_twn\\_full\\_text\\_e.pdf](http://www.sice.oas.org/trade/panrc/pan_twn_full_text_e.pdf); New Zealand-China FTA, *supra* note 87, art. 200(2); Japan-Singapore BIT, *supra* note 87, art. 83.

90. See, e.g., 2012 U.S. Model BIT, *supra* note 5, art. 30(3); 2004 Canadian Model BIT, *supra* note 5, arts. 40(2), 41, 51(2)(b); Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement, art. 40(3), Feb. 26, 2009; 2012 Canada-China FIPA, *supra* note 76, arts. 18(1)(b), 30.

91. See, e.g., 2012 U.S. Model BIT, *supra* note 5, art. 20; 2004 Canadian Model BIT, *supra* note 5, art. 17.

92. See, e.g., North American Free Trade Agreement, U.S.-Can.-Mex., art. 2202, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA]; Australia-U.S. FTA, *supra* note 88, art. 23.3; Panama-Taiwan FTA, *supra* note 89, art. 21.01.

93. See, e.g., NAFTA, *supra* note 92, art. 2205; Australia-U.S. FTA, *supra* note 88, art. 23.4; Panama-Taiwan FTA, *supra* note 89, art. 21.05.

94. See, e.g., 2012 U.S. Model BIT, *supra* note 5, art. 22; Agreement Between the People’s Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments, China-Ger., art. 15(2), Dec. 1, 2003, available at [http://arbitrationlaw.com/files/free\\_pdfs/china-germany\\_bit\\_0.pdf](http://arbitrationlaw.com/files/free_pdfs/china-germany_bit_0.pdf); Agreement Between the Government of the Argentine Republic and the Government of New Zealand for the Promotion and Reciprocal Protection of Investments, N.Z.-Arg., art. 14(2), Aug. 27, 1999, available at [http://www.sice.oas.org/Investment/BITSbyCountry/BITS/ARG\\_New\\_Zealand.pdf](http://www.sice.oas.org/Investment/BITSbyCountry/BITS/ARG_New_Zealand.pdf); Agreement on the Promotion and Protection of Investments, Fin.-Phil., art. 12(2), Mar. 25, 1998, available at [http://unctad.org/sections/dite/ia/docs/bits/finland\\_philippines.pdf](http://unctad.org/sections/dite/ia/docs/bits/finland_philippines.pdf).

95. See Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 INT’L & COMP. L. Q. 573, 576 (2011).

national law is presumed to apply unless expressly or impliedly precluded.<sup>96</sup> Substantively, these debates play out with respect to the applicability of general international law defenses or circumstances precluding wrongfulness, like necessity<sup>97</sup> and countermeasures.<sup>98</sup> Procedurally, the same debates occur with respect to the applicability of the Vienna Convention on the Law of Treaties (“VCLT”), which expressly applies to all treaties between states, without making an exception for treaties that create rights or benefits for individuals.<sup>99</sup> Absent express provisions to the contrary, one would expect treaty parties to retain the rights to influence interpretation through subsequent agreements and practice; amend the treaty by agreement; and terminate or withdraw in conformity with the treaty or at any time by mutual consent.<sup>100</sup>

There is room to debate whether implying these general international law rules should itself be subject to some implied limits when dealing with treaties that create rights and benefits for individuals.<sup>101</sup> This debate has important implications for ongoing controversies, including whether treaty parties can amend or jointly terminate investment treaties with immediate effect.<sup>102</sup> In the same way, the co-existence of two arbitral tracks might re-

96. This approach is evident in both the ILC’s Draft Articles on Diplomatic Protection and the ILC’s Draft Articles on State Responsibility. See ILC Draft Articles on Diplomatic Protection with Commentaries, *supra* note 70, art. 16; Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 55, in Rep. of the Int’l Law Comm’n, 53d Sess., U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10, at 43 (2001); see also VCLT, *supra* note 81, art. 31(3)(c).

97. For instance, can respondents in investor-state disputes rely on the customary international law defense of necessity or is this precluded by the inclusion of non-precluded measures clauses? Non-precluded measures clauses typically provide that nothing in the treaty precludes a party from applying measures that are necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests. See generally Andrea Bjorklund, *Emergency Exceptions: State of Necessity and Force Majeure*, in OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 459 (Muchlinski et al. eds., 2008); William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT’L L. 307, 349 (2008); Jürgen Kurtz, *Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis*, 59 INT’L & COMP. L. Q. 325, 326 (2010).

98. For instance, can countermeasures be invoked in investor-state arbitrations or is this impliedly excluded due to the existence of investor rights or the limited jurisdiction of such tribunals? See generally N. Jansen Calamita, *Countermeasures and Jurisdiction: Between Effectiveness and Fragmentation*, 42 GEO. J. INT’L L. 233 (2010); Martins Paparinskis, *Investment Arbitration and the Law of Countermeasures*, 79 BRIT. Y.B. INT’L L. 264 (2008).

99. VCLT, *supra* note 81, arts. 2–3.

100. *Id.* arts. 31(3)(a) & (b), 39, 54.

101. For example, Reisman argues that such treaties require “special concern that interpretation by one or both of the States-parties not undermine the rights and expectations of the third-party beneficiaries.” Reisman Opinion, *supra* note 9, at 4. Similarly, Arsanjani and Reisman argue for limiting recourse to travaux préparatoires when interpreting such treaties, because these treaties are designed to influence the behavior of private entities which often lack any or ready access to such documents. See Mahnouch H. Arsanjani & W. Michael Reisman, *Interpreting Treaties for the Benefit of Third Parties: The “Salvors’ Doctrine” and the Use of Legislative History in Investment Treaties*, 104 AM. J. INT’L L. 597, 603–04 (2010).

102. Anthea Roberts, *The Nature and Limits of Investment Treaty Rights* (2013) (draft manuscript) (on file with author).

quire some limitations and coordination, but it cannot justify wholesale evisceration of one form of dispute resolution. Any rights accorded to investors are qualified in nature because they must be interpreted in light of the treaty as a whole, including the right of the treaty parties to bring state-to-state claims.

## 2. *The Evolution of the Treaty System*

How do these multifaceted purposes fit with the evolution of dispute resolution under the investment treaty system? In the first era of investment protection, states accepted investment treaty obligations, but dispute resolution remained state-to-state.<sup>103</sup> If an investor considered that it had been injured by a treaty breach, it had to petition its home state to take up its cause on the international plane with the host state. The home state could choose whether or not to do so and, if it did choose to bring a claim, it could pursue the case on a diplomatic basis or turn to state-to-state arbitration. This era was characterized by a public international law paradigm that focused exclusively on the inter-state treaty relationship and state-to-state arbitration.<sup>104</sup>

From a policy perspective, investors criticized this era for providing insufficient and highly politicized protection for foreign investments. They argued that state-to-state arbitration was not a powerful mechanism for protecting foreign investment and thus did not induce investors to rely upon the regime in order to increase foreign investment. Home and host states also had other concerns: home states did not always appreciate being embroiled in disputes between their investors and host states; and host states often bristled at being subject to diplomatic pressure by the home states.<sup>105</sup>

These concerns led to the second era in which investor-state arbitration clauses were added to investment treaties, which resulted in a significant shift in power away from states and towards investors (which were authorized to bring claims) and investor-state arbitral tribunals (which were empowered to interpret and apply vague treaty standards). This era was characterized by a private international law or commercial arbitration paradigm, which focused on the investor-state disputing relationship, analogizing it to commercial arbitration between private parties.<sup>106</sup> The home state's interest as a treaty party was largely ignored, as was the host state's other role as a treaty party, not just a disputing party.<sup>107</sup>

103. See *infra* Part III.B.1.a)(1) (discussion of diplomatic protection).

104. See Roberts, *Clash of Paradigms*, *supra* note 12, at 58–63.

105. See Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA*, 1 ICSID REV.–FOREIGN INV. L. J. 1, 4, 11–12, 24–25 (1986) (providing an overview of these concerns leading up to creation of the ICSID Convention).

106. *Id.*

107. Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L. 179, 179–84 (2010) [hereinafter Roberts, *Power and Persuasion*].

From a policy perspective, investors celebrated the addition of investor-state arbitration as serving the object and purpose of enhancing investment protection and depoliticizing investment disputes. But many states began having serious concerns. Scholars and states began to question the causal relationship between strong and enforceable protection of foreign investment, on the one hand, and increased foreign investment and development, on the other hand.<sup>108</sup> From the perspective of host states, this development brings the system's *raison d'être* into doubt. In addition, the early treaties had largely been drafted by capital-exporting states that were primarily concerned with protecting their investors abroad rather than preserving their domestic regulatory autonomy. When these states started having cases filed against them, their perception of the ideal balance changed dramatically.<sup>109</sup>

States were also becoming aware of concerns arising from the asymmetrical and decentralized nature of investor-state arbitration. In terms of asymmetry, giving investors standing to bring claims gave them significant agenda-setting power.<sup>110</sup> Investors were able to file claims without the consent of their home state, which meant that they could push for broad interpretations of investment protections that went beyond what the treaty parties intended or would have supported.<sup>111</sup> This tendency was exacerbated in the arbitral context by a number of factors. Investor-state tribunals were selected by the disputing parties, rather than the treaty parties, which meant that the tribunals often were not conscious that they were agents of the treaty parties. Many of the arbitrators that were appointed, particularly by investors, evidenced a distinct commercial orientation in their profile and/or approach, particularly compared to judges selected for other international courts and tribunals.<sup>112</sup> This led to concerns that investor-state tribunals were interpreting broad and vague treaty language in ways that were overly protective of investors' commercial interests and insufficiently sensitive to states' regulatory needs.

In terms of decentralization, a number of states (like Argentina, Ecuador, Venezuela, and the Czech Republic) were exposed to multiple claims arising out of the same or similar facts, imposing substantial time and financial

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108. See Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397, 397–442 (2010) (summarizing much of the empirical literature on the conflicting evidence on whether investment treaties lead to increased foreign investment); United Nations Conference on Trade & Development, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries*, U.N. Doc. UNCTAD/DIAE/IA/2009/5 (Dec. 1, 2009), available at [http://unctad.org/en/Docs/diaeia20095\\_en.pdf](http://unctad.org/en/Docs/diaeia20095_en.pdf).

109. Roberts, *Clash of Paradigms*, *supra* note 12, at 75–76, 78.

110. Robert O. Keohane, Andrew Moravcsik & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT'L ORG. 457, 462 (2000) ("From a legal perspective, access measures the range of social and political actors who have legal standing to submit a dispute to be resolved; from a political perspective, access measures the range of those who can set the agenda.").

111. Lack of gatekeeping by states increases opportunities for tribunals to "assert and establish new legal norms, often in unintended ways." *Id.* at 459; see also VAN HARTEN, *supra* note 51, at 96–99 (discussing states' lack of control over potential claims and arguments made by investors).

112. Roberts, *Clash of Paradigms*, *supra* note 12, at 77 n. 131.

costs on these states.<sup>113</sup> This is particularly significant given that the cost of arbitrating investment treaty cases appears to be growing,<sup>114</sup> with estimates that average costs might now reach as high as \$8 million per case.<sup>115</sup> In addition, the lack of an appellate mechanism led to conflicting treaty interpretations and applications, causing concern over inequality and inconsistency, as demonstrated by the infamous *CME* and *Lauder* cases.<sup>116</sup> Inconsistency also generated uncertainty about states' ongoing treaty obligations. For example, Ecuador experienced this uncertainty with respect to whether the effective means clause imposes obligations that are the same as or different to the customary international law denial of justice standard.<sup>117</sup>

For all of these reasons, the supposed depoliticization of the investment treaty system during the second era in fact resulted in intense political controversy. If the first period was criticized for being insufficiently protective of investors' interests, the second era is criticized for being insufficiently protective of the interests of treaty parties. In short, the pendulum had swung from one extreme to the other. A key problem with the restrictive approach is that it treats the second era as the system's ultimate goal rather than as an imbalanced phase that is due for a correction. By privileging investment protection and the depoliticization of investor-state disputes above all other goals, the restrictive approach denies treaty parties the opportunity to take advantage of a mechanism that they built into investment treaties in order to allow them to pursue other important interests, such as correcting errant interpretations, promoting consistency, reducing uncertainty, streamlining disputes, increasing efficiency, and minimizing costs.

This Article argues that the time has come for states to re-engage with the investment treaty system in an effort to move towards a third era that seeks to correct the imbalances of the previous eras. It is impossible to deter-

113. See INVESTMENT TREATY ARBITRATION, available at <http://www.italaw.com/cases-by-respondent> (list by respondent).

114. United Nations Conference on Trade & Development, *Investor-State Disputes: Prevention and Alternatives to Arbitration* 16–18 (2010), available at [http://unctad.org/en/Docs/diaeia200911\\_en.pdf](http://unctad.org/en/Docs/diaeia200911_en.pdf).

115. OECD, INVESTOR-STATE DISPUTE SETTLEMENT: PUBLIC CONSULTATION 18 (2012), <http://www.oecd.org/daf/inv/internationalinvestmentagreements/50291642.pdf>; David Gaukrodger & Kathryn Gordon, Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community 19 (2012), [http://www.oecd.org/daf/inv/investment-policy/WP-2012\\_3.pdf](http://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf).

116. In these cases, the same facts led to two arbitrations by related investors (a company and its main shareholder) against the Czech Republic. One tribunal found no liability and thus awarded no damages, and the other found liability and awarded over \$350 million (equivalent to the Czech Republic's annual healthcare budget). Compare Ronald S. Lauder v. Czech Republic, UNCITRAL, Final Award, (Sept. 3, 2001), with *CME Czech Republic B.V. (Neth.) v. Czech Republic*, UNCITRAL, Final Award (Mar. 14, 2003). See also Tomas Kellner, *Call It the Ronald Lauder Tax*, 171 FORBES MAGAZINE 60 (Apr. 28, 2003); Luke Eric Peterson, *Bilateral Investment Treaties and Development Policy-Making*, INT'L INST. FOR SUSTAINABLE DEV. 25–26 (2004), available at [http://www.iisd.org/pdf/2004/trade\\_bits.pdf](http://www.iisd.org/pdf/2004/trade_bits.pdf).

117. Compare *Chevron v. Ecuador*, *supra* note 25, at ¶¶ 242–44 (effective means clause provides a distinct standard from customary international law denial of justice standards), with *Duke Energy Electroquil Partners v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, ¶ 391 (Aug. 18, 2008) (effective means clause seeks to implement and form part of the more general guarantee against denial of justice under customary international law).

mine the ideal balance between the interests of investors and treaty parties. We lack information about what benefits and burdens flow from investment treaties in general, let alone what pros and cons would flow from tweaking the system in one way over another. But there are clear signs that states do not view the second era as creating a sustainable balance. Some states have responded by disengaging with the investment treaty system by, for instance, withdrawing from the ICSID Convention,<sup>118</sup> terminating investment treaties,<sup>119</sup> and refusing to include investor-state arbitration provisions in new treaties.<sup>120</sup> Investors may not like the prospect of states re-engaging with the system, but presumably they would prefer this to states abandoning the system altogether.

There are numerous ways in which states can re-engage with the investment treaty system. In drafting new treaties, states can rebalance investor protection and state sovereignty, on the one hand, and recalibrate interpretive authority between investor-state tribunals and the treaty parties, on the other hand.<sup>121</sup> However, focusing on redrafting treaties going forward is grossly inadequate for solving the system's existing imbalances given that more than 3000 investment treaties already exist and many have ten or fifteen year survival clauses.<sup>122</sup> If we want to develop a sustainable approach that grants investor protections whilst maintaining a meaningful degree of state sovereignty, it is important to look for mechanisms within existing

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118. For example, Bolivia, Ecuador, and Venezuela have withdrawn from the ICSID Convention. See ICSID, List of Contracting States and Other Signatories of the Convention (May 20, 2013), <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main>.

119. Some countries, including Ecuador and Venezuela, have reportedly withdrawn from or sought to renegotiate a number of their investment treaties. See United Nation Conference on Trade & Development, *Recent Developments in International Investment Agreements* (2007–June 2008), 2 IIA MONITOR 6 (2008). Others have suspended further negotiations of investment treaties pending reviews of their policy frameworks and withdrawn from some early-style treaties. See, e.g., Republic of South Africa, Bilateral Investment Treaty Policy Framework Review: Government Position Paper 12, 12 (2009), available at <http://www.pmg.org.za/files/docs/090626trade-bi-lateralpolicy.pdf>; Luke Eric Peterson, *South Africa Pushes Phase-Out of Early Bilateral Investment Treaties After at Least Two Separate Brushes with Investor-State Arbitration*, INVESTMENT ARB. REP. (Sept. 23, 2012), available at [http://www.iareporter.com/articles/20120924\\_1](http://www.iareporter.com/articles/20120924_1).

