The Subversion of State-to-State Investment Treaty Arbitration

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State-to-state arbitration provisions in bilateral investment treaties and other international investment agreements (collectively called BITs here) have been little used—and rightly so—given the introduction of investor-state arbitration provisions in the same BITs. In a handful of cases, however, some states have sought to resurrect state-to-state arbitration, either to contest issues already decided in separate investor-state arbitral proceedings, or else to stave off such proceedings. Most recently and controversially, in Ecuador v. U.S., Ecuador initiated arbitration against the United States under the U.S.-Ecuador BIT to (re)arbitrate an issue that had arguably been determined against Ecuador in a separate prior arbitration between Ecuador and certain U.S. investors. This subversion of state-to-state arbitration and its attack on the finality of arbitral awards threaten to destabilize the investor-state arbitration regime, which undergirds much of foreign direct investment. With a

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This paper was presented at the 2013 Biennial Meeting of the Asian Society of International Law in New Delhi, India and the 2014 American Society of International Law International Economic Law Interest Group Biennial Research Conference. I am grateful for the always sterling library research assistance, with special thanks to Easton Broome and Michael Shepherd for helping to survey the various investment treaties. My thanks also to Afra Afsharipour, Raquel Aldana, Anne Bloom, Linda Carter, Susan Franck, Frank Gevurtz, Amy Landers, Brian Landsberg, Stephen C. McCaffrey, Darien Shanske, Brian Slocum, John Sprankling, and Jason Yackee for their comments and suggestions. I, of course, blame them all for any remaining errors in this paper that they failed to uncover.
fresh focus on the relationship between the two arbitral systems, this paper’s systematic analysis of the cases reveals the interaction of state-to-state and investor-state arbitration to be a far more complex and ultimately disorderly affair than was ever contemplated by the respective state parties to the various BITs, or even appreciated in the literature. As it turns out, whether state-to-state arbitration is permissible, or at least not proscribed, when investor-state arbitration is available to resolve the same issue turns awkwardly on a number of ill-fitting factors, including whether the actor initiating state-to-state arbitration is the host state or home state, and whether the investor has consented to investor-state arbitration. Much of the blame for this incongruous state of affairs can be pinned on the unfortunately drafted Article 27(1) of the ICSID Convention. This paper argues for a re-conception of the relationship between the two arbitral regimes that accords better with their historical narrative and purpose, as well as that of the ICSID Convention. The more coherent approach here is to treat the two arbitral regimes as mutually exclusive, and disallow state-to-state arbitration of any issue that may properly be resolved by investor-state arbitration. In this way, duplicative arbitral proceedings and the potential for conflicting awards are averted, and the investment dispute is safely insulated from the vagaries and astrictions of politics and so-called diplomacy.
INTRODUCTION

Investor-state arbitration was designed to supersede and has indeed supplanted all other means of resolving disputes arising under investment treaties, including state-to-state arbitration. In a number of cases, however, certain states have sought subversively to resurrect state-to-state arbitration either to rearbitrate or displace issues properly decided in investor-state arbitration. As it turns out, the relationship between the two arbitral regimes is extraordinarily complicated, yet little studied. What limited authorities exist suggest that whether state-to-state arbitration is permitted when investor-state arbitration is available depends on such incoherent factors as whether and when investor-state arbitration is initiated in relation to state-to-state arbitration, and whether it is the host or home state that initiates state-to-state arbitration. I argue that the relationship should be reconceived such that the two arbitral regimes are treated as mutually exclusive, and to disallow state-to-state arbitration of any issue that may be resolved by investor-state arbitration. This approach prevents duplicative arbitral proceedings and conflicting awards, shields investment disputes from entanglement with politics and diplomatic protection efforts, and better reflects the primacy of investor-state ar-
arbitration and thus the historical purpose of the two arbitral regimes in relation to each other.

Perhaps the most significant innovation of the modern bilateral investment treaty (BIT) is the ability it confers on the private investor unilaterally and directly to initiate arbitral proceedings against the host state for a breach of the BIT in relation to its investment in that state. As a result, an investor no longer has to look to its home state to pursue a claim under the doctrine of diplomatic protection, an inherently unreliable and discretionary process. Investor-state arbitration has proven so successful that it has been all but forgotten that many BITs also contain state-to-state arbitration provisions that authorize either state party to initiate arbitral proceedings against the other state to resolve any dispute concerning the interpretation or application of the BIT. These state-to-state arbitration BIT provisions effectively enable a home state to extend diplomatic protection to its nationals (the investors) by pursuing an arbitration claim against the host state for injury to the relevant investment.

The need, however, for diplomatic protection of investments diminished substantially once investor-state arbitration became available through BITs. State-to-state arbitration has instead been relied upon predominantly to resolve territorial boundary disputes and in post-conflict settlements. Indeed, although state-to-state arbitration BIT provisions have existed for decades, they have been invoked rarely and without attention. Recently, however, Ecuador set off a storm of controversy when it filed a request for UNCITRAL state-to-state arbitration in 2011 against the United States under the U.S.-Ecuador BIT.

Ecuador’s complaint against the United States originated

1. See KENNETH J. VANDEVELDE, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION 58 (2010); Jarrod Wong, Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide between Developing and Developed Countries in Foreign Investment Disputes, 14 GEO. MASON L. REV. 135, 142 (2006) (“From the investor’s perspective, this ability to submit an investment dispute to international arbitration is one of the BIT’s chief benefits.”).

2. See infra Part I.

from a separate prior arbitration between Ecuador and certain U.S. investors. 4 In Chevron and TexPet v. Ecuador, the investor-state arbitral tribunal had determined, inter alia, that the failure of Ecuadorian courts to adjudicate several cases filed by Texaco Petroleum for over a decade constituted a violation by Ecuador of Article II(7) of the U.S.-Ecuador BIT, which requires “each Party [to] provide effective means of asserting rights and claims with respect to investment, investment agreements, and investment authorizations.” 5 In the process, the tribunal determined that Article II(7) provided an independent treaty obligation with a higher bar than the standard for denial of justice under customary international law. 6 Ecuador subsequently protested to the United States concerning what it regarded as a misinterpretation of Article II(7), and upon receiving no substantive response, initiated an arbitral proceeding against the United States pursuant to Article VII(1) of the same BIT, which provides that “[a]ny dispute between the Parties concerning the interpretation or application of the Treaty . . . shall be submitted, upon the request of either Party, to an arbitral tribunal for binding decision in accordance with the applicable rules of international law.” 7 While the decision has not been made public, the U.S. Department of State website reports that the Ecuador v. U.S. tribunal ultimately dismissed the case for lack of jurisdiction on the ground that there was no “dispute” between the state parties. 8

Ecuador v. U.S. raises a host of vexing questions concerning the availability of state-to-state arbitration under a BIT and its relationship to investor-state arbitration more generally. These questions remain very much on the table, for in resolving the case on the basis of a lack of a “dispute,” the Ecuador v. U.S. tribunal did not have to reach the more fundamental questions concerning the nature and scope of state-to-state arbitration under the BIT. In challenging the very issue already decided in Chevron and TexPet v. Ecuador, albeit

5. U.S.-Ecuador BIT, supra note 3, art. II(7).
7. U.S.-Ecuador BIT, supra note 3, art. VII(1).
in a different forum, Ecuador was seeking the proverbial second bite of the apple. While such parallel proceedings do not strictly compete with each other insofar as they involve different parties, they may well lead to conflicting awards when they deal in essence with the same claim. Yet, nothing in the U.S.-Ecuador BIT, including Article VII(1)—which is similar if not identical to the state-to-state arbitration provisions in many other BITs—technically prevents Ecuador from rearbitrating the issue in such a way.

On the surface, there appears to be little guidance on how to make sense of the relationship between the two arbitral regimes in Ecuador v. U.S. Consulting a broader perspective of the development of BITs is also not immediately helpful. What history we have suggests that investor-state arbitration provisions were introduced into the earliest BITs without much thought as to their interaction with preexisting state-to-state arbitration provisions. Even the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)—to which over 150 states are party, although not including Ecuador—does not speak comprehensively to the issue. While Article 27(1) of the ICSID Convention does consider the relationship between investor-state and state-to-state arbitration, it focuses on prohibiting abuses of diplomatic protection, and applies to home states seeking to extend such protection to those of its nationals who have already consented to submit to investor-state arbitration. In any event, Ecuador, having formally denounced the ICSID Convention in 2009, is no longer a party to

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9. See Clovis J. Trevino, State-to-State Investment Treaty Arbitration and the Interplay with Investor-State Arbitration under the Same Treaty, 5 J. INT’L DISP. SETTLEMENT 199, 200 (2014) (“Almost all BITs provide that treaty parties may resort to state-to-state arbitration over treaty ‘interpretation or/and application.’ Similar formulations, with variations and different levels of detail as to the negotiation or consultation phase, the applicable rules of procedure or the applicable law, are to be found in virtually every BIT.”) (citations omitted).

10. See infra Part I.


12. Specifically, Article 27(1) provides that:

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.

Id. art. 27(1); see infra Part I.

13. See Int’l Centre for Settlement of Investment Disputes News Release, Ecuador Submits a Notice under Article 71 of the ICSID Convention (July 9, 2009), available at
the Convention. It turns out, however, that a closer parsing of these and other legal authorities reveals a partial blueprint for aligning the two arbitral regimes, namely that state-to-state arbitration should be precluded for any investment treaty issue that may be resolved through investor-state arbitration.

