

Investment Arbitration and Political Systems Theory[†]

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Abstract: This chapter suggests that political systems theory allows us to make better sense of the fragmented understanding we have today of investment law in general and of investment arbitration in particular. Relying on a theory by David Easton, the chapter presents investment arbitration as a political system: one that transforms the input of key actors into output, with feedback loops from the latter to the former. This perspective, the chapter contends, helps us get a better sense of some of the system's key dynamics, including its conditions of stability, factors and direction of change, and the functions it is effectively called upon to fulfil. It grounds the discussion of the drivers of investment arbitration more closely in reality than do the common references to notions of obsolescing bargain, credible commitment, promotion of the rule of law, and development of sensible rules of state behaviour.

In this chapter we present a vision of investment treaty arbitration filtered through the lens of political systems theory.¹ Political systems theory was developed in the 1950s and 1960s by David Easton, an eminent political scientist.² The core idea of Easton's theory, which we describe in more detail below, is that political systems can be understood as consisting of inputs from various actors that are aggregated and transformed into outputs, where outputs, as Easton puts it, consist of the authoritative allocation of values. The import, or impact, of those outputs feed back into the system as actors react to them, by, for example, changing the content or intensity of their level of support for the system as a whole.

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¹ This chapter builds upon earlier work by Dupont and Schultz: Cédric Dupont and Thomas Schultz, "Towards a New Heuristic Model: Investment Arbitration as a Political System" 7 *Journal of International Dispute Settlement* 3 (2016).

² David Easton, *A Systems Analysis of Political Life* (Wiley 1965); David Easton, *The Political System. An Inquiry into the State of Political Science* (Knopf 1968); David Easton, *A Framework for Political Analysis* (Prentice-Hall 1969).

Admittedly, Easton's theory was the subject of significant criticism in the 1970s³ and today his work is rarely cited by political scientists. Easton had the misfortune of making unwarranted grandiose claims about his theory's potential to revolutionize the discipline by transforming it into an actual "science", which would have been conducted under a unified, all-encompassing theoretical framework.⁴ Political scientists have almost uniformly rejected these claims, and his theory clearly has failed in that regard. However, if we put this overreach aside, we think that his theory provides a valuable heuristic through which to better and more easily understand the complicated interactions that produce international investment law as we know it today. It eventually helps highlight the sources of stress that seem to be leading the system's actors to rethink whether the system should be modified or even abandoned.

Easton's model, as we present and apply it, is simple, and its vocabulary at least subconsciously familiar. But that does not mean that it is not able to show something new. As Ludwig Wittgenstein put it, "The aspects of things that are most important for us are hidden because of their simplicity and familiarity. (One is unable to notice something – because it is always before one's eyes)." The point of a heuristic model is to make familiar things unfamiliar, and thereby make them differently noticeable. |

One of the main values of adopting an Eastonian heuristic in the present context is that it serves to correct currently dominant and unduly narrow neo-functionalist understandings of international investment law. Those understandings tend to view the investment law system either through an economic or legal lens. The first understands the system to be an inevitable "equilibrium" to a prisoner's-dilemma-like game, the function of which is to resolve otherwise irresolvable problems of "obsolescing bargain" and "credible commitment". The second views the system as an inherently desirable attempt to impose the "rule of law" on investor-state relations. Either of these views can be useful in their own right, but they also suffer from limitations.

One important limitation of the first is that it exaggerates the stability of current arrangements. An important limitation of the second is that it conceals the sometimes-

³ See, for example, John D. Astin, "Easton I and Easton II", *Western Political Quarterly*, Vol. 25, No. 4 (Dec. 1972), pp. 726-737.

