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The Originality of Outsiders: Innovation in the Investment Treaty System

Anthea Roberts[*] and Taylor St John[**]

Abstract

In recent years, several proposals by states to reform or displace investor-state dispute settlement (ISDS) have gained prominence. While many factors shape which reform proposals states support, here we focus on one important, but often overlooked, factor: the 'insider' or 'outsider' status of the government officials who formulate states' proposals. Based on five years of para-ethnographic observation and interviews with officials involved in ISDS reform, and informed by the interdisciplinary innovation literature, we explore how individuals who have not spent their careers within the field of investment arbitration (and are perceived as 'outsiders' by those within that field) have developed more disruptive reform proposals while arbitral insiders have typically proposed sustaining reforms. We illuminate these dynamics in the ISDS reform debates with case studies of four actors: the USA, the European Union, Bahrain and Brazil.

1 Introduction

In recent years, several proposals by states to reform or displace investor-state dispute settlement (ISDS) have gained prominence. Some of these proposals are now the basis for negotiations in United Nations Commission on International Trade Law

[*] Professor, School of Regulation and Global Governance, Australian National University, Australia. Email: anthea.roberts@anu.ed.au. Anthea attends the United Nations Commission on International Trade Law (UNCITRAL) Working Group III as an observer; she was previously a member of the Australian delegation but has always acted and written in her independent academic capacity.

[**] Researcher, PluriCourts, University of Oslo, Norway, and Lecturer, School of International Relations, University of St. Andrews, United Kingdom. Email: t.st.john@jus.uio.no. She attends UNCITRAL Working Group III as an observer from iCourts, University of Copenhagen, Denmark.

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(UNCITRAL) Working Group III. What can the origins of these proposals tell us about innovation in the investment treaty system? How do proposals for sustaining or disruptive ISDS reforms emerge? Who is behind their development and why did they formulate that approach? The reform proposals that states support at UNCITRAL and beyond vary widely. Some states support incremental procedural reforms with the aim of improving upon, but largely sustaining, existing institutions and practices. Other states support more far-reaching structural reforms that would create new institutions or practices to supplement or replace ISDS, such as the introduction of an appellate body or a multilateral investment court. Still others support more radical, paradigm-shifting innovations that would displace ISDS without providing a direct replacement.[1]

This variation raises the question of why, in response to many of the same concerns about the legitimacy of ISDS, states have produced such a variety of reform proposals. In answering, it is helpful to start with the handful of state-level factors that scholars have traditionally focused on to explain states' policies towards ISDS. The first factor is the state's structural position in the world economy. In earlier decades, scholars divided states into capital exporters, which they viewed as likely to see the system through the lens of what benefited their outbound investors, and capital importers, which they saw as likely to view it through the lens of potential recipients of investment and likely respondents to investor-state disputes. Today, however, no state sees itself exclusively as an exporter of capital with regard to ISDS policy and all states are potential respondents. But there is still a meaningful divide: while some states have a dual identity as both importers and exporters of capital, others are almost exclusively importers.[2] The second factor is the state's general policies with respect to foreign investment and international arbitration and the ideology of its relevant officials. Different national policy priorities and economic ideologies have led officials to see the costs and benefits of ISDS-related actions differently, even when their states' structural positions and experiences are similar.[3] In a similar vein, if states are, or aspire to become, hubs for arbitration, it is likely to influence their policy decisions, although sometimes there are tensions between hubs and their host states.[4] The third factor is the state's experience with ISDS. For instance, states

1 Roberts, 'Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration', 112 *American Journal of International Law* (*AJIL*) (2018) 410.

2 Officials representing states with a dual identity are assumed to be balancing competing perspectives, seeking to protect their investors abroad while also protecting themselves as potential respondents at home. Roberts, 'Triangular Treaties: The Nature and Limits of Investment Treaty Rights', 56 *Harvard International Law Journal* (2015) 353, at 360–361; Cai, 'Outward Foreign Direct Investment Protection and the Effectiveness of Chinese BIT Practice', 7 *Journal of World Investment and Trade* (2006) 621; Vandevelde, 'A Comparison of the 2004 and 1994 U.S. Model BITs: Rebalancing Investor and Host Country Interests', in K.P. Sauvant (ed.), *Yearbook on International Investment Law and Policy 2008–2009* (2009) 283; Schill, 'Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China', 15 *Cardozo Journal of International and Comparative Law* (2007) 73, at 82.

3 Akinkugbe, 'Africanization and the Reform of International Investment Law', 53 *Case Western Reserve Journal of International Law* (2021) 7; Calvert, 'Constructing Investor Rights? Why Some States (Fail to) Terminate Bilateral Investment Treaties', 25 *Review of International Political Economy* (*RIPE*) (2018) 75.

4 Erie, 'The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution', 60 *Virginia Journal of International Law* (2020) 225, at 230.

are much less likely to sign investment treaties after facing their first investment treaty claim.[5] When states have faced ISDS cases with high domestic political salience or had to pay out considerable sums in damages or costs, presumably this experience makes them more likely to be sceptical of ISDS than states that have been involved in few cases or only low-salience cases or have not had to pay large sums.

We agree that all these factors play a role in the formulation of states' ISDS reform positions. However, based on five years of ethnographic observation and interviews with officials involved in ISDS reform, we identify another factor that we believe is significant yet under-analysed: which agencies or ministries have been given primary responsibility for crafting ISDS policy and, relatedly, what backgrounds their officials have. A recurring feature that we observe at UNCITRAL is that officials who are 'outsiders' to investor-state arbitration are more likely to support innovations that are disruptive to ISDS than officials who are 'insiders'. Whether these outsiders come to prominence, however, often depends on inter-ministerial allocations of responsibility for ISDS policy, which may change over time.

The field of international commercial arbitration has traditionally been characterized as an insider's club.[6] Although the dynamics in investment treaty arbitration differ in some ways from its commercial cousin,[7] practitioners and officials still talk about 'insiders' in the investment treaty system – by which they mean the arbitrators and counsel who dominate investment treaty arbitration, as evidenced by statistics on which arbitrators are selected most often for ISDS disputes and which law firms handle the most treaty-based cases.[8] The tight web of networks created in ISDS, and

5 Poulsen and Aisbett, 'When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning', 65 *World Politics* (2013) 273.

6 In their landmark book, Dezalay and Garth observe, 'it was clear that this international arbitration community was relatively small and linked together pretty closely. Members of the inner circle and outsiders often referred to this group as a "mafia" or a "club"'. Y. Dezalay and B. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (1996), at 10. Dezalay and Garth were studying primarily commercial arbitration since treaty arbitration was much smaller then. This conception of an arbitrator has been characterized as 'outdated' in some recent studies that see arbitrators less as elite 'oracles' and more as ordinary legal 'service providers' or 'problem solvers'. Cole, Ortolani and Wright, 'Arbitration in Its Psychological Context: A Contextual Behavioural Account of Arbitral Decision-Making', in T. Schultz and F. Ortino (eds), *The Oxford Handbook of International Arbitration* (2021) 91. While the pool of arbitrators has grown larger and more diverse since Dezalay and Garth's book, the image of treaty arbitration practitioners as a club with clear insiders endures, including among officials at UNCITRAL.

7 Over time, the academic community of lawyers familiar with arbitration has grown larger and the field has become more mainstream, while the practitioners have often become more specialized as investment treaty lawyers rather than as a mix of international commercial arbitration practitioners and public international law generalists. On the diversification of the academic community, see Schill, 'W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law', 22 *European Journal of International Law* (*EJIL*) (2011) 875; Schultz and Ridi, 'Arbitration Literature', in T. Schultz and F. Ortino (eds), *The Oxford Handbook of International Arbitration* (2021) 1.

8 Puig, 'Social Capital in the Arbitration Market', 25 *EJIL* (2014) 387; Langford, Behn and Hilleren Lie, 'The Revolving Door in International Investment Arbitration', 20 *Journal of International Economic Law* (2017) 301; M. Waibel and Y. Wu, *Are Arbitrators Political? Evidence from International Investment Arbitration* (2017), available at www.yanhuiwu.com/documents/arbitrator.pdf.

the close, dense connections among certain actors – law firms, funders, arbitrators, damages experts – lead to concerns about conflicts of interest in the investment treaty system.[9]

At UNCITRAL, we observe that the relative insider or outsider status of individual officials – as judged by their proximity to, or distance from, ISDS practice – can play a role in influencing the reform proposals that have emanated from their states. This observation is consistent with a wide cross-disciplinary literature on innovation that suggests that insiders, who tend to be well socialized in a field's norms and to have a personal and professional stake in its ongoing existence, are more likely to suggest sustaining innovations, while outsiders, who have not spent their careers within a particular field and who are not socialized within or incentivized to maintain the *status quo*, are more likely to propose disruptive innovations.

The relevance of ministerial competence and the growing influence of outsider officials is most evident in the European Union (EU), the actor that spearheaded the ISDS reform agenda at UNCITRAL.[10] When competence shifted to Brussels from member state capitals, a group of officials with no background in investment arbitration assumed responsibility for ISDS policy. When investment treaties and ISDS became politically toxic in Europe, this group needed to find a set of reforms that would help assuage civil society concerns. While external pressure created a window of opportunity for change, the precise reform that the EU officials proposed – jettisoning ISDS in favour of a multilateral investment court – reflected their outsider backgrounds.

The EU's experience contrasts sharply with that of the USA, the actor that did the most to resist the adoption of UNCITRAL's ISDS reform agenda. While the EU's court proposal seeks to displace ISDS, the USA has long championed reforms aimed at improving investor-state arbitration rather than displacing it. Like the EU, the USA is a dual capital exporter and importer, and both are major seats of arbitration. Unlike the EU, however, the US officials charged with developing ISDS policy frequently have extensive experience in ISDS, often including experience in arbitral private practice. The 'insider' status of these US officials appears to be one factor that has played a role in the country's preference for sustaining rather than disruptive ISDS reforms. The differences between the EU and the USA are important given their centrality to the investment treaty system, but the relevance of officials' insider or outsider status extends well beyond these two actors.

