

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”

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There are two ways of thinking about institutional choice in the context of multilateral investment law reform. One starts from abstract principles, asking what policy goal investment law is supposed to achieve and what institutional choice most effectively advances that goal. The other draws on practical experimentation, asking what institutional choices states are making and how these choices perform in real life. Sergio Puig and Gregory Shaffer present a compelling analytical framework for the former, top-down approach to investment law reform.<sup>1</sup> In this essay, I will scrutinize their analysis and argue that the latter, bottom-up approach is more promising.

First, I show that Puig and Shaffer’s framework is contingent on specifying investment law’s overarching policy goal as a common yardstick by which to compare institutional choices. Yet, as part of the current reform process, states are not only exploring new institutional alternatives, but are also redefining what investment law is about in the first place. I show empirically that investment treaties are more diverse today than they have ever been, in part because many states, particularly in the developing world, have shifted from being rule-takers to rule-makers. The current investment regime thus resembles a global laboratory of investment law reform alternatives where states experiment with new policy goals and novel institutional designs. On the one hand, this diversity limits the applicability of Puig and Shaffer’s top-down framework since states use different yardsticks to measure institutional performance. On the other hand, it creates new opportunities as we get to observe how a wide range of reform alternatives actually performs in practice. I end with the recommendation that we should let this experimentation run its course in the short term and then, in the medium term, distill best practices that can guide multilateral reform of investment law from the bottom up.

*Institutional Choice Depends on the Goal of Investment Law*

In their article, Puig and Shaffer argue that institutional choice in the investment law reform context requires a systematic comparative analysis. Rather than engaging in an idealized comparison of the advantages of a permanent investment court and the disadvantages of ad hoc arbitration, they assert that reformers should consider the unique trade-offs presented by different institutional alternatives to pick the design that best advances the policy objective that investment law is trying to achieve. Puig and Shaffer are right that no institution is perfect. But we

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

still have many of them because one can often offset the weaknesses of another. Institutions can be combined to compensate for their individual shortcomings and reinforce their collective strengths. Institutional choice is thus more often about the right mix of institutions (complementarity), rather than the choice of one institution over another (substitution). This simple idea of institutional complementarity underpins institutional design across a range of areas, from constitutional checks and balances to the development of international treaty regimes.<sup>2</sup>

The reform of international investment arbitration offers yet another opportunity to mix and match complementary institutions. Puig and Shaffer compare a selection of market-based, political, and judicial reform alternatives to investor-state arbitration and highlight the merits of considering domestic courts and international tribunals as complements rather than substitutes. Institutional complementarity, however, is not limited to the interplay between domestic and international dispute settlement, but applies to the other institutional alternatives Puig and Shaffer identify as well. For example, one could view state-to-state dispute settlement as complementary to investor-state arbitration rather than as its substitute, with treaties channeling exclusively toward state-to-state settlement only certain types of disputes that investor-state arbitration is ill-equipped to handle, such as mass claims or purely interpretive disputes. Similarly, the market-based and political reform alternatives that Puig and Shaffer describe are often part and parcel of a larger mix of complementary judicial and nonjudicial institutions. The recent Brazilian investment treaties, which Puig and Shaffer refer to as examples of political dispute-settlement alternatives, in fact couple nonjudicial dispute prevention through negotiation and mediation with the possibility of interstate adjudication. In short, states seeking to reform their investment treaties do not face a choice of one institution over another but of picking the right mix from a wide menu of judicial, nonjudicial, domestic, and international institutional alternatives that can be combined in a myriad of different ways.

Given this plethora of potential reform combinations, which institutional mix is to be preferred? Puig and Shaffer rightly state that comparing the merits of different institutional design choices necessarily requires a yardstick. The benchmark they pick is the extent to which different institutional alternatives advance investment law's normative goals. They identify three such goals: fairness, resource allocation efficiency, and peace, all of which they ultimately aggregate under the overarching goal of "accountability under the rule of law." Because judicial institutions are more likely than market-based or political mechanisms to address rule-of-law policy objectives, it is not surprising that Puig and Shaffer limit their discussion of institutional complementarity to the interplay between municipal courts and international tribunals.