⁴ Henrik P. Bang, "David Easton's Postmodern Images", *Political Theory*, Vol. 26, No. 3, June 1998, pp. 281-316). There are also further controversies around Easton's work, but they do not concern us here. They are largely intra-disciplinary struggles over particular visions of political science's goals and methods, or debates about whether "political" systems were distinctive from other kinds of social system – again, issues that make no difference to the usefulness of this theories for our purposes.

vigorous contestation over what the “rule of law” in this context should mean or how it should be applied. And a shared limitation of both approaches is a tendency to ignore the multiplicity of actors who actually influence (or agitate to influence) the system’s outputs.

As we describe below, a political-systems approach encourages us to move beyond overly reductionist visions of international investment law as a quasi-inevitable product of state and investor interactions, or as the quasi-autonomous and teleological identification and imposition by tribunals of necessarily sensible or correct rules of state behaviour.

To summarize, our key claim is that one way to make better sense of the fragmented understanding we have today of investment arbitration is to view it as a political system: one that transforms the input of key actors into output, with feedback loops from the latter to the former. We contend that seeing investment arbitration as political system allows us to bring out elements of its workings with greater clarity. We claim that, altogether, this helps us get a better sense of some of the key dynamics of investment arbitration.

In the first section of this chapter, we explain the idea of a political systems, what this means for investment arbitration at the modelling level, and briefly introduce the main actors of the system. In the second section, we draw on Easton’s theory to highlight sources of and reactions to systemic “stress”, a key Eastonian concept. We then briefly conclude.

I. International investment law as a political system

The basic contours of Easton’s framework are easy to specify, at least informally:

The political system is an aspect of the social system. It is an open, transformational system, which functions so as to turn inputs of demands and support into outputs of policies and allocations, the consequences of which then feed back into the inputs. Owing to an inherent scarcity of many valued resources (not least of which is time) there is a propensity to overload or stress, which, if unchecked, could lead to the failure of the system to perform its characteristic function: the allocation of valued goods in an authoritative way. Political systems have the capacity, however, to respond to stress through changes in both system structure and system states; but a system may fail to make such adjustments and therefore fail to persist through time.⁵

⁵ Leslie Green, “Support for the System”, *British Journal of Political Science*, Vol. 15, No. 2 (Apr. 1985), pp. 131-132.

A simple schematic illustrates the basic approach.⁶

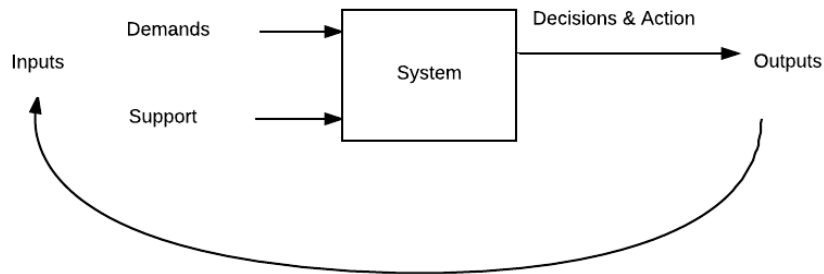


Figure 1: Simplified Eastonian Model

In the simplified model, various actors (who we identify and discuss further below) provide inputs to the system, in the form of what Easton calls “demands” and “support”. He defines demands as “expressions of opinion that an authoritative allocation with regard to a particular subject matter should or should not be made by those responsible for doing so.”⁷ Demands are distinguished from, but may reflect, an actor’s “expectations, opinions, expressions of motivations, ideologies, interests and statements of preference.”⁸ To offer a concrete example, a state (or some sub-unit, such as the Ministry of Foreign Affairs), may prefer that international investment law reflect an understanding of the fair and equitable treatment (FET) standard that mirrors the standard enunciated in the famous *Neer* decision.⁹ The state makes a “demand” to the international investment law system when it argues to an investment arbitration tribunal (in a memorandum, at a hearing) that the tribunal’s ultimate decision should articulate, as an authoritative statement and application of the law, that same understanding. The award is the “output” of the system, and it consists of the decision of the tribunal to articulate a certain understanding of FET, and to act by publishing that decision as an award. The system itself can be viewed as the locus of interactions between the system’s various actors; it consists of the processes through which their various demands are aggregated into the system’s outputs.