120. For example, the 2005 Australia-United States FTA does not include investor-state arbitration, and in 2011 Australia announced that it would no longer include investor-state dispute settlement provisions in its future trade agreements due to concerns about sovereign risk. See Australia-U.S. FTA, *supra* note 88; AUSTRALIAN GOVERNMENT: DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, GILLARD GOVERNMENT TRADE POLICY STATEMENT: TRADING OUR WAY TO MORE JOBS AND PROSPERITY 14 (2011). India has resisted the inclusion of an investor-state arbitration provision in its negotiations over a Free Trade Agreement with the European Union, and recent reports suggest that it plans to resist the inclusion of such provisions in its future investment treaties. See Asit Ranjan Mishra, *India Rejects Clause on Litigation*, Livemint, (July 4, 2011), <http://www.livemint.com/Home-Page/T8uMUbH7Psx9sJawlwtz vN/India-rejects-clause-on-litigation.html>; Asit Ranjan Mishra, *India May Exclude Clause on Lawsuits From Trade Pacts*, Livemint, (Jan. 29, 2012), <http://www.livemint.com/Home-Page/dTXmHa0mYU yRtFko4HbiLP/India-may-exclude-clause-on-lawsuits-from-trade-pacts.html>.

121. Roberts, *Clash of Paradigms*, *supra* note 12, at 78–83.

122. See UNCTAD, *World Investment Report*, *supra* note 1, at 101, 109.

treaties and public international law that permit states to re-engage with the system from within.

In my previous work, I have argued that states can and should seek to influence the development of investment treaty law through the medium of subsequent agreements and practice.<sup>123</sup> International law generally recognizes that treaty parties retain some interpretive authority with respect to their treaties. In the investment treaty field, there has also been an increase in formal mechanisms for states to reach interpretations that will bind investors and investor-state tribunals alike. This form of re-engagement is helpful in circumstances where the treaty parties *agree* on an interpretation, but what about when they *disagree*? Here, I contend that re-engagement can and should take the form of state-to-state arbitration.

The right of investors to bring arbitrations and the power of investor-state tribunals to interpret and apply investment treaties are sufficiently powerful and entrenched that re-engagement of states will not take us back to the first era. Just as the treaties do not subordinate state-to-state arbitration to investor-state arbitration, nor do they allow the rights and interests of treaty parties to uniformly trump those of investors. Instead, recognizing the co-existence of these two forms of dispute resolution and coordinating their interaction has the potential to help move us towards a third era where states actively influence, but do not completely control, the interpretation and application of their treaties.

### B. *Managing Re-Engagement and Hybridity*

As I have argued elsewhere, we need to develop a hybrid theory of the investment treaty system.<sup>124</sup> The first era was characterized by a public international law paradigm that focused exclusively on the treaty parties and state-to-state arbitration. The second era was characterized by an international commercial arbitration paradigm that focused primarily on investors' rights and investor-state arbitration. Both paradigms reveal important aspects of the system while obscuring others; neither provides an accurate account of its *sui generis* nature. Instead, the key to understanding the platypus that is the investment treaty system is to develop a hybrid theory that simultaneously recognizes and values both relationships whilst acknowledging the inevitable tensions that result from this union.

States cannot expect to have the same freedom that they had before they entered into treaties granting investors a right to bring claims, nor can investors expect to have an absolute right to pursue their interests given the co-existence of investor-state and state-to-state arbitration. Views will differ on how exactly to calibrate this balance, but the key is to pursue some balance instead of radically privileging the rights and interests of states or in-

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123. See Roberts, *Power and Persuasion*, *supra* note 107, at 179–83.

124. See Roberts, *Clash of Paradigms*, *supra* note 12, at 45, 92–94.

vestors, as occurred in the field's previous eras. In developing a hybrid approach, this Article contends that investment treaties should be understood as (1) granting interdependent rights to investors and their home states and (2) creating shared interpretive authority between the treaty parties, investor-state tribunals, and state-to-state tribunals.

In Part 1 below, this Article argues that home states should be permitted to bring diplomatic protection claims under state-to-state arbitral clauses and, in doing so, develops the theory of interdependent investment treaty rights. The existence of investor-state arbitration obviates the need for diplomatic protection in most cases, but does not categorically exclude it. This Article contends that investment treaties create procedural and substantive rights for both investors and home states that are best understood as interdependent. Claims to vindicate these common rights can be brought by either the investor or the home state, but not generally by both. To protect the rights of investors, procedural mechanisms should be adopted that give interested investors an opportunity to make submissions in state-to-state arbitrations, just as non-disputing treaty parties have an opportunity to make submissions on treaty interpretation in investor-state arbitrations.

In Part 2, this Article contends that home and host states should be permitted to seek rulings from state-to-state arbitral tribunals on disputes about the proper interpretation of their treaties and, in doing so, it develops a theory of shared interpretive authority. The asymmetrical and decentralized nature of investor-state arbitrations may skew interpretations in favor of investors and produce inconsistent interpretations that are binding on states. State-to-state arbitration provides a useful mechanism for countering these problems. To promote certainty and consistency, state-to-state awards should be considered binding on the treaty parties and future investor-state tribunals. However, failing that, they should be considered binding on the treaty parties and highly persuasive with respect to future tribunals. Such awards should not be permitted to function as an appeal from or collateral attack on existing investor-state awards, but may be used to approximate a preliminary reference mechanism in appropriate circumstances.

In Part 3, this Article argues that home states and, more controversially, host states should be permitted in certain circumstances to seek declaratory rulings from state-to-state tribunals on the interpretation and application of their treaty with respect to particular facts. For instance, where a host state's action affects a class of investors, the home state could seek a ruling that the host state violated the treaty with respect to that class. This approach would permit common issues of law or fact, such as liability and defenses, to be determined in a consistent, streamlined way. Future investor-state claims could then build on, but not undermine, these awards by establishing jurisdiction and damages on an individualized basis. This approach would help counter some of the problems states currently face in fighting arbitral battles on multiple fronts and in being bound by conflicting rulings. It also

combines both theories of interdependent rights and shared interpretive authority.

### 1. *Diplomatic Protection Claims*

The most obvious form of state-to-state claims are diplomatic protection claims where the home state initiates arbitration with respect to treaty violations affecting its nationals.<sup>125</sup> This possibility confronts unresolved disputes about the nature of investment treaty rights and, in particular, the relationship between the rights of investors and their home states.<sup>126</sup> This Article argues that investment treaties should be understood as creating interdependent substantive and procedural rights for investors and home states that either—but usually not both—may enforce.

#### a) *The Nature of Investment Treaty Rights*

##### (1) *The Nature of the Rights under Diplomatic Protection*

Traditionally, only the state had the right to bring claims on the international stage. Diplomatic protection re-conceptualized an injury to a foreign national as an injury to that national's home state, giving that state complete discretion over the claim's handling. As the International Court of Justice ("ICJ") stated in the *Barcelona Traction* case:

[W]ithin the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, *for it is its own right that the State is asserting*. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress . . . . The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case.<sup>127</sup>

125. See Berman, *supra* note 15, at 72 ("What can [this phrase] possibly be referring to, if they are not referring to disputes about according, or withholding, precisely the benefits to foreign investments which the whole investment treaty regime is intended to bring about?").

126. By referring to the "nature" of the rights, I am not engaging in a philosophical or jurisprudential debate about the nature of rights. Rather, I am looking at which rights have been allocated to which parties and how these rights relate to one another.

127. *Barcelona Traction, Light & Power Co. Ltd. (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, 44 ¶ 77-79 (Feb. 5) (emphasis added).

The traditional approach conceptualizes the home state as having the procedural right to enforce its own substantive rights.<sup>128</sup> Emmerich de Vattel famously said “whoever ill-treats a citizen *indirectly injures the State*.”<sup>129</sup> Likewise, the *Mavrommatis Palestine Concessions* case declared that “[b]y taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure, in the person of its subjects, respect for the rules of international law.”<sup>130</sup>

As the right of diplomatic protection belonged to the home state, the national could not prejudice its state’s right to bring a claim. For instance, if an investor contracted with the host state to waive its ability to seek diplomatic protection, the investor might be prevented from requesting diplomatic protection, but it could not prevent the home state from providing diplomatic protection.<sup>131</sup> The home state could also bring and settle claims, even on unfavorable terms, without the consent, acquiescence or even knowledge of the investor. However, the home state’s ability to bring a diplomatic protection claim depended on the nature and actions of its national: the state had to prove that the investor was a national, both at the time of injury and when bringing the claim, and had exhausted local remedies.<sup>132</sup> Damages were generally quantified by reference to the harm suffered by the investor.<sup>133</sup>

## (2) Modern Challenges Caused by the Rise of Individual Rights

This conception of diplomatic protection whereby states had a procedural right to vindicate their own substantive rights developed during an era when only states were considered to be subjects of international law. While states could enjoy rights and obligations under international law, individuals were generally regarded as its objects, rather than its subjects. As the

128. See *id.* at 45–46, ¶ 85 (“[W]hether claims are made on behalf of a State’s national or on behalf of the State itself, *they are always the claims of the State*.” (emphasis added)); see also Aron Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 136 RECUEIL DES COURS 331, 372 (1972); KATE PARLETT, *THE INDIVIDUAL IN THE INTERNATIONAL LEGAL SYSTEM: CONTINUITY AND CHANGE IN INTERNATIONAL LAW* 49–50 (2011).

129. EMMERICH DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND SOVEREIGNS* 136 (1916) (Charles G. Fenwick trans., ed., 1916) (1758) (emphasis added).

130. *Mavrommatis Palestine Concessions* (Greece v. U.K.), 1924 P.C.I.J. (ser. A) No. 2, at 12 (Aug. 30) (emphasis added); see also Berman, *supra* note 15, at 68 (explaining that diplomatic protection involves a “State adopting, in its own right, the cause of its national”).

131. Broches, *supra* note 128, at 373–74 (“Since diplomatic protection is based on the theory that the injury to a national is a wrong done to his State and the exercise of diplomatic protection is therefore an exercise of the State’s own right, the majority of the international community denies that a private individual can waive a right that belongs to his State.”); Christoph Schreuer, *Investment Protection and International Relations*, in *THE LAW OF INTERNATIONAL RELATIONS* 345, 356–57 (Reinisch & Kriebbaum eds., 2007).

132. See ILC Draft Articles on Diplomatic Protection with Commentaries, *supra* note 70, arts. 5, 10, 14, 19; see generally CHITTHARANJAN F. AMERASINGHE, *DIPLOMATIC PROTECTION* (2008).

133. *Id.*

Commentaries on the ILC Draft Articles on Diplomatic Protection recognize:

In the early years of international law the individual had no place, no rights in the international legal order. Consequently if a national injured abroad was to be protected this could be done only by means of a fiction - that an injury to the national was an injury to the State itself. This fiction was, however, no more than a means to an end, the end being the protection of the rights of an injured national. Today the situation has changed dramatically.<sup>134</sup>

Modern international law grants certain *substantive* rights to individuals, particularly human rights. For instance, the International Covenant on Civil and Political Rights uses broad rights declaring language to provide that “every human being has the inherent right to life” and “[e]veryone has the right to liberty and security of person.”<sup>135</sup> Even provisions not formulated in rights language, such as “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,”<sup>136</sup> are generally understood as creating a right to be free from such interference.

Some human rights treaties also grant individuals *procedural* rights. The European Convention on Human Rights (“ECHR”), for example, provides that the European Court of Human Rights (“ECtHR”) “may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth.”<sup>137</sup> This right exists alongside the right of the treaty parties to bring claims. For instance, the ECHR permits any treaty party to “refer to the Court any alleged breach of the provisions of the Convention” by any other treaty party.<sup>138</sup>

Individual rights have also been recognized outside the human rights context. In *LaGrand* and *Avena*, the ICJ affirmed that the Vienna Convention on Consular Relations (“VCCR”) created both state rights and individual rights.<sup>139</sup> Nationals have the “right” to be informed of their consular rights, to have their consulate informed of their arrest or detention (upon their request), and to have communications passed to their consulate. The home state has the “right” to visit detained nationals, to converse and correspond

134. ILC Draft Articles on Diplomatic Protection with Commentaries, *supra* note 70, at 25.

135. International Covenant on Civil and Political Rights arts. 6, 9, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976) [hereinafter ICCPR].

136. *Id.* art. 7.

137. Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Number 11 and Number 14 art. 34, June 1, 2010, C.E.T.S. No. 194 [hereinafter ECHR].

138. *Id.* art. 33.

139. *LaGrand* (Ger. v. U.S.), 2001 I.C.J. 466, ¶ 77 (June 27); *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12, ¶ 40 (Mar. 31) [hereinafter *Avena*]. Whilst not deciding the matter, the ICJ indicated no support for the claim that these individual rights amounted to human rights. See *id.* ¶ 124.

with them, and to arrange for their legal representation (unless the nationals opposed the state acting on their behalf).<sup>140</sup>

No consensus exists on how the advent of individual rights at international law affects the rights of states exercising diplomatic protection. During the drafting of the ILC Draft Articles, some viewed diplomatic protection as a legal fiction that was no longer necessary; others viewed it as a procedural right of states that remained an important weapon to protect human rights; while still others viewed it as involving substantive and procedural rights of states, even if individuals held parallel rights.<sup>141</sup> As a result of disagreement, the Draft Articles are deliberately ambiguous on this issue, describing diplomatic protection as:

the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.<sup>142</sup>

This formulation was intended to “leave open the question whether the State exercising diplomatic protection does so in its own right or that of its national - or both.”<sup>143</sup> The Draft Articles viewed diplomatic protection as a procedure to hold states responsible for wrongful acts, without taking a position on whose rights had been wronged.<sup>144</sup>

Clearly a state exercising diplomatic protection has a procedural right to bring an international claim, but it is not clear whether the underlying substantive right belongs to the national, the state, or both.<sup>145</sup> The Commentaries to the Draft Articles provide some support for the latter position, stating that: “A State does not ‘in reality’—to quote *Mavrommatis*—assert its own right only. ‘In reality’ it also asserts the right of its injured na-

140. See Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 251, 261 [hereinafter VCCR].

141. See Rep. of the Int'l Law Comm'n, 50th Sess., Apr. 20–June 12, July 27–Aug. 14, 1998, U.N. Doc. A/53/10; GAOR, 53d Sess., Supp. No. 10, reprinted in [1998] 2 Y.B. Int'l L. Comm'n 2, vol II(2), ¶¶ 63, 65, 68, 76–80, 84–85; Diplomatic Protection, reprinted in [1998] 2 Y.B. Int'l L. Comm'n 2, vol II(2), ¶¶ 415–16, 440–445, U.N. Doc. A/CN.4/SER.A/2000; Int'l Law Comm'n 2005, ¶¶ 238, 241.

142. ILC Draft Articles on Diplomatic Protection with Commentaries, *supra* note 70, art. 1.

143. *Id.* at 26.

144. See *id.*

145. This is consistent with Article 2 of the ILC Draft Articles, which provides that “[a] State has the right to exercise diplomatic protection in accordance with the present draft articles.” *Id.* at 28; see also Rep. of the Int'l Law Comm'n, 56th Sess., May 3–June 4, July 5–Aug. 8, 2004, 27, U.N. Doc. A/59/10; GAOR, 59th Sess., Supp. No. 10 (“In exercising diplomatic protection the State adopts in its own right the cause of its national arising from the internationally wrongful act of another State. This formulation follows the language of the International Court of Justice in the *Interhandel* case when it stated that the Applicant State had ‘adopted the cause of its national’ whose rights had been violated. The legal interest of the State in exercising diplomatic protection derives from the injury to a national resulting from the wrongful act of another State.”); *Interhandel* (Switz. v. U.S.), 1959 I.C.J. 6, 25 (Mar. 21).

tional.”<sup>146</sup> However, much depends on the particular treaty, and there may not be a common answer across subject areas.

In the human rights sphere, the argument that the substantive rights are owed to the home state only is unconvincing. Textually, the rights are framed as individual rights, which accords with the object and purpose of such treaties of recognizing qualities inherent in being human. It makes little sense to conceptualize these rights as belonging to their home state only as human rights law often protects an individual from its own home state.<sup>147</sup> States also enter into human rights treaties to collectively impose enlightened standards on themselves and each other.<sup>148</sup> Some have thus characterized these treaties as creating “objective” regimes rather than contract-based regimes based on reciprocal inter-state rights and benefits.<sup>149</sup>

Accordingly, the substantive rights in human rights treaties are best conceptualized as being owed to the individual and to the treaty parties as a whole, including, in certain circumstances, to the home state.<sup>150</sup> Human rights treaties give individuals substantive rights and, in some circumstances, procedural rights. Many of these rights are *erga omnes*, meaning that they are also owed to the international community as a whole, with all states having an interest in their enforcement. Thus most human rights treaties permit any treaty party, including the injured individual’s home state in appropriate circumstances,<sup>151</sup> to bring a claim against any other treaty party for a treaty violation.<sup>152</sup>

146. ILC Draft Articles on Diplomatic Protection with Commentaries, *supra* note 70, at 25.

147. See Juratowitch, *supra* note 59, at 26.

148. The normative nature of these treaties makes them different in kind to the more facilitative nature of many traditional treaties. See Roberts, *Power and Persuasion*, *supra* note 107, at 205–07.