A broader mix of judicial and nonjudicial complements comes into view once we consider the subgoals Puig and Shaffer identify. Take resource allocation efficiency as an example. The idea here is that investment law tries to remedy the underprovision of foreign investment: Governmental conduct can harm foreign investors, giving rise to a political risk premium. Because higher profits and insurance markets cannot offset this premium, less capital is invested abroad, leading to fewer investment-related benefits to host states. Investment law is said to remedy this problem by deterring (or pricing-in) bad governmental conduct and thus reducing the political-risk premium. If we accept this as investment law's purpose, reform should focus on identifying the mix of institutional complements that best remedies the underprovision of foreign investment. Reform debates would then focus as much on the goals of investment promotion, facilitation, and liberalization as on protection.

Moreover, when it comes to investment protection, judicial and nonjudicial institutions could be combined to achieve the subgoal of resource allocation efficiency. As Puig and Shaffer rightly state, political risk insurance by itself will not generate efficiency because host states typically fail to price-in the harmful effects of their conduct. But forcing states to price-in the consequences of their actions through the prospect of investment arbitration and monetary damages, which in practice risks overdeterrence (i.e., regulatory chill), is not the only plausible

<sup>2</sup> On the idea of institutional complementarity in international treaty regimes, see for instance Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1 (2005); J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 82 (1991).

institutional response. For example, as a complement to insurance, one can imagine judicial recourse through municipal courts, state-to-state dispute settlement, and nonjudicial compliance mechanisms. One example of the latter is reporting on a state's investment climate by independent third parties and peer-based monitoring mechanisms akin to the World Trade Organization's Trade Policy Review, which could increase reputational costs of noncompliance and thereby strengthen deterrence.<sup>3</sup>

In short, institutional choice in Puig and Shaffer's framework depends on the specific yardstick chosen. Moreover, to exhaustively compare the performance of different institutional designs, one needs to evaluate institutional choices in combination (complementarity) rather than in isolation (substitution). As a result, Puig and Shaffer's analysis works best in a context where the number of design choices to be compared is low (and thus the number of combinations remains manageable)<sup>4</sup> and the policy goal as yardstick is clear.

### *Investment Law's Goals and Institutions Are in Flux*

Present day investment law does not meet these conditions. Hotly contested and in the midst of multilayered reform, the policy goals and institutional choices long associated with investment law are now being challenged. In recent years, scholars have successfully debunked many of the founding myths of investment law. As Puig and Shaffer note, foreign investors often are more rather than less powerful than their domestic counterparts, and this calls into question the additional privileges conferred on them by investment law ("fairness").<sup>5</sup> There is scant empirical evidence that investment treaties lead to more foreign direct investment ("resource allocation efficiency").<sup>6</sup> And investment law has not fully depoliticized interstate investment relations ("peace").<sup>7</sup> Indeed, the most sophisticated empirical and archival research to date suggests that investment law and arbitration are the product of chance, diplomatic photo opportunities, and entrepreneurial public servants rather than a careful design of investment law's costs and benefits.<sup>8</sup>

For many states, the ongoing investment law reform is therefore the first opportunity to genuinely reflect on what purpose investment law is supposed to serve. Today, the question of investment law's underlying policy objective is thus not an empirical or legal one that can be rationalized ex post on the basis of past practice but a political one that states are answering as they design their agreements anew. And different states can come up with different answers to that same question. For some states, including Brazil, investment law may be about facilitating investment flows. For others, including the current U.S. administration, investment treaties may be useful for protecting existing investment stock but should not encourage investment outflows. Still others, including the European Union, may see investment law as an instrument for strengthening a rule-based rather than power-based

<sup>3</sup> There is a rich literature on the different policy instruments that can induce compliance. See, e.g., ABRAM CHAYES & ANTONIA HANDLER CHAYES, [THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS](#) (1995).

<sup>4</sup> Once one compares combinations of institutions rather than individual institutions the number of institutional alternatives to be considered increases exponentially.

<sup>5</sup> Puig & Shaffer, [supra note 1](#), at 369.

<sup>6</sup> See JONATHAN BONNITCHA ET AL., [THE POLITICAL ECONOMY OF THE INVESTMENT TREATY REGIME](#) (2017).

<sup>7</sup> Geoffrey Gertz et al., [Legalization, Diplomacy, and Development: Do Investment Treaties De-Politicize Investment Disputes?](#), 107 *WORLD DEV.* 239 (2018).