⁶ Adapted from Easton, *A Systems Analysis*, 32.

⁷ *Ibid*, 38.

⁸ *Ibid*, 47.

⁹ On the *Neer* decision, see Stephen M. Schwebel, “Is *Neer* Far from Fair and Equitable”, *Arbitration International*, Vol 27, Issue 4, 1 December 2011, Pages 555–562.

“Support”, for Easton, consists of actions and attitudes that promote the maintenance and functioning of the system.¹⁰ In the case of the international investment law system, the decision of a state’s representative at the World Bank to vote to increase funding to the International Centre for the Settlement of Investment Disputes (ICSID) can be viewed as “support”. The support doesn’t *demand* anything from the system, but it does signal the state’s continued willingness to see the system continue to function as it has been. Other kinds of support are easy to identify. If law firms are actors relevant to the system, their decisions to promote the use of ICSID to their clients can be analyzed as support. The willingness of businesses to insert ICSID clauses in their investment contracts is support for the system. And so on.

A key aspect of Easton’s model is the familiar concept of the feedback loop, illustrated in Figure 1 by the curved arrow running from outputs to inputs. The idea here is that the system’s actors experience the system’s outputs, and that in response to those outputs they adjust the character and quality of the demands that they place on and the support that they provide the system in later rounds. As an example, imagine that the arbitral tribunal rejects the state’s demand that its articulation of FET reflects the *Neer* standard. The state is disappointed that the output—the award—articulates a more expansive standard, and, because of that disappointment, the state refuses to vote to fund ICSID the next time the question is presented to the Bank’s Board of Directors. Here we see a withdrawal of support that was caused by the system’s prior output. Likewise, demands may be modified in reaction to outputs. In the next investment treaty arbitration to which it is a party, the state may abandon its previous demand that the system adopt the *Neer* standard (recognizing the question as having been authoritatively settled that it does not), but will now demand that the correct standard is one that reflects only an incremental advance beyond *Neer*. Here the character of the demand has changed because of the earlier output.

One of Easton’s major analytic concerns is the possibility, or indeed, the likelihood, of “continuing disequilibrium” in political systems subject to what he calls “stress”. Stress results from the quantity and quality of demands placed upon the system, which can impede the system from providing authoritative allocations that actors in the system desire. A

¹⁰ Easton 1965, pp. 159-170.

domestic legal example illustrates one version of the problem.¹¹ Federal district courts in the United States face large volumes of “demands” for “outputs” (high-quality adjudications of civil and criminal matters), but the numbers of federal judges, and their budgets, are highly constrained. The result is systemic “stress” in which the ability of the courts to produce the desired output (adjudications) is impeded, as the courts—because of the volume of demands and their limited resources—are forced to resort to the suboptimal use of expedited procedures that dispose of cases without a trial, leading to criticisms of (and in a sense, a decline in support for) the courts.

Easton also suggests that stress can occur because of the content (quality) of demands. Actors may make complex demands that the system can process only with great difficulty, or actors may make competing and inconsistent demands that the system cannot easily aggregate. In either case, Easton’s concern is that such stresses can impact the quality of system outputs, and that as output quality declines, system actors may reduce their support for, or even abandon, the system. The system may adapt to reductions in support or (threats of) abandonment. Or it may cease to exist, to be replaced by some other system. Easton thus identifies the dynamics and discontinuities that political systems experience as they react to, sometimes successfully and sometimes not, the stresses that actors and their demands place upon them.¹² And this is precisely what is of interest to us, in this chapter: it is the mechanisms and dynamics and stresses of the system that are the centre of attention and that structure our thinking, putting the focus on how the object of study is changing and adapting.