149. See Willem Riphagen, Special Rapporteur on State Responsibility, *Fourth Rep. on State Responsibility*, Int’l Law Comm’n, U.N. Doc. A/CN.4/366 (Apr. 14–15, 1983), reprinted in [1983] 2 Y.B. Int’l L. Comm’n 17, ¶ 89, U.N. Doc. A/CN.4/SER.A/1983/Add.1; see also *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) ¶ 60 (1988) (“Unlike international treaties of the classical kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a ‘collective enforcement’”); Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17 EUR. J. INT’L L. 483, 511, 526 (2006).

150. For example, when an individual’s rights are violated by a treaty party other than its state of nationality, the injury is shared by the individual and his or her home state.

151. See ILC Draft Articles on Diplomatic Protection with Commentaries, *supra* note 70, at 87. In practice, state-to-state claims are most likely to be brought by the individual’s home state, but that reflects a difference in interest as a matter of fact rather than capacity as a matter of law. For instance, even though the ECHR permits any treaty party to bring a state-to-state claim, in practice this has typically been invoked by an individual’s home state against another treaty party. See ECHR, *supra* note 137.

152. See, e.g., ICCPR, *supra* note 135, art. 41; International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195, 226; 2012 U.S. Model BIT, *supra* note 5, art. 11; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 21, Dec. 10, 1984, 1465 U.N.T.S. 85; Organization of American States, American Convention on Human Rights art. 4(5), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 144; African Charter on Human and People’s Rights arts. 47–54, adopted June 27, 1981, 1520 U.N.T.S. 217.

While neutral on the nature of the substantive rights involved, the ILC Draft Articles on Diplomatic Protection left open the possibility of parallel claims by individuals and their home states, particularly in the human rights sphere. Article 16 provides that “[t]he rights of States, natural persons, legal persons or other entities to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act are not affected by the present draft articles.”<sup>153</sup> This is fully consistent with the approach of the ECHR, which permits parallel claims by states and individuals.<sup>154</sup>

In the consular rights sphere, the VCCR creates substantive rights for individuals and home states, while the Optional Protocol gives home states a procedural right to enforce those substantive rights. In *LaGrand*, the ICJ held that the VCCR created individual rights that could be invoked by that individual’s state of nationality.<sup>155</sup> In *Avena*, the Court clarified that violations of the rights of the individual could entail violations of the rights of the home state and vice versa.<sup>156</sup> In these “special circumstances of *interdependence*,” the home state could submit a claim alleging violations of its own rights and the rights of its nationals, without the nationals first having to exhaust local remedies.<sup>157</sup>

When states bring diplomatic protection claims, they remain in control of those claims regardless of the individual interests underlying them. This is evident from Article 19 of the Draft Articles, which includes “recommended practice[s]” for how states should exercise diplomatic protection:

A State entitled to exercise diplomatic protection according to the present draft articles, should:

- (a) Give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred;
- (b) Take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought; and
- (c) Transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions.<sup>158</sup>

The Commentary treats these recommended practices as instances of progressive development of the law, rather than codification.<sup>159</sup> They are de-

153. ILC Draft Articles on Diplomatic Protection with Commentaries, *supra* note 70, art. 17.

154. See ECHR, *supra* note 137, art. 34.

155. *LaGrand*, *supra* note 139, at ¶ 77.

156. *Avena*, *supra* note 139, at ¶ 40.

157. *Id.* at ¶ 40 (emphasis added).

158. ILC Draft Articles on Diplomatic Protection with Commentaries, *supra* note 70, art. 19.

159. See *id.* art. 19, commentary at 94–95. There was some debate over whether Article 19(b) represents customary international law or progressive development. See *id.* at 97.

signed to encourage states to take account of the individual's substantive interests underlying a diplomatic protection claim, but control is left with the home state. Nationals are not given the ability to direct diplomatic protection claims, even if their substantive rights are implicated.

(3) *Substantive and Procedural Rights under Investment Treaties*

Even when treaties clearly create individual rights, as above, the right of home states to bring diplomatic protection claims is not necessarily precluded. The same conclusion should be even more likely with respect to investment treaties given that it is not clear whether they grant investors rights in the first place.

The Draft Articles on Diplomatic Protection take a soft *lex specialis* approach to investment treaties, providing that “[t]he present draft articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments.”<sup>160</sup> There has been little analysis of the nature of investment treaty rights and how they might impact the availability or scope of diplomatic protection under those treaties. I contend that existing analyses are problematic because they tend to gravitate toward the extremes—of rights being given *only* to investors or *only* to states—without considering intermediate positions.<sup>161</sup>

At one extreme, some claim investment treaties create substantive and procedural rights for treaty parties only, closely tracking the traditional approach to diplomatic protection.<sup>162</sup> This approach also follows trade law. Trade treaties create benefits for third parties (e.g., individuals who trade in goods and services), but grant enforceable substantive or procedural rights to the treaty parties only. Under this approach, investors can initiate arbitrations as a matter of convenience only, stepping into the shoes of their home state to bring a claim. At the other extreme, some claim that investment treaties grant only investors substantive and procedural rights, leaving at best a residual role for states. This position closely tracks the approach taken in human rights.<sup>163</sup>

160. *Id.* art. 17 (emphasis added).

161. For instance, Zachary Douglas provides the most detailed discussion of the nature of investor rights, but does not consider this possibility. *See, e.g.,* Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 BRIT. Y.B. INT'L L. 151, 152–55 (2003) [hereinafter Douglas, *Hybrid Foundations*]; ZACHARY DOUGLAS, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* 6–10 (2009); *see also* PARLETT, *supra* note 128, at 109.

162. *See* Roberts, *Clash of Paradigms*, *supra* note 12, at 71–74; *see also* Jamal Seifi, *Investor-State Arbitration v. State-State Arbitration in Bilateral Investment Treaties*, OIL, GAS & ENERGY L. INTELLIGENCE, Sept. 2003 at 3 (“From a traditional point of view, a bilateral investment treaty, like any other treaty, is an international legal instrument representing common sovereign will of the signatories defining their rights and obligations vis-à-vis one another. In other words, it is a law between States, for States, by States and therefore, subject to extensive sovereign prerogative to set up, abolish and modify international investment treaties, as instruments under the unfettered control of only States.”).

163. Seifi, *supra* note 162, at 4–5 (“It seems that . . . an investor-[s]tate arbitration provision in an investment treaty should not merely be seen as a matter of procedural convenience, but as a mechanism

There is no need to take an either/or approach. Investment treaties can and should be understood to create rights for *both* investors and home states, as the VCCR does. Investment treaties give both investors and treaty parties the procedural right to bring investor-state and state-to-state claims, respectively. The more contentious issue is to whom the underlying substantive rights are owed. Some argue that these substantive rights are owed on an inter-state basis only, with investors having a procedural right to enforce these standards (the procedural-direct rights theory).<sup>164</sup> For instance, Crawford observes that “one might argue that bilateral investment treaties in some sense institutionalize and reinforce (rather than replace) the system of diplomatic protection, and that in accordance with the *Mavrommatis* formula, the rights concerned are those of the state, not the investor.”<sup>165</sup>

Unlike human rights treaties, most investment treaties do not use rights-creating language. Investors do not have the “right” not to have their property unlawfully expropriated or the “right” to national treatment. Instead, the treaties impose certain obligations on host states, providing that each state “shall accord” certain treatment or may not expropriate except on certain conditions.<sup>166</sup> This formulation is weaker than even non-human rights comparisons, such as nationals’ “right” to consular notification and access in the VCCR. Investment treaties do not recognize the “inherent” rights of investors in the same way that human rights treaties recognize the “inherent” rights of humans.<sup>167</sup> Rather, investment treaty rights are recognized for instrumental reasons, i.e., as a means to the end of promoting foreign investment.<sup>168</sup> This also explains why investment treaties do not create objective

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for direct enforcement by the investor of its rights, quite on comparable scale to judicial bodies established under some human rights treaties.”)

164. See Douglas, *Hybrid Foundations*, *supra* note 161, at 181–84; PARLETT, *supra* note 128, at 109.

165. James Crawford, *The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 AM. J. INT’L L. 874, 887–88 (2002).

166. See, e.g., 2012 U.S. Model BIT, *supra* note 5, art. 3(1) (“Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors . . .”), art. 4(1) (“Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party . . .”), art. 5(1) (“Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.”), art. 6(1) (“Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (“expropriation”), except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and (d) in accordance with due process of law . . .”).

167. However, some investor protections are considered to form part of customary international law, such as the prohibition on expropriation without compensation and the minimum standard of treatment. See JAMES CRAWFORD, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 607–26 (8th ed. 2012).

168. See, e.g., Roberts, *Clash of Paradigms*, *supra* note 12, at 71 (“Human rights are typically understood as a good in their own right, whereas investor rights might be viewed as a means to the end of increasing foreign investment, rather than an end in and of themselves.”); Martins Paparinskis, *Investment Treaty Arbitration and the (New) Law of State Responsibility*, 24 EUR. J. INT’L L. 617, 623 (2013) (suggesting that a human rights framework “fails to capture the structural dynamic of the [investment arbitration] regime. In particular, the grant of investment protection is explicitly linked with and justi-

regimes like human rights. Investment protections are given only to foreign investors whose home states agree to give reciprocal protections, not to all foreign investors within a host state. This *quid pro quo* differs from the human rights field.

The significant innovation that most commentators attribute to investment treaties is that the treaties grant investors the ability to bring direct arbitral claims, not that they create substantive rights for investors.<sup>169</sup> Indeed, many of the same substantive provisions can be found in FCN treaties and FTAs that permit state-to-state claims only. In *ADM v. Mexico*, for instance, the Tribunal found that the substantive rights in NAFTA were granted on an inter-state basis even if investors had the procedural right to bring a claim.<sup>170</sup> The Tribunal noted that Chapter 11 of NAFTA was divided into two: Part A set out various substantive obligations on the treaty parties, while Part B provided a procedural right for investors to bring claims to enforce those obligations. The Tribunal found that the substantive obligations contained in Part A were owed on an inter-state basis only, in line with the submissions of the NAFTA treaty parties.<sup>171</sup>

On the other hand, some argue that the substantive rights are owed to investors only (the substantive-direct rights theory).<sup>172</sup> The idea that an injury to a national is an injury to that national's home state is a legal fiction that is no longer necessary in an era when individuals may be granted substantive and procedural rights at international law. According to Mohamed Bennouna, the First Rapporteur for the ILC Draft Articles on Diplomatic Protection, "where the right of the individual is recognized directly under international law . . . and the individual himself can enforce this right at the international level, the 'fiction' no longer has any reason for being."<sup>173</sup>

In *Corn Products v. Mexico*, the Tribunal found that investors were given a procedural right to enforce their own substantive rights, describing the al-

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fied by utilitarian considerations of enticing the non-state actor consciously to make the choice of entering the particular regime.").

169. See, e.g., Broches, *supra* note 128, at 349 ("From the legal point of view the most striking feature of the Convention is that it firmly establishes the capacity of a private individual or a corporation to proceed directly against a State in an international forum, thus contributing to the growing recognition of the individual as a subject of international law."); Kenneth J. Vandeveld, *The BIT Program: A Fifteen-Year Appraisal*, 86 ASIL PROCEEDINGS 532, 538 (1992) ("The great innovation of the BIT is its investor-to-state dispute resolution provision.").

170. *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award, ¶¶ 168–80 (Nov. 21, 2007).

171. *Id.* at ¶ 168.

172. See, e.g., Douglas, *Hybrid Foundations*, *supra* note 161, at 181–84; Parlett, *supra* note 128, at 111.

173. See Special Rapporteur on Diplomatic Protection, *Preliminary Report on Diplomatic Protection*, Int'l Law Comm'n, ¶ 40, U.N. Doc. A/CN.4/484 (Feb. 4, 1998) (by Mohamed Bennouna); see also Juratowitch, *supra* note 59, at 24 (arguing that this approach involves building a fiction upon a fiction: "It is only through a fiction that diplomatic protection involved the rights of the State in the first place. Subrogation involves a further fiction that the investor is stepping into the shoes of the State. They are shoes that belonged to the investor in the first place.").

ternative that investors were merely enforcing substantive rights owed to their home state as “counterintuitive”:<sup>174</sup>

[W]hen a State claimed for a wrong done to its national it was in reality acting on behalf of that national, rather than asserting a right of its own. The pretense that it was asserting a claim of its own was necessary, because the State alone enjoyed access to international dispute settlement and claims machinery. However, there is no need to continue that fiction in a case in which the individual is vested with the right to bring claims of its own.<sup>175</sup>

Moreover, the idea that investment treaties create substantive rights for treaty parties only seems hard to reconcile with investors’ entitlement to direct damages awards, which is clearly more than procedural in nature.

Ultimately, arguments that substantive rights are owed only to investors or only to home states are unconvincing. Treaty parties appear to have left the issue of who gets substantive rights deliberately ambiguous, as did the ILC in its Draft Articles on Diplomatic Protection. Investment treaties create substantive obligations (without clearly identifying corresponding substantive rights) and procedural rights (which clearly belong to both investors and states). I contend that, given that both home states and investors have an interest in vindicating investment treaty obligations, and that both have been granted a procedural mechanism for doing so, we should presume that both have been granted substantive rights under investment treaties absent clear wording to the contrary.

#### *b) Toward a Theory of Interdependent Rights*

In keeping with the hybrid nature of the investment treaty system, I argue that, while investment treaty rights have been granted to both investors and home states, this co-existence makes the rights qualified and shared, rather than absolute and exclusive, in nature. Any rights granted to investors are qualified because they are subject to express and implied limits imposed by the treaties and general international law. They are also best conceptualized as being shared or jointly held on an “interdependent” rather than an “independent” basis.<sup>176</sup>

##### *(1) Independent Rights*

The joint rights of investors and home states could be conceptualized as independent. In the event of a violation, independent claims could be

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174. *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, ¶¶ 169, 173 (Jan. 15, 2008).

175. *Id.* at ¶ 173.

176. See Robert Volterra, *International Law Commission Articles on State Responsibility and Investor-State Arbitration: Do Investors Have Rights?*, 25 ICSID REV.—FOREIGN INV. L. J. 218, 220 (2010) (“Generally, one would have to say that the rights contained in an investment treaty are, at best, rights of investors that are shared with the [s]tate party and their [s]tate of nationality.”).

launched by the investor, the home state, or both; a claim by one party would not foreclose or affect a claim by the other. No issues of *res judicata* or *lis pendens* would arise because the claims would be understood as involving different claimants (the investor and the host state) and different causes of action (violation of the investor's rights and violation of the home state's rights), even if the remedies sought were overlapping or identical (e.g., declaration of a violation or an award of damages).

This approach is in keeping with the strict approach to identity that some tribunals have adopted, allowing parallel investment treaty claims by both companies and their shareholders. The *CME* and *Lauder* tribunals adopted this formalistic approach, allowing cases to proceed because they involved different (although related) claimants bringing claims under different (although substantially similar) treaties.<sup>177</sup> It is also in keeping with the approach adopted by some human rights courts that permit parallel claims by individuals and treaty parties, including the individual's home state.<sup>178</sup>

But the independent rights approach is problematic. As a matter of theory, it is difficult to conceptualize investment treaty obligations as giving rise to independent rights because the rights of investors and home states substantially overlap. In the VCCR cases, the ICJ noted that the substantive rights were interdependent because violations of the rights of the individual could entail violations of the rights of their home state and vice versa.<sup>179</sup> The same is true in the investment treaty context. A violation of the rights of the investor equates to a violation of the rights of the home state; conversely, a violation of the rights of the home state equates to a violation of the rights of its investors, either existing or potential.<sup>180</sup> For instance, when Italy brought direct and diplomatic protection claims against Cuba based on the same substantive obligations, its damages claim was calculated based on the damage suffered by its nationals plus one Euro in symbolic damages for violations of its own rights.<sup>181</sup> And the Tribunal found that Italy's direct claim failed because its claim on behalf of its nationals failed.<sup>182</sup>

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177. See Ronald S. Lauder v. Czech Republic, UNCITRAL, Final Award (Sept. 3, 2001), ¶¶ 156–75 [hereinafter *Lauder*]; *CME Czech Rep. B.V. v. Czech Republic*, Partial Award (Sept. 13, 2001), 2 Stockholm Arb. Rep. 167, 170–71 (2003).