<sup>8</sup> LAUGE N. SKOVGAARD POULSEN, [BOUNDED RATIONALITY AND ECONOMIC DIPLOMACY: THE POLITICS OF INVESTMENT TREATIES IN DEVELOPING COUNTRIES](#) (2015); TAYLOR ST. JOHN, [THE RISE OF INVESTOR-STATE ARBITRATION: POLITICS, LAW, AND UNINTENDED CONSEQUENCES](#) (2018); 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); Lauge N. Skovgaard Poulsen & Emma Aisbett, [Diplomats Want Treaties: Diplomatic Agendas and Perks in the Investment Regime](#), 7 *J. INT'L DISP. SETTLEMENT* 72 (2016).

approach to international economic governance. Instead of having one yardstick by which we can compare institutional alternatives, the current investment reform climate is thus producing different yardsticks that favor an ever-widening range of institutional combinations.

*The Global Laboratory of Investment Law Reform Alternatives*

For a long time, investment treaties were homogenous texts designed by Northern rule-makers and adopted by Southern rule-takers.<sup>9</sup> States shared a path-dependent treaty design marked by common terms, principles, and mechanisms. The specific formulation that contracting states “shall at all times [provide/accord/ensure] fair and equitable treatment,” for example, can be found in at least 1220 investment treaties and roots the treaty practice of 152 states from North and South in language from the 1954 Germany-United States Friendship, Commerce, and Navigation treaty.<sup>10</sup> Change in investment law was so modest and limited that a commentary to the 2009 German model Bilateral Investment Treaty (BIT) would relate each clause to the equivalent provision in the Germany-Pakistan BIT concluded fifty years earlier.<sup>11</sup> Similarly, more than one hundred BITs that the United Kingdom concluded over thirty-five years had on average seventy percent of their text in common.<sup>12</sup> More ambitious efforts at institutional innovation emanated principally from North America following the conclusion of the North American Free Trade Agreement, with subsequent U.S. practice serving as focal point for other states as an alternative (BIT 2.0) to the short and simple European-style treaties (BIT 1.0) after investment claims began to rise.<sup>13</sup>

Today, things look very different. We have entered an era where treaty design innovation is more diverse, widespread, and creative than it has ever been. We see states breaking with path dependency and innovating from scratch. Brazil’s investment facilitation agreements and the European investment court system are examples. Similarly, European states such as Slovakia and the Netherlands have departed strongly from their own earlier agreements as well as from current EU investment chapters and are coming up with novel treaty templates.<sup>14</sup>

But not all innovation is from scratch; much of it is the creative recombination of existing design elements in novel ways. Rather than anchoring their practice in models used by dominant states, countries shop around and combine treaty elements as they see fit. The 2016 Slovakia-Iran BIT, for instance, is textually more similar to the 2004 American model BIT than to any prior Slovak, EU, or Iranian treaty.<sup>15</sup> Finally, we are seeing a wider pool of emerging norm entrepreneurs, some of which are coming from the Global South and breaking with the paradigm of Northern rule-makers and Southern rule-takers. India and Brazil, for instance, have both launched new

<sup>9</sup> Wolfgang Alschner & Dmitriy Skougarevskiy, *Mapping the Universe of International Investment Agreements*, 19 J. INT’L ECON. L. 561 (2016); Todd Allee & Clint Peinhardt, *Evaluating Three Explanations for the Design of Bilateral Investment Treaties*, 66 WORLD POL. 47 (2014).

<sup>10</sup> Wolfgang Alschner, *Locked in Language: Historical Sociology and the Path Dependency of Investment Treaty Design*, in RESEARCH HANDBOOK ON THE SOCIOLOGY OF INTERNATIONAL LAW (Moshe Hirsch & Andrew Lang eds., forthcoming 2018).