If we pan back to look at the two states with the most extreme positions in the room at UNCITRAL – Brazil, which has never signed up for ISDS and is represented by officials who are true outsiders to investor-state arbitration, and Bahrain, which is

[9] P. Eberhardt and C. Olivet, *Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are Fuelling an Investment Arbitration Boom* (2012), available at www.tni.org/files/download/profitingfrominjustice.pdf.

[10] We use the term 'actor' for European Union (EU), US, Brazil, Bahrain and other delegations at UNCITRAL. We avoid the term 'state' to avoid mislabelling the EU, but, in informal usage at Working Group III, the term 'state' includes the EU and its member states. To others in the room, there is not a discernible difference between how the EU and USA act, whereas there is a marked difference between how the EU and other regional economic organizations act.

seeking to become a regional arbitral hub and is represented by arbitral practitioners who are consummate insiders to ISDS – the same pattern appears. In identifying this pattern, our argument is not normative or predictive; we do not take a stand on whether disruptive or sustaining reforms are better or worse, or which ones are likely to be adopted by other states. We also do not make the claim that the positions of any actor can be traced only to the insider/outsider status of their officials. Our argument is that outsider status increases the chances that officials will develop disruptive innovations, as one of a number of factors influencing state policy.

In section 2 of this article, we introduce our participant-observer methodology. In section 3, we develop our argument about the role that outsiders play in formulating innovations. In subsequent sections, we apply this argument to the investment treaty system, exploring the role of outsider and insider officials in the development of ISDS reforms in four actors: the EU, the USA, Brazil and Bahrain. We conclude by considering how the various individual- and state-level factors identified as influencing the development of ISDS reform policies are likely to interact and by noting that the qualities that lead to innovation often differ from those that lead to diffusion.

2 Methodology: Participant Observation

States and other actors have been meeting in UNCITRAL Working Group III since 2017 to consider whether and how to reform ISDS.[11] We have been present as academic observers at every session, similar to Susan Block-Lieb and Terence Halliday, who studied other UNCITRAL working groups as 'participant-observer insiders'.[12] We sit in the negotiating room throughout the formal deliberations, listening and taking notes. We also have audio recordings of each negotiating session. During the breaks and in informal settings, we converse with a wide range of negotiators and other actors in the room, including representatives of civil society, international organizations and private sector groups. Since 2017, we have attended 10 full weeks of Working Group III formal sessions, plus a further 30 days of informal sessions, intersessionals and UNCITRAL Commission sessions. During each full week of Working Group III, we have substantive interactions with 15 delegations on average, varying in form from in-person chats to email exchanges. We use a purposive sampling strategy, selecting actors who represent the breadth of views at UNCITRAL. In addition, we focus primarily on two axes of diversity – region and perspectives toward reform – yet the delegations with whom we interact also vary in terms of previous experience, gender and other traits in ways that make them representative of the broader population of officials at UNCITRAL.

In addition to informal conversations, we have formally interviewed a group of negotiators and other participants throughout the process. These interviews are loosely

[11] We refer to the state officials participating in the Working Group as negotiators, even though they have not been engaged in formal negotiations during all stages.

[12] S. Block-Lieb and T. Halliday, *Global Lawmakers: International Organizations in the Crafting of World Markets* (2017), at 9.

structured and focus on the participant's sense of recent developments about the investment treaty system and ISDS.[13] These interviews are recorded if the participant gives permission and are then transcribed. Over the five-year period in which we have been interviewing participants, our aim has been to develop empathetic understandings of how these actors perceive the negotiations and related issues, such as their aims, constraints, mandates, audiences and strategies.[14] We treat these participants as collaborators or epistemic partners with whom we exchange insights over time. Adopting a similar approach in the trade field, Gregory Shaffer describes it as 'the study of social processes through interviewing, and even working with, practitioners who are themselves engaged in quasi-social scientific studies of the same processes in an effort to understand and respond to them'.[15] Research that involves a dialogue with participants in the process, like ours, is sometimes described as 'para-ethnographic'.[16] We noted the importance of individual officials in formulating government positions based on our observations of the process. We came to appreciate the significance of their backgrounds through our discussions and interviews. We then framed these ideas based on literature about the role of outsiders in innovation (discussed in the next section) before using those insights to shape some of the questions we asked our participants and ourselves. We drew our conclusions from this iterative, dialectical process.

3 Argument: Insiders, Outsiders and Innovation

What connections exist between innovation and insider/outsider status? In business, a distinction is often drawn between sustaining innovations that improve upon a product but do not threaten its market (compare a typewriter with an electronic typewriter) and disruptive innovations that threaten to replace the product all together (compare a typewriter with a personal computer).[17] Such sustaining and disruptive innovations are not binary. Instead, they represent ideal types at either end of a spectrum, so innovations can be more or less sustaining or disruptive. Studies of innovation from outside the legal field suggest that insiders in a given field are more likely to propose sustaining innovations, while individuals who are outsiders to that field are more likely to produce disruptive innovations. The reasons for this association have

[13] 'Loosely structured interviews are appropriate for elite interview design given that "elites" extensive information and considered views render them fairly impervious to minor variations in interview questions.' Beckman and Hall, 'Elite Interviewing in Washington, DC', in L. Mosley (ed.), *Interview Research in Political Science* (2013) 196, at 205.

[14] For a more detailed explanation of our methodology, see Roberts and St. John, 'Complex Designers and Emergent Design: Reforming the Investment Treaty System', 116 *AJIL* (2022) 96, at 100–103.

[15] G. Shaffer, *Emerging Powers and the World Trading System: The Past and Future of International Economic Law* (2021), at xv (internal quotation marks omitted).

[16] Holmes and Marcus, 'Para-Ethnography', in L.M. Given (ed.), *The Sage Encyclopaedia of Qualitative Research Methods: M-W* (2008), vol. 2, 595.

[17] Christensen *et al.*, 'What Is Disruptive Innovation?', 93 *Harvard Business Review* (2015) 44; C. Christensen, *The Innovator's Dilemma: When New Technologies Cause Great Firms to Fail* (1997).

long interested scholars across a range of disciplines. From this broad literature, we draw out three characteristics that make outsiders more likely than insiders to develop disruptive innovations.

The first characteristic is freedom from accumulated common sense in a field, which can lead outsiders to be more open to new ideas or fresh ways of seeing things. In his influential essay 'The Stranger', sociologist Georg Simmel notes that the stranger (who does not belong to a group initially but comes into it, bringing ideas, experiences and connections that are not indigenous) can be more objective because the stranger is not bound by his or her roots to the particular constituents or partisan dispositions of the group, which could prejudice him or her.[18] This insight carries into contemporary psychology in which the creative potential of outsiders is connected to them being less intellectually and socially constrained by a community's established ways of thinking.[19]

The more expertise and experience people gain within a field, the more entrenched they often become in a particular worldview, making it harder to innovate in more creative or far-reaching ways.[20] Experience can make people prisoners of their own prototypes.[21] There is often an inverted U-shaped curve when it comes to knowledge and creativity: '*Some* knowledge is good, but too much knowledge can impair flexibility.'[22] That is why people's most creative contributions to a field typically come before they reach their peak knowledge within that field,[23] with examples ranging from economics[24] to science.[25] Outsiders bring fresh eyes to an existing system, enabling them to question established truths and accepted wisdom. As polymath Michael Polayni explained of his contributions to physics: 'I would never have conceived my theory, let alone have made a great effort to verify it, if I had been more familiar with major developments in physics that were taking place. Moreover, my initial ignorance of the powerful, false objections that were raised against my ideas protected those ideas from being nipped in the bud.'[26]

[18] Simmel, 'The Stranger (1908)', in D. Levine (ed.), *Georg Simmel: On Individuality and Social Forms* (1971) 143.

[19] A. Grant, *Originals: How Non-Conformists Move the World* (2016), at 40–50; S.B. Kaufman and C. Gregoire, *Wired to Create: Unraveling the Mysteries of the Creative Mind* (2016), at 94–99, 176–178.

[20] Dane, 'Reconsidering the Trade-Off between Expertise and Flexibility: A Cognitive Entrenchment Perspective', 35 *Academy of Management Review* (2010) 579.

[21] Grant, *supra* note 19, at 41.

[22] Kaufman and Gregoire, *supra* note 19, at 79 (emphasis in the original).

[23] Frensch and Sternberg, 'Expertise and Intelligent Thinking: When Is It Worse to Know Better?', in R.J. Sternberg (ed.), *Advances in Psychology of Human Intelligence* (1989) 157; D.K. Simonton, *Greatness: Who Makes History and Why* (1994).

[24] D. Galenson, *Old Masters and Young Geniuses: The Two Life Cycles of Artistic Creativity* (2007); Weinberg and Galenson, 'Creative Careers: The Life Cycles of Nobel Laureates in Economics', National Bureau of Economic Research Working Paper no. 11799 (2005).

[25] Root-Bernstein, Bernstein and Gamier, 'Identification of Scientists Making Long-Term, High Impact Contributions, with Notes on Their Methods of Working', 6 *Creativity Research Journal* (1993) 329; see also T. Harford, *Messy: How to Be Creative and Resilient in a Tidy-Minded World* (2016), at 26–27.

[26] Polanyi, 'The Potential Theory of Adsorption', 141 *Science* (1963) 1010, at 1012, quoted in March, 'Exploration and Exploitation in Organizational Learning', 2 *Organization Science* (1991) 71, at 85.

Although freedom from the accumulated common sense within a field can foster innovation, outsiders may lack the recognition necessary for their innovative proposals to be taken seriously within a field, at least initially. This lack of recognition may make it harder for them to spread their approach within the existing field, but it can also be a strength. Sometimes, insiders do not understand the threat posed by disruptive outsider innovations until it is too late.[27] For instance, successful camera companies like Kodak failed to take low-quality cameras on mobile phones seriously until it was too late and their business model was disrupted.