We have repeatedly used, and will keep using, the word ‘system’ throughout this chapter. One might wonder, then, whether the word is really apposite: is the investment arbitration system really a system? Is it an actual (or perhaps real, or “natural”) political *system*, in the sense that the human body, for example, is a real, existing, naturally demarcated biological *system*? Easton’s answer was to insist that it does not matter: he was only positing the analytic utility of treating a given political system as *if* it were indeed a system.¹³ On the one hand, that is largely our approach as well: treating investment

¹¹ Our example is based upon Daniel J. Knudsen, *Institutional Stress and the Federal District Courts: Judicial Emergencies, Vertical Norms, and Pretrial Dismissals*, 2014 Utah L. Rev. 187 (2014).

¹² For a convincing articulation of this point, see Henrik P. Bang, “David Easton’s Postmodern Image”, *Political Theory*, Vol. 26, No. 3 (June 1998), pp. 281-316.

¹³ This move can be criticized. See Green, *supra*, at p. 128-129, who argues that once we accept political systems as purely analytical constructs, notions of persistence and dynamism can have no meaning.

arbitration as if it were as a “political system” for analytic purposes can identify interesting and important questions about the potential stability and direction of current rules and institutional arrangements for generating authoritative rules of international investment law. Wearing the ‘systems glasses’, as it were, encourages us to concentrate on identifying the main actors who seek to shape and influence those rules, as well as the incentive structures in which they operate as they both influence rule creation and experience the consequences of the rules that they help to create. Then again, it is not such a great jump into heuristic fiction. There is in investment arbitration something naturally demarcatable, and something arguably system-like in a quite objectively determinable sense. The primary products of the system—arbitral awards—are concrete and identifiable; they self-consciously articulate values that claim the status of binding authority; and the primary actors who seek to influence their creation (and who experience their impacts), as well as those actors’ sites and patterns of interaction, are relatively easily identified. Quite possibly the Eastonian model does not work for every situation. In some instances its application does bring to mind the Green’s memorable *reductio ad absurdum* of a “political system” consisting of “this paper, the moon, [and] Whitehall”¹⁴ – which would admittedly be purely analytical, and in the end arbitrary. But there is something quite more “real” about the regime of investment arbitration understood as a system, in the Eastonian sense.

Figure 2, below, presents a less generic version of Easton’s basic model, depicting the international investment law system in the pre-investment-treaty era. Before discussing the model, we should point out one departure from Easton’s original formulation. Easton articulated an analytic distinction between the “environment” in which a political system operated, and those actors who were “within” the system and able to influence it directly. Actors in the environment (e.g, the voting public) provide “inputs”, while those actors within the system (e.g., politicians) provided what Easton called “withinputs”. We ignore this complicating distinction (one that has been criticized elsewhere)¹⁵ in order to present a simpler model that, in our view, does not lose analytic or suggestive utility. In our model, then, and even though Easton himself might have characterized states and the other actors as being “within” the international investment law system, we present them as if they were outside of it, in the “environment”. In our conception, then, the “system” contains not the

¹⁴ Green, *supra*, p. 129.

¹⁵ Astin, *supra*, at 731 n. 30.

actors themselves, but their modes and patterns of joint interaction in the production of international investment law.