178. For instance, cases about Turkey's responsibility for the acts of the Turkish Republic of Northern Cyprus were brought before the ECtHR by both individuals and Cyprus. See *Loizidou v. Turkey*, App. No. 15318/89, 23 Eur. H.R. Rep. 513 (1996); *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 1.

179. *Avena*, *supra* note 139, at ¶ 40.

180. VCCR rights have a sequential and overlapping quality. In some cases, a violation of the national's right (e.g., to provide notification of consular rights) precludes a home state from subsequently exercising its rights (e.g., to arrange for legal representation of the national upon request). In other cases, the same action simultaneously violates the rights of both the national and home state (e.g., failure to permit consular access). By contrast, investment treaty rights are concurrent and overlapping, so that the violation of an investor's right also results in a violation of the home state's rights, which seems to strengthen rather than undermine the applicability of the concept of interdependence.

181. *Italy v. Cuba*, Interim Award, *supra* note 18, at ¶¶ 24–25. See also Potestà, *Italy v. Cuba*, *supra* note 19, at 345.

182. See Potestà, *Italy v. Cuba*, *supra* note 19, at 345.

As a matter of practice, moreover, the independent rights approach gives rise to duplicative claims and potentially inconsistent results. Claimants may favor multiple claims that give them two or more opportunities for recovery. Arbitral tribunals may avoid resolving tensions occasioned by multiple proceedings on the basis that doing so exceeds their powers. Their ad hoc nature also provides financial incentives for arbitrators to retain jurisdiction, despite multiplicity, as the extent of their remuneration depends on whether the case before them proceeds.<sup>183</sup> However, allowing parallel claims increases costs and presents asymmetrical risks: the host state must win every claim to avoid liability, whereas the home state and investor need to win only one claim to recover. Parallel claims also risk inconsistent awards (e.g., one tribunal finds liability and the other does not) or, though less likely, double recovery (e.g., both tribunals find liability and do not apply other limiting doctrines).

Parallel claims may be less problematic in some circumstances. Human rights are highly normative and greater concerns exist about their under-enforcement than over-enforcement. This may explain the concern of the ILC Draft Articles that the doctrine of diplomatic protection not undermine the right of individuals to bring direct claims or vice versa.<sup>184</sup> In addition, when a treaty party other than the home state brings a claim, the remedy sought is likely to be a declaration of violation rather than damages, obviating the risk of duplicative damages. Where a single tribunal, such as the ECtHR, hears all claims, the risk of inconsistent results is also marginal. Many of these factors, however, are not present in investment arbitration. For instance, if investors have rights, these are less fundamental than many human rights, and parallel claims are likely to be heard by unrelated tribunals.

Various strategies could be adopted to minimize the risks of inconsistent results and duplicative damages. For example, the second tribunal could be encouraged to stay its proceedings until the first tribunal rendered an award and to treat that award as binding or highly persuasive. While some international tribunals have been reluctant to stay their proceedings,<sup>185</sup> others have done so.<sup>186</sup> Tribunals could also prevent double recovery by invoking general

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183. I am not claiming that these considerations influence the decisions of all or most arbitrators; it is important to recognize, however, that the choice of ad hoc tribunals creates incentives to favor jurisprudence that embraces multiplicity.

184. ILC Draft Articles on Diplomatic Protection with Commentaries, *supra* note 70, art. 16; Rep. of the Intl Law Comm'n, 52d Sess., May 1–June 9, July 10–Aug. 18, 2000, ¶ 60 U.N. Doc. A/CN.4/SER.A/2000 (2005); Report of the International Law Commission, GAOR, 55th Sess., Supp. No. 10, U.N. Doc. A/55/10 (2000) reprinted in [2000] 2 Y.B. Int'l L. Comm'n (Part II) 1, U.N. Doc. A/CN.4/SER.A/2000/Add.1, ¶ 445 ("It was stressed that the very welcome step in international law of recognizing direct individual rights, in the context either of the protection of human rights or the protection of investments, had not undermined the traditional doctrine of diplomatic protection.")

185. Southern Bluefin Tuna Cases (N.Z. v. Japan; Aust. v. Japan), Case No. 3 & 4, Order of Aug. 27, 1999, 3 ITLOS Rep. 280.

186. Mox Plant (Ir. v. U.K.), Case No. 10, Order No. 3 of June 24, 2003.

principles of law and equity, as contemplated in *Lauder*.<sup>187</sup> However, these discretionary approaches will likely vary between tribunals, so they do not eliminate the risks posed by treating the claims as independent.

Finally, treating the claims as independent creates problems vis-à-vis exhaustion of local remedies. As a general rule, states can bring direct claims without having to exhaust local remedies, but exhaustion is required for diplomatic protection claims.<sup>188</sup> If state-to-state arbitration were subject to exhaustion but investor-state arbitration were not, the possibility of a home state being able to bring a state-to-state claim without its investors' express or tacit consent would be significantly reduced. However, exhaustion exists to protect the host state, not the investor, and thus could be waived by the host state on a case-by-case basis.<sup>189</sup> This would give host states, not investors, control over which claims are heard at an investor-state and state-to-state level.

There are also good reasons to think that exhaustion should not be required. Investment treaties are unusual because they typically permit investor-state arbitration without requiring investors to exhaust local remedies. This distinguishes them from FCN treaties (which do not create individual causes of action) and human rights treaties (which often create individual causes of action but make them subject to exhaustion).<sup>190</sup> As a matter of policy, there seems to be little rationale in dispensing with exhaustion for investor-state claims, but requiring it for state-to-state claims. It also creates anomalies when dealing with "mixed" direct and diplomatic protection claims. At a minimum, exhaustion should not apply to mixed claims where the direct claim is preponderant<sup>191</sup> or the rights involved are interdependent.<sup>192</sup>

187. See *Lauder*, *supra* note 177, at ¶¶ 170–175.

188. ILC Draft Articles on Diplomatic Protection with Commentaries, *supra* note 70, art. 14; *id.* art. 14, commentary, ¶ 9.

189. The exhaustion of local remedies rule ensures that "the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic system." *Interhandel*, *supra* note 145, at 27. As this requirement exists for the benefit of the respondent state, it can also be waived by that state. See ILC Draft Articles on Diplomatic Protection with Commentaries, *supra* note 70, art. 15(e); In the matter of *Viviana Gallardo et al.*, Decision, Advisory Opinion No. G 101/81, Inter-Am. Ct. H.R. (ser. A), ¶ 26 (Nov. 13, 1981).

190. See, e.g., ECHR, *supra* note 137, arts. 34 (individual applications) and 35 (exhaustion requirement).

191. The ILC favored the preponderance test, but noted that international courts have applied it in a seemingly inconsistent way. See ILC Draft Articles on Diplomatic Protection with Commentaries, *supra* note 70, art. 14; see also *id.* art. 14, commentary, ¶¶ 1–14.

192. For instance, in *Avena*, the ICJ permitted Mexico to bring direct and diplomatic protection claims without requiring exhaustion on the basis of the "interdependence of the rights of the State and individual rights." *Avena*, *supra* note 139, at ¶ 40.

(2) *Interdependent Rights*

Picking up on the last suggestion, I argue that the shared rights of investors and home states are best conceptualized as interdependent.<sup>193</sup> If substantive investment treaty rights are held jointly by investors and their home states, investor-state and state-to-state arbitration should be understood as two avenues for redressing violations of the same substantive obligations. While there might be advantages in pursuing investor-state arbitration over state-to-state arbitration or vice versa in a given case, there is little advantage in permitting both options to be pursued simultaneously or sequentially. Accordingly, either the investor or the home state, but generally not both, could bring a claim, as one claim would preclude the other.

This form of preclusion could be analyzed under the doctrines of *res judicata* (where a claim has already been decided) or *lis pendens* (where a claim has been filed but not yet decided) on the basis of the same claim and related parties.<sup>194</sup> Alternatively, the doctrine of collateral estoppel might be apt given that the parties in the two cases differ but the underlying right is jointly held. According to this doctrine, a finding concerning a right, question, or fact may not be re-litigated by *a party or its privies* where (a) the issue was distinctly put before a previous tribunal, (b) the previous tribunal decided the issue, and (c) resolution of the issue was necessary to resolving the claims before previous tribunal.<sup>195</sup>

While this interdependent approach prevents duplication and inconsistency, it leaves open the question of whether the claims of investors and states should be treated hierarchically (prioritizing either the investor's claim or state's claim), sequentially (prioritizing the first-in-time claim), or somewhere in between. States could expressly choose to take any of these approaches, but it is less clear what should happen in the absence of an express choice.

Treaty parties could expressly prioritize either investor-state or state-to-state arbitration. For instance, the 1967 OECD Convention on the Protection of Foreign Property expressly gave superiority to state-to-state arbitra-

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193. Parlett briefly suggests this possibility before dismissing it as less likely than either the individual or the home state holding the substantive rights. PARLETT, *supra* note 128, at 112.

194. Paparinskis, *supra* note 98, at 297–300 (arguing in favor of permitting multiple claims but suggesting the application of a modified form of *res judicata* where one claim has already been decided).

195. See *Amoco Asia Corp. v. Republic of Indon.*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, ¶ 30 (May 10, 1988); *RSM v. Grenada*, ICSID Case No. ARB/10/6, ¶ 7.1.1-2 (Dec. 10, 2010) (recognizing collateral estoppel as a general principle of law); *Southern Pac. R.R. Co. v. U.S.*, 168 U.S. 1, 48–49 (1897) (“The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies, and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.”).

tion.<sup>196</sup> Article 7(a) provided that the treaty parties could submit any dispute as to the interpretation or application of the Convention to an arbitral tribunal.<sup>197</sup> Article 7(b) permitted a national of one treaty party who claimed to have been injured by a breach of the Convention to bring a claim against another treaty party, provided, *inter alia*, that “(ii) the Party of which he is a national has indicated that it will not institute proceedings under paragraph (a) or, within six months of receiving a written request from its national for the institution of such proceedings, has not instituted them.”<sup>198</sup> Further:

At any time after the expiry of the period of six months referred to [above], the Party concerned may institute proceedings in accordance with paragraph (a). In this case proceedings instituted in accordance with paragraph (b) shall be suspended until the proceedings in accordance with paragraph (a) are terminated.<sup>199</sup>

The Commentary accompanying the Draft Convention clearly contemplated a hierarchical relationship between these forms of dispute resolution. It provided that the right of a national to submit a claim was “subject to the general principle of international law that, as regards international process, the State of the national concerned has the right of espousal.”<sup>200</sup>

Treaty parties could also expressly adopt a sequencing approach, according priority to the first claim filed. Article 27 of the ICSID Convention provides a prominent example of a type of sequencing, stating that:

- (1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.
- (2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.<sup>201</sup>

A home state has the right to bring a diplomatic protection claim at any point before its national has submitted a claim or consented to arbitration

196. Organization for Economic Co-operation and Development (OECD), Draft Convention on the Protection on Foreign Property, art. 7(b)(ii), Oct. 12, 1967, 7 I.L.M. 133. (1968) [hereinafter 1967 OECD Draft Convention]; Organization for Economic Co-operation and Development (OECD), Draft Convention on the Protection on Foreign Property, 1963, 2 I.L.M. 257–58 (1963) [hereinafter 1963 OECD Draft Convention]; 1968 OECD Draft Convention, 2 I.L.M. 117, 132–33 (1968).

197. See 1967 OECD Draft Convention, *supra* note 196, art. 7(a).

198. *Id.* art. 7(b)(ii).

199. *Id.* art. 7(d).

200. 1963 OECD Draft Convention, *supra* note 196, at 260.

201. ICSID Convention, *supra* note 48, art. 27.

under the Convention.<sup>202</sup> However, the home state's diplomatic protection right is then suspended and curtailed, only reviving if and to the extent that the host state fails to pay the investor-state award.<sup>203</sup>

Various explanations have been given for this provision.<sup>204</sup> The Executive Directors' Report to the ICSID Convention explained Article 27 excluded diplomatic protection because, "[w]hen a host State consents to the submission of a dispute with an investor to the Centre, thereby giving the investor direct access to an international jurisdiction, the investor should not be in a position to ask his State to espouse his case and that State should not be permitted to do so."<sup>205</sup> This is consistent with some views expressed during the drafting that the option of investor-state arbitration renders diplomatic protection unnecessary.<sup>206</sup> However, these views are not consistent with the text of Article 27, which rules out diplomatic protection only when *both* the host state and the investor have consented to arbitration.

Instead, the two main justifications for Article 27 that recur in the drafting history are (1) protecting the host state from having to deal with multiple claims and (2) removing the dispute from the political and diplomatic realm and placing it in the legal realm:

As a corollary of the principle of allowing an investor direct and effective access to a foreign State without the intervention of his national State it was proposed – and this was an important innovation – that an investor's national State would no longer be able to espouse a claim of its national. In this way it was sought to ensure that States would not be faced with having to deal with a multiplicity of claims and claimants. The Convention would therefore offer a means of settling directly, on the legal plane, investment disputes between the State and the foreign investor and insulate such disputes from the realm of politics and diplomacy.<sup>207</sup>

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202. See Berman, *supra* note 15, at 71 ("If there is no arbitration instituted under the investment treaty regime, then certainly the scope for diplomatic protection remains untouched . . ."); Juratowitch, *supra* note 59, at 35; Potestà, *Italy v. Cuba*, *supra* note 19, at 345.

203. Juratowitch, *supra* note 59, at 15.

204. See generally CHRISTOPH SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 419 (2d ed. 2009).

205. *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 1 ICSID REP. 23, 30 (R. Rayfuse ed., 1993).

206. 2 CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES: DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION, pt. 1, at 273 (1968) [hereinafter *Convention Drafting History*] ("Once an investor had been given the right to direct access to a foreign State, he should not have the right to seek the protection of his own State, and his State should not have the right to intervene on his behalf . . ."), 432 (it is the "corollary of the principle of direct access of an individual to a State before an international tribunal. To the extent that such access was available to an individual and could be put to effective use, the reason for giving his State a right to afford him diplomatic protection fell away").

207. *Id.* at 372; see *id.* at 242 ("it was sought to ensure that States would not be faced with having to deal with a multiplicity of claims and claimants. The Convention would therefore offer a means of

These rationales support a sequencing approach to prevent multiple legal claims arising from the same facts and to protect host states from simultaneously being subjected to legal claims and diplomatic pressure. As Schreuer explains in his Commentary on the ICSID Convention:

A combination of arbitration and diplomatic protection would lead to undesirable results. The balance of interests between the parties would be upset if the host State, after consenting to international arbitration, remained exposed to diplomatic protection by the investor's home State. In fact, the guarantee against diplomatic protection may constitute a strong incentive for the host State to consent to arbitration. Also the arbitration process between the host State and the foreign investor could be severely hampered by simultaneous efforts to pursue the claim through diplomatic channels.<sup>208</sup>

A significant minority of investment treaties includes a similar provision to Article 27.<sup>209</sup> Others go further and prohibit the home state from providing any form of diplomatic protection once a dispute has been referred to investor-state arbitration.<sup>210</sup> In the absence of such provisions, commentators are divided over whether sequencing is required by customary international law or treaty interpretation. Paparinskis, for example, argues that the policy wisdom of a sequencing approach is evident, but it is "less obvious that there exists sufficient State practice to justify its existence as a result of

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settling directly, on the legal plane, investment disputes between the State and the foreign investor and insulate such disputes from the realm of politics and diplomacy."); *id.* at 303 ("A host State would . . . not be faced with the likelihood of having to deal with a multiplicity of claims and claimants. The Convention would offer a means of settling directly, on the legal plane, investment disputes between the State and the foreign investor, and would insulate such disputes from the realm of politics and diplomacy."); *id.* at 348 ("What was excluded was the traditional legal right of a State to espouse the cause of one of its nationals through the usual international channels, thus protecting the host State from exposure to the risk of multiple claims.").

