

SYMPOSIUM ON SERGIO PUIG AND GREGORY SHAFFER, “IMPERFECT ALTERNATIVES: INSTITUTIONAL CHOICE AND THE REFORM OF INVESTMENT LAW,” AND ANTHEA ROBERTS, “INCREMENTAL, SYSTEMIC, AND PARADIGMATIC REFORM OF INVESTOR-STATE ARBITRATION”

CONTROL, CAPACITY, AND LEGITIMACY IN INVESTMENT TREATY ARBITRATION

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Arbitration has long been the default mechanism for resolving international investment disputes. The traditional consensus favoring arbitration, however, has now given way, and reform proposals abound. The articles by Sergio Puig and Gregory Shaffer, on institutional choice and investment law reform, and by Anthea Roberts, on incremental, systemic, and paradigmatic reform of investor-state arbitration, helpfully situate the current controversies, debates, and reform options for states.¹ Both articles reveal just how far and fast the debate has shifted in recent years. They also confirm states’ desire to exercise greater control over the regime for resolving international investment disputes. Many states continue to struggle to fully comply with their investment treaty obligations, to efficiently defend against investor claims, and to properly keep abreast of and shape developments in international investment law. Puig and Shaffer provide a useful framework for comparatively assessing possible institutional alternatives in light of their relative trade-offs. But any reform recommendations should draw lessons from states’ experience with the existing regime, including states’ significant problems of *capacity*. The merits of any reform proposals, therefore, should be measured in part by their ability to improve states’ capacity to cope with the existing investment protection regime and rapidly changing developments.

Shifting Perceptions of Legitimacy

Perceptions of the legitimacy of investment treaty arbitration have shifted radically in the last fifteen years. In 2003, in the early stages of the “baby boom” of investment treaty arbitration,² all signs pointed toward an international consensus in favor of international arbitration, including for international investment disputes. An editorial note in the *American Journal of International Law* observed:

Arguably, the international community overall is closer now than at any time in history to a consensus on (1) the utility of international arbitration as a proper substitute for national court litigation of international

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¹ Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AJIL 361 (2018); Anthea Roberts, *Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*, 112 AJIL 410 (2018).

² Stanimir A. Alexandrov, *The “Baby Boom” of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals—Shareholders as “Investors” under Investment Treaties*, 6 J. WORLD INV. & TRADE 377 (2005).

investment and commercial disputes, (2) the basic procedures required for fair and effective international dispute resolution, (3) the role that states must play in creating an international and national legal environment that fosters effective arbitration, and (4) the need for a reciprocally supportive relationship between national courts and arbitral tribunals.³

Today, it would be difficult to find any such consensus.⁴ Instead, a new consensus appears to have emerged in recent years, at least among states: increased state control. All states appear to be seeking to exercise greater control over the international investment protection regime, albeit through different routes. States are seeking greater control over the development of international investment law, including by better defining certain key treaty protections. States are seeking to promote greater coherence in investor-state arbitration, including by expressly authorizing non-disputing-party submissions and binding treaty interpretations. They are narrowing the types of permissible claims and claimants, including by eliminating procedures and substantive protections deemed too broad or indeterminate. They are seeking to exercise greater control over the dispute-resolution process, by conditioning or limiting consent to arbitration, or even by eliminating investor-state arbitration entirely in favor of state-to-state arbitration or litigation before an international investment court. And they are expanding the ways in which they preserve authority and discretion to regulate, including by exempting from arbitration additional sectors or types of core government activities (such as tax or monetary policy) or taking additional reservations and exceptions to national and most-favored-nation treatment.