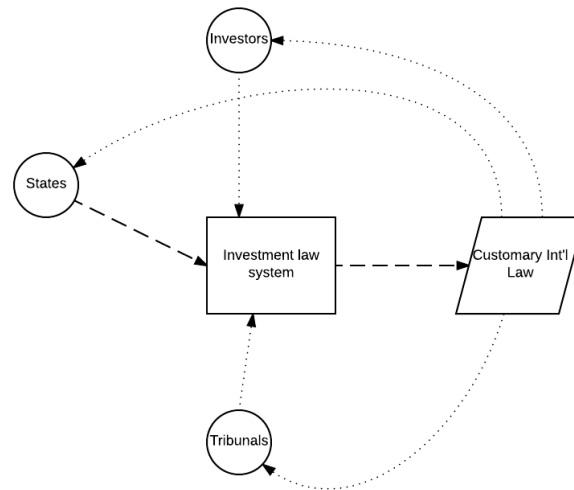


Figure 2: *The International Investment Law System Before BITs*

In the pre-BIT era, the main actors who experienced investment law (as outputs) and who actively sought to influence it (through inputs) were states, investors, and tribunals. However, the influence of investment law on investors and tribunals was rather weak, as suggested by the lightly dotted lines. Tribunals came into existence only rarely, on an ad hoc basis, and the rules of custom were so few and vague as to play little real constraining impact on the occasional arbitral decision. Likewise, investors had few opportunities to directly experience international investment law, as custom did not (and does not) allow investors, as private actors, to activate the system through arbitration. Investors largely experienced international investment law only indirectly, when they could persuade their foreign ministries to exercise diplomatic protection on their behalf, which itself functioned as a mix of diplomacy and law.

Figure 2 also illustrates (again through lightly-dotted lines) that the ability of investors and tribunals to directly place demands on the system were quite weak, or even, for analytic purposes, largely non-existent. Tribunals, as temporary, infrequent, ad hoc affairs, were not sufficiently organized or long-lived enough to formulate and present demands on the system. A robust norm of confidentiality further weakened the ability of tribunals to place demands on the system, as their work product—the natural vehicle for demands—was often secret.

And while foreign investment was alive and well in the pre-BIT era, investors rarely had direct access to the adjudicatory fora that today provide their best and most effective means of trying to shape system output. When they did, it was through occasional arbitration clauses in investment contracts that would result in ad hoc and largely secret adjudications.

Instead, we see states as the primary source of demands on and reactors to the system. This privileged role is built into the conceptual apparatus of customary international law itself, which is said to emerge exclusively from the practice of states, and to depend on the sense in which states understand their practice (*opinio juris*). At the same time, the collective nature of custom generation means that states' ability to actively "demand" certain outputs was quite limited (reflected in a dashed rather than solid line), and that the system correspondingly was able to produce only limited quantities of custom in response. The nature of that custom—rare, vague, incomplete—and the absence of a robust system of international adjudication that would authoritatively interpret, develop, and apply it meant that whatever custom the system did generate was felt only weakly by states (just as it was felt perhaps even more weakly by investors and the occasional tribunal).

Figure 3, below, presents an Eastonian model of the modern international investment law system.

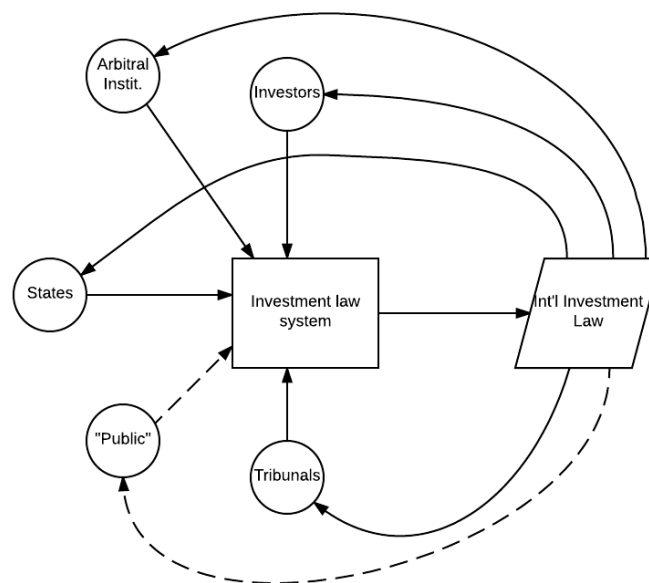


Figure 3 The Modern International Investment Law System

We include five sets of actors as involved in the operation of the modern version of the system: (1) states; (2) investors; (3) arbitral tribunals; (4) arbitral institutions; and (5) the “public”, which we mean as shorthand for the NGOs (and occasionally, individual private citizens) who are increasingly obtaining the right to participate directly in the system’s functioning. States are obviously key actors in the modern system, be it only because their consent to investment arbitration is a necessary requirement for the system to operate. Their input, in general terms, revolves around the ways in which they express that consent and how they frame international investment law substantively, through (state) practice, treaty-making, contracts with foreign investors, and domestic legislative actions, for instance when they consent to investment arbitration in a national ‘investment code’. Another type of states’ input relates to their behaviour during arbitration procedures. Yet another is their role in choosing arbitrators for institutional lists.