A second trait of outsiders that can enable innovation is their ability to cross borders and intermediate between different fields, often bringing insights from one to another. Sociologists Michel Crozier and Erhard Friedberg use the term 'marginal *sécant*' (which can be translated as influential outsider or smuggler) to describe an individual who is marginal to any particular world but skilled at mediating across or between worlds.[28] Individuals who cross between fields are likely to be able to translate insights from one field into another or to be more flexible in their thinking and better able to combine insights in novel ways. Knowledge of multiple fields can make it easier for individuals to see from multiple perspectives or to imagine doing things in a different way. In transnational legal settings, intermediaries play important roles as go-betweens translating global scripts for local realities or translating local grievances into global frameworks.[29] Florian Grisel argues that the grand old men of commercial arbitration were themselves secant marginals, individuals who were marginal to their national legal systems (often because they were immigrants) but skilled at mediating across worlds (in particular, across civil law and common law) and, in doing so, crafted arbitration as a hybrid of various legal traditions.[30]

A third trait of outsiders is that they are unlikely to have vested financial and reputational interests that would lead them to favour sustaining innovations over disruptive ones. Insiders often have professional interests in maintaining and improving the *status quo*, which favours them privileging sustaining innovations while attempting to quash disruptive innovations before those can gain traction. General Motors, for instance, was in a position to take over the electric car market in the 1980s and 1990s but refrained from pursuing this market because it risked cannibalizing its main business of making cars with combustion engines.[31] In addition to a vested interest in

[27] Christensen, *Innovator's Dilemma*, *supra* note 17.

[28] M. Crozier and E. Friedberg, *Actors and Systems: The Politics of Collective Action* (1980).

[29] On boundary-crossing transnational professionals, see Harrington and Seabrooke, 'Transnational Professionals', 46 *Annual Review of Sociology* (2020) 399. On global scripts and intermediation, see Carruthers and Halliday, 'Negotiating Globalization: Global Scripts and Intermediation in the Construction of Asian Insolvency Regimes', 31 *Law and Social Inquiry* (2006) 521, at 529–532; Broome and Seabrooke, 'Shaping Policy Curves: Cognitive Authority in Transnational Capacity Building', 93 *Public Administration* (2015) 956. On translating local grievances for global audiences, see Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle', 108 *American Anthropologist* (2006) 38.

[30] Grisel, 'Competition and Cooperation in International Commercial Arbitration: The Birth of a Transnational Legal Profession', 51 *Law and Society Review* (2017) 790.

[31] See T. Wu, *The Master Switch: The Rise and Fall of Information Empires* (2011), at 26.

Table 1: Propensity of outsiders and insiders to support different types of innovation

	Support for different types of innovation
Outsider	More likely to support disruptive innovation because: • More diverse expertise and experience from outside the field • Stronger networks outside the field, weaker networks inside the field • Less vested interest in maintaining the status quo
Insider	More likely to support sustaining innovation because: • More specialized expertise and experience within the field • Stronger networks inside the field, weaker networks outside the field • More vested interest in maintaining the status quo

the *status quo*, insiders are likely to have strong knowledge of, and networks within, the existing community, which they can leverage to develop and diffuse sustaining innovations that suit their interests. These factors, which contribute to the relative propensity of outsiders and insiders to support disruptive or sustaining innovations, are summarized in Table 1.

4 Outsider Officials: The EU

How might these ideas be relevant at UNCITRAL? The importance of outsider officials in ISDS reform is particularly prominent and surprising in the EU. EU member states are among the primary creators of the investment treaty system, European cities like London and Paris are traditional centres of the arbitral community and the EU is the world's largest source of, and destination for, investment.[32] One might assume from this that the individuals representing the EU would be consummate insiders of the arbitral community, but the reality is more interesting. The EU assumed competence for investment treaty policy in 2009 when the Treaty of Lisbon came into force.[33] Although some member states had been represented by officials with strong ties to the arbitral community, when the European Commission was tasked with working out a common investment treaty policy, it was outsider officials who took over the portfolio. This was not by design but, rather, as one official recalled, a product of routine allocation procedures:

> This was all linked to how we manage policy matters. Our Legal Service, which does the litigation, does not do policy. That goes to the Directorates General. So for this, the question was which Directorate-General. That was pretty obvious. Investment was added to trade policy in the EU treaties (it's all in one article) so it was obvious that it would be given to DG Trade. Then

[32] The Commission states this in their reform proposals: 'International investment rules were invented in Europe. Today, EU Member States are parties to almost half of the total number of international investment agreements that are currently in force worldwide (roughly 1400 out of 3000).' European Commission, Concept Paper: Investment in TTIP and Beyond – The Path for Reform (2015), available at https://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

[33] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community 2007, OJ 2007 C 306.

> within DG Trade, the legal unit is the unit which manages dispute settlement policy (e.g. it leads negotiations on dispute settlement in the World Trade Organization or State-State Dispute Settlement in Free Trade Agreements). So it was obvious that this was also the unit that would do ISDS.[34]

Although not necessarily intended, the effect of this routine allocation following a shift in competence was to put outsiders at the helm of Europe's ISDS policy.

'At the time the competence was transferred late 2009–10, there were no officials in the Directorate General for Trade that had any experience with ISDS', a Commission official explained.[35] The initial team was small, beginning with just one member in 2010, two in 2011 and three in 2012. None of the team members had a background in arbitral practice: the team's lead had a background in trade, another came from tax and corporate law and a third had an academic and government background in investment treaties but not in arbitration. They worked in a department that dealt primarily with trade issues. They had never been respondents in an investor-state arbitration. This outsider team took over ISDS policy at a time when the field was becoming increasingly fraught. In the early days of the Commission's competence, the political salience of ISDS was rising. High-profile cases, particularly *Vattenfall v Germany*, fanned public ire, as did negotiations with the USA on a potential Transatlantic Trade and Investment Partnership.[36] The combination of a controversial case against Germany and concerns about litigious American corporations possibly challenging European regulatory standards through ISDS led to civil society mobilization, especially in German-speaking countries.[37]

In January 2014, this controversy led the Commission to pause EU–US negotiations on ISDS and to open a public consultation on ISDS that received an unprecedented number of responses – 97 per cent of which came from civil society groups – that were overwhelmingly negative.[38] After the consultation, Trade Commissioner Cecilia Malmström called ISDS the 'most toxic acronym in Europe' and noted 'a fundamental lack of trust by the public in [its] fairness and impartiality'.[39] In Brussels, keeping arbitration had become politically untenable since the controversy over it threatened the

[34] Interview, European Commission official, May 2022.

[35] Interview, European Commission official, April 2018.

[36] European Commission, EU and US Conclude First Round of TTIP Negotiations in Washington (2013), available at https://ec.europa.eu/commission/presscorner/detail/en/IP_13_691. ICSID, *Vattenfall AB v. Federal Republic of Germany – Order of the Tribunal Taking Note of the Discontinuance of the Proceeding*, 9 November 2021, Case No. ARB/12/12.

[37] Eliasson and Huet, 'TTIP Negotiations: Interest Groups, Anti-TTIP Civil Society Campaigns and Public Opinion', 16 *Journal of Transatlantic Studies* (2018) 101; Chan and Crawford, 'The Puzzle of Public Opposition to TTIP in Germany', 19 *Business and Politics* (2017) 683.

[38] European Commission, Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (2015), available at https://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf.

[39] P. Ames, *ISDS: The Most Toxic Acronym in Europe* (2015), available at www.politico.eu/article/isds-the-most-toxic-acronym-in-europe/.

ratification of trade deals.[40] Commission officials needed to find a way to address the legitimacy concerns raised by civil society whilst maintaining a form of investment dispute settlement that could satisfy industry groups and future treaty parties.

The Commission's initial proposal to replace arbitration with a multilateral investment court including an appellate mechanism attests to the team's distance from the arbitral community as well as their familiarity with the trade law system. As outsiders to arbitration, they were not entrained in the idea that investment disputes had to be resolved through arbitration. Instead, Commission officials recall being 'struck' by the differences between investment arbitration and World Trade Organization (WTO) dispute resolution (including the lack of an appeal), attaching 'relatively little value' to the idea that disputing parties should be able to appoint their adjudicators and viewing the importance of a relatively high degree of transparency to be 'obvious'.[41] The Commission officials were also particularly concerned to ensure that the EU's and the member states' investment treaties conformed to EU law. The influence of the trade law system on the EU's initial proposal, and the link between that and the background of the officials tasked with developing the proposal, was evident to many observers. One former official from a member state remembered the Commission's first position paper in 2010, titled 'Towards a Comprehensive European International Investment Policy', which included what the Commission termed 'deficiencies' in the current system, like there being inconsistency and a lack of an appellate system, and pointed towards reforms that this former official described as 'copying basically the WTO'.[42]

Since the Commission's team did not come from, and had no plans to return to, arbitral practice in the private sector, they had no vested interest in maintaining the *status quo*. They also did not have specialized expertise or networks in the arbitral community to either derive knowledge or feel constraints. 'We didn't know the field', explained a Commission official of the team's knowledge when they began working on these issues, and 'we didn't really know who to talk to either'.[43] For instance, the Commission's first position paper flagged the issue of working towards greater transparency in ISDS,[44] but the team did not know that UNCITRAL was due to start work on transparency beginning in October 2010 until a non-governmental organization (NGO) called to tell them.[45] According to that Commission official, 'we went there not knowing anything about the UNCITRAL process and with very little knowledge of investor-state arbitration. An example of what complete novices we were: I was sitting

[40] Trade agreements with Canada, Singapore and Vietnam were each split into two agreements to insulate the rest of the agreements from the controversy of the investment provisions, and so the main agreements required consent from the European Parliament but not from member states.

[41] Interview, European Commission official, September 2017; Interview, European Commission official, April 2018.

[42] Interview, practitioner, April 2018.

[43] Interview, European Commission official, September 2017.

[44] European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee, and the Committee of the Regions: Towards a Comprehensive European International Investment Policy (2010), at 10, available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0343:FIN:EN:PDF.