It bears emphasizing that how we make sense of this relationship between investor-state and state-to-state arbitration can have profound implications for the existing investment arbitral regime. If a respondent state can now initiate state-to-state arbitration for any case it loses in prior investor-state arbitration, or conversely, a home state for any claim its nationals lose in prior investor-state arbitration, then few BIT claims ostensibly resolved in arbitral proceedings are safe. This includes all claims resolved against host states through arbitration under the auspices of ICSID, the predominant arbitral forum for investment claims.14 Such dual procedures can only destabilize an investment arbitral regime premised critically on the finality of awards.15

Notwithstanding the stakes involved, however, the surprisingly complex and convoluted relationship between investor-state and state-to-state investment treaty arbitration has not been systematically examined. More than simply a clash between two different procedures, the two arbitral paradigms are dynamic phenomena that interact in at least five distinct ways:

• When a home state or an investor seeks state-to-state arbitration after the investor has consented to investor-state arbitration;
• When a home state or an investor seeks state-to-state arbitration before the investor has consented to investor-state arbitration;


15. It bears observance here that modern governance of foreign direct investment (FDI) is effected primarily through investment treaties, with 2012 global FDI flows valued at $1.35 trillion and projected to grow to $1.8 trillion by 2015. See United Nations Conference on Trade and Development, World Investment Report 2013, U.N. Doc. UNCTAD/WIR/2013, at xxi, 2 (2013), available at http://unctad.org/en/PublicationsLibrary/ wir2013_en.pdf. Even though investment arbitration was largely unknown until just two decades ago, the total number of publicly identified investment arbitrations, in a context of nearly 2,900 BITs, is at least 514 today. Id. at x, xxi.
When a BIT requires investor-state arbitration to be conducted through state-to-state arbitration;
When a host state initiates state-to-state arbitration after the investor has consented to investor-state arbitration; and
When a host state initiates state-to-state arbitration before the investor has consented to investor-state arbitration.

Presently, the limited legal authorities available suggest that whether state-to-state arbitration is permissible when investor-state arbitration is also involved, or at least not categorically prohibited, can depend on which scenario above is implicated. The principal cause, or less charitably, blame, for this needlessly complicated state of affairs resides in Article 27(1) of the ICSID Convention, which begins to, but does not comprehensively tackle, the problem of potentially conflicting awards. More broadly, what this mismatched patchwork of permutations also suggests is that state governments, in negotiating their BITs, were themselves unclear on the scope of state-to-state arbitration, particularly as it relates to investor-state arbitration.

This paper argues that the relationship between the two arbitral regimes should be reordered so as to accord with the history and purpose of each regime and the ICSID Convention. Investor-state arbitration was designed to displace diplomatic protection, including through state-to-state arbitration, and thereby allow the investor effectively to seek redress for injury to its investment in a depoliticized environment. Article 27(1) of the ICSID Convention reflects, if imperfectly, such a prioritization of investor-state arbitration, as does the relevant case law, which has refused to sanction the subversion of state-to-state arbitration in aid of dislodging investor-state arbitration. The very narrative of modern international investment law, which features investor-state arbitration as the dominant means of investment treaty dispute resolution while state-to-state arbitration languishes in almost complete dormancy, further supports according primacy to investor-state arbitration. Moreover, such prioritization is to be preferred as a matter of procedure and due process since the host state is a party in either set of proceedings, but the third party investor will face a greater challenge than the third party home state in securing any meaningful participation in state-to-state and investor-state arbitration, respectively. Accordingly, I advocate treating the two systems as mutually exclusive, and barring state-to-state arbitration of any dispute that can be or is appropriately resolved through investor-state arbitration. While acknowledging the risk of duplica-
tive proceedings leading to conflicting awards, other commentators have taken a different view, and are content to live with the web of permutations, but trusting one of the tribunals to stay its proceedings based on nebulous notions of good faith, or even endorsing this larger role of state-to-state arbitration through an after-the-fact characterization of the system as inherently hybridized, thereby advancing the interests of host states at the expense of investors. These alternative approaches all fail to recognize, however, the purposive primacy of investor-state arbitration as ultimately gleaned from the ICSID Convention, the history of investment treaties, and the relevant case law.

Part I outlines the history of the development of state-to-state and investor-state arbitration under BITs, and the treatment of their relationship in the ICSID Convention. Part II provides a chronology of the cases relating to state-to-state arbitration that also implicate investor-state arbitration. Part III examines and summarizes the present convoluted interaction between state-to-state and investor-state arbitration, tracing much of it to Article 27(1) of the ICSID Convention in the process. Part IV argues that the existing structure of the relationship between the two arbitral regimes is not entirely consistent with their history and purpose or the ICSID Convention. It proposes instead a realignment of the relationship that recognizes the priority of investor-state arbitration by proscribing state-to-state arbitration of any dispute that may properly be resolved through investor-state arbitration. In the process, the paper negotiates legal and other obstacles to adopting such an approach, including alternative proposals for resolving the tension between the two arbitral regimes.

I. THE DEVELOPMENT OF STATE-TO-STATE AND INVESTOR-STATE ARBITRATION PROVISIONS IN BILATERAL INVESTMENT TREATIES

Modern state-to-state arbitration took hold in the eighteenth century and has been predominantly used in post-conflict settlements and the resolution of territorial boundary disputes. Before the advent of BITs, however, state-to-state arbitration had a role to play in the protection of foreign property under bilateral treaties of friendship, commerce, and navigation (FCNs)—the predecessors of BITs.

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16. See infra Part IV.

European powers were engaged in the practice of concluding FCNs from as early as the 1820s. The United States had been concluding such treaties even earlier, at least since the 1770s. FCNs were primarily designed to establish and govern trade relations between state parties, although certain treaties also contained provisions that incidentally addressed the protection of foreign property. Insofar as they provided for dispute resolution, the primary forum was a domestic court and thus the early FCNs sought to ensure that foreign nationals had the right to appear in local courts. Certain FCNs did, however, contain state-to-state arbitration clauses, with some of these clauses getting fair mileage in the process. For example, the 1794 FCN between the United States and Great Britain contained an arbitration clause that covered disputes involving, *inter alia*, the confiscation of property, which resulted in over five hundred arbitral awards in just a five-year span from 1799 to 1804. State-to-state arbitration continued to be used by states on behalf of their nationals as one of the occasional means of resolving property disputes throughout the nineteenth century. On the cusp of the twentieth century, arbitration in general received a boost with the conclusion of the 1899 Hague Peace Conference and the establishment of the Permanent Court of Arbitration, with countries concluding general arbitration treaties as well as introducing arbitration clauses into their FCNs.

Beginning in 1914, however, the global turmoil engendered by two world wars and the Great Depression significantly hobbled the international investment regime and it was not until after 1945 that the negotiation of FCNs resumed in earnest. Though in the post-war era, the investment protection function rather than the trade aspect of FCNs came to dominate as capital markets began to turn around. At the same time, the increasingly strident self-assertion of capital-importing states and the implementation of social economic policies in the 1950s significantly increased the risks for foreign investments of expropriations and nationalizations. The resulting uncertainty drove capital-exporting states to secure higher standards of

19. *See id.*
21. *See id.*
22. *See id.* at 31.
25. *See id.*
investment protection than those available under customary international law, leading ultimately to the conclusion of the first bilateral investment treaties and other international investment agreements, which this Article collectively refers to as BITs herein. Unlike FCNs, BITs generally protected investment (as opposed to property) and, indeed, addressed investment-related issues exclusively.26 But the early BITs of the 1960s did resemble FCNs insofar as they provided only for the resolution of investment disputes between states through submission of the dispute to an arbitral tribunal or the International Court of Justice.27

Because only governments could access the state-to-state arbitration provisions in FCNs and the early BITs, investors had to look to their home states to initiate arbitration to resolve their investment disputes. Home states are under no obligation, however, to initiate such arbitration or exercise diplomatic protection, which may not even be possible if the investor has not exhausted all available local remedies. Indeed, home states are often and understandably wary of expending precious political capital to engage in what may well become a charged dispute deleterious to both state parties. Even if the home state acts on behalf of the investor, it is the home state that has full discretion and control over the process. The home state is not even obligated to pass on to the investor any monetary compensation awarded as a result.28 In short, the injured investor may not have much of a remedy at all in relying upon state-to-state arbitration or more conventional diplomatic protection mechanisms.

To address this shortfall, several early multilateral investment initiatives separately provided for investor-state arbitration that would have entitled the investor independently to bring an arbitral claim against the host state concerning certain investment disputes. These proposals, including the International Law Commission’s 1948 Draft Statute of the Arbitral Tribunal for Foreign Investment and Draft Statute of the Foreign Investments Court,29 and the 1959 Abs-Shawcross Draft Convention on Investments Abroad,30 were never

26. See Van de Velde, supra note 1, at 55.
27. See Newcombe & Paradell, supra note 23, at 44.
adopted. They did, however, pave the way for the one initiative that did succeed: the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). Established under the auspices of the World Bank, ICSID is not a permanent arbitral tribunal, but rather a legal framework and neutral venue for the resolution of investment disputes between Contracting States and investors who are nationals of other Contracting States. It is designed as such to engender “an atmosphere of mutual confidence and thus stimulat[e] a larger flow of private international capital into those countries [that] wish to attract it.”