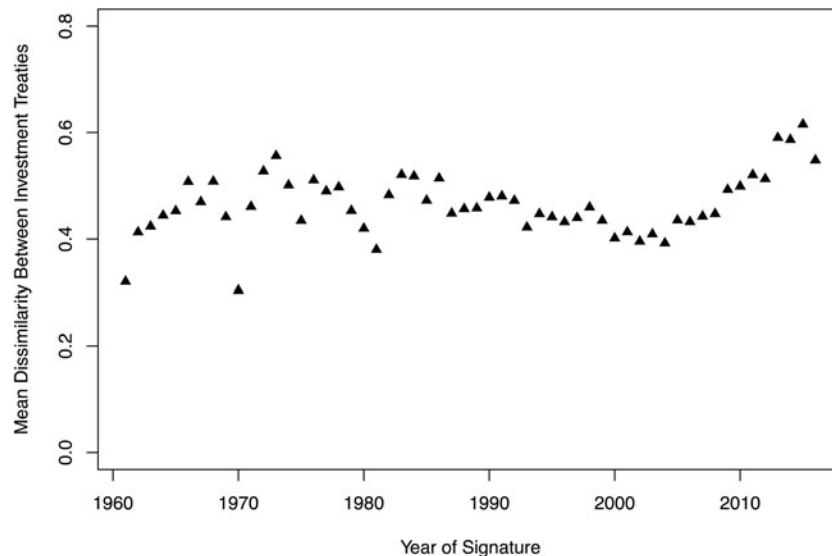
<sup>11</sup> Rudolf Dolzer & Yun-I Kim, *Commentary on Germany’s Model BIT (2009)*, in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES (Chester Brown & Devashish Krishan eds., 2013).

<sup>12</sup> Alschner and Skougarevskiy, *supra* note 9, at 576.

<sup>13</sup> Wolfgang Alschner, *The Impact of Investment Arbitration on Investment Treaty Design: Myth Versus Reality*, 42 YALE J. INT’L L. 1 (2017).

<sup>14</sup> 2016 Slovakia Model BIT (on file with the author); *Agreement on Reciprocal Promotion and Protection of Investments Between and the Kingdom of the Netherlands* (2018). For background on the Slovakian model, see Statement of Slovakia, *UNCTAD Expert Meeting on Taking Stock of IIA Reform* (Mar. 16, 2016).

<sup>15</sup> Wolfgang Alschner & Dmitriy Skougarevskiy, *Convergence and Divergence in the Investment Treaty Universe – Scoping the Potential for Multilateral Consolidation*, 8 TRADE, L. & DEV. (2016).



**Figure 1:** Content Differences of Newly Signed Investment Treaties

investment treaty programs. Innovation has also occurred with respect to African investment treaties.<sup>16</sup> And small states such as Mauritius have played an active role in pushing reform at the multilateral level.<sup>17</sup>

This increasing diversity in the actors and the magnitude of treaty reform is not only evident in the examples provided above, but also measurable empirically. Figure 1 traces differences across investment treaties over time. It uses data from the UN Conference on Trade and Development Mapping Project, which coded 2576 investment treaties from 1959 to 2016 along 205 variables,<sup>18</sup> to calculate average differences in the content of newly concluded treaties by year, and then assigns an annual value between zero and one to reflect the degree of difference between agreements.<sup>19</sup> If all treaties concluded in a year shared the same set of 205 features, this value would be zero. If those treaties had no features in common, the value would be one. Figure 1 shows that investment treaty practice started off more diverse, with around fifty percent of features differing between treaties signed from the late 1960s through the 1970s, but then converged in the 1990s, when differences dropped to forty percent. This trend was then reversed in the early 2000s. Today, with around sixty percent of differences in content, investment treaty practice is more diverse than it has ever been.

We are thus experiencing a time of unprecedented change, innovation, and experimentation. Investment treaty design is growing more diverse and more and more states are taking part in it as active rule-makers. On the one hand, this makes abstract comparative institutional analyses, as put forth by Puig and Shaffer, more difficult because new policy yardsticks and institutional choices abound. On the other hand, it also presents unique opportunities. Consider that for ISDS alone we will shortly have investment treaties in force that provide for (1) no ISDS (as in the BITs of the 1960s), (2) mediation-based ISDS (as in Brazilian treaties), (3) simple ISDS (as in BITs of the

<sup>16</sup> See, e.g., Tarcisio Gazzini, *Nigeria and Morocco Move Towards a "New Generation" of Bilateral Investment Treaties*, EJIL: TALK! (May 8, 2017).

<sup>17</sup> See, e.g., [United Nations Convention on Transparency in Treaty-based Investor-State Arbitration](#) (2015), as adopted by GA Res. 69/116 (Dec. 10, 2014).