Investors are key too, as they activate the system by filing claims. They are principally corporations but may also be individuals. Their input, again in general terms, revolves around the claims they file or threaten to file, the procedural rules or institution that they use, and the framing of their arguments and claims.

The third category of key actors comprises arbitrators, who sit as tribunals and whose actions and decisions are the most proximate “cause” of the system’s outputs. They are the direct producers of awards, crafted and issued within the framework, guideposts, and constraints set by states and investors. Arbitrators’ inputs consist largely but not exclusively in the drafting of their awards, though they may also seek to influence the system through other activities, such as public scholarship.

The fourth category of key actors consists of arbitral institutions, such as ICSID or the ICC, and quasi-arbitral institutions, such as UNCITRAL, because of their role in drafting their own procedural rules and their residual capacity in appointing arbitrators. Their input revolves mainly around the ways in which they exercise this role and this residual capacity, but also extends to their own efforts in exhibiting a successful caseload.

The fifth actor is the “public”. By the public we do not mean individual citizens at large, the vast majority of whom know nothing about international investment law and make no attempts, and have little or no capacity, to influence the system. Rather, we are referring to the typically organized and specialized segments of civil society (primarily NGOs) who have lobbied for, obtained, and taken advantage of opportunities to participate directly in the

system, often through amicus curiae-type provisions in arbitration rules. This is not to deny that the larger public has some theoretical capacity to influence the system when, or if, particular investment-law issues become highly salient. However, those kinds of mass-public inputs will usually be presented to other system actors, such as states, and are best viewed as indirect inputs.

We consider the system's primary output to be the arbitral awards, taken in the aggregate, and including all their variegated effects, from the determination of rights, to their precedential value, to their actual financial implications on all actors involved, to their impact on the reputation of all actors involved, and including all forms of legal, economic, social, and political dimensions. This output has feedback effects on the key actors of the system, who react to it, either by adjusting their input so as to maximise the realisation of their own preferences and perceived interests, or by adjusting their actions without seeking to alter the system itself, for instance by simply complying with it or by exiting it. These reactions create the system's dynamics.

We think it important to emphasize that our graphical implementation of Easton's political systems model is just one possible way of summarizing, in a heuristic figure, the kinds and quantities of actors and interactions that produce international investment law broadly construed. It is a choice that puts ease of understanding over exhaustiveness: undoubtedly the graphical representation could be made much more comprehensive. For instance, it would be possible to incorporate into Figure 3 the observation that the various actors may try to influence the system's output indirectly, by placing demands directly on other actors. For example, certain segments of the public regularly attempt to influence international investment law by lobbying national governments on investment treaty practice. It would also be possible to further disaggregate our five actors, out of recognition that collectivities such as "the state" are in reality made up of constituent units (and, ultimately, of individuals) who may have varied interests at play in the operation of the international investment law system, and different pathways of influence over it. For example, investment treaty litigators in the state's foreign ministry may have very different ideas about the values that the system should be providing than do government employees in the ministries whose actions are being challenged. We could also disaggregate the system's outputs into customary, treaty, and arbitral law, as different actors may have different kinds and degrees of influence over different forms of international investment law. We ultimately think that something like Figure 3 strikes the proper balance between too much fidelity to the

complications of reality and too little. Perhaps we err on the side of too little. But the ability of simplifying models, like Easton's, to usefully structure our thinking about complex socio-legal phenomena depends on simplicity.