208. SCHREUER, *supra* note 204, at 416.

209. See, e.g., Treaty Concerning the Reciprocal Encouragement and Protection of Investments, U.S.-Turk., art. VII, Dec. 3, 1985, S. TREATY DOC. NO. 19, 99th Cong., 2d Sess. (1986); U.S.-Cameroon BIT, *supra* note 46, art. VIII; Barbados-Germany BIT, Barb.-Ger., art. 10(6), 1994; Costa Rica-Germany BIT, Costa Rica-Ger., art. 9(6), 1994. For a breakdown of different treaty provisions, see Paparinskis, *supra* note 98, at 284-85. This approach was also adopted in the Draft Multilateral Agreement on Investment: "A Contracting Party may not initiate proceedings under this Article for a dispute which its investor has submitted, or consented to submit, to arbitration under [the investor-state dispute settlement provision], unless the other Contracting Party has failed to abide by and comply with the award rendered in that dispute or those proceedings have terminated without resolution by an arbitral tribunal of the investor's claim." OECD Draft Multilateral Agreement on Investment (MAI), Negotiating Text as of Apr. 24, 1998, Part V, C1b, <http://italaw.com/documents/MAIDraftText.pdf>.

210. For example, the UK Model BIT provides that "neither Contracting Party shall pursue through the diplomatic channel any dispute referred to" ICSID arbitration unless ICSID or the arbitral tribunal finds that it lacks jurisdiction, or the other Contracting Party fails to abide by or comply with any award rendered by the tribunal. United Kingdom Model BIT (2005, with 2006 amendments), Draft Agreement Between The Government of The United Kingdom of Great Britain and Northern Ireland and The Government of [Country] for the Promotion and Protection of Investments, art. 8.

law.”<sup>211</sup> As many investment treaties do not contain sequencing provisions, and Article 27 was treated as an “innovation,” he argues that the rights of investors and states exist in “parallel,” with the possibility of duplication and inconsistency being simply “a natural element of an increasingly multifaceted international legal order.”<sup>212</sup> In contrast, Amersinghe argues that:

It would be reasonable to infer that, once the procedures directly involving the investor are invoked, the treaty does not permit the resort to diplomatic protection directly with the involvement in arbitration of the investor’s national State; otherwise, the settlement procedures provided for would duplicate rather than simplify the procedures for the settlement of disputes which would not be a logically consistent result.<sup>213</sup>

The sequencing approach is consistent with the object and purpose of increasing the efficacy of investment treaty obligations by increasing opportunities for enforcement by arbitration. This aim is achieved when either the investor or the home state brings a claim; it does not require multiple claims. This approach was adopted in *Italy v. Cuba*, the only case to have considered this issue outside of the ICSID context.<sup>214</sup> The Tribunal rejected Cuba’s argument that Italy’s diplomatic protection claim was excluded by the existence of an investor-state arbitration provision. The Tribunal seemed alert to avoiding the problems of duplication and inconsistency associated with treating investor and state claims as independent. Accordingly, it opted for a sequencing solution that drew on Article 27 “by analogy,” implicitly adopting the interdependent approach.<sup>215</sup>

The text of Article 27 does not deal with whether a prior state-to-state claim preempts a subsequent investor-state claim. Here, the purpose of the provision is central to understanding its reach. If one views investment treaties as primarily concerned with protecting foreign investors, an asymmetrical approach might be appropriate, allowing investors’ claims to preclude home states’ claims, but not the other way around. If the primary point of sequencing is to prevent multiple claims, a symmetrical approach would achieve this, with the state-to-state claim precluding a later investor-state claim and vice versa. Alternatively, if sequencing is primarily concerned with protecting the host state from multiple claims, the issue would become whether the host state (rather than the investor) objected to the later-in-time claim.

Following a symmetrical sequencing approach, treaty parties could not reserve a dispute to the domain of politics and diplomacy because investors

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211. Paparinskis, *supra* note 98, at 281; see also Potestà, *Italy v. Cuba*, *supra* note 19, at 346.

212. Paparinskis, *supra* note 98, at 287.

213. CHITTHARANJAN F. AMERASINGHE, DIPLOMATIC PROTECTION 341 (Vaughn Lowe ed., 2008).

214. See *Italy v. Cuba*, Interim Award, *supra* note 18.

215. *Id.* at ¶ 65; Potestà, *Italy v. Cuba*, *supra* note 19, at 342.

would have the right to submit a claim or consent to arbitration. But if a home state transferred a dispute to the legal plane by bringing a state-to-state claim, a prohibition on duplicative claims would kick in.<sup>216</sup> This would have the advantage of preventing duplication and inconsistency, but would have the disadvantage of creating a race to arbitration, i.e., investors and home states would have incentives to bring claims or accept arbitral jurisdiction early on in order to preempt a claim by the other.<sup>217</sup>

As a matter of fact, we should expect that investor-state arbitration will remain the primary mechanism for dealing with investment disputes, as investors usually have the best incentive and greatest resources to take up claims. Thus, in *CMS v. Argentina*, the Tribunal stated that:

Diplomatic protection itself has been dwindling in current international law, as the [s]tate of nationality is no longer considered to be protecting its own interest in the claim but that of the individual affected. To some extent, diplomatic protection is intervening as a residual mechanism to be resorted to in the absence of other arrangements recognizing the direct right of action by individuals.<sup>218</sup>

Likewise, in the *Diallo* case, the ICJ noted that the rise of investment treaties saw diplomatic protection “somewhat fad[ing], as in practice recourse is only made to it in rare cases where treaty regimes do not exist or have proved inoperative.”<sup>219</sup> However, as a matter of law, we should not confuse the small number of state-to-state arbitrations as a matter of practice with the inability of treaty parties to bring state-to-state claims or the inferiority of such claims.<sup>220</sup>

In the absence of an express provision creating a hierarchy or endorsing symmetrical or asymmetrical sequencing, it is an open question which ap-

216. Of course, the wording of a particular treaty may preclude this approach. In the ECHR context, for instance, the clause on individual applications provides that “the High Contracting Parties undertake not to hinder in any way the effective exercise of this right.” See ECHR, *supra* note 137, art. 34. This would presumably prevent a home state from preempting an individual application by one of its nationals by bringing or settling a diplomatic protection claim against that national’s consent. Investment treaties do not typically insulate investor-state claims in this way.

217. In situations where multiple investors are affected, this creates the possible difficulty of some investors accepting jurisdiction before their home state while others are preempted, again resulting in multiplicity and potential inconsistency. This approach might also favor investors, as they are likely to be able to respond with greater speed than home states.

218. *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, ¶ 45 (July 17, 2003), 42 I.L.M. 788 (2003) (internal footnote omitted).

219. *Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo)*, Preliminary Objections, 2007 I.C.J. 582, 614, ¶ 88 (May 24). In fact, this statement is potentially misleading because we have no idea how much diplomatic protection continues to go on, short of state-to-state arbitration.

220. NOAH RUBINS & N. STEPHAN KINSELLA, *INTERNATIONAL INVESTMENT, POLITICAL RISK AND DISPUTE RESOLUTION: A PRACTITIONER’S GUIDE* 415 (2005) (“Most investment treaties are silent on this point, however, leaving open the possibility of State espousal in parallel to an investor-State claim . . . [However,] many States may be reluctant to espouse the claims of investors who can benefit from such an alternative remedy.”).

proach should be implied. Regardless of how the claims are prioritized, however, the key to the interdependent approach is that only one claim should be allowed to continue, which has the virtue of maximizing enforcement while minimizing duplication and inconsistency.

c) *Managing Diversity between Investors and Home States*

The possibility of investor-state claims preempting state-to-state claims or vice versa raises larger questions about how to deal with diversity of interests between investors and their home states. This sort of conflict is likely to be unusual, but focusing on it is important because it highlights a new and untested issue in investment treaty law. We know that investment treaties protect investors against unilateral actions by host states, such as expropriation without adequate compensation. It is much less clear whether they also protect investors from unilateral actions by home states, such as bringing or settling a diplomatic protection claim without the investors' knowledge or consent.<sup>221</sup>

To understand how diversity of interests between investors and home states might arise, consider the following scenarios. First, individual investors' interests could differ from the collective interests of a class of investors of the same nationality. For example, consider a situation where the host state is facing multiple claims, but it does not have enough money to pay all of them. An individual investor might wish aggressively to prosecute a claim with the hope of being one of the first to receive an award. However, the home state might wish to agree to a settlement for all of its investors to be paid out at an equitable, though reduced, rate. This could have happened with respect to claims by U.S. investors against Argentina, for instance.<sup>222</sup>

Second, the collective interests of investors could also differ from those of their home state. The home state has an interest in the protection of its nationals, but it also has an interest in the proper interpretation of the investment treaty. A home state must weigh its interest in protecting the rights of its nationals against its interest in protecting regulatory freedom for host states. Consider, for instance, the claim by Philip Morris against Australia under the Hong Kong-Australia BIT for its plain packaging of cigarettes.<sup>223</sup> Hong Kong might view such a claim as beyond the scope of

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221. For different positions on whether individual claimants needed to have consented to their claim being presented by their home state before a claims commission would have jurisdiction, see PARLETT, *supra* note 128, at 53, 82 (citing *U.S. v. Portugal*, in 2 HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 1092, 1098 *et seq.* esp. 1106 (Moore ed., 1898) (individual's consent was not required)); *Melzer Mining Company (USA) v. United Mexican States*, 4 R.I.A.A. 481 (U.S.-Mex. Gen. Cl. Comm'n, 1929) (individual's consent was not required); *Emilia Marta Viuda de Giovanni Mantellero*, Decision no. 3, unpublished, *extracted in A.H. FELLER, THE MEXICAN CLAIMS COMMISSIONS (1923-45) 90-91 (1935)* (individual's consent was required though the case was unusual and any principle derived from it might be limited thereof).

222. See *supra* Introduction.

223. See *Philip Morris Asia Ltd. v. Austl.*, PCA Case No. 2012-12, Notice of Claim, (Jun. 22, 2011), Perm. Ct. Arb. (2011).

what the treaty parties intended. Alternatively, Hong Kong might wish to enact similar plain packaging legislation and, thus, might not welcome a potentially adverse arbitral award, even if it did not form a strict precedent.

Third, home states also have broader interests outside of the treaty that might influence their actions. Consider a situation like the Iran-U.S. hostage crisis. As part of an agreement to resolve the hostage crisis, the two states created the Iran-United States Claims Tribunal and agreed that this body should resolve all claims by U.S. nationals against Iran and Iranian nationals against the United States.<sup>224</sup> This agreement nullified existing domestic claims and awards.<sup>225</sup> As a matter of international law, a state has historically had the power to settle claims on behalf of its nationals. Would the answer have been different had an Iran-U.S. BIT existed? Do investment treaties grant investors inviolable rights that their home states cannot take away, or do home states retain their ability to act, particularly where the states' essential interests are implicated?

The Draft Articles on Diplomatic Protection accept that home states remain in control of diplomatic protection claims but "recommend" that states should take into account the views of their injured nationals (as far as possible) and transfer any compensation obtained to those nationals (subject to reasonable deductions).<sup>226</sup> This may reflect a balance struck with Article 16, which permits individuals to bring their own claims notwithstanding the right of diplomatic protection.<sup>227</sup> If investor-state and state-to-state claims were independent in this way, there would be less need for individuals to be granted a role in state-to-state claims.<sup>228</sup> If the claims of investors and states are treated as interdependent, however, a stronger argument exists for protecting the rights and interests of investors in the context of state-to-state claims.

Providing a full analysis of the relationship between investors and their home states is beyond the scope of this Article. States could well have expected to retain the right to bring diplomatic protection claims, possibly even if this meant preempting previously filed investor-state claims, unless they expressly renounced their power to do so. Even if previously filed investor-state claims generally preempted state-to-state claims, an exception would likely exist where the home state wished to take over the claims of its investors for compelling reasons, such as protection of the state's essential security interests. However, in order to help protect the interests of inves-

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224. See Declaration of the Government of the Democratic and Popular Republic of Algeria, U.S.-Iran, Jan. 19, 1981, in 1 Iran-U.S. Cl. Trib. Rep. 3 (1983).

225. See generally *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (holding that the President has the power to suspend and terminate claims of American nationals against Iran).

226. ILC Draft Articles on Diplomatic Protection with Commentaries, *supra* note 70, art. 19.

227. *Id.* art. 16.

228. Tensions could still arise, however. Consider, for example, the situation where a home state refused to pay to the individual compensation the state had received, and the individual was prohibited from receiving compensation under its own claim because of limits on double recovery.

tors, directly affected investors should be treated as interested parties with a right to intervene in state-to-state cases.<sup>229</sup>

A number of scholars have complained about the prospect of investors being bound by state-to-state awards without having the opportunity to present arguments to the state-to-state tribunal.<sup>230</sup> Giving affected investors a right to intervene would help to counter these concerns and would enable state-to-state tribunals to fully consider the impact of their decisions on affected investors. Whilst investors would not have as much influence here as in investor-state arbitrations, they would have more influence than they typically receive with respect to interpretive agreements by the treaty parties. This proposal also mirrors the right of non-disputing treaty parties to intervene in investor-state arbitrations on matters of treaty interpretation.

If investors felt that they were not sufficiently able to protect their interests in these circumstances, they would be left with two potential options. First, investors might be able to bring claims against their home states in domestic courts, arguing that their legal claim was expropriated with no or insufficient compensation.<sup>231</sup> Whether and when such an expropriation claim could be brought would be matters of domestic law, although some human rights regimes that protect against expropriation (like the ECHR) might also come into play.<sup>232</sup> This possibility is yet to be tested in the investment treaty context.<sup>233</sup>

Second, investors might be able to argue that their right to bring an investor-state claim should not be preempted where their home state acted in bad faith,<sup>234</sup> particularly if no alternative domestic remedy is available. This might catch collusive attempts by home and host states to avoid legitimate claims, but would not cover situations like the Iran-U.S. hostage crisis, in which investor-state claims were settled in order to protect the essential security interests of the home state, and some compensation or mechanism for achieving compensation was provided. Again, this possibility is untested.

229. Some newer model treaties expressly include such a right. For instance, the 2012 U.S. Model BIT permits state-to-state tribunals to accept amicus submissions from non-disputing parties. 2012 U.S. Model BIT, *supra* note 5, arts. 37(2), 28(3). In the absence of such a provision, tribunals could accept such interventions under their general power to make procedural rulings.

230. See, e.g., Reisman Opinion, *supra* note 9, at 19–20.

231. For instance, in the Iran Hostages crisis, the U.S. Supreme Court ruled that the government could extinguish the domestic claims of a U.S. national, but that this did not amount to an expropriation because the government permitted claims to be filed before the Iran-U.S. Claims Tribunal. See *Dames & Moore v. Regan*, *supra* note 225, at 688–90.

232. See ECHR, *supra* note 137, Protocol 1, art. 1.

233. With respect to non-investment treaty claims in the U.S. context, see Jeremy Blumenthal, *Legal Claims as Private Property: Implications for Eminent Domain*, 36 HASTINGS CONST. L. Q. 373 (2009); *Alliance of Descend. of Tex. Land Grants v. United States*, 37 F.3d 1478 (Fed. Cir. 1994); *Abraham-Youri v. United States*, 139 F.3d 1462 (Fed. Cir. 1997); *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237 (1983), *aff'd*, 765 F.2d 159 (Fed. Cir. 1985).

234. See VCLT, *supra* note 81, art. 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”).

In summary, investment treaties create procedural and substantive rights for investors and home states. To avoid problems of duplication and inconsistency from treating these rights as independent, I propose viewing them as interdependent, such that a violation could be pursued by either, but not usually both, an investor or its home state. The exact mechanics of how investor-state and state-to-state claims should interact remains an open issue. In general terms, however, the interdependent approach is consistent with the text and history of investment treaties, as well as the treaties' objectives of balancing the interests of investors, home states, and host states. It also reflects the system's essential hybridity.

## 2. *Interpretive Disputes*

State-to-state arbitration clauses could also serve as a mechanism to allow the treaty parties, via their agents, to resolve interpretive disputes through prospective and generalized rule-making rather than retrospective and individualized dispute resolution. Investment treaties have traditionally been short and broadly worded, so much turns on who interprets them and how they are interpreted.<sup>235</sup> In this section, I argue that interpretive authority should be understood as shared between the treaty parties, investor-state tribunals, and state-to-state tribunals, such that pure interpretive disputes should be permitted.

### a) *The Shared Nature of Interpretive Authority*

Interpretive authority exists at three levels. First, investor-state tribunals necessarily enjoy some interpretive authority. While these tribunals are typically given a narrow grant of jurisdiction to resolve investment disputes between investors and host states, discharging this function inevitably involves them in interpreting and applying the treaty. Although these awards do not create binding precedent, they are routinely cited and distinguished by parties and tribunals in future cases.<sup>236</sup> Accordingly, investor-state awards are granted persuasive authority even if they lack binding precedential force and have become an important way to concretize abstract investment provisions.<sup>237</sup>

Second, the treaty parties enjoy some interpretive authority. Investor-state tribunals may adopt interpretations that conflict with and/or diverge from the treaty parties' intentions. In the absence of an appellate mechanism, the treaty parties are likely to pursue other avenues to correct errant interpreta-

235. Roberts, *Power and Persuasion*, *supra* note 107, at 76–77.

236. Jeffery P. Commission, *Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence*, 24 J. INT'L. ARB. 129, 130 (2007); Ole Kristian Fauchald, *The Legal Reasoning of ICSID Tribunals: An Empirical Analysis*, 19 EUR. J. INT'L L. 301, 333–43 (2008).