The broad operative concept is that a Contracting State and a national from another Contracting State would consent in writing to binding arbitration under the ICSID Convention of future investment disputes, thereby allowing the investor to proceed directly against the host state in such a dispute without the need also to involve the home state. In this way, otherwise contentious confrontations between states would be avoided and the relevant investment dispute “depoliticized.” As put by Ibrahim Shihata, former Secretary General of ICSID and General Counsel of the World Bank, ICSID provides: “A forum for conflict resolution in a framework which carefully balances the interests and requirements of all the parties involved, and attempts in particular to ‘depoliticize’ the settlement of investment disputes.”

Given this purpose of introducing investor-state arbitration, it is unsurprising then that the ICSID Convention took steps to circumscribe the ability of states to act on behalf of the investment interests of their nationals, including by way of state-to-state arbitration. Indeed, allowing the latter presented the additional acute danger that the same claim would be the subject of two different arbitral procedures resulting in conflicting awards. Accordingly, Article 27(1) of the ICSID Convention provides that:

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.


32. See ICSID Convention, supra note 11, art. 25(1) (“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.”).

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.\textsuperscript{34}

As noted in Christoph Schreuer’s seminal treatise on the ICSID Convention, the rationale for the phrase “or bring an international claim” is “the existence of arbitration clauses in many bilateral investment treaties (BITs) for the settlement of disputes between the State parties to the treaties,”\textsuperscript{35} i.e., state-to-state arbitration provisions. Specifically, the drafters of the Convention were concerned that permitting both investor-state and state-to-state arbitration of essentially the same claim could lead to inconsistent awards.\textsuperscript{36} Although such parallel proceedings technically involve different parties, the potential for conflict exists since the scope of the state-to-state arbitration provision is usually broad enough to extend to the investor’s claim itself.\textsuperscript{37} Instructively, the drafters chose to subordinate state-to-state arbitration to investor-state arbitration in Article 27(1) by prohibiting home states from initiating state-to-state arbitration when the relevant investor has submitted to investor-state arbitration.

While Article 27(1) attempts to address this problem, it is flawed. On its terms, Article 27(1) bars a host state from initiating state-to-state arbitration to protect itself concerning claims by an investor who has consented to investor-state arbitration, but not a host state from initiating state-to-state arbitration to protect its nationals who have consented to investor-state arbitration. Yet, both scenarios carry the same potential for conflict. Just as a home state might subsequently initiate state-to-state arbitration of a claim that an investor has lost in prior investor-state arbitration, a host state could subsequently initiate state-to-state arbitration of a claim that it lost in prior investor-state arbitration. In both situations, the subsequent state-to-state arbitration might lead to an award that conflicts with the prior award issued in the earlier investor-state arbitration. Further, Article 27(1) bars a home state from relying on state-to-state arbitration only at the point when its national has consented to investor-state arbitration. This means that a home state can, in collusion with its national,

\textsuperscript{34} ICSID Convention, supra note 11, art. 27(1) (emphasis added).


\textsuperscript{36} See id. at 420 (“This possibility [of two different arbitration procedures arising from the same claim] greatly concerned the drafters of the Convention.”).

\textsuperscript{37} See id. at 421.
strategically bring state-to-state arbitration proceedings before its national consents to investor-state arbitration, thereby potentially allowing for both sets of proceedings. The upshot is that Article 27(1) fails comprehensively to tackle the problem it sought to address, i.e., that of potentially conflicting awards, but nonetheless reflects a prioritization of investor-state arbitration over state-to-state arbitration.

The early BITs only provided for the resolution of investment disputes through state-to-state arbitration or the submission of the dispute by states to the International Court of Justice. In the wake of the establishment of ICSID, BITs began to include investor-state arbitration alongside state-to-state arbitration provisions. It is not clear, however, that most state parties specifically considered the relationship between the two. Of note is the fact that many, if not most, BITs that contain both state-to-state and investor-state provisions are silent on the relationship between the two. Further, it is also of note that certain subsequent BITs—including between ICSID Contracting States for which it would not have been strictly necessary—contained language akin to Article 27 while others did not suggest this to be the case. For instance, Article 13(8) of the Netherlands-Peru BIT (both parties to the BIT being ICSID Contracting States) provides in part that:

Neither Contracting Party shall give diplomatic protection or bring an international claim with respect to a dispute which one of its nationals and the other Contracting Party have submitted to a competent international arbitral tribunal . . . unless such other Contracting Party does not abide by and comply with the award rendered in such dispute.

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38. See Newcombe & Paradell, supra note 23, at 44.
39. See, e.g., Agreement for the Promotion and Protection of Investments, Egypt-U.K., June 11, 1975, arts. 8–9, Gr. Brit. T.S. No. 97 (Cmnd. 6639); see also Trevino, supra note 9, at 201 (“[S]tate-to-state and investor-state arbitration clauses co-exist in almost all BITs.”).
Conversely, there are BITs involving at least one non-ICSID state party that provide for both state-to-state and investor-state arbitration without clarifying the relationship between the two, and to which the ICSID Convention is inapplicable.\footnote{See, e.g., Agreement on Encouragement and Reciprocal Protection of Investments, Neth.-S. Afr., May 9, 1995, 2066 U.N.T.S. 413; Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital, Greece-S. Afr., Nov. 19, 1998, 2528 U.N.T.S. 185; Agreement for the Promotion and Reciprocal Protection of Investments, Mauritius-S. Afr., Feb. 17, 1998, available at \url{http://investmentpolicyhub.unctad.org/IIA/country/134/treaty/2527}; Agreement for the Promotion and Protection of Investments, Arg.-Can., Nov. 5, 1991, 2467 U.N.T.S. 97 (Canada had not ratified ICSID at the time); Agreement Regarding the Promotion and Mutual Protection of Investments, Leb.-Russ., Apr. 7, 1999, available at \url{http://investmentpolicyhub.unctad.org/Download/TreatyFile/1893}; Agreement on the Promotion and Reciprocal Protection of the Investments, Lith.-Russ., June 29, 1999, available at \url{http://investmentpolicyhub.unctad.org/Download/TreatyFile/1921}.} A plausible explanation is that state-to-state arbitration provisions were simply carried over from FCNs, the predecessors of BITs,\footnote{See Trevino, \textit{supra} note 9, at 201 (“These [BIT state-to-state arbitration] clauses are modeled after the compromissory clauses found in Treaties of Friendship, Commerce and Navigation (FCN Treaties), the predecessors of BITs.”).} and that states were subsequently introducing investor-state arbitration provisions into BITs alongside the state-to-state arbitration provisions without particular thought as to their relationship, never mind potential conflict. These states likely did not contemplate looking to state-to-state arbitration to resolve investment disputes. And why should they? Today, as has historically been the case, state-to-state arbitration continues to be used predominantly to resolve territorial boundary disputes and in post-conflict settlements.\footnote{See \textsc{Born}, \textit{supra} note 17, at 439; see also Chang-fa Lo, \textit{Relations and Possible Interactions between State-State Dispute Settlement and Investor-State Arbitration Under BITs}, 6 \textsc{Contemp. Asia Arb. J.} 1, 8 n.12 (2013) (”[T]he Permanent Court of Arbitration (PCA) plays the key role in handling dispute \textit{sic} between states through state-state arbitration. But the vast majority of the disputes concern boundary disputes.”).} It is also telling that, while state-to-state arbitration provisions in BITs have now been around for decades, they have been little used. Still, for much of that time, it didn’t matter that these provisions fell into desuetude. Recently, however, \textit{Ecuador v. U.S.} has ignited a controversy in demonstrating how state-to-state arbitration can be subverted for purposes inconsistent with prevailing investment law norms and serve as timely, if ominous, reminders of why we should care.
This Section describes in chronological order the handful of decisions that touch materially on the relationship between state-to-state and investor-state arbitration. In the process, it comments upon the decisions and summarizes the current state of the law in this area.


*Banro American* arose under mining and oil agreements rather than a BIT, but is nonetheless instructive on the relationship between investor-state and state-to-state arbitration.⁴⁵ In that case, Banro Resource, a Canadian company, had sought and secured the diplomatic protection of Canada in its dispute with the Congo government under mining and oil agreements between the parties. At the same time, Banro American, a U.S. subsidiary of Banro Resource, had initiated ICSID arbitration against the Congo government with respect to the same dispute. The tribunal held that this was improper, as it amounted to seeking diplomatic protection and ICSID arbitration simultaneously or successively, which was prohibited under Article 27(1) of the ICSID Convention.⁴⁶ Even though Article 27(1) only applied on its terms to states, the tribunal held that it nonetheless applied to investors when interpreted in tandem with Article 26 (which provides in relevant part that “[c]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy”)

Regarding the purpose and aim of the ICSID Convention, [Articles 26 and 27] are to exclude diplomatic protection, along with its political drawbacks, for the benefit of arbitration channels. As [Christoph Schreuer] writes, “A choice between ICSID arbitration and diplomatic protection appears to be contrary to at least some of the avowed purposes of Article 27.” If the investor does not have the choice between the two

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⁴⁶ See id. ¶¶ 19–20.