[45] Interview, European Commission official, September 2017.

in the meetings and keeping the Dolzer Schreuer book under the desk, looking through it so that I could better understand the discussion. That's how much we were starting from scratch'.[46] Although this lack of knowledge about the investment treaty system gave the European Commission's team a certain freedom to suggest departures from the *status quo*, it also meant that they were initially uncertain about the workability of their proposals. 'We were waiting for someone to say "but what about X?" and because X is not there, the whole thing falls apart', the Commission official explained about presenting their ideas.[47] If they were doing an event with academics or practitioners from the field, the officials often came back with 'a slight sense of triumph' when nobody said 'but you forgot about X', or 'you've got X completely wrong'.[48]

The Commission team were sufficient outsiders to the arbitral field that many practitioners did not recognize the potential significance of the EU's reform proposals until it was too late.[49] As one Commission official explained, 'we were quite expectant that the arbitration community would come and expound to us "you should do this, you should do that", but we got almost none of that. We got almost zero attention. And that didn't bother us in the sense that we were seeking the attention, but we were quite surprised that nobody really engaged with us at all'.[50] For instance, almost no arbitration practitioners or law firms made submissions during the European Commission's public consultation process.[51] Yet gradually and with a noticeable uptick between 2014 and 2017 as the court proposal gained prominence, these Commission officials became visible participants in ISDS reform debates, despite being relative newcomers and outsiders to the arbitral field. Some in the arbitral community later seemed to regret that they had not engaged earlier in political debates about the legitimacy of ISDS when the EU's new policy position was being formed – it was a disruptive innovation that some did not take seriously until it was too late (much like Kodak had not initially registered the threat posed by phone cameras until its whole business was disrupted).[52]

By 2015, the European Commission was leading the charge for the multilateral reform of ISDS, and, by 2017, it was the most prominent supporter of the push to have a mandate on ISDS reform given to UNCITRAL Working Group III. While they may have been new to arbitration a few years earlier, by the first Working Group session in November 2017, the EC officials had been through

[46] Interview, European Commission official, April 2018. Rudolf Dolzer and Christoph Schreuer's *Principles of International Investment Law* (2008) is an introductory textbook.

[47] Interview, European Commission official, April 2018.

[48] *Ibid.*

[49] This pattern has similarly been observed for innovations in business. T. Harford, *Adapt: Why Success Always Starts with Failure* (2011), at 239–244.

[50] Interview, European Commission official, September 2017.

[51] Only seven of the nearly 150,000 submissions were from law firms. Three submissions were from arbitration secretariats, and 19 were from large companies. European Commission, *supra* note 38, at 11–14.

[52] See, e.g., J. Beechey, *Mood Music for Arbitration, Dr. J.S. Archibald QC Lecture* (2017), available at www.bviiac.org/Portals/0/Files/Publications/Mood%20music%20for%20arbitration_John%20Beechey%20CBE_May%202017.pdf.

extensive internal discussions and preparation.[53] The EU and its member states arrived at UNCITRAL with a concrete proposal for displacing investor-state arbitration altogether whilst sustaining substantive investment treaty obligations and the possibility of international claims being brought by investors. For the EU and its member states, only through creating new permanent mechanisms could their concerns about ISDS be addressed: 'It is worth recalling that the European Union and the European Union's member states has put forward a particular approach and takes the view that significant change through the establishment of permanent mechanisms is an urgent matter. … We do not think that some of the other ideas which are put forward go far enough in addressing what we see as urgent concerns.'[54]

The EU and its member states tied their reform concerns to the ad hoc nature of arbitration: '[I]n our view, this problem is, again, a systemic problem because it's a problem which flows from the ad hoc nature of the existing regime, that there are always three individuals asked to hear a particular case, and they may take a slightly different view and they may take a different view from their predecessors on any particular issue.'[55] To officials who had spent their previous career within the arbitral community, the ad hoc nature of arbitration may not have seemed so unusual or problematic, whereas to European officials coming from other systems like the WTO, it did. The EU pointed out at UNCITRAL that many concerns about ISDS 'simply do not arise anymore if we move towards a permanent dispute settlement system'.[56] For instance, when discussing conflicts of interest, the EU noted that adjudicators in a permanent mechanism would be collectively screened in advance so they 'will not have these close links with the disputing parties that appoint them for an individual dispute', which would reduce potential conflicts, and that, if there were still close links between an adjudicator and a disputing party, the adjudicator would recuse him- or herself, 'like in every international court'.[57] In forming these positions, the EU drew on broad experience in international dispute resolution, well beyond ISDS: 'We have a lot of experience in the EU with international courts and saying that standing permanent courts cannot sufficiently address these possible conflicts is, in our experience, simply not the case. … [W]e don't believe that the current ISDS system is better suited to address these possible conflicts than an international permanent court.'[58]

[53] European Commission, Staff Working Document: Impact Assessment, Multilateral Reform of Investment Dispute Resolution, Accompanying the Document Recommendation for a Council Decision Authorising the Opening of Negotiations for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes (2017), available at https://ec.europa.eu/transparency/documents-register/detail?ref=SWD(2017)302&lang=en.

[54] Transcript of audio, EU, UNCITRAL WG.III, 37th Session, 3 April 2019, 15:00–18:00, at 16:13.

[55] Transcript of audio, EU, UNCITRAL WG.III, 34th Session, 30 November 2017, 14:00–17:00, at 14:56.

[56] Transcript of audio, EU, UNCITRAL WG.III, 38th Session, 16 October 2019, 9:30–12:30, at 11:24.

[57] Transcript of audio, EU, UNCITRAL WG.III, 38th Session, 16 October 2019, 14:00–17:00, at 16:18.

[58] Transcript of audio, EU, UNCITRAL WG.III, 38th Session, 16 October 2019, 14:00–17:00, at 16:18.

Consistent with the outsider status of its main officials, the EU thought about investment dispute settlement through a different paradigm.[59] The reallocation of responsibility for ISDS with the Treaty of Lisbon enabled this group of outsiders to assume responsibility for this policy area, while the pressure from civil society created the crisis or window of opportunity necessary for innovation. However, the background of the officials – including their relative distance from investor-state arbitration but their proximity to the WTO system – played a key role in the ISDS reform proposal that the European Commission ended up adopting. The relevance of this outsider status becomes particularly apparent if one contrasts the EU's experience with that of the USA.

5 Insider Officials: The USA

Like the EU, the USA has historically been a large exporter of investment, but it increasingly understands itself as a dual capital exporter and importer. It hosts major seats of international arbitration, including New York, Washington, DC and Miami. In the 25 years since the North American Free Trade Agreement (NAFTA) came into force, the USA has been seen as an innovator – probably, the primary state innovator – within the system, both as a negotiator of treaties and as a respondent in disputes.[60] Like the EU, the USA has played a major role in the UNCITRAL ISDS reform debates. Unlike the EU officials, however, US officials working on investor-state arbitration are generally specialized and socialized in the arbitral community; they are insiders. Several US officials worked at the US-Iran Claims Tribunal before negotiating investment treaties, while others worked as assistants to major arbitrators and others came up through the government but with a focus on investment. Many US officials worked in private law firms before, after or in between periods of government service.[61] These links give rise to strong networks between US officials and the arbitration community.

Indicative of these connections, the US delegation at UNCITRAL is one of the few delegations to include several individuals from private practice; these individuals all have experience in the US government and in law firms.[62] There are also former US officials who attend UNCITRAL regularly, often speaking on behalf of industry lobby groups or legal or academic associations. This means there are often many current and former US officials in the UNCITRAL room. For instance, at the January 2020 session (the last 'in-person' session), there were at least 17 current or former US officials

[59] The EU speaks about the need for a different perspective: '[W]hen we look at appointments to have permanent structure, we have to look at them from a different perspective.' Transcript of audio, EU, UNCITRAL WG.III, 38th Session resumed, 22 January 2020, 14:00–17:00, at 16:44.

[60] North American Free Trade Agreement 1992, 32 ILM 289, 309 (1993). For a discussion of the significant role of the USA in inspiring changes within the investment treaty practice of other states, see W. Alschner, *Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes* (2022).

[61] Officials from a few other states that have been frequent respondents in ISDS cases, such as Argentina and Spain, have also entered private practice after government.

[62] For instance, in January 2020, the US delegation included 14 individuals; five of these individuals were in private practice. A handful of other delegations include private practitioners, but typically these delegations include one practitioner or two at most.

present: 14 on the delegation and three attending for other organizations.[63] As insiders, US officials are more likely to be trained in arbitral ways of thinking and acting and less likely to want to upset the *status quo* of ISDS; their expertise, networks and incentives all favour promoting sustaining ISDS reforms over disruptive ones. Yet, even if US officials have worked on arbitration cases in private practice, they tend to be keenly aware of the differences between working in government and private practice, and they leverage that understanding in shaping the US approach to ISDS. One former US official described a distinctly 'government approach to litigation':

> It's a different kind of analysis [from] representing a private claimant … even [from representing] a state in a one-off case [since then] you could just look at their treaty and you might not think about it holistically at all … you might not think about the state's broader legal and policy interests, whereas in the United States, someone's always reminding you of this, including all the voices at the table in the interagency [process] and so forth. So you're just aware, you're alert to [considerations and obligations] across treaty regimes, up and down the government, horizontally across different agencies, and over a longer period of time. You have all these different dimensions. And you can't escape that.[64]

This approach is 'institutionally ingrained in the way that the United States, Canada and other states practice, so you can't fail to be acclimated, institutionalized in it'.[65] In addition to this strong and distinct institutional culture, US officials note that they may have more appreciation for the state-side sensitivities of cases than other arbitral insiders. 'I'm not sure that people coming in from a purely private practice background recognize how fundamentally difficult – different and difficult – this is for states at every level', one individual observed, citing indeterminate obligations, the quantums in dispute and possible political fallout as things that do not 'really lend themselves to an ordinary depoliticized system of dispute resolution'.[66]

Despite the difficulties, the USA has found ways to manage these sensitivities, actively monitoring tribunal decisions, and refining and asserting its practice in various ways over time, in ways that leverage its ISDS expertise. Unlike many governments that separate negotiators and litigators into different units or even different ministries, US practice in cases and treaties is managed in a relatively unified way and reviewed through an interagency process, and some US officials even work on both negotiations and disputes. Since officials who handle disputes tend to have closer connections to the arbitration community, this arrangement means that US negotiators tend to be positioned to transfer insights and influence from the arbitration community to negotiations.[67] In other words, the USA has been an engine of innovation in the investment treaty system, but this innovation is sustaining rather than disruptive and has

[63] For instance, in January 2020, at least three individuals who previously worked for the US Department of State or US Trade Representative attended for observer organizations, including the Centre for International Law (CIL), International Bar Association and US Council for International Business.

[64] Interview, former US official, November 2020.

[65] Interview, former US official, November 2020.