237. See generally Andrea K. Bjorklund, *Investment Treaty Arbitral Decisions as Jurisprudence Constante*, in INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 265 (Colin B. Picker et al. eds. 2008); Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 ARB. INT'L 357 (2007).

tions and achieve consistency. One way of doing this is by providing an “authentic interpretation” of a treaty through subsequent agreements and practice.<sup>238</sup> In some cases, the treaty parties have expressly reserved this interpretive authority. For instance, the NAFTA treaty parties have given themselves the power to adopt interpretations that are binding on investor-state tribunals.<sup>239</sup> In the absence of such a clause, this form of interpretive authority is implied from the VCLT unless it is excluded.<sup>240</sup>

Debate exists about the interpretive weight to be accorded to subsequent agreements by the treaty parties, particularly in dealing with treaties that accord rights or benefits to third parties.<sup>241</sup> NAFTA provides that interpretive agreements by the treaty parties shall be binding on investor-state tribunals.<sup>242</sup> Some NAFTA tribunals have viewed themselves as having the power to distinguish between permissible interpretations (that are binding) and impermissible amendments (that are not binding), while others view this authority as belonging to the treaty parties.<sup>243</sup> Outside the NAFTA context, disagreement exists over whether an “authentic” interpretation by the treaty parties is binding or simply highly persuasive.<sup>244</sup>

There is also disagreement about the appropriateness of treaty parties issuing interpretive agreements that look like amendments or are issued during the course of investor-state arbitrations.<sup>245</sup> Some have viewed interpretive agreements as a valid way for treaty parties to shape and correct interpretations, emphasizing the treaty parties as masters of their own treaties. Others have viewed such interpretive agreements as back-door amendments or abusive attempts by actual and potential respondents to limit their liability in the face of existing or future claims. Some recent and proposed treaties have limited interpretive agreements to having prospective effect only.<sup>246</sup>

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238. Kasikili/Sedudu Island, *supra* note 78, at ¶ 49 (discussing VCLT, *supra* note 81, arts. 31(3)(a) and (b)).

239. NAFTA, *supra* note 92, arts. 1131(2), 2001(1), 2001(2)(c).

240. Roberts, *Power and Persuasion*, *supra* note 107, at 208.

241. See generally Roberts, *Power and Persuasion*, *supra* note 107, at 202; Rahim Moloo, *When Actions Speak Louder Than Words: The Relevance of Subsequent Party Conduct to Treaty Interpretation*, 31 BERKELEY J. INT'L L. 34, 75–76 (2013).

242. NAFTA, *supra* note 92, art. 1131(2).

243. Compare *Pope & Talbot Inc. v. Canada, Damages*, ¶ 47 (NAFTA Ch. 11 Arb. Trib., May 31, 2002), 41 I.L.M. 1347 (2002) with *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, ¶ 177 (Jan. 9, 2003), 18 ICSID REV. 195 (2003).

244. See, e.g., RICHARD K GARDINER, *TREATY INTERPRETATION* 32 (2008); 1 OPPENHEIM'S INTERNATIONAL LAW 1268–69 (Robert Jennings & Arthur Watts eds., 9th ed. 1996); MARK E VILLIGER, *COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES* 429 (2009); Interpretation of the Air Transport Services Agreement of 6 February 1948 (It. v. U.S.), 16 R.I.A.A. 75, 99 (1965); International Status of South West Africa, Advisory Opinion, 1950 I.C.J. 128, 135–36 (July 11); Steven R. Ratner, *The Cambodia Settlement Agreements*, 87 AM. J. INT'L L. 1, 40 (1993).

245. See generally Roberts, *Power and Persuasion*, *supra* note 107, at 212–15; Moloo, *supra* note 241, at 75–76; Charles H. Brower II, *Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105*, 46 VA. J. INT'L L. 347 (2006).

246. For example, the draft text of the EU BIT that was leaked in June 2012 provides that an interpretive agreement “shall be binding on a tribunal hearing a claim . . . where the treatment on which

Third, state-to-state tribunals also enjoy some interpretive authority. Interpretations agreed on by the treaty parties are “authentic,” but what happens when the treaty parties disagree? The state-to-state arbitral clause provides that, when there is a dispute between the treaty parties about the interpretation or application of the treaty, either treaty party may bring a state-to-state claim against the other treaty party. This mechanism provides an important way for treaty parties to establish binding interpretations of their treaties, thereby promoting certainty and consistency, without allowing appeals from or collateral attacks on existing investor-state awards. This theory requires an account of the permissibility of interpretive disputes and the effect of resulting awards.

*b) The Permissibility of Interpretive Disputes*

The treaty parties may agree to refer a particular interpretive dispute to a state-to-state tribunal for resolution. However, where one state unilaterally invokes the jurisdiction of the state-to-state tribunal, the responding state may object that: (a) the issue is too abstract because it requires the tribunal to engage in pure interpretation; or (b) the issue is too concrete because it relates to a particular investor-state dispute. Both objections are generally unpersuasive.

*(1) Abstract Disputes*

The argument against abstract disputes played out recently in *Ecuador v. United States*. After disagreeing with the *Chevron v. Ecuador* Tribunal’s interpretation of a particular treaty provision,<sup>247</sup> Ecuador sought an interpretive agreement, but the United States refused to respond. Ecuador then launched a state-to-state arbitration seeking an interpretation,<sup>248</sup> which the Tribunal’s majority dismissed on the basis that (1) the dispute was abstract rather than concrete, and (2) the United States had remained silent rather than putting itself in “positive opposition” to Ecuador’s interpretation.<sup>249</sup> This narrow approach is problematic on both counts.

First, interpretive disputes are unlikely to be purely abstract. *Ecuador v. United States* provides a good example. Whether the treaty’s “effective means” clause created an obligation equal to or more demanding than customary international law had already been interpreted by several investment tribunals with divergent results, and the same issue was likely to arise in

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the claim is based occurred after the date on which the interpretation was adopted.” Note for the Attention of the Trade Policy Committee (Services and Investment), Text on investor state dispute settlement for EU agreements (Jun. 5, 2012), art 9(2). The 2007 Draft Norwegian Model BIT also provided that the treaty parties could “interpret this Agreement, bearing in mind that this competence shall not be used to undermine the amendment provisions . . . [and that they] should refrain from adopting interpretations of provisions already submitted to a Tribunal in a dispute between a Party and an Investor of the other Party.” Art 23(4)(ii), available at <http://www.italaw.com/sites/default/files/archive/ita1031.pdf>.

247. *Chevron v. Ecuador*, *supra* note 25, at ¶¶ 242–44.

248. *Ecuador v. United States*, *supra* note 26, Request for Arbitration.

249. Hepburn and Peterson, *supra* note 28.

future disputes.<sup>250</sup> Another example is whether the non-precluded measures clause in the U.S.-Argentina BIT was self-judging and how it related to customary international law. This interpretive issue, which arose in multiple investor-state arbitrations and led to conflicting interpretations and multiple annulments, could have been resolved in a consistent way by a binding state-to-state award.

Resolving interpretive disputes on abstract questions is not inherently contrary to the function of international judicial bodies.<sup>251</sup> For instance, the ICJ has jurisdiction to give advisory opinions on the law,<sup>252</sup> which the Court has interpreted to include “any legal question, abstract or otherwise.”<sup>253</sup> Giving abstract interpretations comes with certain risks, most notably that the full implications of an interpretation may not be clear in the absence of specific facts, but the same is also true when an interpretation reached in an old case is applied to new facts. As the PCIJ stated in *Certain German Interests in Polish Upper Silesia*, “[t]here seems to be no reason why [s]tates should not be able to ask the Court to give an abstract interpretation of a treaty; rather it would appear that this is one of the most important functions which it can fulfill.”<sup>254</sup>

Whether a particular tribunal has, in fact, been granted such jurisdiction depends on the wording of the dispute resolution clause. The United States appeared to accept this in *Ecuador v. United States* when it argued that no international tribunal had given an authoritative interpretation where no concrete case existed, the parties were not in positive opposition, and “the treaty did not expressly confer advisory, appellate or referral jurisdiction on the tribunal.”<sup>255</sup> Interpretive jurisdiction is sometimes expressly granted, as with the ICJ. At other times, state-to-state claims are clearly limited to concrete disputes, as with the ECHR.<sup>256</sup> Often the answer is less clear, as with the typical state-to-state arbitral clause.

250. In the circumstances, the interpretive dispute should not be dismissed as purely abstract. See Case Concerning the Northern Cameroons (Cameroon v. U.K.), 1963 I.C.J. 98–99 (Dec. 3) (separate opinion of Judge Gerald Fitzmaurice) (“[C]ourts of law are not there to make legal pronouncements in *abstracto* . . . [but] are there to protect existing and current legal rights, to secure compliance with existing and current legal obligations, to afford concrete reparation if a wrong has been committed, or to give rulings in relation to existing and continuing legal situations.”).

251. The jurisdiction of some domestic courts is limited to cases and controversies, thus excluding pure interpretive disputes. See, e.g., U.S. Const. art. III (limiting federal jurisdiction to “Cases” and “Controversies”).

252. Statute of the International Court of Justice, annex to the U.N. Charter, art 65(1) [hereinafter ICJ Statute]; see also Statute of the Inter-American Court of Human Rights, art 2(2).

253. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 236 (July 8).

254. *Certain German Interests in Polish Upper Silesia* (Ger. v. Pol.), Judgment (Merits), 1926 P.C.I.J. (ser. A) No. 7, at 18–19 (May 25).

255. *Ecuador v. United States*, Respondent’s Memorial on Jurisdiction, *supra* note 26, at 6.

256. For instance, the ECHR’s jurisdiction over state-to-state claims is limited to disputes concerning “any alleged breach” by a treaty party. ECHR, *supra* note 137, art. 33.

The best parallel to the state-to-state arbitral clause can be found in the Iran-U.S. Claims Tribunal, which provided that “[a]ny question concerning the interpretation or application of this Agreement shall be decided by the Tribunal upon the request of either Iran or the United States.”<sup>257</sup> The Tribunal decided to divide its jurisdiction into three categories: interpretive disputes between Iran and the United States (A claims), intergovernmental claims over contractual disputes (B claims), and disputes between Iranian nationals and the United States and U.S. nationals and Iran.<sup>258</sup> Interpretive disputes were raised and pled on an inter-state level, but they arose in the context of past and future litigation between nationals and one of the states and thus had an element of concreteness.

Second, positive opposition should not be required, though the law on this point is not settled, and the policy considerations are finely balanced. The PCIJ held in *Mavrommatis Palestine Concessions* that a dispute is a “disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.”<sup>259</sup> In the *South West Africa Advisory Opinion*, the ICJ limited this by requiring that a claim by one party be “positively opposed” by the other party.<sup>260</sup> It then weakened this requirement in *Georgia v. Russian Federation* by finding that the existence of a dispute may be “inferred from the failure of a State to respond to a claim in circumstances where a response is called for.”<sup>261</sup> Views differ as to when a state is entitled to remain silent and when a response is called for, and the answer might depend, in part, on treaty requirements to consult.<sup>262</sup>

A treaty party cannot create a dispute by asserting that one exists, nor can it prevent a dispute from arising by denying its existence.<sup>263</sup> Whether one can find a “dispute” when one treaty party has given an interpretation and the other has failed to respond will have significant distributive consequences. If the United States could prevent a state-to-state tribunal from having jurisdiction by remaining silent, Ecuador would be hamstrung in resolving interpretive issues of concern to it.<sup>264</sup> However, if silence is suffi-

257. Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, U.S.-Iran, art. VI(4), DEP’T ST. BULL., Feb. 1981, at 1, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. 3 (1981-1982). As with the Iran-U.S. Claims Tribunal, the Ecuador-U.S. BIT gave state-to-state arbitral tribunals jurisdiction over disputes about “interpretation or application” of the treaty, which represents an easier case than clauses over “interpretation and application.”

258. See CHARLES N. BROWER AND JASON D. BRUESCHKE, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL* 26-27, 102-106 (1998).

259. *The Mavrommatis Palestine Concessions*, Collection of Judgments, 1924 P.C.I.J. (ser. B) No. 3, at 11 (Aug. 30).

260. *South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*, 1962 I.C.J. 328 (Dec. 21).

261. *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.)*, Preliminary Objections, 50 I.L.M. 607, ¶ 30 (Apr. 1, 2011).

262. On this point, the Tribunal might have been more sympathetic had Ecuador more systematically and patiently gone through the treaty’s consultation process.

263. See *South West Africa*, *supra* note 260, at 328.

264. *Ecuador v. United States*, *supra* note 26, Claimant’s Counter-Memorial on Jurisdiction, at 2 (“The circumstances in which Ecuador finds itself—suffering loss due to an erroneous and unprecedented interpretation by an investor-State tribunal, at a loss regarding what it must do to be in compliance with

cient to create a dispute, Ecuador could require the United States to litigate against its will.<sup>265</sup> On balance, I argue that permitting interpretive disputes in these circumstances would be helpful by leveling the playing field between capital-importing and capital-exporting states and pushing them towards reaching interpretive agreements or giving balanced interpretive pleadings.

Primarily capital-exporting states, like the United States, are likely to favor giving weight to interpretive agreements by the treaty parties while strongly opposing giving weight to state-to-state awards resulting from a lack of such agreement. States with significant economic and political power are in a strong position to negotiate interpretive agreements with other treaty parties and they know that such agreements cannot be reached without their consent. However, if silence in the face of an interpretation can constitute a dispute, these states could be forced to litigate interpretive issues against their wishes. By contrast, primarily capital-importing states, like Ecuador, may welcome interpretive agreements, but they have less economic and political clout to achieve them. Consequently, they are more likely to initiate state-to-state interpretive disputes and will want such awards to be given considerable weight.<sup>266</sup>

The possibility of state-to-state claims changes incentives to negotiate. The United States warns that it might have a chilling effect on diplomatic negotiations,<sup>267</sup> but it actually increases the motivation for home states to reach interpretive agreements where possible. At present, there are many reasons why home states might wish to remain quiet. They may welcome investor-state arbitration because it insulates them from having to be involved in disputes. They may not have settled views on all issues of interpretation and such views may be time consuming and costly to develop, especially if they have an extensive inter-agency process. These are legitimate concerns, but they do not outweigh the problems faced by states, like Ecuador, which want clarity over their treaty obligations, particularly where these have ongoing and potentially significant financial consequences.

A key reason why home states do not want to plead in interpretive disputes is that many like to exploit the bilateralized nature of investment disputes, allowing their investors to pursue broad interpretations even where those states would vigorously oppose such an interpretation if they were subject to it in an investor-state claim. A compelling reason to permit inter-

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its treaty obligations, and wishing quite reasonably to avoid future erroneous holdings of liability—all of which have been conveyed to the United States, are circumstances that, under the applicable principles of international law, thereupon called for a response from the United States.”)

265. See *id.* at 45.

266. Compare, for instance, (1) the United States’ embrace of interpretive agreements in the NAFTA context with its objection to interpretive disputes in *Ecuador v. United States* and (2) Ecuador’s desire for an interpretive agreement with the United States that was rebuffed, leading it to file its state-to-state claim and argue for the award to have binding effect.

267. *Ecuador v. United States*, *supra* note 26, Respondent’s Memorial on Jurisdiction, at 6, 59.

pretive disputes is that it forces all states to plead towards the middle by adopting more balanced interpretations that they are prepared to live with as either a capital-exporting state that is concerned about its investors or a capital-importing state that is concerned about its own liability. This is because pleadings count as state practice,<sup>268</sup> and any resulting award will be binding on the treaty parties. A similar effect can be observed in the formulation of Model BITs where states like the United States have had to internalize the risks and rewards of importing and exporting capital, resulting in more balanced treaties.

A *realpolitik* assessment would suggest that, if powerful states like the United States are likely to end up on the respondent side of these interpretive claims, tribunals are unlikely to accept jurisdiction in the absence of positive opposition. From a normative perspective, however, permitting interpretive disputes may help level the playing field between states like the United States and Ecuador and give rise to more balanced interpretations that are consistent with the views of both treaty parties.