The Existing Ad Hoc, Decentralized, and Bilateral System

In evaluating these developments, it is useful to recall how the current system developed and evolved. To date, the international community has been unable to conclude a comprehensive treaty on international investment protection, such as the failed Organisation for Economic Co-operation and Development-sponsored Multilateral Agreement on Investment. Instead, the investment protection “system” has evolved piecemeal over decades through many sources and actors: espousal practice; customary international law; national investment laws; international investment contracts; UN practice; private efforts (including draft conventions, International Chamber of Commerce codes, International Bar Association guidelines, the writings of scholars, and so forth); many hundreds of awards and decisions by international tribunals; and of course thousands of treaties, mostly bilateral (friendship, commerce, and navigation treaties, bilateral investment treaties, and free trade agreements), as well as some important but narrow multilateral treaties, such as the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States and the New York Convention.⁵

The resulting framework is ad hoc, decentralized, and largely bilateral.⁶ The system’s bilateralism (or, increasingly, regionalism) has been perceived as a key strength. It thus has been argued:

Because there is no global, comprehensive treaty on investment protection, it remains for each State to conclude, with willing partners, agreements based on the State’s own assessment of the costs and benefits of various approaches, both to dispute settlement and to investment protections themselves. The system is

³ Charles N. Brower & Jeremy K. Sharpe, *International Arbitration and the Islamic World: The Third Phase*, 97 AJIL 643, 647 (2003).

⁴ See Puig & Shaffer, *supra* note 1; Roberts, *supra* note 1.

⁵ See Joost Pauwelyn, *At the Edge of Chaos? Foreign Investment Law As a Complex Adaptive System, How It Emerged and How It Can Be Reformed*, 29 ICSID REV. 372 (2014) (tracing development); Puig & Shaffer, *supra* note 1.

⁶ *But see* STEPHAN W. SCHILL, *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* (2009) (discussing the mechanisms fostering multilateralization of the international investment regime).

not static, but is capable of evolving—and in fact is evolving—in ways that might be far more difficult if a global investment treaty were already in place.⁷

The current investment arbitration system may be considered a dynamic laboratory. For some, its success can be measured by the number of international investment agreements concluded by states from all parts of the world and at all levels of economic development, as well as the number of cases brought and successfully adjudicated.⁸ But the current ad hoc, decentralized, bilateral system of investment protection also has created significant challenges for states. Puig and Shaffer highlight the many criticisms of the existing system: indeterminacy; inconsistency; insufficient transparency; treaty-shopping; conflicts of interest; and so on. But states face at least three additional important challenges, the responses to which could have enormous consequences for institutional choice and the reform of international investment law.

Three Challenges with the Existing System

The first challenge concerns *reciprocity*. Unlike traditional international dispute resolution, international investment disputes generally are not between two states, but between a state and a private party. This difference matters. States are repeat players in international adjudication, acting as claimants and respondents. States understand that the arguments they advance can later be made against them or their investors. As a result, states are—or at least should be—constrained in the arguments they advance in international adjudication. Private parties are different. They generally are not repeat players in international adjudication and typically act only as claimants in investment treaty disputes. As Vaughan Lowe has observed, private parties have every reason to pitch their claims at the highest levels, because they have no fear that their words will be used against them later.⁹ The legal arguments they advance, therefore, can distort the sound development of international law through their influence on international investment awards.¹⁰

The second challenge concerns *opposability*. There are now hundreds of publicly available investment arbitration awards. Most of these awards are not directly opposable to any particular state, but they may be cited against that state in its investment disputes. As Daniel Bethlehem asks, in a related context:

What does one do if you are the UK or some other indirectly interested state in such circumstances, both to protect your own interests and to ensure that the development of the law stays on a sensible track? These statements or determinations are not directly opposable to you, but they nonetheless form part of a growing body of dispositive legal principles that in many cases is of very variable quality.¹¹

This is one of the central challenges in investment arbitration today. Formally, arbitration decisions are not binding precedent. Yet they are routinely cited as persuasive authority, including against states that were not party to the dispute and that had no role in the underlying case. Thus, *every* state potentially has an interest in *every* investment

⁷ Karin Kizer & Jeremy K. Sharpe, *Reform of Investor-State Dispute Settlement: The U.S. Experience*, in *RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM* 172, 174 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015).

⁸ See, e.g., Stephen M. Schwebel, Remarks at Sidley Austin: [The Proposals of the European Commission for Investment Protection and an Investment Court System](#) (May 17, 2016).