[66] Interview, former US official, November 2020.

[67] As noted above, this transfer of insights also occurs in other governments where similar connections and bureaucratic practices or arrangements exist, notably Canada and Mexico.

occurred largely incrementally as the USA makes non-disputing party submissions, issues joint interpretations or updates its model treaty, for instance: 'It's only of course once you get sued that it becomes very much a problem for the negotiators to deal with the specific issues', but, once that happens, individual cases spur innovation by negotiators.[68] And there have been so many cases that treaty negotiation and dispute resolution have today become an iterative, dialectical process instead of a more open-ended delegation model:

> It's a much more iterative process now and the negotiators are hyper focused on very particular problems that have arisen for them, in their treaties. Like *Maffezini*, there are dozens and dozens of *Maffezini* footnotes. … So it's a completely different model. And the future of this is totally iterative or dialectical in the sense that arbitrators, it is the judicial function to interpret the text, and they will interpret the text, but it will not be the delegation model [of] open-ended, open-textured, indeterminate provisions where the arbitrators not only interpret them but essentially create the rule that then gets followed in later cases. … States are taking that away, they are saying 'Here's the standard, here's how to interpret [it]'.[69]

This is the essence of how the USA innovates in the investment treaty system: it negotiates with insights from litigation, and it litigates with insights from negotiations.[70] Throughout this process of innovation as updating, the USA asserts its views about what the law is 'repeatedly and often'. The following quote from the UNCITRAL negotiations is a rare articulation of the US approach, so we reproduce it at length:

> As keepers of their treaties, states are uniquely placed to provide authoritative and authentic interpretations to ISDS tribunals and should embrace this role. The United States has certainly embraced this role beginning with our first cases under NAFTA in the late 1990s. We have focused on pursuing four primary avenues for promoting correct treaty interpretation.
>
> First, we take consistent positions on the interpretation of our IIAs whether in pleadings as a respondent or in NDTP [non-disputing treaty party] submissions and we publish these positions on our website. We also engage in a thorough inter-agency review of our pleadings and NDTP submissions so that they reflect US negotiating and policy positions.
>
> Second, we use NDTP submissions repeatedly and often to promote the correct interpretation of a treaty provision before a decision is issued by a tribunal to minimize the need to correct an erroneous interpretation after the award is made. And because NDTP submissions can be submitted in any dispute, they may also persuade subsequent tribunals interpreting a provision from adopting an incorrect interpretation for which a prior NDTP submission on the same provision had been made in another case.
>
> Third, we include provisions authorizing binding joint interpretations in our modern IIAs [international investment agreements]. And we have issued such an interpretation on the minimum standard of treatment under NAFTA with Canada and Mexico.

[68] Interview, former US official, November 2020.

[69] Interview, former US official, November 2020.

[70] Sharpe, 'From Delegation to Prescription: Interpretive Authority in International Investment Agreements', in C. Brower *et al.* (eds), *By Peaceful Means: International Adjudication and Arbitration* (2022) (manuscript on file with the authors).

> Four, our modern IIAs provide that the disputing parties may review an award before it is issued, although we have not yet had occasion to rely on this particular tool in our practice. And as other interventions have highlighted, these same tools have been adopted by many states in their modern IIAs.[71]

States' role as keepers of their treaties and providers of authoritative interpretations is a continual, ongoing one. For the USA, the process of innovation is iterative, as the US learns from its own experience and those of other states and then translates these experiences into updates to the US model treaty and arbitral practice. For the USA, these updates are transformative, even if the transformation is gradual, and these updates are the innovations that the investment treaty system needs: 'While these reforms may have emerged over time, they are not incremental but represent real change to the practice of ISDS. And they could be adopted more systematically in the first-generation agreements for those governments that wish to do so. There are many examples of tools that would go a long way to reforming existing agreements and which are found in more recent agreements like the USMCA.'[72] The USA concludes that, 'given all of the existing tools, what can be done right now is capacity building and guidance on the use of these interpretive tools to help states fulfil their role as the keepers of their IIAs and proactively manage the interpretation of their IIAs rather than wait for structural reform'. The experience of states like the USA provides an example, 'especially for those states that may be unfamiliar with these tools or do not have a tradition of using them'.[73] Insider US officials suggest that others should learn from their experiences and practices.

The USA and other states with extensive respondent experience, like Canada, often reference recent updates to their model or recently concluded agreements. Many US interventions at UNCITRAL follow a similar pattern: the USA acknowledges that there are problems arising from a certain issue in the investment treaty system, points to existing tools or fixes built into its recent treaty practice, clarifies that these existing tools work in practice to solve the problem and suggests that these tools need to be used more widely or systematically throughout the investment treaty system. They draw on their insider expertise and experience to suggest that sustaining innovations are both workable and worthwhile. For instance, after referencing 'some of the tools that we've developed in our practice', the USA notes that 'we have had some questions raised very fairly about whether these mechanisms are effective' and that 'one of the challenges is that these mechanisms have not yet found widespread use in treaty practice'.[74] While the USA, Mexico and many Latin American and Asian states have been including the relevant provisions in their treaties, they 'have yet to become more broadly used in treaties in other parts of the world'.[75] The USA challenges other states who 'believe that these tools may be inadequate' to bring to the Working Group examples where through practice they have been able to get the same benefits.[76]

[71] Transcript of audio, EU, UNCITRAL WG.III, 39th Session, 8 October 2020, 15:00–17:00, at 15:28.
[72] Transcript of audio, EU, UNCITRAL WG.III, 37th Session, 3 April 2019, 10:00–13:00, at 10:53.
[73] Transcript of audio, EU, UNCITRAL WG.III, 39th Session, 8 October 2020, 15:00–17:00, at 15:28.
[74] Transcript of audio, EU, UNCITRAL WG.III, 34th Session, 1 December 2017, 9:30–12:30, at 10:06.
[75] *Ibid.*
[76] *Ibid.*

To the USA, the necessary tools exist, but they just have not been used enough by other states, many of which have less experience in ISDS. US officials argue that the existing tools should be tried before more dramatic reforms are introduced:

> As we've said repeatedly, we firmly believe that existing tools such as non-disputing party submissions, and joint interpretations should definitely be included and be pursued actively. … We also believe that tools such as the review of an interim award or a draft award by dispute parties are important and should not be forgotten as they exist in current treaties. Now, given that these tools already exist, though, we think that in considering an appellate review, the Working Group should, could benefit from a better understanding of the added value that appellate adds when we already have these tools.[77]

In line with its innovation-as-updating method and its dialectical-not-delegating approach, the USA warns that disruptive reform, such as replacing ISDS with a multilateral investment court, may have unintended consequences:

> We need to consider that there will not only be positive outcomes but downsides as well for how investment disputes are resolved should a standing body be created. … [W]e have years of experience with ad hoc arbitration to resolve investment disputes, and the current ad hoc arbitration system has shown certain benefits, including the protection of party autonomy, flexibility, and relative efficiencies and cost savings. By contrast, we do not have the benefit of knowing how the establishment of a standing body would work in a multilateral context or resolving modern day investment disputes.[78]

Speaking specifically about a court option, the USA has said that 'the need for a standing body may not be justified. At the very least our analysis should continue to consider the benefits of ad hoc arbitration and the potential risks of creating new permanent institutions'.[79] The US insider officials see little benefit in disrupting the *status quo*, preferring sustaining innovations in order to improve upon, while stabilizing, the existing system. In doing so, they draw on their expertise, experience and networks within the field in order to bolster the credibility of their approach and to encourage others to follow their lead.

6 Outsider Officials: Brazil

Do our observations about the relevance of outsider and insider status of officials to ISDS reform proposals apply beyond the EU and the USA? To gain insight on this point, we look at two states that are seen as extreme opponents or proponents of ISDS. No state has been a more consistent opponent of ISDS than Brazil, the system's only complete outsider. The diverse experiences and connections of Brazil's outsider officials enabled them to entirely reimagine investment protection when updating Brazil's

[77] Transcript of audio, EU, UNCITRAL WG.III, 38th resumed session, 21 January 2020, 14:00–17:00, at 14:31.

[78] Transcript of audio, EU, UNCITRAL WG.III, 40th Session, 8 February 2021, 15:00–17:00, at 16:39.

[79] Transcript of audio, EU, UNCITRAL WG.III, 40th Session, 8 February 2021, 15:00–17:00, at 16:41.

investment policy. Despite having a large economy and both sending and receiving lots of investment, Brazil has never been a central player in the investment treaty system. Brazil signed a handful of investment treaties in the 1990s, but, when these were submitted to Congress for ratification, they generated heated debate, and none were ratified.[80] Thus, Brazil has never been a party to an ISDS dispute. According to the Brazilian representative at UNCITRAL,

> [t]here are many reasons why Brazil decided not to have ISDS in its agreements, some of them coincide with [the] general critique that many organizations and scholars make regarding ISDS which is the fact that it may be considered discriminatory against national investors who do not have the chance to resort to international arbitration and must tackle any issues within domestic courts. This is one of the reasons why historically, Brazil has decided not to go down this road.[81]

When Brazil began to frame new investment policy proposals in the early 2010s, the officials involved had expertise in international economic law and long experience in trade law, but they were outsiders to arbitration. While many states have differences of view towards ISDS among their ministries, traditionally, ISDS has had very few supporters within the government of Brazil: 'The predominant sentiment within the Brazilian government and parliament is that there is neither the appetite to accept traditional BITs [bilateral investment treaties] and ISDS mechanisms (given the hurdles imposed by the Brazilian legislation) nor the need to do so in view of the attractiveness of the domestic economy. This sentiment seems to be echoed as well by both Brazilian and foreign investors.'[82] Relatively broad agreement within the government that ISDS was not worth embracing likely helped to create conditions under which outsider officials could prevail in shaping their country's position, similar to the dynamics within the EU after the public consultation.