⁴⁷ ICSID Convention, supra note 11, art. 26.
channels, even less so does he have the right to resort to one or the other, whether simultaneously, or successively. Therefore since the ICSID Convention has as its purpose and aim to protect the host State from diplomatic intervention on the part of the national State of the investor and to “de politicize” investment relations, it would go against this aim and purpose to expose the host State to, at the same time, both diplomatic pressure and an arbitration claim.48 Accordingly, the tribunal held that Article 27, read in light of Article 26, “ought to be interpreted as foreclosing the investor from using a plurality of channels.”49 Thus, while Canada—which was not then a party to the ICSID Convention—was free to provide diplomatic protection to its nationals including Banro Resource, the Banro Group . . . was not free to submit to the Democratic Republic of the Congo both diplomatic intervention on the part of the Canadian Government, availing itself of the nationality of its parent company, Banro Resource, and an arbitration proceeding before an ICSID tribunal by availing itself of the American nationality of one of its subsidiaries, Banro American.50

In reaching this conclusion, the tribunal is arguably straining the language of Article 27, which plainly refers only to (home) states and not to investors. Further, the operation of both Articles 26 and 27(1) are only triggered upon the investor’s consenting to investor-state arbitration, which apparently would allow for any diplomatic protection, including through state-to-state arbitration, that takes place before the initiation of investor-state arbitration (typically coincident with the investor consenting to arbitration). The tribunal’s acrobatics highlight the flawed nature of Article 27. But they also suggest that the more sensible approach is to prioritize investor-state arbitration when both mechanisms are available, consistent with the history and the spirit, if not quite the letter, of Article 27.

B. Lucchetti v. Peru (2005)

In Lucchetti v. Peru, a Chilean investor, Lucchetti, filed an

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49. Id. ¶ 20.
50. Id. ¶ 23.
ICSID arbitral claim against Peru in 2002, invoking the investor-state arbitration provisions of the Peru-Chile BIT. In response, Peru initiated state-to-state arbitration against Chile pursuant to the same BIT and then requested that the Lucchetti v. Peru tribunal suspend its proceedings pending the resolution of the state-to-state arbitration. Rejecting Peru’s request, “the [Lucchetti v. Peru tribunal] found that the conditions for a suspension of the proceedings were not met.” It is not clear on what basis or legal authority the tribunal rested its decision, as no additional information is publicly available on the tribunal’s determination, and the Peru-Chile BIT is silent on the relationship between the two arbitral mechanisms. Further, although both Peru and Chile are parties to the ICSID Convention, Article 27(1) would not on its terms be applicable here since it bars only home and not host states, and Peru had initiated state-to-state arbitration in the capacity of a host state. Presumably, the tribunal was never going to abide by Peru’s naked bid to circumvent investor-state arbitration, but it would have been helpful to learn precisely on what rationale the tribunal based its conclusion. Regardless, the tribunal’s decision indicates that state-to-state arbitration should not be permitted to displace investor-state arbitration on the same issue. Peru abandoned the state-to-state arbitral proceedings thereafter.

C. Italy v. Cuba (2008)

Italy v. Cuba involved disputes between various Italian investors and Cuban state entities. The Italian government invoked the

52. See id. ¶ 7.
53. Id. ¶ 9.
54. See ICSID Convention, supra note 11, art. 27(1).
state-to-state arbitration provisions of the Italy-Cuba BIT and brought two categories of claims against Cuba. One category was premised on the diplomatic protection of the Italian investors, while the other was ostensibly based on the violation of Italy’s own rights.\textsuperscript{57} According to a summary of the case:

Italy claimed that through the actions of different entities, such as the Cuban Central Bank and the Cuban Chamber of Commerce, Cuba discriminated against Italian investors, including by denying them fair and equitable treatment, national treatment and full protection and security. Italy also sought from Cuba a symbolic compensation of one Euro for the violation of the letter and spirit of the BIT.\textsuperscript{58}

All of the claims were ultimately dismissed for a number of jurisdictional and merits-related reasons.\textsuperscript{59}

At first glance, it seems unusual, even strategic, for the home state rather than the investors to have initiated arbitration for what in essence was alleged injury to the investors. Indeed, one of the preliminary objections Cuba raised was that “Italy was not entitled to initiate a proceeding for diplomatic protection on the basis of [A]rticle 10 of the BIT. Under this provision, Italy could only bring a dispute in its own name regarding the interpretation and application of the treaty.”\textsuperscript{60}

However, this course of action may have been the result of the unique structure of the Italy-Cuba BIT, which on one view shunts investor-state arbitration through state-to-state arbitration. Article 9 of the Italy-Cuba BIT governs the settlement of investor-state disputes and specifically allows the investor to elect for arbitration, pursuant to Article 10, of any investment dispute between the parties that is not resolved amicably after six months.\textsuperscript{61} In turn, Article 10 of the

\textit{Dispute Between Italy and Cuba, INVESTMENT TREATY NEWS (July 19, 2012), http://www.iisd.org/itn/2012/07/19/awards-and-decisions-8/}.

\textsuperscript{57} See Republic of It. v. Republic of Cuba, Sentence Finale (Final Award), ¶¶ 46–48, 55; see also Cabrera, supra note 56, at 3.

\textsuperscript{58} Babiy, supra note 56.

\textsuperscript{59} See id.

\textsuperscript{60} Id.

\textsuperscript{61} See Tra Il della Repubblica Italiana e il Governo della Repubblica di Cuba sulla Promozione e Protezione degli Investimenti [Agreement between the Government of the Italian Republic and the Government of the Republic of Cuba on the Promotion and Protection of Investments], Cuba-It., arts. 9–10, May 7, 1993 [hereinafter Italy-Cuba BIT], available at http://investmentpolicyhub.unctad.org/IIA/country/52/treaty/1127. This is not a typical formulation for BITs. Compare id., with U.S.-Educador BIT, supra note 3. See also W. Michael Reisman, Opinion with Respect to Jurisdiction in the Interstate Arbitration
BIT governs settlement of disputes between the state parties and provides for \textit{ad hoc} arbitration by a tribunal appointed by the state parties that will establish its own procedural rules.\footnote{Italy-Cuba BIT, \textit{supra} note 61, art. 10; \textit{see} Reisman Opinion, \textit{supra} note 61, ¶ 36.} As such, conventional investor-state arbitration would not appear to be available under the Italy-Cuba BIT, and any disputes between investors and the host state would have to be resolved through state-to-state arbitration mechanisms. In other words, under this reading, the Italian investors had no choice but to rely on Italy to initiate state-to-state arbitration under the BIT to resolve their disputes.

While the tribunal rejected Cuba’s preliminary objection to Italy’s initiation of a state-to-state arbitration for the investor claims, the tribunal did so not because the investors lacked such ability, but because they had not yet consented to investor-state arbitration under Article 9.\footnote{See Republic of It. v. Republic of Cuba, Sentence Sentence Préliminaire [Interim Award], ¶ 65.} The tribunal determined that so long as the investor had not yet consented or submitted to arbitration with the host state, the home state was not barred from espousing the investor claims.\footnote{\textit{See id.}} That is, the tribunal did not read Articles 9 and 10 as channeling investor-state arbitration through the framework of state-to-state arbitration. Instead, the tribunal treated Article 9 as a standard investor-state arbitration provision, but decided nonetheless that Italy was not precluded from exercising diplomatic protection because the Italian investors had not yet in its view submitted to investor-state arbitration. This conclusion, even if questionable for its assumption, is significant because nothing in Articles 9 and 10, or anywhere else in the BIT, speaks to the timing or coordination between investor-state and state-to-state arbitration.\footnote{\textit{See generally} Italy-Cuba BIT, \textit{supra} note 61.} Rather, the tribunal looked to and based its decision on Article 27(1) of the ICSID Convention, even though Cuba is not a party to the ICSID Convention and the Italy-Cuba BIT provides for \textit{ad hoc} arbitration and is not subject to the ICSID Convention. In the tribunal’s estimation, the absence of a similar provision

\begin{footnotesize}
\begin{itemize}
  \item Initiated by Ecuador against the United States, ¶ 36, Republic of Ecuador v. U.S., PCA No. 2012-5 (Perm. Ct. Arb. 2012) [hereinafter Reisman Opinion], available at http://www.italaw.com/sites/default/files/case-documents/ita1061.pdf (“In contrast to the vast majority of modern BITs, the [Italy-Cuba] BIT, which appears to be unique in both Italy’s and Cuba’s BIT practice, has no analogue to Article VI [of the U.S.-Ecuador BIT] (i.e., a separate track dedicated to investor-state arbitration). Rather, it assigns a single arbitral procedure for inter-state and investor-state disputes in which the States-parties establish and select the panel.”).
  \item Italy-Cuba BIT, \textit{supra} note 61, art. 10; \textit{see} Reisman Opinion, \textit{supra} note 61, ¶ 36.
  \item \textit{See} Republic of It. v. Republic of Cuba, Sentence Sentence Préliminaire [Interim Award], ¶ 65.
  \item \textit{See id.}
  \item \textit{See generally} Italy-Cuba BIT, \textit{supra} note 61.
\end{itemize}
\end{footnotesize}
in the BIT did not prevent the application “by analogy” of the principle embedded in Article 27.\textsuperscript{66} Such an extension of Article 27(1) is difficult to justify since Cuba did not agree to the rule, and Article 27(1) can hardly be said to constitute customary international law. If, however, we accept the decision, two critical implications of Article 27(1) of the ICSID Convention arise from its conclusion: First, Article 27(1) represents a general principle of broad application beyond the confines of the ICSID Convention; and second, Article 27(1) is reasonably interpreted to permit state-to-state arbitration initiated before but not after the initiation of investor-state arbitration.