## (2) Concrete Disputes

In many cases, a dispute about the interpretation of a treaty will be precipitated by a particular investor-state dispute. This leads to tension because a state-to-state tribunal will be called upon to adjudicate an abstract issue of interpretation that may also be before a related investor-state tribunal as an alleged violation of the investment treaty. A state-to-state arbitration may be initiated: (1) before a related investor-state arbitration has commenced; (2) after a related investor-state arbitration has commenced but before the investor-state award has been issued (as occurred in *Peru v. Chile*); and (3) after a related investor-state award has been issued (as occurred in *Ecuador v. United States*).<sup>269</sup>

Some treaties provide that investor-state arbitration provisions “shall not prejudice the Contracting Parties from using the procedures [on state-to-state arbitration] where a dispute concerns the interpretation or application

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268. International Law Association, *Final Report of the Committee on the Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law, Report of the Sixty-Ninth Conference, London, 2000*, at 14 (2000), available at <http://www.ila-hq.org/> (last visited Nov. 12, 2012) (describing state practice as including “pleadings before international tribunals”); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 24 (7th ed. 2008) (“Pleadings before the International Court contain valuable collations of material and, at the least, have value as comprehensive statements of the opinions of particular states on legal questions.”); INTERNATIONAL COMMITTEE OF THE RED CROSS, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* xxxii (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 1st ed. 2005) (defining state practice to include “pleadings before international tribunals”). For disputes about the appropriateness of relying on pleadings as state practice in the investment context, see Roberts, *Power and Persuasion*, *supra* note 107, at 217–19.

269. Although I treat these scenarios separately for clarity’s sake, it is possible for a state-to-state arbitration to simultaneously be in two or three of these time periods with respect to different investor-state claims.

of this Agreement.”<sup>270</sup> Some prohibit diplomatic protection claims after an investor-state dispute has been filed, as in ICSID Article 27, but this would not preclude interpretive disputes where the home state is not seeking to espouse the investor’s claim.<sup>271</sup> In the absence of contrary language, the existence or possibility of a related investor-state claim should not prevent a state-to-state interpretive dispute being heard, though it may affect the impact of the interpretive award.

*c) Legal Effect of Interpretive Awards*

*(1) Binding, Persuasive, or Highly Persuasive?*

The legal effect of state-to-state interpretive awards is unclear. Some investment treaties provide that a state-to-state award shall be “binding on the parties” or is “final and binding on the parties,”<sup>272</sup> while others provide simply that the award will be “binding.”<sup>273</sup> As investment treaties typically do not expressly provide that a state-to-state award will bind investor-state tribunals, at least three interpretations are possible.<sup>274</sup> The narrowest construction is that a state-to-state award is binding on the treaty parties only with respect to the instant dispute. The intermediate construction is that such awards are binding on the treaty parties only but in general rather than simply with respect to that dispute. The broadest construction is that state-to-state interpretive awards are binding in general, i.e., binding on the

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270. See, e.g., China-New Zealand BIT, China-N.Z., art. 13.12, 1988; China-Singapore BIT, China-Sing., art. 13.12, 1985; see also China-Sri Lanka BIT, China-Sri Lanka, art. 13.11, 1986. Canada’s Model BIT includes a similar provision. 2004 Canada Model BIT, *supra* note 5, art. 20 (“Without prejudice to the rights and obligations of the Parties under Section D (State to State Dispute Settlement Procedures), this Section [art. 20, Section C - Settlement of Disputes between an Investor and the Host Party] establishes a mechanism for the settlement of investment disputes.”).

271. The ICSID Convention’s drafting history makes clear that the continued availability of state-to-state arbitration over interpretive disputes was “self-evident,” which is confirmed by contemporaneous and contemporary commentators. See Convention Drafting History, *supra* note 206, at 576–77; Broches, *supra* note 128, at 378 (“The question may arise whether the same facts could give rise to two arbitrations, or put differently, whether the two procedures are or are not mutually exclusive? Without trying to answer that question, I want to give my view that the answer will not be found in Article 27 of the Convention—since no question of diplomatic protection is involved—but by interpretation of the [underlying] treaty.”); Peter Malanczuk, *State-to-State and Investor-to-State Dispute Settlement in the OECD Draft Multilateral Investment Agreement*, in MULTILATERAL REGULATION OF INVESTMENT 137, 155–56 (Nieuwenhuys & Brus eds., 2001) (“ICSID Article 27 does not preclude a state-to-state arbitration on treaty interpretation or application issues, which are also part of the investor-to-state disputes, as far as this does not amount to an espousal of the claim of the investor.”).

272. 2012 U.S. Model BIT, *supra* note 5, art. 37(1); 2004 Canadian Model BIT, *supra* note 5, art. 48(7); 2003 Indian Model BIT, *supra* note 5, art. 10(5); 2007 Colombian Model BIT, *supra* note 5, art. 10(6).

273. 2008 German Model BIT, *supra* note 5, art. 9(5) (“The arbitral tribunal shall reach its decisions by a majority of votes. Its decisions shall be binding.”); 2006 French Model BIT, *supra* note 5, art. 10(5) (“The tribunal shall reach its decisions by a majority of votes. These decisions shall be final and legally binding upon the Contracting Parties.”).

274. I am analyzing the issue here on the assumption that the investment treaty is bilateral. The effect of a state-to-state award in a multilateral treaty regime is more complicated because the disputing parties are likely to be a subset of the treaty parties.

treaty parties, investors, and future tribunals with respect to that dispute and future disputes.

A key problem with the narrow reading is that these clauses, unlike similar clauses with respect to some other international tribunals, generally do not include language that limits their binding effect on the parties only to the instant dispute.<sup>275</sup> Moreover, if state-to-state tribunals have jurisdiction over pure interpretive disputes, giving that award binding effect with respect to the instant dispute would deprive the award of practical effect.

The intermediate interpretation would create asymmetries and potential inconsistencies. The treaty parties would be prevented from adopting a position inconsistent with the award's interpretation in subsequent pleadings or dealings with investors, but investors and investor-state tribunals would not be so bound. The interpretation would thus create a "floor" but not a "ceiling," as investors could push for, and subsequent tribunals could adopt, more stringent interpretations. If the tribunals reached contradictory holdings, a treaty party might be bound by both decisions, even though giving effect to one might put it in breach of the other. In another possibility, the treaty parties would have to comply with the more exacting requirements of the two in order to be in compliance with both.

As for the broadest construction, two different routes can lead to the conclusion that interpretive awards bind subsequent investor-state tribunals as well as the treaty parties. First, the express provision that state-to-state awards are "binding" or "binding on the parties" impliedly includes the idea that they are binding on investor-state tribunals. One could object that, if the treaty parties had intended interpretive awards to be binding on investor-state tribunals, they would have expressly provided so, as some treaties have done with respect to interpretive agreements by the treaty parties.<sup>276</sup> Silence, however, does not necessarily mean that nothing can be implied or that the opposite position must be true. It can also mean that the treaty parties did not consider the issue, thought that it was dealt with by the existing language, or considered that the answer was supplied by general international law.<sup>277</sup>

Second, the binding nature of the award might result from the authoritative status of interpretive agreements of the treaty parties. If the treaty parties agree on the interpretation of their treaty, this represents an "authentic

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275. Cf. ICJ Statute, *supra* note 252, art. 59 ("The decision of the Court has no binding force except between the parties and in respect of that particular case.").

276. See, e.g., 2012 U.S. Model BIT, *supra* note 5, art. 30(3); 2004 Canada Model BIT, *supra* note 5, art. 40(2).

277. There is a tendency for participants within the field to happily imply conclusions they like but to resort to the "if-it-is-not-express-then-it-cannot-be-implied" argument to avoid conclusions they dislike. Reisman, for instance, insists on the need for an express statement in order for state-to-state awards to be found to bind investor-state tribunals, but is happy to imply extensive limits on the scope of state-to-state arbitration from the existence of the investor-state arbitration clause. See Reisman Opinion, *supra* note 9, at 4, 11, 13–21, 23–24, 29, 32.

interpretation,” which some commentators have taken to mean “binding.”<sup>278</sup> If the treaty parties disagree on the interpretation of their treaty, and they provide for a dispute resolution mechanism that results in a “binding” award on interpretation, the award should also be treated as an authentic, and therefore authoritative, interpretation. For instance, Broches concluded that any subsequent investor-state tribunal interpreting a treaty would be “bound by the interpretation of the bilateral treaty arrived at by the Contracting States, whether as a result of agreement or of arbitration.”<sup>279</sup>

Both alternatives are open to argument, however. Some view “authentic interpretations” by the treaty parties as highly persuasive rather than binding, undermining step one.<sup>280</sup> This view is particularly compelling when dealing with treaties that create rights or benefits for third parties, possibly creating legitimate expectations that curb the ability of the treaty parties to reinterpret the treaty at will.<sup>281</sup> As to step two, it is not clear whether an agreement by the treaty parties should be given the same status as a disagreement between the treaty parties that is resolved by arbitration. For instance, it is hard to argue that such awards should be given retrospective rather than prospective effect on the basis that they represent what the treaty parties always intended their obligations to mean. Accordingly, some view the status of these awards as closer to that of investor-state awards (persuasive) than interpretive agreements of the treaty parties (authoritative).<sup>282</sup>

In resolving this ambiguity about the binding nature of state-to-state awards, I suggest two alternatives. From a normative perspective, the best interpretation is that state-to-state interpretive awards are binding on the treaty parties *and* subsequent investor-state tribunals. The reason for this is that interpretive disputes are meant to promote consistency and certainty about the interpretation of investment treaties, which will occur only if they are given binding effect. In addition, this approach would help to rectify some of the problems caused by the decentralized arbitral system and the lack of an appellate mechanism. To avoid situations where the state-to-state tribunal reaches a binding interpretation with which the treaty parties col-

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278. See, e.g., GARDINER, *supra* note 244, at 32 (“That the agreement of the parties on an interpretation trumps other possible meanings seems obvious enough, given the nature of a treaty as an international agreement between its parties.”); OPPENHEIM’S INTERNATIONAL LAW, *supra* note 244, at 1268.

279. Broches, *supra* note 128, at 377.

280. See, e.g., Interpretation of the Air Transport Services Agreement of 6 February 1948 (It. v. U.S.), 16 R.I.A.A. 75, 99 (1965) (addressing persuasiveness in noting that the subsequent practice of treaty parties is not “in itself decisive for the interpretation of the disputed text; it can however serve as additional evidence as regards the meaning to be attributed to the text”); International Status of South West Africa, Advisory Opinion, 1950 I.C.J. 128, 135–36 (July 11).

281. See Roberts, *Power and Persuasion*, *supra* note 107, at 183; Anthea Roberts, *Subsequent Agreements and Practice: The Battle over Interpretative Power*, in TREATIES AND SUBSEQUENT PRACTICE 95, 101–02 (Georg Nolte ed., 2013).

282. Thus a number of commentators conclude that state-to-state awards are merely persuasive with respect to investor-state arbitral tribunals. See, e.g., Seifi, *supra* note 162, at 6; Potestà, *State-to-State Dispute Settlement*, *supra* note 20, at 341.

lectively disagree, states should incorporate a provision like the one found in the recent Canada-China FIPA.<sup>283</sup>

However, I accept that if the treaty parties had intended to create an adjudicatory body with the power to issue interpretations that bound future tribunals, it would have been preferable to say so expressly. It would also have been wise to give jurisdiction to a body that looks different from and more authoritative than an ordinary investor-state tribunal. One problem with the current system is that because state-to-state and investor-state tribunals look identical once constituted, many will resist viewing their decisions as qualitatively different. Here, the Iran-U.S. Claims Tribunal provides a good alternative model. The Tribunal comprised nine judges divided into three Chambers to hear particular disputes. However, all nine judges decided general interpretive disputes, which were then binding on individual Chambers.<sup>284</sup>

Even so, there are good reasons to treat state-to-state awards as more significant than investor-state ones. The treaties provide that state-to-state awards will be binding, and there are important differences between investor-state and state-to-state tribunals. The latter are constituted in a different way (they are appointed by the treaty parties not the disputing parties) and given a different mandate (resolving disputes about the interpretation and application rather than adjudicating particular investment disputes). Treaty parties may prefer to select arbitrators with expertise in public international law,<sup>285</sup> whereas most investor-state arbitrators have a commercial arbitration background.<sup>286</sup> These differences are likely to make state-to-state tribunals more sensitive to reaching decisions in accordance with the intentions of the treaty parties, helping to counteract the imbalances of the second era.

From a descriptive perspective, however, many within the arbitral community will be resistant to accepting any sort of hierarchy or strict precedent system because it goes against prevailing norms in international adjudication and arbitration. Accordingly, and in the alternative, I propose viewing state-to-state interpretive awards as “binding” on the treaty parties with respect to the particular case and “highly persuasive” with respect to future

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283. Under the Canada-China FIPA, state-to-state awards are “final and binding” but the treaty parties can subsequently “meet and decide on the manner in which to resolve their dispute.” Canada-China FIPA, *supra* note 76, art. 15(8). Whilst that decision “shall normally implement the decision of the arbitral tribunal,” that is not necessary. *Id.* If the treaty parties fail to reach a decision, the successful treaty party is entitled to compensation equivalent to the award. *Id.*

284. The Algiers Accords did not specify whether “question[s] concerning the interpretation or application” of the agreement should be decided by individual Chambers or the Full Tribunal; this was determined by a Presidential Order. Exec. Order No. 1, 46 C.F.R. 55, 468 (Oct. 19, 1981), *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. 95 (1981–82).

285. The composition of the *Ecuador v. United States* panel provides a good example. The three arbitrators (Luis Olavo Baptista, Donald McRae, and Raul Vinuesa) all have considerable public international law experience. For instance, Baptista has served as a Member and Chair of the WTO Appellate Body, McRae has been a WTO Panel Member on numerous occasions and is currently serving on the International Law Commission, and Vinuesa is serving as an ad hoc judge at the International Court of Justice.

286. Roberts, *Clash of Paradigms*, *supra* note 12, at 77, n. 131 (citation omitted).

conduct and tribunals. This approach places them somewhere between an authoritative interpretation by the treaty parties and a persuasive interpretation by investor-state tribunals. A state-to-state award is less persuasive than an interpretive agreement because it involves a disagreement, rather than an agreement, between the masters of the treaty. However, it has greater persuasive force than an investor-state award because the treaty parties have delegated jurisdiction to that tribunal to resolve their interpretive disputes and agreed that such a decision will be binding upon them.

Following this approach, investor-state tribunals should adopt a rebuttable presumption that state-to-state awards provide a persuasive interpretation of the treaty in order to promote clarity and consistency (the rebuttable presumption is what makes the interpretation highly persuasive rather than just persuasive). Subsequent investor-state tribunals may depart from that interpretation, but only where there are clear and compelling justifications for doing so. The disadvantage of this approach is that it does not ensure consistency and in some ways it would increase the system's complexity rather than reducing it. However, this approach gives treaty parties a way to re-engage with the system when they are concerned about expansive interpretive approaches and the presumption pushes towards convergence whilst accepting the disaggregated and largely horizontal makeup of the current system.

(2) *Impact upon Existing Investor-State Disputes?*

What effect should interpretive awards have on existing investor-state arbitrations and awards? In order to curb systemic concerns and protect the integrity of existing investor-state awards, I argue that interpretive awards should have prospective effect only. This means that state-to-state awards should not be able to function as an appeal from investor-state awards, nor should they be permitted to form a collateral attack. However, in appropriate circumstances, interpretive awards can approximate a preliminary reference procedure.

State-to-state interpretive awards should not function as an appeal from investor-state awards. Investor-state awards are final and binding subject to any review process permitted by the relevant treaty regime, such as the ICSID annulment process and domestic court review at the seat of arbitration and place of enforcement for non-ICSID awards.<sup>287</sup> Investment treaties do not create an appellate mechanism for reviewing investor-state awards and certainly do not place this function in the hands of state-to-state tribunals. This point was accepted by both states in *Ecuador v. United States*.<sup>288</sup> Broches

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287. ICSID Convention, *supra* note 48, art. 52; Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention].

288. See *Ecuador v. United States*, *supra* note 26, Claimant's Counter-Memorial on Jurisdiction, at 4 ("Ecuador accepts that the Partial Award in Chevron is final and binding, as required by Article VI(6), subject only to its right to challenge the award under the procedures available to it under the laws of the

took the same view about the ICSID Convention.<sup>289</sup> The same approach was also taken by the Iran-US Claims Tribunal: an interpretation decided by a Chamber in the context of a specific dispute could later come before the Full Tribunal as an interpretive A claim, but the interpretive ruling would have prospective effect only.<sup>290</sup>

State-to-state awards should also not be permitted to form a collateral attack on investor-state awards. This was a key concern in *Ecuador v. United States*, as Ecuador initiated the case after the *Chevron* Tribunal had issued its Award but before that Award had been enforced.<sup>291</sup> Ecuador sought to have the *Chevron* award set aside at the seat of the arbitration in the Netherlands.<sup>292</sup> The Dutch court rejected this challenge before the state-to-state tribunal was required to rule on the permissibility of Ecuador's claim.<sup>293</sup> But the Tribunal had to rule before Ecuador's period to appeal the Dutch decision had expired.