II. Stress in the System?

In this section we use the Eastonian heuristic developed above to frame a discussion of sources of stress in the system. We discuss volume-related stress first, and then discuss content-related stress. Our discussion of the latter focuses most extensively on the system's evolution toward greater transparency and participation rights.

A. *Volume-related stress*

At a general level, a comparison between Figures 2 and 3 illustrates that the system has expanded in terms of the number of actors who place demands upon it and in the system's capacity to produce outputs that have meaningful feedback potential. This expansion is due in large part, of course, to the massive increase in the numbers of investment treaties in force that contain state pre-consents to investor-initiated, binding arbitration. Volume is likely to continue to expand, and perhaps even to dramatically expand, as the system expands to cover foreign investment between highly developed economies. It is also likely to expand as investment-treaty-litigation financing grows more institutionalized and more available.

One important implication that we can derive from Easton's framework is that the expanded, modern system is potentially more likely to suffer from "stress" than was the more primitive system illustrated in Figure 2. This is because the modern system is characterized by a much greater number of actors capable of placing demands into the system (volume stress) and to the potential for much greater conflict between demands, as an increasingly heterogeneous set of actors brings different interests and perspectives to bear on the question of what the system should produce (content stress).

Figure 4 shows the increase in volume of demands in the system, pictured as the annual number of known investment arbitrations filed. Clearly, investors are "demanding"

much more from the international investment law system today than they did just thirty years before: according to our own data, over the last five years (2013-2017), investors have initiated 350 new investment arbitrations; during the same five-year span thirty ago (1983-1987), there were only 13. This is a 2692%, or 27 fold, increase. Over the last three decades, the average growth rate of investment arbitration has been 608% per decade: each new decade, investors have on average filed more than six times more investment claims than they have the decade before.¹⁶ This has brought the number of claims the system has dealt with to a total of 1012 so far. And as approximately half of these claims have resulted in an award, tribunals are having much more say over what the content of international investment law is and means. In short, demand for the production of investment-related “authoritative allocations of value” has increased dramatically; the role of investors in making those demands has increased dramatically, and the role of tribunals in providing system outputs has increased dramatically as well.