\textit{Ecuador v. U.S.} has its genesis in a much earlier dispute between Ecuador and certain U.S. investors. Between 1991 and 1993, Texaco Petroleum (TexPet) brought claims in Ecuadorean courts against Ecuador for the breach of various agreements between the parties.\textsuperscript{67} Even though TexPet had submitted its evidence by the mid-1990s, the courts did not adjudicate the cases.\textsuperscript{68} In 2006, TexPet and Chevron (which had acquired TexPet in the interim) filed a request for arbitration against Ecuador pursuant to the U.S.-Ecuador BIT, arguing, \textit{inter alia}, that the Ecuadorean courts’ failure to adjudicate constituted a violation of the BIT. The tribunal agreed with the claimants and determined on March 30, 2010 that Ecuador had violated Article II(7) of the BIT,\textsuperscript{69} which provides that “[e]ach Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.”\textsuperscript{70} In so holding, the tribunal held that Article II(7) was not fully congruent with the customary international law standard relating to the denial of justice, but rather was “created as an independent treaty standard to address a lack of clarity in the customary international law regarding denial of justice,” with its “\textit{lex}}
**specialis** nature... confirmed by its origin and purpose.”

Ecuador contended that the tribunal, in finding a breach of Article II(7), committed legal error sufficiently serious to justify setting aside the award. On June 8, 2010, the Minister of Foreign Affairs of Ecuador, Ricardo Patiño Aroca, wrote to then-U.S. Secretary of State, Hillary Clinton, on the subject of the misinterpretation of Article II(7) of the Treaty. After decrying the perceived errors in the award, the letter summarized Ecuador’s understanding of Article II(7), including that it required no more than the lower standard for denial of justice under customary international law. The letter then asked the U.S. government to confirm its agreement with Ecuador’s interpretation of Article II(7) by reply note, and that the failure to so confirm would be treated as evidencing “an unresolved dispute... between the Government of the Republic of Ecuador and the Government of the United States of America concerning the interpretation and application of the Treaty.” In August 2010, the United States sent a reply diplomatic note to Ecuador’s Foreign Minister, attaching a letter from the U.S. Assistant Secretary of State for Western Hemisphere Affairs, which stated that “the U.S. government is currently reviewing the views expressed in your letter and considering the concerns that you have raised.” In the interim, on July 7, 2010, Ecuador proceeded to petition the District Court of The Hague (the place of arbitration) to set aside the investor-state award in favor of TexPet and Chevron. In May 2012, the Dutch court denied Ecua-

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71. Chevron Corp. (U.S.) and Texaco Petroleum (U.S.), Partial Award on the Merits, ¶ 243.


74. U.S. Memorial, supra note 72, at 11 (emphasis omitted) (quoting the letter from Ricardo Patiño Aroca, Ecuadorian Minister of Foreign Affairs, Trade and Integration, to Hillary Clinton, U.S. Secretary of State of June 8, 2010).

75. Id. at 11.

76. Id. at 9.
In the meantime, having received no further substantive response from the United States government, Ecuador filed a request for state-to-state arbitration on June 28, 2011, pursuant to Article VII(1) of the BIT, which, predictably enough and typical of the standard inter-state arbitration BIT provision, provides that “[a]ny dispute between the Parties concerning the interpretation or application of the Treaty . . . shall be submitted, upon the request of either Party, to an arbitral tribunal for binding decision in accordance with the applicable rules of international law.”

Maintaining that the tribunal was without jurisdiction under the circumstances, the United States government sought and obtained a bifurcation of the proceedings with an initial hearing on jurisdictional matters. In support of its position, the U.S. government argued primarily that there was no “dispute” between the parties, as it had not taken a stand on the interpretation of Article II(7), and thus the tribunal lacked jurisdiction under Article VII(1) of the BIT. More relevant for our purposes, the United States further argued that asserting jurisdiction over Ecuador’s claim was inappropriate because it “would contradict a principal object and purpose of the Treaty, which is to encourage investment by giving assurances that, if disputes arise, investors can obtain final and binding awards in a de-politicized forum.” Permitting such jurisdiction would undermine investor-state arbitration and, by extension, the entire system of investment arbitration. In particular, the United States warned of the significant uncertainty that would arise regarding the supposedly final and binding nature of investor-state awards:

Under Ecuador’s theory, States could unilaterally seek a preferred interpretation of the Treaty through State-to-State arbitration prior to an investor-State arbitration, to try to deter an investor from bringing a claim, during an investor-State arbitration, to influence the outcome of that case; or after an investment tribunal has issued its award, to use in annulment, set-aside, or

78. U.S.-Ecuador BIT, supra note 3, art. VII(1).
79. See U.S. Memorial, supra note 72, at 7.
80. See id. at 15–34.
81. Id. at 5.
enforcement proceedings.\textsuperscript{82}

In response, Ecuador emphasized that the “ordinary meaning of the terms of Article VII grants jurisdiction over any dispute concerning interpretation or application of Article VII(1).”\textsuperscript{83} In exercising its right to resolve the interpretive differences over Article VII, Ecuador was not seeking to “appeal” the \textit{Chevron} award, whose final and binding character it acknowledged, but rather to clarify its existing obligations under the BIT so that Ecuador can be in full compliance thereof and thereby avoid future liability.\textsuperscript{84}

Many memorials and a panoply of expert opinions later, the case came to an anticlimactic end, with the tribunal dismissing the case for lack of jurisdiction “due to the absence of the existence of a dispute falling within the ambit of Article VII of the Treaty.”\textsuperscript{85} At least, that is what we gather from the terse pronouncement on the U.S. Department of State website, which is all we have to rely on as the award is unpublished.\textsuperscript{86} In declining jurisdiction for failure to locate a dispute between the parties, the tribunal would not have had to reach the more fundamental question of the precise relationship between state-to-state and investor-state arbitration, which remains a very live issue.

\section*{III. The Unruly Relationship between State-to-State and Investor-State Arbitration}

Examined separately and in isolation, each of the cases above might suggest that the two arbitral regimes, while potentially on a collision course, counteract one another in straightforward fashion. Taken together, however, a much bigger and more chaotic picture emerges of their interaction that suggests an organic relationship evolving outside the conscious purview of states, which have paid it little if any attention. Many if not most BITs that contain both state-to-state and investor-state arbitration provisions are silent on the relationship between the two.\textsuperscript{87} As such, the primary legal authority on the interaction between the two arbitral systems remains Article 27(1) of the 1965 ICSID Convention, which provides that:

\begin{itemize}
\item \textsuperscript{82} \textit{Id.}
\item \textsuperscript{83} \textit{See} Ecuador Counter-Memorial, \textit{supra} note 73, at 10.
\item \textsuperscript{84} \textit{See id.} at 104–08.
\item \textsuperscript{85} \textit{See} U.S. Dep’t of State, U.S.-Ecuador BIT, \textit{supra} note 3.
\item \textsuperscript{86} \textit{See id.}
\item \textsuperscript{87} \textit{See supra} note 39 and accompanying text.
\end{itemize}
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. 88

Under Article 27(1), a state party to the ICSID Convention is barred from initiating state-to-state arbitration of any dispute that its national (the investor) has consented to submit to ICSID investor-state arbitration with the host state. 89 Article 27(1) gives primacy to investor-state arbitration in the event of conflict with state-to-state arbitration both to avoid inconsistent awards as well as ensure the depoliticization of the dispute resolution process. 90 As noted above, however, Article 27(1) on its face applies exclusively to home and not host states. Furthermore, it is triggered only when the investor has consented to arbitration, which typically occurs at the point that the investor submits a request for arbitration. 91 Thus, whether the terms of Article 27(1) permit state-to-state arbitration with respect to any particular dispute turns on whether the home or host state is initiating state-to-state arbitration as well as whether the parties have commenced investor-state arbitration. Specifically, the ICSID Convention bars a home state from pursuing state-to-state arbitration of an investment dispute only in the event of contemporaneous investor-state arbitration, and does not bar a host state. Or, as rendered in tabular form:

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88. ICSID Convention, supra note 11, art. 27(1).
89. Id.
90. See supra notes 31–38 and accompanying text.
91. See supra Part I.
### Whether State-to-State Arbitration Is Permitted under the Terms of Article 27(1)

<table>
<thead>
<tr>
<th>Actor initiating state-to-state arbitration</th>
<th>Home State initiating state-to-state arbitration</th>
<th>Host State initiating state-to-state arbitration</th>
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<tbody>
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<td>Whether investor-state has been initiated</td>
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<tr>
<td>Investor-state arbitration already initiated</td>
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<td>✓</td>
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<tr>
<td>Investor-state arbitration not yet initiated</td>
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Notwithstanding its plain language, however, what little case law we have on Article 27, including *Banro American v. Congo* and *Lucchetti v. Peru*, would have us apply it not just to home states, but also to investors and host states, respectively.\(^9\) Thus, for those cases that follow the lead of *Banro American* and *Lucchetti*, the two arbitral systems will interact differently so as to give us the following outcomes instead:

\(^9\) See supra Part II.A–B.
Whether State-to-State Arbitration Is Permitted under Banro American and Lucchetti’s Interpretation of Article 27(1)

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<th>Whether investor-state has been initiated</th>
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It bears emphasizing that the tables above do not, of course, represent the universe of relations between the two arbitral systems. The question of how the two systems interact in any particular BIT must first be considered by examining the terms thereof. As previously noted, many BITs are simply silent on how state-to-state arbitration relates to investor-state arbitration.93 There are BITs that explicitly prioritize between the two mechanisms, however, and it is particularly noteworthy that many if not most of such BITs prioritize investor-state arbitration over state-to-state arbitration along the lines of Article 27(1).94 That is, these BITs prohibit state-to-state arbitra-

93. See supra note 39 and accompanying text.
tion of any dispute that has been referred to investor-state arbitration. Yet other BITs can be interpreted as referring to the relationship between the two indirectly. For instance, as discussed above, the Italy-Cuba BIT can be regarded uniquely as folding investor-state arbitration into state-to-state arbitration, thereby effectively extinguishing the former.95 The Italy-Cuba BIT thus presents an alternative (if cannibalistic) relationship between the two systems that is not captured in the tables above.