<sup>18</sup> UN Conference on Trade & Dev., [IIA Mapping Project](#).

<sup>19</sup> Formally, the value is calculated by averaging the Jaccard distances of the feature spaces of all BITs concluded in a given year.

1980s), (4) simple ISDS as amended through updated arbitration rules or the Mauritius Convention, (5) reformed ISDS (as in recent Canadian treaties), (6) ISDS with exhaustion of domestic remedies (as in the new Indian model BIT), and (7) ISDS through a permanent but bilateral investment court (as in recent EU agreements with Canada or Vietnam). This diversity of approaches turns the world into a global laboratory where different investment law reform alternatives are playing out.

### *Bottom-Up Reform Rather Than Top-Down Solutions*

The fact that states are implementing new ideas as to what investment law is about and are combining institutional choices in novel ways should play a key role in ongoing efforts to reform investment law multilaterally. The multilateral process was launched in earnest in 2017, when the UN Commission on International Trade Law (UNCITRAL) tasked one of its working groups to explore ISDS reform options. Bringing together government representatives from a geographically diverse set of developed and developing countries, Working Group III is mandated first to identify concerns relating to ISDS, then to consider whether reform is needed, and finally to develop reform proposals.<sup>20</sup> This sequence may strike one as odd, since many states, as we have just seen, have already gone through these steps, devised their own problem definition, and settled on institutional solutions. A key challenge will therefore be to leverage the parallel bilateral and regional reform processes for the benefit of the multilateral one.

To take advantage of this diversity and fast-paced innovation, multilateral reform must work from the bottom up and not from the top down. A *de novo* assessment of concerns relating to ISDS at the multilateral level will do little to resolve deeper disagreements about investment law's policy objectives. An abstract comparison of the pros and cons of institutional alternatives may work well where objectives are clear and reform options limited, but cannot do justice to the complexity of the current investment law environment where goals are in flux and institutional diversity flourishes. Worse, such top-down rationalization risks engaging in the sort of ideal-type comparisons that Puig and Shaffer caution against, likely resulting in a short grid that lists pros and cons of stylized institutional choices rather than engaging in a full comparison of possible reform combinations. Moreover, as Anthea Roberts observes, such reform processes are sensitive to the way choices are presented: if reform options are framed as being between no reform, an appellate tribunal on top of the current system, and a permanent investment court, there is a risk that camps converge in the middle, not because it is the best solution, but because incrementalists prefer moderate reform over radical reform and radicals prefer moderate reform over no reform.<sup>21</sup>

A bottom-up approach, in contrast, lets states set their own policy goals, develop tailor-made institutions, and test them in practice to eventually distill best practices based on the accumulated evidence. In the aggregate, that means that more policy objectives and institutional combinations are being considered and tried than would be the case in a top-down setting. Moreover, it allows us to validate how well these different institutional choices work in real life and draw lessons on that basis for multilateral investment law reform.

To be clear, I agree that a multilateral reform of ISDS is desirable and that, ideally, such reform should occur sooner rather than later. My point is rather that it is better to wait to get it right than to rush and get it wrong. A moment of growing institutional innovation where former rule-takers finally become rule-makers is the wrong time for top-down consolidation. Instead, we should let diversity thrive—for now. I therefore want to join Puig and Shaffer as well as Roberts in stressing the need for pluralism and flexibility in investment law reform.<sup>22</sup>

<sup>20</sup> UN Comm'n on Int'l Trade Law, Working Group III (Investor-State Dispute Settlement Reform), [Annotated Provisional Agenda](#), UN Doc. A/CN.9/WG.III/WP.141, para. 10 (Sept. 15, 2017).

<sup>21</sup> Anthea Roberts, *Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*, 112 AJIL 410 (2018).

<sup>22</sup> Puig and Shaffer, [supra note 1](#); Roberts, [supra note 21](#).

In the short term, we should let current innovation and experimentation run its course. The UNCITRAL process is the ideal venue for states to monitor these evolving institutional choices and to report on how they are working in practice. In five to seven years, or whenever the process of bilateral and regional institutional innovation has slowed down and evidence of the performance of institutional choices has accumulated, states should then proceed to the third limb of their UNCITRAL mandate and develop reform recommendations based on the best practices observed. Thereby, today's experimentation can become tomorrow's multilateral solution.