

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”

WHO’S AFRAID OF REFORM? BEWARE THE RISK OF FRAGMENTATION

*Catharine Titi**

With multilateral negotiations to reform investor-state dispute settlement (ISDS) now underway, it is legitimate to wonder about the outcome. Many seem to hope for a single, global reform, but that may be unrealistic in the near future. Indeed, the article by Sergio Puig and Gregory Shaffer and the essay by Anthea Roberts both suggest that states are pursuing a wide range of changes to the current system, some of which are incompatible with one another. A number of states prefer investment arbitration. Others favor an investment court. Still others reject international dispute settlement altogether. In this essay, I identify a collection of these options and argue that their number and variety, combined with the intensity of state preferences on the matter of ISDS reform, are likely to preclude a multilateral solution for the foreseeable future and lead to continued fragmentation.

A Plurality of Options

Although their contributions differ in important ways, the article by Puig and Shaffer and the essay by Roberts both suggest that states are pursuing a wide range of reforms in international investment law. Puig and Shaffer canvass the advantages and disadvantages of the various options with respect to ISDS.¹ Evident in their article is not only the breadth of choice, but also the thinness of the line between a *good* option and a *better* alternative.

The plurality of options also becomes obvious in Roberts’s comment.² In view of the positions that states are adopting in Working Group III of the UN Commission on International Trade Law (UNCITRAL), she identifies three types of reform: incremental, systemic, and paradigmatic. Incremental reform favors investment arbitration and encourages modest change to address particular concerns. Systemic reform advocates more radical change, such as by replacing investment arbitration with an international investment court. Paradigmatic reform aims to disengage from the existing system, which it rejects as fundamentally flawed.³ Roberts refers to these types as evidence of pluralism, but pluralism is simply another word for fragmentation, and is a substandard option if a truly multilateral solution were feasible. But is it? This is the question to which I now turn.

* *Research Associate Professor at the French National Centre for Scientific Research (CNRS)–CERSA, University Paris II Panthéon-Assas.*

¹ Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AJIL 361 (2018).

² Anthea Roberts, *Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*, 112 AJIL 410 (2018).

³ I find Roberts’s taxonomy useful and will therefore adopt it for purposes of the ensuing discussion.

Reforms That Include ISDS

International investment agreement (IIA) practice can be divided into two camps: (1) practice that includes some type of ISDS and (2) practice that discourages or disallows ISDS. This section addresses the former, which reflects both incremental and systemic reform, and intermediate approaches but may also correspond to nonreform positions.

The bulk of existing IIAs endorse investment arbitration. So do some new regional investment treaties that arguably institute incremental reforms. Examples of the latter include the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),⁴ which eleven Pacific states signed in 2018 after the United States withdrew from the Trans-Pacific Partnership, and the Pacific Alliance Additional Protocol,⁵ which Chile, Colombia, Mexico, and Peru concluded in 2014.

There is nothing surprising about incremental reform. Because it conforms to existing models, incrementalism is the most predictable way of proceeding. States have regularly revised and adapted IIAs to adjust to changing circumstances and to react to lessons learned in ISDS. For this reason, incrementally reformed treaties do not necessarily reveal a state's wholesale commitment to incremental reform.

The incrementalist camp doubtless contains some strong supporters opposed to radical change or paradigmatic reform. The United States, with its marked skepticism towards standing international courts and tribunals, is unlikely to countenance the institutionalization that will come about with an international investment court. But some states might pursue incremental reform in some treaties while accepting systemic or even paradigmatic reform in others. For example, Australia follows an approach of incremental reform in the CPTPP and an approach of paradigmatic reform in the Australia–Japan Economic Partnership Agreement, which does not provide access to ISDS. Incremental reform can also be a fallback for those who are undecided or those who wish to retain flexibility.⁶

Other actors are unlikely to buy into incremental reform with investment arbitration. This appears to be the case with the European Union, currently the main champion of systemic reform. Since 2015, the European Union has been building and promoting a new model of dispute settlement, a standing international investment court. In March 2018, after earlier exploratory talks on multilateral reform of ISDS, the Commission obtained an official mandate to negotiate a convention establishing a multilateral court.⁷ In addition, the Union has already instituted bilateral investment courts in a number of pending IIAs, notably in the Comprehensive Economic and Trade Agreement (CETA) with Canada (2016), the EU–Singapore Investment Protection Agreement (2018), and the EU–Vietnam Investment Protection Agreement (2018).⁸ Likewise, in the Union's IIA with Mexico, the parties have agreed in principle to establish an investment court.