Further and strictly speaking, Article 27(1) is only applicable to those arbitral disputes that are governed by the ICSID Convention. As such, investment disputes involving a state that is not party to the ICSID Convention (or its nationals) are not subject to Article 27, and there may be little guidance on the relationship between the two arbitral systems when the relevant BIT is silent on the question. That said, as was described above, the Italy v. Cuba tribunal was undeterred from applying Article 27(1) by “analogy” even though Cuba did not agree to the rule, and Article 27(1) does not rise to the level of customary international law.96

Given all the various ways the relationship between the two arbitral systems may be delineated, and the legal uncertainty that attends certain constructions thereof, the complete story of their present interaction is accordingly a sprawling and incoherent one. Its complexities range beyond what many state parties to BITs ever contemplated, or that is even conveyed by current literature on the subject. An informed appreciation of the confused state of affairs is, however, a necessary first step to making sense of the troubled relationship between the two arbitral regimes. Pulling together the various strands of discussion above, and focusing on the operation of Article 27(1) and the relevant case law, one might summarize the interaction of the two arbitral systems as manifesting thus far in at least five distinct ways:

- When a home state or an investor seeks state-to-state arbitration after the investor has consented to investor-state arbitration;
- When a home state or an investor seeks state-to-state arbitration before the investor has consented to investor-state arbitration;
- When a BIT requires investor-state arbitration to be

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95. See supra Part II.C.
96. See id.
conducted through state-to-state arbitration;
• When a host state initiates state-to-state arbitration after the investor has consented to investor-state arbitration; and
• When a host state initiates state-to-state arbitration before the investor has consented to investor-state arbitration.

As the discussion below argues, this unstable framework, springing primarily from Article 27(1), is ultimately inconsistent with the historical narrative of the two arbitral regimes and the averred purposes of the ICSID Convention.

IV. A PROPOSED RECONCEPTION OF THE RELATIONSHIP BETWEEN STATE-TO-STATE AND INVESTOR-STATE ARBITRATION

On its terms, Article 27(1) of the ICSID Convention bars state-to-state arbitration initiated by home states but not host states, and then only when the investor has consented to investor-state arbitration of the relevant dispute. Yet, both the qualification limiting the reach of Article 27(1) to home states and disputes to which investors have already consented are inconsistent with the purposes of Article 27 and the ICSID Convention more broadly. As discussed above, the rationale behind Article 27(1) giving priority to investor-state arbitration when the same dispute can be resolved through both arbitral mechanisms is to avoid inconsistent awards, as well as ensure the depoliticization of the dispute resolution process.97 However, duplicative, politicized proceedings and the potential for conflicting awards result whether state-to-state arbitration is initiated by the home or host state after investor-state arbitration has commenced. For example, in both the Lucchetti and Ecuador v. U.S. cases, the host state initiated state-to-state arbitration to resolve a dispute that was arguably the subject of existing investor-state proceedings, thereby presenting the same potential for conflicting awards and the politicization of the dispute through the engagement of both states in the process.98

As with limiting the application of Article 27(1) to host states, structuring its prohibition of state-to-state arbitration only at the point when the investor has consented to investor-state arbitration is ill

97. See supra notes 31–38 and accompanying text.
98. See supra Parts II.B, D.
An investor could deliberately hold off on bringing an investment claim, and instead collude with or pressure its home state strategically to initiate state-to-state arbitration first against the host state. This way, the investor gets a second bite of the apple because it is free to initiate investor-state arbitration of the same claim should the state-to-state arbitration be resolved against the home state. Again, the same risks of conflicting awards resulting from duplicative proceedings and of the politicization of the dispute are presented here. In short, Article 27(1) fails comprehensively to address its averred concerns.

A far more coherent rule would be to bar state-to-state arbitration, whether initiated by the home or host state, of any dispute that would properly be resolved by investor-state arbitration—meaning any issue over which the investor-state arbitral tribunal would have jurisdiction—regardless of whether the investor has yet to consent to arbitration. Going back to the tabular format employed above, the outcomes for such a rule would look like the following:

**Whether State-to-State Arbitration Is Permitted under this Article’s Proposed Rule**

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<tr>
<th>Actor initiating state-to-state arbitration</th>
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This proposed rule would also be consistent with the historical progression of the two arbitral systems. As an initial matter, state-to-state arbitration has traditionally been and continues to be relied upon predominantly to resolve territorial boundary disputes. To the extent it was relied upon to resolve investment disputes, it has been categorically superseded by investor-state arbitration, which
was designed to replace all manner of diplomatic protection as a means of resolving foreign investment disputes. Investor-state arbitration allows the investor effectively to seek redress of injury to its investment, and in a way that takes politics out of the equation. So long as the investor is able to invoke the investor-state arbitration provisions to resolve the particular investment dispute, there is little reason to allow for state-to-state arbitration of the same dispute regardless of whether the investor has in fact initiated arbitral proceedings. Indeed, even though its actual language falls short, the rationale expressed behind what eventually became Article 27 in the relevant travaux of the ICSID Convention supports this view:

It would seem to be a natural concomitant of the recognition of the private party’s right of direct access to an international jurisdiction, to exclude action by its national State in cases in which such access is available under the Convention.

Fashioned thus, duplicative proceedings leading to potentially inconsistent awards will be avoided and ICSID, as Aron Broches, its architect and then General Counsel of the World Bank observed, can then truly serve as “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.”

Further, the proposed rule avoids the due process concerns potentially raised when state-to-state arbitration is prioritized over investor-state arbitration respecting any investment dispute. While state-to-state arbitration procedures resemble those in international commercial arbitration, they generally allow for significantly less witness evidence and discovery “both because of customary practice and notions of state sovereignty and governmental secrecy.” For the same reasons, one would not expect a state-to-state arbitral tribunal to allow readily for amicus or other third party participation, particularly when the third party is a private investor. An investor with a stake in the state-to-state arbitration proceedings will face significant

99. See supra Part I.


102. See Born, supra note 17, at 442.
challenges then in having its voice heard.

Conversely, the third party home state in any investor-state arbitration will not have to surmount quite the same difficulties in having its view represented. Take the Ecuador v. U.S. case as an example. As the host state in the investor-state arbitration, Ecuador of course had every opportunity to present its arguments in the underlying investor-state arbitration against Chevron and TexPet. If the home state, the United States here, had a unique interest and viewpoint to defend, it could have applied for amicus status with the investor-state arbitration tribunal, which would have given the application serious consideration given the status of the United States as the other state party to the BIT. Now consider the scenario in reverse and suppose that Ecuador had hurriedly initiated state-to-state arbitration proceedings against the United States in anticipation of and before Chevron and TexPet had initiated investor-state arbitration, seeking a declaration that Article II(7) of the U.S.-Ecuador BIT did not present a higher bar than the standard for denial of justice under customary international law. Chevron and TexPet would surely have experienced far more difficulty than the United States in gaining access to state-to-state and investor-state arbitration proceedings, respectively, and having their views represented, even though they had a critical interest in the outcome. By precluding state-to-state arbitration for any issue over which an investor-state tribunal would have jurisdiction, the proposed rule would neuter such gamesmanship as well as any accompanying due process concerns.

It needs to be emphasized that the proposed rule does not render state-to-state arbitration superfluous. Indeed, it applies only to bar state-to-state arbitration for any issue that the investor-state arbitral tribunal would have jurisdiction over and thus may resolve. That is, the table above does not represent the sum of all issues that may arise among investors and states, but only those issues that can properly be so resolved by investor-state arbitration. For instance, state-to-state arbitration (but not investor-state arbitration) is plainly appropriate for disputes arising from a state’s failure to enforce a final award, or regarding whether a state party may terminate a BIT early and to the detriment of prospective investors.\textsuperscript{103} It is true that

\textsuperscript{103} See ICSID Convention, supra note 11, art. 27(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.”) (emphasis added); see also Reisman Opinion, supra note 61, ¶ 30 (describing the two-track jurisdiction structure in the U.S.-Ecuador BIT, which reserves “disputes concerning
the scope of state-to-state arbitration is circumscribed as a result, but that is a natural and necessary result of recognizing the purposive primacy of investor-state arbitration in investment treaties.