ICSID annulment committees can annul on the ground that the tribunal "manifestly exceeded its powers,"<sup>294</sup> while domestic courts may set aside or refuse to enforce a non-ICSID award if the tribunal exceeded its powers.<sup>295</sup> If an investor-state tribunal was to interpret a legal standard (particularly a jurisdictional provision) broadly, and a subsequent state-to-state tribunal was to interpret it more narrowly, a respondent state might argue that the former exceeded its powers. Annulment committees and domestic courts

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seat of the arbitration (the Netherlands). It does not seek here to affect, let alone appeal, set aside or nullify that award, and it understands that the Tribunal's award in this case will have no impact on the legal effect of the *Chevron* award, whose status is entirely in the hands of the Dutch courts.".)

289. See Broches, *supra* note 128, at 377 ("The ICSID decision will have finally disposed of the particular dispute between the investor and the host State. The decision in the intergovernmental arbitration would settle the interpretation of that treaty as much as would a settlement by mutual agreement. With respect to disputes subsequently submitted an ICSID Tribunal would be bound by that interpretation. It would not, however, affect the decision taken by the ICSID Arbitral Tribunal in the earlier case, which is *res judicata*."). This conclusion is supported by the last clause of the provision that was added to and then removed from the draft of Article 27, which permitted related investor-state and state-to-state arbitrations, but noted that this was "without prejudice . . . to the finality and binding character of any arbitral award rendered pursuant to this Convention as between the parties to the arbitral proceedings." Convention Drafting History, *supra* note 206, at 221.

290. For instance, when the Full Tribunal decided to issue an authoritative interpretation on the issue of dual nationality, it noted that its decision could not affect existing Chamber awards on the issue as these were final and binding. Iran and United States, Case No. A/18, Decision No. DEC 32-A 18-FT (Apr. 6, 1984), *reprinted in* 5 Iran-U.S. Cl. Trib. Rep. 251-252. See also Brower and Brueschke, *supra* note 258, at 104 (citing the decisions in Case Nos. A/20 and A/25 as evidence that 'A' claims on interpretation could not be used as a "pretext to circumvent the 'final and binding' nature of awards by, in effect, appealing a Chamber decision or award of the Full Tribunal . . . .")

291. See Luke Eric Peterson, *Ecuador initiates unusual state-to-state arbitration against United States in bid to clarify scope of investment treaty obligation*, INVESTMENT ARB. REP. (Jul. 4, 2011), [http://www.iareporter.com/articles/20110704\\_4](http://www.iareporter.com/articles/20110704_4).

292. Luke Eric Peterson, *Ecuador sets out arguments in effort to set-aside UNCITRAL award in favour of energy company (Chevron/TexPet)*, INVESTMENT ARB. REP. (Aug. 5, 2010), [http://www.iareporter.com/categories/20100326\\_2](http://www.iareporter.com/categories/20100326_2).

293. *Ecuador v. United States*, *supra* note 26, Claimant's Counter-Memorial on Jurisdiction, at 4.

294. ICSID Convention, *supra* note 48, art. 52(1)(b).

295. New York Convention, *supra* note 287, art. v(1)(c).

should be extremely reluctant to accept such arguments. The tribunals and the treaty parties may well disagree because the underlying legal provision is open to multiple interpretations. Even if the state-to-state award has the effect of confirming one interpretation going forward, others may have been reasonably open in the past.

It is possible, however, for state-to-state awards to function akin to a preliminary reference procedure to clarify controversial points of law where an investor-state arbitration is initiated before a state-to-state arbitration, but the latter rules first. This possibility is far from hypothetical. The state-to-state tribunal could rule first if it simply has to decide on an issue of interpretation, while the investor-state tribunal must both interpret and apply the treaty. Some investment treaties, like the Ecuador-United States investment treaty, impose strict time limits on state-to-state cases, which increase the likelihood of the state-to-state tribunal ruling first.<sup>296</sup> However, this prospect is implied and possible, rather than express and required.

Some treaties include an express preliminary reference procedure between investor-state tribunals and the treaty parties. For instance, the ASEAN Australia-New Zealand FTA provides that an investor-state tribunal “shall, on its own account or at the request of a disputing party, request a joint interpretation of any provision of this Agreement that is in issue in a dispute.”<sup>297</sup> The treaty parties have sixty days to submit in writing a joint decision declaring their interpretation, which “shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.”<sup>298</sup> If the treaty parties fail to reach an agreement, the issue must then be decided by the investor-state tribunal “on its own account.”<sup>299</sup>

Other treaties include an express preliminary reference procedure between investor-state tribunals, the treaty parties and state-to-state tribunals. For instance, the 2012 Canada-China investment treaty provides that if a state invokes a “prudential measures” exception in an investor-state arbitration, that tribunal cannot decide whether that exception is a valid defense.<sup>300</sup> Instead, the tribunal shall seek a report on the matter from the treaty parties, who may then issue a joint decision that is binding on the investor-state tribunal.<sup>301</sup> If the treaty parties are unable to reach a joint decision, either can refer the matter to a state-to-state tribunal, whose decision will then be binding on the investor-state tribunal.<sup>302</sup>

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296. See, e.g., Treaty Between the United States and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Ecuador, art. VII(3), Aug. 27, 1993, S. TREATY Doc. No. 103-15.

297. ASEAN Australia-New Zealand FTA, ch. 11, art. 27(2).

298. *Id.* arts. 27(2)-(3).

299. *Id.* art. 27(2).

300. Canada-China FIPA, *supra* note 76, art. 20(2)(a).

301. *Id.* art. 20(2)(b).

302. *Id.* art. 20(2)(c).

Some treaty parties have sought to use state-to-state arbitration in this way in the absence of an express preliminary reference mechanism. For instance, Peru argued that the *Lucchetti* Tribunal should stay its hearings pending the resolution of the *Peru v. Chile* case.<sup>303</sup> Unlike express mechanisms that typically require the investor-state tribunal to stay its hearings, investment treaties usually grant investor-state and state-to-state tribunals jurisdiction to determine their own jurisdiction and do not direct one to stay for the other. It is permissible for an investor-state tribunal to stay its jurisdiction pending an interpretive ruling by a state-to-state tribunal, but this is not required. Thus, the *Lucchetti* tribunal was within its rights to refuse to stay,<sup>304</sup> and Peru subsequently failed to pursue its state-to-state arbitration. This precedent should help to calm fears about state-to-state arbitration paralyzing investor-state arbitrations.

If the state-to-state tribunal rules first, that ruling should be treated as binding or highly persuasive on investor-state tribunals, even if the latter were seized of jurisdiction first. Interpretations of the law evolve over time, and any expectations that investors have about how their treaty rights will be interpreted remain subject to the power of treaty parties to bring state-to-state interpretive claims. Will this encourage respondent states to launch interpretive claims? Possibly, but this is unlikely to cause a major systemic problem. It is possible that: a respondent state in an investor-state arbitration will bring a state-to-state interpretive claim; the respondent state will receive a favorable interpretation; the state-to-state case will be decided before the investor-state case (possibly, though not necessarily, because the investor-state tribunal stayed its proceedings); and the investor-state tribunal will take the state-to-state award into account as binding or highly persuasive. But none of these possibilities is guaranteed to occur.

This moderate approach is unlikely to open the floodgates or make the existing system collapse. State-to-state arbitrations take time, money and political will, and their outcomes and effect remain uncertain. By ruling out the possibility of using such claims as an appeal from or collateral attack on existing investor-state awards, and permitting, but not requiring, investor-state tribunals to stay their cases pending an award by a related state-to-state tribunal, treaty parties will likely only have an incentive to bring such claims in order to resolve ongoing concerns about the interpretation of their obligations. This approach has the advantage of promoting consistency and certainty while limiting prospects for gamesmanship and abuse.

### 3. *Declaratory Claims*

Having dealt with states bringing diplomatic protection claims and interpretive disputes, this section focuses on something in between: a treaty party

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303. *Lucchetti v. Peru*, *supra* note 21, at ¶ 7.

304. *See id.* ¶ 9.

seeking declaratory relief. A home state could seek a declaration that the host state has violated the treaty, without identifying particular investors that have been harmed or seeking compensation on their behalf. Alternatively, and more controversially, a host state could seek a declaration that it did not violate the treaty. Such claims overlap but are not coextensive with related investor-state disputes. This Article deals only briefly with this possibility because many of the issues that declaratory claims pose have already been covered above and we are yet to see such a case arise from an investment treaty.

Allowing these sorts of declaratory claims has clear advantages. The availability of such claims would allow treaty parties to challenge each other's actions at an early stage, potentially before individual investors have been harmed, thereby preventing or limiting damage. Host states would then have the option of changing their behavior (a primary remedy) rather than incurring costly compensation (a secondary remedy). Even if damages were required, this approach would permit common issues, such as liability and defenses, to be litigated in a single forum, in a manner resembling representative and class actions. Investors could then bring separate claims seeking to establish individualized issues, such as jurisdiction and damages.

A home state may be particularly interested in bringing a state-to-state claim seeking a declaration that the host state has violated its treaty obligations when the relevant action or measure affects a number of its investors,<sup>305</sup> as occurred in *In the Matter of Cross-Border Trucking Services*.<sup>306</sup> If home states and investors were viewed as having interdependent rights, the state-to-state claim would create a collateral estoppel. Where a state-to-state award finds that the host state has not violated the treaty, this would have the effect of precluding a later investor-state claim. If the award found that the host state had violated the treaty, but damages had not been sought or awarded, this would have the effect of preventing litigation on the issue of liability but not on damages.<sup>307</sup> As discussed above, it would be advisable to give interested investors an opportunity to make submissions to state-to-state tribunals.

A host state could also initiate arbitration under the state-to-state provision seeking a declaration that certain actions or measures did not violate the investment treaty. Where a particular action affected multiple investors, this could amount to something akin to a respondent-initiated class action. No such case exists, and this possibility has not been previously considered in the literature. The Executive Directors of ICSID pointed out that the Convention "maintain[s] a careful balance between the interests of investors and those of host States" and "permits the institution of proceedings by host

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305. See Berman, *supra* note 15, at 71–72; Juratowitch, *supra* note 59, at 32.

306. *In re Cross-Border Trucking Services*, *supra* note 30.

307. See Paparinskis, *supra* note 98, at 300 (considering the interaction of overlapping investor-state and state-to-state claims requesting divergent remedies, such as compensation and an apology).

States as well as by investors.”<sup>308</sup> One way that this balance could be achieved is by permitting host state claims under treaties.<sup>309</sup>

A host state might believe that its interests are better aligned with the home state than the investor if, for instance, the host state would not be supportive of particular claims by its investors. If the host state is facing many claims, it might wish to have a single award dealing with all of the claims at once to ensure consistency. It might believe that it could more easily reach a global settlement with the home state than with all of the investors individually. The host state could also have an interest in all claims being heard by a single tribunal as, for instance, some defenses (like necessity) might play out differently before a single body than before multiple tribunals.<sup>310</sup> If a state-to-state award were considered binding (or highly persuasive) with respect to future investor-state tribunals, this arbitration strategy would present high risks and potentially high rewards.

Full treatment of this possibility is beyond the scope of this paper, but it represents a novel and intriguing avenue for future state-to-state claims. Host state declaratory claims would raise a variety of difficult questions, such as whether positive opposition by the home state would be required in order for such a claim to be permissible and whether the same approach to positive opposition should be applied in the context of concrete disputes and interpretive claims given that the alternative of investor-state arbitration exists for the former but not the latter. This Article leaves those questions for another time.

## CONCLUSION

The re-emergence of state-to-state arbitration is important for two reasons. First, state-to-state arbitration provides an important mechanism for

308. *Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 1 ICSID REP. 23, 25 (1993). This is most likely to arise under contractual disputes where claims can be brought by the investor or the host state, but host-state claims could also arise under the state-to-state clause.

309. On the possibility of host state claims and counterclaims, see Melmet Toral and Thomas Schultz, *The State, a Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations*, in *THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY* 577 (Balchin et al. eds., 2010); Gustavo Laborde, *The Case for Host State Claims in Investment Arbitration*, 1 J. INT'L DISP. SETTLEMENT 97, 97–102 (2010).

310. Some tribunals have interpreted the requirement that a state prove that its actions were the “only way” to safeguard an essential interest to mean that the state has to prove that it had no other options available to it before it can rely on necessity. See, e.g., *CMS v. Argentina*, Award, *supra* note 7, at ¶¶ 323–24; *Enron v. Argentina*, Award, *supra* note 7, at ¶¶ 305–09; *Sempra Energy v. Argentina*, *supra* note 7, at ¶¶ 347–51. But see *Enron v. Argentina*, Annulment, *supra* note 7, at ¶¶ 361–78 (criticizing this approach and annulling the Award). When dealing with a single claim, it can be relatively easy for a tribunal to conclude that the host state’s action with respect to a particular claimant were not necessary as the state could have done X or Y. But when dealing with a multitude of claims, it may become apparent that, while the state could have done X or Y in a handful of cases, it could not have done X or Y in every case. In such cases, a tribunal hearing all of the claims might reach a different conclusion on necessity than multiple tribunals tasked with hearing individual claims.

treaty parties looking to re-engage with the investment treaty system in order to influence the interpretation and application of their treaties. This mechanism involves a shift of power from investors to treaty parties and from investor-state tribunals to state-to-state tribunals, but it also entails a shift in power between treaty parties, because diplomatic protection claims are likely to be invoked by powerful home states while interpretive claims may help to redress disadvantages currently faced by less powerful host states.

Second, recognizing the co-existence of investor-state and state-to-state arbitration requires that a hybrid theory be developed about the architecture of the investment treaty system. Instead of privileging the rights and powers of states and state-to-state tribunals (as in the first era) or investors and investor-state tribunals (as in the second era), we should move into a third era based on the ideas that investment treaty rights are granted to investors and home states on an interdependent basis, and interpretive authority is shared between the treaty parties, investor-state tribunals, and state-to-state tribunals.

With respect to state-to-state arbitration, these theories lead me to posit a role for state-to-state claims with respect to diplomatic protection, interpretive disputes, and requests for declaratory relief. On the first, home states should be permitted to bring diplomatic protection claims under state-to-state arbitral clauses, and these claims should be treated as interdependent with claims by their investors. When diplomatic protection claims are brought with the consent or acquiescence of the investor, they should be relatively uncontroversial. When they are brought without the knowledge or consent of investors, they will be more controversial. To safeguard the interests of non-disputing parties, investors and home states should be permitted to file submissions in state-to-state and investor-state arbitrations respectively.

On the second, home and host states should be permitted to seek state-to-state awards on interpretive disputes. Resolving pure interpretive disputes is not contrary to the judicial function of international arbitral bodies, nor should positive opposition be required, as that would allow respondent states to stymie attempts to get an authoritative interpretation. Interpretive awards should be understood as binding in general or, failing that, binding on the treaty parties and highly persuasive with respect to future conduct and tribunals. While state-to-state awards cannot function as an appeal to investor-state awards and should not be permitted as a form of collateral attack, they may function as something akin to a preliminary reference mechanism in appropriate circumstances. Investor-state tribunals will be permitted but not required to stay their proceedings pending a related state-to-state award.

On the third, home and host states should be permitted to seek declaratory rulings on the interpretation and application of their treaty with respect

to particular facts. These claims will typically take the form of a home state seeking a ruling that the host state violated the treaty, which would then be binding in future investor-state claims on the basis of collateral estoppel. This approach would permit core legal issues, such as liability and defenses, to be determined in a consistent, streamlined way, leaving investors to establish jurisdiction and damages in separate investor-state claims that build on but do not conflict with the state-to-state award. More controversially, a host state might seek a declaration that it did not violate the treaty, but the novelty of such a claim requires more extensive consideration.

With respect to the field more generally, this hybrid theory creates a framework for analyzing many other contentious issues currently confronting the system. The reason that the re-emergence of state-to-state arbitration is so controversial is that it implicates fundamental, but unresolved, questions about what rights have been given to investors and what rights have been retained by home and host states acting individually and the treaty parties acting collectively. These same concerns lie at the heart of other controversies, such as whether investors can waive investment treaty rights granted to their home states, whether host states can rely on interstate countermeasures as a defense in investor-state claims, and whether treaty parties can agree to amend or jointly terminate their investment treaty rights with immediate effect.