The European Union probably perceives a standing court as a means of legitimizing what has become a system that is difficult to sell in Europe. There is also some hypocrisy involved: European states and civil society were happy with investment arbitration for half a century, but things changed when EU member states started to

⁴ [Comprehensive and Progressive Agreement for Trans-Pacific Partnership](#), Mar. 8, 2018.

⁵ [Pacific Alliance Additional Protocol](#), Oct. 2, 2014.

⁶ See also Roberts, *supra* note 2.

⁷ Council of the Eur. Union, [Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes](#), 12981/17 ADD 1 DCL 1 (Mar. 20, 2018).

⁸ In light of Opinion 2/15 of the Court of Justice of the European Union, the investment chapter of the EU–Singapore and EU–Vietnam FTAs has been separated from the rest of the agreement. Modifications to the final text of the investment chapter appear to be still forthcoming, at least in the case of the EU–Vietnam IIA.

become the target of investment claims. This led to a quest for alternatives untainted by the bad publicity that attached to investment arbitration, precisely due to such claims.

Either way, it will be difficult for the European Union to withdraw from the multilateral investment court project for two reasons. First, the EU has argued vociferously in favor of the court. The very reason for the competence transfer over foreign direct investment from the member states to the Union in 2009 was to strengthen the Union's power in investment negotiations. At this point, the European Union could very well lose face if it changes course. One should also recall pending Opinion 1/17 of the Court of Justice of the European Union (CJEU), concerning the compatibility of CETA's investment court system with EU law, which hangs at this moment like the sword of Damocles over the Union's IIAs by creating uncertainty as to whether the CJEU will condone CETA's investment court. Second, creating a multilateral court would release the pressure brought to bear by the bilateral investment courts, which some fear to be unworkable, given the high upfront costs required to establish them and uncertainty regarding the enforcement of their decisions, particularly in countries that do not endorse systemic reform, such as the United States.

An intermediate reform that would retain ISDS is investment arbitration with an appellate system instead of the currently limited review options: set-aside or annulment. An appellate system could be introduced either by allowing recourse to ad hoc appellate committees, as per the International Centre for Settlement of Investment Disputes (ICSID) annulment model, or a permanent appellate tribunal. It could also assume a variety of forms; it could include de novo review, it could be fact-finding intensive, or it could be an annulment-plus model permitting review of legal correctness. But it may be difficult even for such intermediate positions to garner global support, as they are compromise solutions that could leave all parties dissatisfied. Incrementalists will be unhappy about what they will view as substantial change. Systemic reformers will resent that reform has not proceeded further. The European Union will resent the lack of predictability if appeal functions through ad hoc appellate committees. And an arbitration-plus appellate body would probably fail to obtain the support of the United States.

Reforms That Discourage or Disallow ISDS

The landscape becomes even more fragmented when one adds paradigmatic reform to the equation. Paradigmatic reform can mean either of two things: a wholesale abandonment of the system (e.g., termination of IIAs and the avoidance of new treaties) or a focus on alternatives, such as domestic courts and dispute prevention. Both exclude or at least discourage access to ISDS.

While some states such as Ireland and Norway have preferred over the years not to sign IIAs, a number of other states have started to terminate their IIAs. In doing so, these states are demonstrating a growing reluctance to accept international investment obligations and ISDS. According to the United Nations Conference on Trade and Development, 2017 was the first year in which states terminated more IIAs than they concluded.⁹ Among the countries recently active in terminating their IIAs are Bolivia, Ecuador, India, Indonesia, South Africa, and Venezuela. Some of these states, such as India, are said to be willing to renegotiate their bilateral investment treaties (BITs). Others may sign IIAs anew; an eagerly-awaited constitutional court decision in Ecuador may allow the state to reengage with investment protections.

Still other states conclude IIAs but exclude ISDS from their provisions. This approach has not proven sustainable for any given state, except perhaps Brazil. Australia has toyed with the idea of ISDS-free investment treaties, but has not consistently pursued the policy. Some time ago, Bolivia, Ecuador, and Venezuela denounced the ICSID Convention, and thus limited access to ISDS, but other states have not followed their example.

⁹ UN Conference on Trade & Dev., [World Investment Report](#) 17 (2018).