Further, the prioritization of investor-state arbitration finds support in Professor Michael Reisman’s expert opinion in Ecuador v. U.S. In Reisman’s view, the two arbitration tracks created by the BIT are each assigned a distinct jurisdiction *ratione personae* (personal jurisdiction) and *ratione materiae* (subject matter jurisdiction).104 Concerning personal jurisdiction, the investor-state track affords standing to the investor and the host state (but not the home state), while the state-to-state track provides standing to the state parties to the BIT (but not the investor).105 With regard to subject matter jurisdiction, and consistent with the BIT’s purpose of promoting investment including through effecting and depoliticizing the resolution of any dispute between the host state and the investor, the interpretation of substantive rights and guarantees in the BIT is reserved for the investor-state track.106 Other issues such as disputes arising from a state’s non-enforcement of a final award or purported denunciation of a treaty are reserved for the state-to-state track.107 As Reisman explains, having deliberately induced investment by conferring investment protection benefits on third-party investors, including through the introduction of an autonomous investor-state dispute resolution system, the BIT must be interpreted in a way that protects the stability of resulting expectations on the part of investors.108

In fundamentally reconceiving the relationship between the two arbitral regimes, however, the proposed rule advocates a position that not surprisingly varies from those of other commentators. It may inform the discussion to consider them briefly—even if in unavoidably broad strokes—as they pertain to the proposed rule. For Clovis Trevino, the universe of investment issues implicating both state-to-state and investor-state arbitration cleaves into two: (1) diplomatic protection claims brought by host states under investment treaties, interpretation or application” for state-to-state arbitration, and concluding that this includes jurisdiction “to hear, for example, disputes arising from one state’s non-enforcement of a final award; or disputes when one state purports to denounce the treaty”.

104. See Reisman Opinion, supra note 61, ¶ 3.

105. See id. ¶¶ 21–22.

106. See id. ¶ 25. My proposal, however, goes further and argues that the interpretation of rights in the BIT is reserved for the investor-state track not only when a party initiates investor-state arbitration, but whenever a party may do so.

107. See id. ¶ 30.

108. See id. ¶ 26.
and (2) investment treaty interpretive matters not directly connected with the application of substantive treaty standards.109 This division is, however, incomplete and not fully resolved. Regarding the latter, Trevino specifically argues—and uncontroversially so—that BIT interstate arbitration is available for settling the latter issues, yet does not clearly articulate whether it should legally and normatively be available for treaty interpretive matters that directly concern substantive treaty standards, including, for example, the claim brought in *Ecuador v. U.S.*110 Regarding the former, Trevino appears content to allow home states to bring diplomatic claims on behalf of their nationals through state-to-state arbitration subject to the operation of the rule expressed in Article 27(1) of the ICSID Convention.111 That is, she maintains that such claims should be permissible so long as the investor has not consented to investor-state arbitration. Yet she also forthrightly acknowledges that this could lead to “the illogical result that the host state would face two consecutive litigations arising out of (substantially) the same operative facts.”112 Further, as noted above, such an interpretation of the rule would presumably allow host states to initiate state-to-state arbitration of issues concerning the application of substantive treaty standards regardless of whether investor-state arbitration on the same issues has been initiated, since Article 27(1) is silent on that issue. This defeats the purpose behind Article 27(1) of avoiding duplicative claims and political controversy. Trevino, however, does not address this oversight, and it is not clear where or how it would fit comfortably in her dichotomy. More generally, while Trevino recognizes that tension can arise from parallel proceedings depending on when the interstate interpretive dispute is brought relative to the investor-state proceedings,113 she is prepared to rely on whichever tribunal is subsequently seized of the dispute to stay its proceedings pending the resolution of the first dispute.114 Quite aside from the fact that such a tribunal has neither the obligation nor the incentive to do so, Trevino’s proposal could encourage an unseemly race between the host state and the in-

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109. See Trevino, supra note 9, at 212–33.
110. See id. at 210–11 (noting the “thin line between interpretive claims and diplomatic protection claims,” and that “this classification is not as clear-cut as it would appear at first sight,” but not discussing where or how to draw the distinction).
111. See id. at 213–20, 231 (“I argued that claims for the purpose of implementing state responsibility may be submitted within the BIT interstate framework, provided that Article 27 of the ICSID Convention (or similar provision in a BIT) is not operative.”).
112. Id. at 215.
113. See id. at 225–31.
114. See id.
vestor or collusion between the home state and the investor, and is ultimately unsatisfactory.

Coming from a different direction, Justice and Professor Chang-fa Lo advocates relying on the good faith principle to resolve any conflict between parallel or successive state-to-state and investor-state arbitration proceedings. In the process, Lo also considers applying lis pendens and res judicata, but ultimately finds them wanting in part because, as strictly construed, they require identity of or privity between the parties and identical claims in both arbitral proceedings. Instead, Lo turns to what he views as the generally applicable international law principle of good faith. In essence, Lo suggests that the tribunal constituted later in time—whether it be the investor-state or state-to-state arbitration tribunal—judiciously apply the generally applicable international law principle of good faith to either suspend or dismiss in part or whole its proceedings in deference to the tribunal that is first seized of the dispute.

One difficulty with Lo’s approach is that it may ironically encourage a race between the investor and the host state to initiate arbitration in different fora, which may not be perceived as consistent with the precept of good faith and cannot be resolved by good faith principles per se. For example, say Ecuador and Chevron each rushes to initiate state-to-state and investor-state arbitration, respectively, and Chevron beats Ecuador to the line. Should the state-to-state arbitration tribunal suspend its proceedings concerning Ecuador’s claims in that event? Or can it refuse to do so on the ground that Chevron was not acting in good faith in rushing to initiate arbitral proceedings, even though Ecuador was equally guilty of the same conduct?

Other difficulties arising from the nebulous nature of “good faith” are present even in the absence of a race. Let us suppose instead that Chevron was slow off the blocks and Ecuador strategically filed its state-to-state arbitration, fully intending to block any subsequent effort by Chevron to initiate investor-state arbitration. Should Ecuador be deemed to be acting in bad faith even though (1) Ecuador was formally entitled to bring such a state-to-state arbitration claim, and (2) Chevron was always free to file its investor-state claim? As the example suggests, reliance on good faith principles in this context can lead to significant uncertainty of outcome.

115. See Lo, supra note 44.
116. See id. at 15, 22–23.
117. See id. at 17–18.
118. See id. at 17–21.
Moreover, Lo’s proposal of managing the interplay between the two arbitral systems by looking principally to good faith principles is also problematic insofar as it fails to refer to, and thus take into account, Article 27(1) of the ICSID Convention and its prioritization of investor-state over state-to-state arbitration.

Professor Anthea Roberts argues for yet a different approach. Roberts expressly rejects any attempt to limit drastically the scope and availability of state-to-state arbitration in favor of investor-state arbitration on the ground that it is inconsistent with the text, purpose, or history of investment treaties.\(^\text{119}\) Instead, she views the parallel existence of the two arbitral procedures without a clear priority system as a reality of investment treaties that reflects the system’s essential hybridity and tension among the interests of investors, host states, and home states.\(^\text{120}\) Roberts welcomes state-to-state arbitration as a way in which state parties can reengage with and influence the investment treaty system.\(^\text{121}\) She posits a framework to accommodate its hybrid nature based on the understanding that investment treaty rights are granted to investors and home states on an interdependent basis, and that interpretive authority is shared among the state parties, investor-state tribunals, and state-to-state tribunals.\(^\text{122}\) Roberts’ framework ultimately rests on the conclusion that the text, object and purpose, and history of investment treaties do not support prioritizing investor-state arbitration over state-to-state arbitration.\(^\text{123}\) But to ad-


\(^\text{120}\) See id. at 5, 14.

\(^\text{121}\) See id. at 5 (“[T]he 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 . . . . 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.”).

\(^\text{122}\) See id. at 5–6, 69 (arguing that “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 . . . . 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—may bring arbitral claims; and (2) interpretive authority should be understood as being shared between the treaty parties, investor-state tribunals, and state-to-state tribunals”) (also noting that “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”).

\(^\text{123}\) See id. at 5 (arguing that “attempts to radically curtail the scope and availability of
vance her theory, she needs to do more than prove a negative: she must demonstrate that this holistic reading of the treaties affirmatively supports her contention of the system as neutral and hybridized in nature; otherwise, both interpretations are equally unsupported, and we are left without any compelling proposal.

While it is true, as Roberts notes, that investor-state arbitration was generally inserted in addition to, rather than in place of, state-to-state arbitration in investment treaties and typically without reference to their relationship,124 this hardly demonstrates that the treaty parties intended for both arbitral procedures to be generally available without any prioritization between them. As discussed earlier, a better explanation is that state-to-state arbitration provisions were a carryover from FCNs, and that states were subsequently introducing investor-state arbitration provisions into BITs alongside the state-to-state arbitration provisions without adequately considering their relationship.125 There was, after all, little reason to do so because investor-state arbitration was designed to replace diplomatic protection as an autonomous system of resolving investment disputes without any involvement of the home state save when the host state failed to make good on an award issued against it.126 Additionally, it is worth noting that state-to-state arbitration provisions have been invoked on only a handful of occasions, even though they have been a feature of a great many BITs for decades now. One may not simply wave away the lopsidedly infinitesimal number of state-to-state arbitrations on account of the reluctance of home states to espouse the claims of their nationals.127 Indeed, the politicization of what are es-

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124. See id. at 11 (“Investor-state arbitration is generally inserted in addition to, rather than in the place of, state-to-state arbitration. 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.”).