These outsider officials began crafting their reform vision years before UNCITRAL began, including drafting a new model treaty that would be a distinctly Brazilian agreement rather than copying from international templates.[83] The model Agreement on Cooperation and Facilitation of Investments (ACFI) that they developed departs from standard investment treaties in key respects. These officials prioritized different aims, notably investment facilitation rather than investment protection as well as

[80] Campello and Lemos, 'The Non-Ratification of Bilateral Investment Treaties in Brazil: A Story of Conflict in a Land of Cooperation', 22 *RIPE* (2015) 1055; Magetti and Choer Moraes, 'The Policy-Making of Investment Treaties in Brazil: Policy Learning in the Context of Late Adoption', in C. Dunlop, C. Radaelli and J.P. Trein (eds), *Learning in Public Policy: Analysis, Modes and Outcomes* (2018) 295.

[81] Transcript of audio, Brazil, UNCITRAL WG.III, 34th session, 28 November 2017, 14:00–17:00, at 14:40.

[82] Interview, Brazilian official, November 2021.

[83] Choer Moraes and Hees, 'Breaking the BIT Mold: Brazil's Pioneering Approach to Investment Agreements', 112 *AJIL Unbound* (2018) 197, at 198. On the Brazilian approach generally, see Badin and Morosini, 'Navigating between Resistance and Conformity with the International Investment Regime: The Brazilian Agreements on Cooperation and Facilitation of Investments (ACFIs)', in M.R.S. Badin and F. Morosini (eds), *Reconceptualizing International Investment Law from the Global South* (2017) 218, at 248.

different means, notably state-to-state dispute settlement (SSDS) rather than ISDS.[84] The model excludes controversial substantive standards, such as fair and equitable treatment, and incorporates new features, such as an ombudsman to help deal with investors' concerns and grievances before they escalate into formal claims, replicating South Korea's innovation.

At UNCITRAL, Brazil's outsider officials encourage others to think more broadly and imagine a wider range of reforms: 'We are fully conscious that the mandate deals with ISDS reform. However, we are also dealing with other possibilities in a broad approach. That's to say we could envisage different types of reform of the investment regime.'[85] They reference the ACFI model to highlight different ways of approaching common problems and explain how the features of their ACFI model address the concerns raised by other states.[86] For instance, in discussions about costs and duration, Brazil intervened:

> I would like very briefly to make reference to our [Brazilian] approach to dispute resolution, which is related to several of the issues that we have been discussing. Our system is grounded on a preventive approach and we take pre-emptive action also to prevent controversy from escalating to a full-fledged dispute. … Perhaps our discussions here should also include alternatives [to ISDS]. We've been talking about these problems [of cost and duration] over and over and over but we should also look at ways of preventing disputes from reaching a stage where we have to spend considerable amounts of time and money.[87]

Both within and beyond UNCITRAL, there is a sense that Brazil is widening the options available to other states, providing some cover for others to break away from ISDS and try different innovations if they wish. 'Looking forward', explains a Brazilian official, 'our approach might be (directly or indirectly) emboldening other actors to also try this path: the EU-China [Comprehensive Agreement on Investment] provides only for SSDS [and] the EU is also negotiating an investment facilitation agreement with Angola'.[88] This emboldening takes place alongside the continued spread of

[84] J.H.V. Martins, *Brazil's Cooperation and Facilitation Investment Agreements (CFIA) and Recent Developments* (2017), available at https://cf.iisd.net/itn/2017/06/12/brazils-cooperation-facilitation-investment-agreements-cfia-recent-developments-jose-henrique-vieira-martins/; Hees, Mendonça Cavalcante and Parahos, 'The Cooperation and Facilitation Investment Agreement (CFIA) in the Context of the Discussions on the Reform of the ISDS System', 11 *South Centre Investment Policy Brief* (2018) 1. The Federative Republic of Brazil, Cooperation and Facilitation Investment Agreement Between the Federative Republic of Brazil and X, available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/download.

[85] Transcript of audio, Brazil, UNCITRAL WG.III, 38th session, 18 October 2019, 14:00–17:00, at 15:49.

[86] Brazilian interventions at UNCITRAL often end by inviting other delegations to consider elements of the Agreement on Cooperation and Facilitation of Investments (ACFI) model. Transcript of audio, Brazil, UNCITRAL WG.III, 36th Session, 1 November 2018, 14:00–17:00, at 14:50 ('[i]f any delegation wishes to have additional information about this model, they should feel free to approach me during the breaks'). See also Transcript of audio, Brazil, UNCITRAL WG.III, 37th Session, 1 April 2019, 10:00–13:00, at 11:34 ('we are available to exchange views with any delegation that wishes to get into more detail on our model for investment agreements').

[87] Transcript of audio, Brazil, UNCITRAL WG.III, 36th Session, 1 November 2018, 14:00–17:00, at 14:48.

[88] Interview, Brazilian official, October 2021. European Commission, EU-China Agreement in Principle, available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/china/eu-china-agreement/eu-china-agreement-principle_en.

Brazilian agreements using the ACFI model; Brazil had signed 16 agreements by late 2021, including with large states like India.[89] Brazilian officials see the Brazil-India agreement as part of a more general trend 'to tilt the balance in the direction of a more robust protection of the State's capacity to regulate and to eschew traditional forms of dispute resolution'.[90]

Brazil is not a central player at UNCITRAL, though it speaks semi-regularly and voices support for the process. Its representatives also demonstrate an interest in being part of whatever emerges from UNCITRAL through their efforts to ensure that it is open and plural enough that it provides space for SSDS and other components of their approach: 'It is important to bear in mind that we too have skin in the investment arbitration game – at the end of the day, the ACFIs provide for arbitration, albeit SSDS.'[91] During discussions of a possible Code of Conduct, for instance, the Brazilian delegation intervened to ensure that any code that emerges could also apply to SSDS, to ensure the code is 'universal'.[92] Despite participating constructively, Brazilian officials have made clear that reforming ISDS is not their primary concern nor is UNCITRAL their primary venue: 'As most delegates know, Brazil tends to favour state-state dispute settlement systems. We are not, [as] you know, supporters of … investor-state systems, but still we participate in these discussions because we feel it's important to understand what goes on here and I think we can make our own contribution.'[93]

Although Brazil participates at UNCITRAL, its principal energies in investment policy are directed elsewhere – in ways that leverage the broader networks and experiences of its officials. According to one official, 'Brazil approaches UNCITRAL as part of a larger set of processes that ultimately should broaden the range of interests incorporated into the investment regime'.[94] Brazil, along with China and other states, spearheaded multilateral discussions on investment facilitation among WTO member states.[95] Brazil's innovations in investment policy-making are gaining ground internationally, but these innovations have been sidelined at UNCITRAL where the focus is on ISDS reform. Brazil's outsider officials have no vested interest in the ISDS *status quo*, and they leverage their diverse expertise and networks to develop their state's more

[89] Choer Moraes and Mendonça Cavalcante, 'The Brazil-India Investment Co-operation and Facilitation Treaty: Giving Concrete Meaning to the "Right to Regulate" in Investment Treaty Making', 36 *ICSID Review* (2021) 304, at 309.

[90] *Ibid.*, at 305.

[91] Interview, Brazilian official, October 2021.

[92] Transcript of audio, Brazil, UNCITRAL WG.III, 38th session, 18 October 2019, 14:00–17:00, at 15:49. Brazil also took care to 'point out an apparent imbalance in the last phrase' of an UNCITRAL summary, 'where we can read that ISDS may have depoliticized conflict arising between investors and states from escalating into interstate conflict. I think there is an implied notion of virtue, as opposed to other systems – namely, we could imagine, state-state dispute settlement. So we would like to point out this apparent conclusion with which we do not agree, bearing in mind other areas in which state-state dispute settlement is being used in the WTO, in other FTAs, where this system is used in investment disputes'. Transcript of audio, Brazil, UNCITRAL WG.III, 35th Session, 26 April 2018, 15:00–18:00, at 17:15.

[93] Transcript of audio, Brazil, UNCITRAL WG.III, 36th Session, 29 April 2018, 14:00–17:00, at 15:13.

[94] Interview, Brazilian official, November 2021.

[95] It is worth noting that Brazil pursued multilateral negotiations at the World Trade Organization (WTO) (where they have been a strong player) not UNCITRAL (where they have not been a strong player). WTO,

ISDS-disruptive reform initiatives both at and (crucially) beyond UNCITRAL. How, then, does this stance compare to Bahrain's, the state in the UNCITRAL process that has taken the most pro-ISDS approach and that is represented by arbitration practitioners rather than government officials?

7 Insider Officials: Bahrain

As a small economy and a latecomer to the investment treaty system, signing its first treaty only in 1991, Bahrain has not historically been a major player in the investment treaty system. It has been involved in only three known treaty-based ISDS cases, all registered after 2015.[96] Yet Bahrain stands out at UNCITRAL as an active participant and the most vocal state proponent of ISDS. Bahrain has been enacting policy changes to become a welcoming seat for international arbitration, including 2009 reforms that divert certain cases away from national courts to tribunals composed of two Bahraini judges and a third member who is not a judge.[97] The third member is appointed by the Bahrain Chamber for Dispute Resolution (BCDR), a new arbitration centre created alongside these 2009 reforms. With the BCDR's creation, Bahrain seeks to participate in the booming growth of commercial arbitration across Asia and the Middle East. This growth is both fuelled and served by the establishment of new arbitration centres that make successful jurisdictions into 'new legal hubs',[98] both supplementing and challenging the dominance of traditional arbitral seats such as New York, London and Paris.

Like other jurisdictions vying to be the new capitals of arbitration, Bahrain is seeking to establish its pedigree with insiders from the global arbitration community. In addition to being created in conjunction with the American Arbitration Association, the BCDR's annual reports showcase the chamber's close links with the arbitral community by recounting joint events or sponsorships.[99] These links are both institutional and driven by individuals who have specialized expertise and well-established networks in the field of international arbitration. The BCDR's chief executive officer is the former head of the Dubai International Arbitration Centre as well as the former deputy and acting secretary-general of the International Centre for Settlement of Investment Disputes (ICSID). One BCDR trustee is a past president of the London

Joint Ministerial Statement on Investment Facilitation for Development, Doc. WT/MIN (17)/59, 13 December 2017; see also Choer Moraes and Hees, *supra* note 83, at 201.

96 PCA, *Bank Melli and Bank Saderat v. Bahrain*, 9 November 2021, PCA Case no. 2017-25; *Qatar Airways v. Bahrain* (for a description of the case, see https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1059/qatar-airways-v-bahrain), while Bahraini investors were the claimant in *Nile Douma v. Egypt*, PCA Case no. 2017-09.