A few states are simply making it harder to pursue ISDS. The recent Indian Model BIT is a case in point. This model requires the investor to exhaust domestic remedies before it can access ISDS. Alternatively, it provides that the investor, “having *diligently* pursued domestic remedies,” can establish that continued pursuit of domestic relief would be futile if (1) there are “no *reasonably* available domestic legal remedies capable of providing *any* relief for the dispute concerning the underlying Measure” or (2) “the process for obtaining legal relief provides no *reasonable possibility* of such relief in a *reasonable* period of time.”¹⁰ Upon satisfying this language, the investor can initiate a dispute, but cannot access an international tribunal until one year later, after using its “best efforts to try to resolve the dispute amicably through *meaningful* consultation, negotiation or continued pursuit of *any* available domestic remedies or *solutions*.”¹¹ The text is thus strewn with adjectives and other specifications that make it difficult to argue the futility of domestic remedies. The model’s power to attract India’s partners is uncertain. If India does not find willing partners, it is unclear whether it would turn away from this model.

Brazil has pursued yet another course. After famously declining to ratify any of its old generation BITs from the 1990s, Brazil developed its own investment treaty model—the “cooperation and facilitation investment agreement” (CFIA)—and started negotiating on its basis in 2015. Focused on dispute prevention, this model offers interstate dispute settlement but no access to ISDS. Brazil has signed CFIAs with a number of African and Latin American countries. In addition, the CFIA served as the basis for the Intra-MERCOSUR Investment Facilitation Protocol, which included, apart from Brazil, Argentina, Paraguay, and Uruguay as parties. After resisting signing IIAs with ISDS for almost thirty years, Brazil will be disinclined to follow incremental or systemic reform.

A separate area of reform concerns access to interstate dispute settlement. Traditional investment treaties have provided for this option alongside ISDS for disputes over the interpretation of the IIA. Other approaches, such as Brazil’s, provide for it as an alternative to ISDS.¹² Some treaties, such as the Canada-China BIT of 2012, incorporate a filter mechanism with a *renvoi* of sensitive issues to an interstate tribunal.

One final area of divergence concerns consultation provisions. Traditional IIAs generally provide for consultations, negotiations, and mediation alongside ISDS. Investors with no access to ISDS may resort to negotiations and mediation as a substitute. Investment mediation, while marginal when compared to arbitration, is certainly becoming an option: mediation rules that have been in disuse are gaining currency, dispute settlement centers are promoting new rules, and in June 2018 UNCITRAL approved a new Convention on the Enforcement of Mediation Settlements.¹³ Disputes can also end in consultations, negotiations, or mediation in a roundabout way through political risk insurance. For instance, the Multilateral Investment Guarantee Agency seeks to prevent disputes from escalating by intervening early in the event of a disagreement.¹⁴ Such intervention can take place through informal consultations or mediation.

Conclusion

The foregoing examples show that the ISDS landscape is fragmented. This does not mean that a coordinated, single solution is impossible. But it does highlight the difficulties that states must surmount to reach such a solution in the future. When faced with different negotiating partners, states sign different treaties. For example, Mexico

¹⁰ [Bilateral Investment Treaty Between the Government of the Republic of India and ___](#) art. 14.3 (emphasis added) [hereinafter Indian Model BIT].

¹¹ *Id.* (emphasis added).

¹² Joerg Weber & Catharine Titi, [UNCTAD’s Roadmap for IIA Reform of Investment Dispute Settlement](#), 21 N.Z. BUS. L.Q. 319, 326 (2015).

¹³ See UN Comm’n on Int’l Trade Law, [International Commercial Mediation: Draft Convention on International Settlement Agreements Resulting from Mediation](#), UN Doc. A/CN.9/942 (Mar. 2, 2018).

¹⁴ [Investment Guarantees: Overview](#), MULTILATERAL INVESTMENT GUARANTEE AGENCY.

agreed to arbitration in the Pacific Alliance Additional Protocol; it agreed to Brazil's CFIA model with dispute prevention in the Intra-MERCOSUR Investment Facilitation Protocol; and it agreed to an investment court in its treaty with the European Union. But while some may cherish their flexibility to diversify their IIAs, other states may be less certain to do so. The United States, for instance, is not very likely to accept an investment court, the European Union is not very likely to accept investment arbitration, and Brazil is unlikely to accept either. Continued fragmentation thus seems more likely than any single uniform solution.

Multilateralism may come in time. Reform of international investment law is slow. It took decades for the ICSID Convention to acquire its current membership, but new states are still adhering to it more than fifty years since its adoption.¹⁵ Maybe the greater risk would have been for states to be unwilling to engage in multilateral reform negotiations. But now that such negotiations *are* afoot, we should be mindful of the new challenge: the risk of formalizing fragmentation by agreeing to disagree, and thereby further embedding fragmentation in the system.

¹⁵ Twelve states have ratified the ICSID Convention since 2009.