125. See supra Part I.

126. See ICSID Convention, supra note 11, art. 27(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.”).

127. But see Roberts, supra note 119, at 48, n.220 (arguing that “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”) (citing 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
essentially investor-state disputes is precisely why investor-state arbitration is and should be prioritized. It also fails to explain why no states have sought state-to-state arbitration under a BIT to resolve purely interpretive disputes that do not implicate existing investor-state disputes.

The simpler and more cogent explanation is that to the extent states contemplated the matter, they did not consider it necessary to introduce prioritizing language insofar as the ICSID Convention, and therefore Article 27(1) thereof, was applicable to the investment treaty. Given that ICSID was established prior to the generation of modern BITs that included investor-state arbitration provisions, Article 27(1) constitutes the context in and background against which BITs were negotiated. In prohibiting home states from initiating state-to-state arbitration of any dispute that has been submitted to investor-state arbitration, and not vice versa, Article 27(1) plainly prioritizes investor-state arbitration and is not a neutral sequencing provision.\footnote{128}{See supra Part I. It is not entirely clear to the author what Roberts would consider to be the import of Article 27(1). On the one hand, she appears to acknowledge that its unidirectional structure is justified because “we should expect that investor-state arbitration will remain the primary mechanism for dealing with investment disputes” and “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.” See Roberts, supra note 119, at 48 (citations omitted). On the other hand, Roberts maintains that “[i]n the absence of an express provision creating a hierarchy or endorsing symmetrical or asymmetrical sequencing, it is an open question which approach should be implied.” Id. at 48–49.}

As to object and purpose, Roberts maintains that the goals of investment protection and the depoliticization of investment disputes are not absolute, and further cannot remove all interpretive doubts. In her view, adopting a general interpretive presumption in favor of investors would be unjustified given how short and vague investment treaties are, and can only “result[] in a heavily skewed analysis that overly stacks the deck in favor of investors’ interests.”\footnote{129}{Roberts, supra note 119, at 12–13 (“Some tribunals have concluded that, as investment treaties were intended to protect foreign investment, all uncertainties should be resolved in favor of investors. As investment treaties tend to be short, vague, 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.”).} As an initial matter, it bears observing that an approach that looks primarily to investor-state arbitration favors neither the investor nor the state. Rather, it favors the resolution of any investment dispute in the forum designed and bargained for that purpose, namely investor-state arbi-
tration, and whose outcome is not preordained in favor of either the investor or the state. Indeed, the statistics show that states prevail more frequently than investors in investor-state arbitrations under investment treaties. Of the 274 known concluded treaty-based investor-state dispute settlement cases, approximately 43% were decided in favor of the state, 31% were decided in favor of the investor, and 26% were settled.\textsuperscript{130}

Additionally, skeletal as investment treaties can be, they very often will declare their purpose, which will invariably be the encouragement and protection of investment, and frequently also the creation of a stable framework for investment.\textsuperscript{131} Indeed, the very structure of investment treaties, insofar as the treaties provide guarantees and benefits to investors\textsuperscript{132} but typically do not also impose obligations on the investors, leaves little doubt that the investment regime is deliberately investor-centric. Under these circumstances, it is not at all surprising, as Roberts herself points out, that some tribunals have concluded that because investment treaties were intended to protect foreign investment, all uncertainties should be resolved in favor of investors.\textsuperscript{133} Correspondingly, any tension between state-to-state and investor-state arbitration should be resolved in favor of the latter.

To sum up, I conclude that on balance, the text, object and purpose, and history of investment treaties support the rule proposed by this Article.


\textsuperscript{131} See NEWCOMBE & PARADELL, supra note 23, at 65 (citations omitted) (“[International investment agreements] have a recognizable look . . . . For example, a common title is ‘Treaty between [one contracting party] and [the other contracting party] concerning the encouragement and reciprocal protection of investment.’ Preambles are also often similar, providing a short statement of purposes such as ‘desiring’ to promote greater economic cooperation, ‘recognising’ that an agreement on the treatment of investment will stimulate the flow of private investment, and ‘agreeing’ in this context on the importance of a stable framework for investment.”).

\textsuperscript{132} See DOLZER & SCHREUER, supra note 55, at 25 (“BITs give guarantees to investors but do not normally address obligations of investors.”).

\textsuperscript{133} See Roberts, supra note 119, at 12 (citations omitted) (“Some tribunals have concluded that, as investment treaties were intended to protect foreign investment, all uncertainties should be resolved in favor of investors.”).
A. The Text of Article 27(1)

All things considered, however, perhaps the most formidable obstacle to implementation of this Article’s proposed rule is the text of Article 27(1) itself (or a similar BIT provision). Article 31 of the Vienna Convention of the Law of Treaties, the cardinal rule for interpreting treaties, provides in part that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”\(^{134}\) The plain language of Article 27(1) and the fact that the Convention’s travaux préparatoires evidence deliberation on the relationship between investor-state and state-to-state investment treaty arbitration suggest that the two qualifications criticized above were intended.\(^{135}\) That is, the “ordinary meaning” of Article 27(1) is that it applies only to home states, and is further triggered only upon the investor consenting to arbitration. There is some—but not much—wiggle room with regard to the former qualification in that Article 27(1) does not explicitly exclude host states from its scope. Nevertheless, like the Banro American tribunal,\(^{136}\) one might read Article 27(1) in tandem with Article 26, which states in relevant part that “[c]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.”\(^{137}\) Article 26 is the clearest expression yet of the self-contained and autonomous nature of investor-state arbitration under ICSID.\(^{138}\) It necessarily and naturally complements Article 27, which for that reason “must also be seen in the context of the exclusive remedy rule of Art. 26.”\(^{139}\) As the Banro American tribunal put it:

Regarding the purpose and aim of the ICSID Convention, they are to exclude diplomatic protection, along


\(^{135}\) See generally SCHREUER ET AL., supra note 35, at 420–22.

\(^{136}\) See Banro American Res., Inc. & Société Aurifère du Kivu et du Maniema S.A.R.L. v. Dem. Rep. Congo, ICSID Case No. ARB/98/7, Award of the Tribunal (Sept. 1, 2000) (excepts), 17 ICSID REV.–FOREIGN INV. L.J. 382 (2002) (“It is for this reason, as noted by Schreuer, that Article 27 should be read in view of Article 26, which constitutes its actual context and according to which the consent to ICSID arbitration ‘shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.’”).

\(^{137}\) ICSID Convention, supra note 11, art. 26.

\(^{138}\) See SCHREUER ET AL., supra note 35, at 351–52.

\(^{139}\) Christoph Schreuer, Commentary on Article 27 of the ICSID Convention, 12 ICSID REV.–FOREIGN INV. L.J., 205, 207 (1997).
with its political drawbacks, for the benefit of [ICSID] arbitration channels . . . . The exclusion of diplomatic protection is, we note, inherent in the system, of which it constitutes an essential element, and we thus understand that it precludes derogation by the parties . . . . Any method of combining diplomatic protection with ICSID arbitration is precluded.\(^{140}\)

Moreover, the three tribunals that have considered Article 27(1), i.e., Banro America, Lucchetti, and Italy v. Cuba, have all taken positions that arguably depart from its literal application in favor of preserving the integrity of investor-state arbitration, highlighting the important role played by the Convention’s “object and purpose” in its interpretation that would favor the proposal argued herein. Further, while Christoph Schreuer has noted in his authoritative treatise on the ICSID Convention that the text of Article 27(1) preserves the investor’s option to request diplomatic protection from its home state so long as the investor has not consented to arbitration, he has at the same time observed that “[a] choice between ICSID arbitration and diplomatic protection appears to be contrary to at least some of the avowed purposes of Art. 27.”\(^{141}\) In sum, notwithstanding the difficulties posed by the language of Article 27(1), the more reasoned approach to resolving the tension between the two arbitral regimes is to disallow state-to-state arbitration of any issue that can and should ordinarily be resolved through investor-state arbitration.

CONCLUSION

While many, if not most, BITs contain both state-to-state and investor-state arbitration provisions, the relationship between the two has been little studied. This paper’s systematic analysis of recent cases brings to light the surprisingly unruly, almost dysfunctional relationship between the two arbitral regimes. This paper traces the contours of the disorder as spawned by Article 27(1) of the ICSID Convention to emphasize its textual inconsistency with the history of the relationship between the regimes and the purposes of the Convention. Specifically, the fact that Article 27(1) applies on its terms to home but not host states, and is triggered only upon the investor consenting to arbitration, leaves room for duplicative and politicized arbitral proceedings of the same dispute and thus conflicting awards.

\(^{140}\) Banro American Res., Inc., ICSID Case No. ARB/98/7, Award of the Tribunal, ¶¶ 19, 21.

\(^{141}\) Schreuer et al., supra note 35, at 425.
The more coherent approach is to treat the two arbitral systems as mutually exclusive, and to preclude state-to-state arbitration of any dispute that is properly resolved through investor-state arbitration regardless of whether the investor has yet to consent to arbitration. As reconceived by my proposal, the relationship between the two arbitral systems finally reflects the historical primacy of investor-state arbitration in investment dispute resolution, averts the risk of conflicting awards, and shields the dispute from entanglement with politics and diplomacy.