97 P. Stothard and D.W. Sapte, *Dispute Resolution in the Gulf: Dubai and Bahrain Lead the Way* (2010), available at https://uk.practicallaw.thomsonreuters.com/2-502-1713.

98 Erie, *supra* note 4; Bookman and Erie, 'Experimenting with International Commercial Dispute Resolution', 115 *AJIL Unbound* (2021) 5.

99 For instance, the 2019 annual report recounts joint events with the Arbitration Institute of the Stockholm Chamber of Commerce and notes that the Bahrain Chamber for Dispute Resolution (BCDR) was a cooperating partner of the EFILA Annual Conference. BCDR, *Annual Report* (2019), available at www.bcdr-aaa.org/wp-content/uploads/BCDR-Annual-Report-2019.pdf.

Court of International Arbitration, past president of the International Council for Commercial Arbitration and has served as a vice-president of the International Chamber of Commerce's International Court of Arbitration. These two individuals from the BCDR form Bahrain's delegation in Working Group III, giving Bahrain's representatives clear insider status.[100]

Although many states are vying to be arbitral hubs, Bahrain is the only such state with representatives from an arbitration institution speaking for it at UNCITRAL rather than government officials. One of these individuals has a long history representing Bahrain in previous Working Group sessions on updating the UNCITRAL Model Rules. The other explains the close working relationship between Bahrain and the BCDR and how he came to represent Bahrain at UNCITRAL: 'Whenever there is a matter involving international law or arbitration, the receiving ministry often forwards it to the BCDR seeking its input. When I saw the invitation that the UNCITRAL sends to every country, I felt that I had the expertise to make a contribution on behalf of Bahrain, and Bahrain supported me in assuming the role.'[101] Although not government officials, the individuals representing Bahrain emphasize the importance of understanding the national interest 'in the round' after noting that, based on their experiences representing many states, they are used to seeing 'a huge difference' in how different ministries view arbitration and investment treaties. Therefore, to get a sense of the government's views, they report consulting widely:

> I speak not only to the Ministry of Foreign Affairs but more relevantly to the Ministry of Commerce. And anybody else who is interested. … I'm using those two ministries as shorthand, they're not the only ones, obviously. The judiciary itself would sometimes be involved in enforcement of arbitration or sometimes finds their work criticized in denial of justice.… The more time that is spent on these important things, the easier it is to perceive the national interest in the round.[102]

Other actors at UNCITRAL take note of Bahrain's identity as a state, but one represented by arbitration insiders, sometimes suggesting that this professional interest and experience skews the perspectives offered by these representatives. For instance, after repeated assertions from Bahrain and private sector groups that adjudicators would be inherently biased if they were appointed by states alone, the EU stated that Bahrain was thinking about the question of appointments to a permanent court through the wrong paradigm – international commercial arbitration rather than public international law – before suggesting that Bahrain's representatives might be acting based on their knowledge of, and expertise in, ISDS rather than their knowledge of, and expertise in, representing states in functions such as treaty negotiations:

[100] The BCDR's chief executive officer has attended eight sessions (out of nine possible sessions) since 2017 and speaks for Bahrain, while the other individual only began attending in 2020. An official from Bahrain's Legal Affairs Department attended one session and another individual from the BCDR also attended three sessions.

[101] Interview, Individual A, delegation of Bahrain to UNCITRAL WG.III, June 2022.

[102] Interview, Individual B, delegation of Bahrain to UNCITRAL WG.III, June 2022.

> Some of the distinguished delegates that we have heard, particularly from the observers who speak from a particular interest in the current system, and some of the delegates, including the distinguished delegates of Bahrain whose function today is in the arbitration system, their view of this is obscured, with all due respect, by their day-to-day activities. Their job is to manage arbitration activities and they are not recognizing what states do when they conclude international treaties.[103]

The individuals representing Bahrain acknowledged that their positions working for an arbitration institution shape how they think about debates in the UNCITRAL room, more so than would be expected for government officials: 'We think constantly about the consequences of anything [that] could impact on the work of arbitral institutions, also in Bahrain, and not just BCDR, there are others and we invite others to come in. We think about it all the time because we are arbitration specialists. In the macroeconomic scheme of things, that's not something that any minister would give high priority.'[104] But to these delegates, this heightened sensitivity to the impact of the UNCITRAL reform process on arbitration is not problematic because, on the major aspects of Bahrain's approach, their views and the government's views align: 'I've always been on that side of wanting to improve … we're both ferocious incrementalists, and I think that coincides entirely with the objectives of those to whom we report.'[105]

These representatives view sustaining and improving ISDS to be in Bahrain's national interest as a developing state. As one explained, 'you should reform rather than replace. I reached this conclusion bearing in mind the interests of developing countries. I do not have the same concerns as the USA or the EU. My position is that the safest and most effective way to address the flaws of the existing system is to reform rather than to replace it'.[106] This individual expressed concern that replacing ISDS with a permanent investment court represents a 'leap in the dark' and may make investors 'reluctant to make investments in countries that have joined the court' or 'make their investment conditional on the insertion of arbitration clauses in investment contracts' or 'negotiate a much higher rate of return to compensate for the perceived increase in risk'.[107]

The representatives' preference for incrementalism is manifest in the submissions that the BCDR prepares for Bahrain to make to the Working Group.[108] In one such submission, Bahrain proposed five improvements to the existing system, including binding codes of conduct to be developed by arbitration institutions and a wider pool of arbitrators.[109] Many of Bahrain's interventions at the Working Group follow a

[103] Transcript of audio, EU, UNCITRAL WG.III, 40th Session, 9 February 2021, 15:00–17:00, at 15:48.

[104] Interview, Individual B, delegation of Bahrain to UNCITRAL WG.III, June 2022.

[105] Interview, Individual B, delegation of Bahrain to UNCITRAL WG.III, June 2022.

[106] Interview, Individual A, delegation of Bahrain to UNCITRAL WG.III, June 2022.

[107] Interview, Individual A, delegation of Bahrain to UNCITRAL WG.III, June 2022.

[108] 'BCDR continues to play an important role in the work of UNCITRAL, heading the Bahraini delegation at the meetings of UNCITRAL's Working Groups II, III and VI, and preparing the submissions for Working Groups II and III on expedited arbitration and investor-State dispute settlement (ISDS) reform, respectively.' BCDR, *supra* note 99, at 3.

[109] The five suggested improvements are: binding codes of conduct to be developed by arbitral institutions, a wider pool of arbitrators, joint interpretive committees, arbitrators dedicated to annulment proceedings and new grounds for annulment. UNCITRAL, Submission from the Government of Bahrain on Possible Reform of Investor-State Dispute Settlement (ISDS), UN Doc. A/CN.9/WGiii/WP180, 29 August 2019, at 15–16.

pattern: first, emphasizing strengths of the existing system; second, acknowledging that the existing system could perform better on a particular issue; third, stating that a permanent mechanism would not address the issue; and, fourth, presenting arbitral institutions as the actors best placed to address the concern. This pattern is evident in this intervention from Bahrain on the issue of arbitrator diversity:

> Several delegates have expressed concern about repeat appointments, which is due to the fact that certain counsel appoint the same arbitrators over and over again. We fail to see however, how this problem could be addressed with a permanent mechanism, if there were only a limited number of adjudicators. By contrast, we believe that arbitration institutions have at their disposal significant means for addressing the flows associated with repeat appointment of arbitrators.
>
> Firstly, arbitration institutions could expand further the geographical representation of the pool of appointed arbitrators so it becomes more reflective of human diversity. … Secondly, [arbitration] institutions have the responsibility of identifying new generations of rising stars from underrepresented regions and populations. … Thirdly, arbitration institutions could take one further step by issuing guidelines to the effect that arbitrators should not carry out more than a certain number of cases at one time.[110]

Since Bahrain's interventions support the existing system, Bahrain's interventions at the Working Group are frequently seconded by arbitral insiders representing private sector groups, more so than any other state. For instance, after Bahrain outlined its reservations to an appellate mechanism, the Corporate Counsel International Arbitration Group (CCIAG) intervened to note: 'We were impressed by the distinguished delegate from Bahrain's observation that there could be alternative solutions. We share that view. We think incremental reform would be a better approach than wholesale change,' while the US Council for International Business (USCIB) 'echo[ed] the concerns raised by Bahrain'.[111] Inside and outside the Working Group, the delegates from Bahrain expressed themselves in ways that set themselves apart from other states and suggest careful bridging between the delegation's identity as a state and the identity of its individual delegates as arbitration community insiders. For instance, even when other states with concerns about a potential multilateral investment court make submissions, they stopped short of denouncing such a court.[112] By contrast, Bahrain's submission includes a direct critique of the court proposal, more closely

[110] Transcript of audio, Bahrain, UNCITRAL WG.III, 38th Session resumed, 23 January 2020, 14:00–17:00, at 14:23.

[111] Transcript of audio, Bahrain, CCIAG, and USCIB, UNCITRAL WG.III, 38th Session resumed, 20 January 2020, 14:00–17:00, at 14:51, 15:19, 16:05. Additional examples are common and include: Transcript of audio, US Council for International Business (USCIB), UNCITRAL WG.III, 39th Session, 6 November 2020, 15:00–17:00, at 15:33 ('I would fully echo the comments by the distinguished delegate from Bahrain'); Transcript of audio, American Bar Association, UNCITRAL WG.III, 40th Session, 9 February 2021, 15:00–17:00, at 15:31 ('[w]e first wish to recall and endorse all of the comments made over the past two days by the delegates of the governments of Bahrain and the United States of America, as well as those of USCIB and CCIAG').