⁹ VAUGHAN LOWE, *INTERNATIONAL LAW* 24 (2007).

¹⁰ See, e.g., [Interpretation of the Free Trade Commission of Certain Chapter 11 Provisions](#) (July 31, 2001) (confirming that the concept of “fair and equitable treatment” standard in Article 1105(1) of the NAFTA does “not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens”—as arbitral tribunals constituted under NAFTA Chapter Eleven previously had determined following arguments advanced by claimant investors).

¹¹ Daniel Bethlehem, *The Secret Life of International Law*, 1 *CAMBRIDGE J. INT'L & COMP. L.* 23, 31-32 (2012).

arbitration award, including in the tribunal's interpretation of international law, and every state arguably has a commensurate interest in proactively shaping the development of international investment law through international adjudication.

Arbitrating parties, including respondent states, primarily seek to shape the law through their pleadings—opining on the relevance, correctness, and persuasiveness of arbitral decisions and awards. This “is an efficient [way] for a party in a judicial process to show what it believes to be the law.”¹²

States also may seek to shape arbitral precedent as non-disputing treaty parties. In principle, states have at least four avenues for doing so:

1. States may make non-disputing-party submissions to arbitral tribunals;¹³
2. States may make official statements on international investment decisions and awards, including in cases in which they were not the respondent state;¹⁴
3. States may issue joint interpretations of their international investment agreements;¹⁵ and
4. States may intervene in annulment or set-aside proceedings.¹⁶

Each of these mechanisms allows courts and tribunals to hear the views of all treaty parties, not just the views of the claimant and respondent state.¹⁷ States also may publish their pleadings and non-disputing-party submissions, allowing others to build on that practice, and thus potentially influence the development of the law through cases in which the state is not a respondent or a non-disputing treaty party. This process should lead to better arbitral decision-making and provide greater clarity and predictability for investors and states alike. The tools available to states within the arbitration process complement those available to states outside of it, including treaty-making.

For many states, opposability is a challenge because the various mechanisms for controlling the development of arbitral precedent are perhaps more theoretical than real, as these states currently do not have the capacity to engage effectively as non-disputing parties. But because cases will continue to be decided under existing treaties for many years, it is imperative that states understand and utilize all of the tools currently at their disposal.

The third challenge concerns *institutionalization*. The decentralized investment treaty system lacks an intergovernmental organization mandated—and adequately funded—to provide the institutional support, training, and

¹² [Railroad Dev. Corp. v. Guat.](#), ICSID Case No. ARB/07/23, Award para. 217 (June 29, 2012).

¹³ See, e.g., [Mesa Power LLC v. Can.](#), PCA Case No. 2012-17, Award paras. 192, 194, 473-74 (Mar. 24, 2016) (in which Mexico and the United States accepted the tribunal's invitation to make non-disputing-party submissions exclusively to address the impact of the award in *Bilcon v. Canada*).

¹⁴ States have many fora in which to make such statements, including in the Sixth Committee (Legal) of the UN General Assembly, the International Law Commission, and the UN Commission on International Trade Law. They may also comment publicly on the outcome of particular disputes. See, e.g., [Statement by the Chinese Ministry of Foreign Affairs](#) (Oct. 21, 2016) (declaring “incorrect” the decision of the Singapore Court of Appeal's judgment upholding an arbitral tribunal's decision that the China-Laos BIT applies to Macau SAR).

¹⁵ See, e.g., Government of India, Ministry of Finance, [Office Memorandum on “Issuing Joint Interpretative Statements for Indian Bilateral Investment Treaties”](#) (Feb. 5, 2016) (proposing joint interpretive statements with twenty-five BIT partners, including on the scope of the “effective means” provision, following the interpretation of that provision made by the tribunal in *White Industries v. India*).

¹⁶ See, e.g., [Letter](#) from U.S. State Department Assistant Legal Adviser Lisa Grosh to ICSID Ad Hoc Committee Secretary re *Siemens AG v. Argentina* (ICSID Case No. ARB/02/8) Annulment Proceeding' (May 1, 2008) (offering U.S. government views to the ad hoc Committee “regarding a Contracting State party's obligation to abide by and comply with adverse ICSID awards”).