[112] See, e.g., UNCITRAL, Submission from the Governments of Chile, Israel, Japan, Mexico, and Peru on Possible Reform of Investor-State Dispute Settlement (ISDS), UN Doc. A/CN.9/WGiii/WP182, 2 October 2019.

resembling the submissions from private sector groups like the European Federation for Investment Law and Arbitration, the CCIAG or the USCIB.[113] Outside the Working Group, Bahrain's speaking delegate pens pieces for specialist arbitration publications that are critical of a multilateral investment court.[114]

Although Bahrain's interventions echo older themes about the virtues of arbitration, these themes are encased in a new framing. Bahrain innovates in the investment treaty system by transplanting old practices to new geographies, which are in line with its interest as an emerging legal hub, while also rejecting the legitimacy of actors from the global North setting the reform agenda:

> It is generally agreed that the existing system has flaws. But the EU wants to move to a concept that is entirely new and untested. The desirability of this new concept is being directed at developing countries at a time when they have learned to use the existing system to their advantage. Now they are winning more cases, now they are doing better in terms of diversity of tribunals. The EU argues we do not want the existing system any longer. But who has granted the EU this natural leadership to tell the rest of the world what to do?[115]

As this and other quotes show, Bahrain is keen to identify as a developing state in the Working Group and to speak for developing states collectively.[116] Bahrain is one of the only states to speak in the language of the global North versus the global South and to use words that echo negotiations on investment protection at the United Nations in the 1960s and 1970s. In those years, the idea of a collective voice from the global South was invoked to reject arbitration, but Bahrain inverts this legacy. For Bahrain, reforming the investment treaty system, especially through structural reform, equates with recolonizing dispute settlement or strengthening neo-colonial continuities.[117] As Bahrain sees it, UNCITRAL's reform agenda is recolonizing because it has been articulated largely by global North states since they began to face cases as respondents, while global South states did not criticize the system when they alone were respondents:

> For many decades, developing countries were almost exclusively the respondents in investment arbitration cases. Very often, they were unable to fully participate in the proceedings, let alone defend themselves effectively. And yet, few voices from developed countries raised the spectre of illegitimacy or criticized the imperfections of the investment arbitration system.

[113] UNCITRAL, Submission from Bahrain, *supra* note 109, at 9–14.

[114] N.G. Ziadé, *Do We Need a Permanent Investment Court?* (2019), available at https://globalarbitrationreview.com/do-we-need-permanent-investment-court.

[115] Interview, Individual A, delegation of Bahrain to UNCITRAL WGIII, June 2022.

[116] For instance, when discussing an appeal mechanism, Bahrain fears that systematic use of appeals 'could have a particularly harmful impact on developing states that have severe budgetary constraints and on investors that are small and medium sized enterprises'. Transcript of audio, Bahrain, UNCITRAL WG.III, 38th Session resumed, 20 January 2020, 14:00–17:00, at 14:53. Or when discussing selection and appointment, Bahrain highlights the under-representation of arbitrators from Africa and other emerging economies. Transcript of audio, Bahrain, UNCITRAL WG.III, 35th Session, 25 April 2018, 15:00–18:00, at 15:30.

[117] It is worth clarifying that this is the opposite to how these terms appear in the academic literature. Scholars emphasizing neo-colonial continuities often believe that structural reform efforts do not go far enough; we are not aware of any other voices that believe reform equates with recolonization.

> It is disquieting to note that at the time when disputants from developing countries are no longer exclusively respondents in these cases and when their nationals increasingly act as investors and serve more frequently on arbitration tribunals, recourse to arbitration by states has now become controversial.
>
> Are we to believe that the philosophical underpinnings of the existing arbitration system – championed, among others, by leading European scholars such as Pierre Lalive, René-Jean Dupuy, and Prosper Weil, to name but a few – were misconceived and ought to be displaced by the views currently in fashion in Brussels? Can developing countries be expected to blindly accept this new trend without questioning or critically evaluating it?[118]

In Bahrain's view, what was wrong with arbitration was not systemic or design-related per se; it was the under-representation of investors and arbitrators from outside the global North. Bahrain seeks to sustain ISDS and extend its reach to new geographical locales, positioning itself as a new arbitral hub that draws upon the expertise of, and is represented by, arbitral insiders. In doing so, it seeks to innovate incrementally without disrupting ISDS.

8 Discussion and Conclusion

In the above four case studies, we see insider officials with deep roots in the arbitration community propose sustaining innovations on behalf of the USA and Bahrain, while outsider officials with no roots in the arbitration community propose disruptive innovations that would displace ISDS on behalf of the EU and Brazil. This pattern echoes observations about innovation in other fields: insiders are more likely to propose innovations with the intention of sustaining and updating existing practices, whereas outsiders are more likely to develop innovations that may disrupt or displace existing practices. These differences can arise from divergences in insiders' and outsiders' experience, networks and interests.

In identifying the backgrounds of officials as a factor that can shape the reform proposals put forward by their states, our work fits within a growing literature on the role of individuals in shaping international law and institutions. Recent books highlight the important roles that individual officials have played in creating international legal institutions historically, drawing out how their backgrounds and experiences shaped their beliefs and vision for new institutions.[119] Yet many questions remain to better understand when and how individuals can have outsized influence. Here, we sketch four avenues for future research on how individuals and internal dynamics within ministries may shape state positions. First, comparing how governments organize

[118] Transcript of audio, Bahrain, UNCITRAL WG.III, 40th Session, 9 February 2021, 11:00–13:00, at 11:55.

[119] Most notably, M. Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (2013); P. Sands, *East West Street: On the Origins of 'Genocide' and 'Crimes against Humanity'* (2016); O.A. Hathaway and S.J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (2018). On individuals in ISDS, see T. St John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (2018).

their ISDS policy-making internally may help explain why governments come to such diverse ISDS reforms. Choices of whether to locate responsibility in one ministry or agency or level of government over another likely make a difference as to which officials work on the policy area and what their backgrounds are. Where there are a limited number of officials tasked with developing a policy, or there are few institutional checks within the policy making process, the preferences of particular individuals may play a more outsized role than when many actors and agencies engage in the policy-making process.

A state's general ISDS policy and officials' backgrounds are endogenous – that is, there are feedback loops connecting earlier policy decisions to later personnel decisions, which in turn shape subsequent policy decisions and so on. In the EU's case, the European Commission's lack of experience with ISDS made it more likely that outsider officials would come to hold policy responsibility, while the outsider status of those officials in turn contributed to the EU's decision to propose replacing ISDS with a multilateral investment court. On the flipside, the USA's involvement in ISDS cases has made it more likely to hire officials who have experience in international arbitration to litigate these cases, and these officials in turn were adept at leveraging their insider experience when proposing reforms and had less interest in displacing ISDS arbitration, particularly as many hoped to return to private practice.

Given these feedback loops, how can we distinguish individual influence from general state policies? What evidence shows that individuals' backgrounds matter for states' proposals beyond what one would anticipate on the basis of the state's general policies and experience? Targeted comparisons may provide a useful approach to answering these questions. For instance, both Bahrain and Singapore export and import considerable investment and have state policies in favour of developing themselves as attractive sites for arbitration. But while arbitral insiders represent Bahrain at UNCITRAL, Singapore is represented by officials from the Attorney General's chambers, and their remarks at UNCITRAL show that these officials are always cognisant of Singapore's diplomatic alliances, recent trade and investment agreements and the government's wider policy priorities. The tone of Singapore's interventions is decidedly diplomatic, and the content often provides a middle-ground path forward, both of which contrast with the advocacy tone and strongly pro-ISDS positions advanced by Bahrain.

If we see ISDS policy in terms of feedback loops between policies and personnel, when are these feedback loops interrupted? Examining these moments is a second avenue for future research. Our case studies suggest that moments in which policy-making responsibility is shifted are a prime opportunity for change and for outsiders to have influence because they are moments of flux in which the way forward is less clear and because interests have become dislodged or not yet formed. These moments can arise from a variety of circumstances, some of which are specific to one state's experience, like the United Kingdom creating a new department with responsibility for ISDS after Brexit, while others are more common, like Egypt and other countries creating new internal agencies or inter-agency procedures after facing several claims. When these reallocations of responsibility occur, do we see a change in policy, and, if so, is it the result of new entrants into ISDS policy-making or is it the result of other

factors? As in other circumstances, it is likely that multiple factors are at play when ISDS policy changes, but scholars can examine their relative importance in particular states at particular times.

Third, if individual backgrounds can help explain changes in states' ISDS policies, they may help to also explain the surprising persistence in some state policies. For instance, the number of cases that have been brought against some states (for example, Argentina) and the amount of damages they have been ordered to pay might be expected to make those states more sceptical about ISDS. Yet the insider experiences gained by the officials representing those states in arbitrations, and the possibility for those officials to later move to the private sector to continue work on similar cases on the investor side, might make those officials more inclined towards innovations that sustain, rather than disrupt, ISDS. In states where responsibility for ISDS has not been reallocated in a long time and where officials are relatively autonomous or insulated, we may be more likely to see persistent policies.

Fourth, our argument about outsiders is limited to proposing reforms; the same outsider traits that contribute to the development of disruptive reforms (such as a lack of networks within the field) may make it harder for these individuals to convince others to support their proposed reforms. When it comes to the question of what traits are most significant in terms of generating support for different reforms within the negotiations, we expect that both state- and individual-level characteristics matter from our observations at UNCITRAL. We have observed that the weight of the state an official represents seems to be more important to the reception of the reform proposal than the outsider or insider status of the official. However, we have noticed that, when other officials see the same individuals representing a state at every session at UNCITRAL for several years, it gives that state's proposals more weight; if these individuals have consistently made contributions to the discussions or written submissions, then their proposals generally earn more respect from their peers. How officials engage likely reflects both their state's commitment to the process (for example, to engage and send experts) as well as their own commitment and skills, and these factors may influence each other (for example, a committed individual may be effective both in negotiations and in their capital lobbying for continued engagement at UNCITRAL).

These questions and observations present fruitful avenues for future research that build upon and extend the insights in this article. Based on sustained participant observation and interviews, we have suggested that scholars and policy-makers need to think more seriously about the role that officials' backgrounds play in how they develop states' positions and that there is a dispositional link between the insider/outsider nature of these officials' backgrounds and the more sustaining or disruptive innovations that these officials are likely to pursue on behalf of their states. When it comes to reforming the investment treaty system, greater originality typically comes from the outside. Whether such innovations are better or not is a matter of opinion. Whether those innovations get picked up by others and diffused within the system more broadly remains to be seen and may depend on a different set of factors, such as the relative size and power of the state and its commitment to playing a significant role in the negotiating process over an extended period of time.