¹⁷ The treaty parties' common, consistent, and concordant views may constitute a “subsequent agreement” or “subsequent practice” for the interpretation of the treaty. See [Vienna Convention on the Law of Treaties](#) art. 31(3), May 23, 1969, 1155 UNTS 331 (providing that any subsequent agreement between the parties regarding the interpretation of the treaty, or any subsequent practice in the application of the treaty that establishes the parties' agreement regarding its interpretation, “shall be taken into account, together with the context”).

capacity-building that many states require to engage effectively in avoiding, mitigating, and managing international investment disputes. In practice, many states lack a dedicated office for responding to international investment disputes. Responsibilities, authorities, and funding for cases tend to be sorted out (if at all) only after investment disputes have been brought. Many states lack a proper understanding of their investment treaty commitments, and thus cannot easily avoid or settle disputes. They often lack significant expertise in international investment arbitration, and thus cannot defend themselves effectively and efficiently. And they often fail to obtain significant practical experience litigating investment disputes, and thus cannot properly revise their treaties with the benefit of that experience. For some, a feedback loop of incomprehension, inexperience, and incapacity has bred discontent with the current decentralized system.

To Puig and Shaffer, the answer to such challenges rests in complementarity. Establishing national courts as “first-line actors” for resolving international investment disputes, they argue, could help build the “domestic rule of law dynamically over time.”¹⁸ Many states, including the United States, already encourage resort to domestic courts prior to the commencement of international investment arbitration,¹⁹ while generally resisting any requirement to exhaust local remedies.²⁰ Many more states are following suit.²¹ It remains to be seen whether such efforts, if widely adopted, will reduce the number of investment treaty arbitrations over time.

Capacity as Legitimacy

In the meantime, many states still need to take concrete steps to build capacity within their governments to better cope with today’s dynamic international investment arbitration system. Not every state, of course, will want or need to develop in-house capacity to represent itself. But every state active in investment arbitration needs to take steps to closely monitor investment disputes; to participate actively as a respondent state; to intervene where appropriate as a non-disputing party; and to adapt its investment treaty negotiations to reflect fast-changing developments in international arbitration.²²

Seen in this light, the biggest challenge (and opportunity) today in international investment arbitration is perhaps at the domestic level. The legitimacy (and utility) of the system rests in part upon states’ ability to understand and comply with their legal obligations, effectively defend against investor claims, and keep the law on a sensible track. Capacity thus is an integral part of the legitimacy and viability of international investment arbitration. We should welcome, and encourage, reform efforts that help states build the capacity required to achieve these goals.

¹⁸ Puig & Shaffer, *supra* note 1.

¹⁹ See, e.g., [2012 U.S. Model Bilateral Investment Treaty](#) art. 26(2)(b)(ii) (encouraging the use of local dispute settlement provisions by permitting investors generally to pursue other legal remedies within the limitations period before commencing investor-state arbitration).

²⁰ Although U.S. international investment agreements contain no “exhaustion” requirement, the United States argues that, as a matter of international law, the “international responsibility of States may not be invoked with respect to non-final *judicial* acts unless recourse to further domestic remedies is obviously futile or manifestly ineffective.” *Eli Lilly & Company v. Can.*, Case No. UNCT/14/2, [Submission of the United States of America](#) 10-11 (NAFTA, Mar. 18, 2006) (emphasis added).

²¹ See, e.g., [Comprehensive and Economic Trade Agreement](#) art. 8.22, Oct. 30, 2016; [Comprehensive and Progressive Agreement for Trans-Pacific Partnership](#) art. 9.21.2, Mar. 8, 2018.

²² See, e.g., Anna Joubin-Bret, [Establishing an International Advisory Centre on Investment Disputes?](#) (E15 Task Force on Investment Policy Think Piece, Dec. 2015) (discussing “the example of the successful Advisory Centre on WTO Law (ACWL) established to provide advice and defence services to states in World Trade Organization (WTO) disputes”).