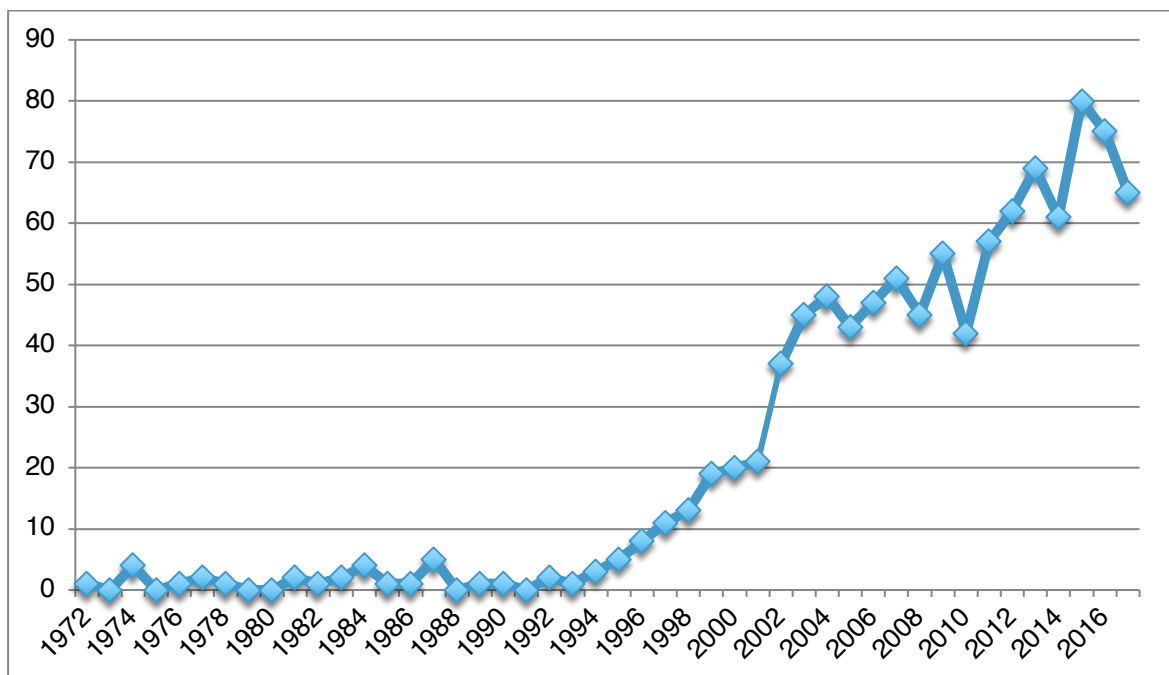


Figure 4. Annual number of new investment arbitrations

To what extent has the geometric growth of system activity, illustrated in Figure 4, caused stress on the system? To what extent has the system managed to adapt to increased

¹⁶ In 1988-1997, 32 claims were filed; in 1998-2007, that number jumped to 344, which means a growth rate of 1075%; in 2008-2017, the number rose more modestly to 611, which is still a 178% increase compared to the decade before.

volumes of demands? Dramatic as the figures reported above may be, the likely answers to these two questions are ‘not much’ and ‘almost entirely’.

Most *domestic* adjudicatory systems would have enormous trouble coping with such a tremendous increase in demands. This is because domestic systems typically face static budgets, static rosters of judges, a fixed judicial infrastructure. The result is a chronic inability to adapt to massive increases in demand for outputs.¹⁷ Some international courts, such as the European Court of Human Rights¹⁸ or the Inter-American Court of Human Rights, may face a similar dynamic as well.¹⁹

In contrast, the investment law system is, to a great degree, inherently scalable. This is because the system is set up as an ad hoc one that automatically shrinks or expands in response to changes in demand. For example, the system doesn’t depend on a budget fixed externally through a cumbersome political process; the main direct costs of adjudication are borne by the parties themselves. Arbitrators earn fees—not a salary—which reflects their work on a particular dispute, and which is paid for by the parties to that dispute. If there is an institution serving to support the arbitration, the parties will pay those fees as well. The main institutions providing such services in principle operate so as to cover their actual costs through fees. In contrast, public courts are often set up so that individual users do not fully cover the costs of their demands for litigation. Judges are salaried, their salaries are paid by the state through tax revenue, and the costs of providing such things as a courthouse are either not charged pro rata to litigants at all or are charged at a highly discounted rate.

¹⁷ For discussions of caseload crises and the difficulties in alleviating them, see William M. Richman and William L. Reynolds, *Injustice On Appeal: The United States Courts of Appeals in Crisis* (OUP 2013); Richard A. Posner, *The Federal Courts: Challenge and Reform* (Harvard UP, rev ed 1999); Andrew B. Coan, ‘Judicial Capacity and the Substance of Constitutional Law’ 122 *Yale Law Journal* 314 (2012).

¹⁸ The ECHR’s size is fixed by Article 20 of the European Convention on Human Rights at just one judge per State Party (for a total of 47). Yet while the number of judges is ossified by treaty, the Court’s caseload volume has exploded in recent years, with nearly 90,000 pending applications in 2017, or almost 2,000 cases per judge. The result, according to some observers, is a “case-overload” that has led to unacceptable delays in decisions. European Law Institute, “Statement on Case-Overload at the European Court of Human Rights” (July 6, 2012), available at <https://www.europeanlawinstitute.eu/publications/eli-publications/>.

¹⁹ See, e.g., Cesare P. R. Romano, The Price of International Justice, 4 *Law & Prac. Int’l Cts. & Tribunals* 281, 291-295 (2005) (Describing how the Inter-American Court of Human Rights’ budget “has become hostage to politics” and that the IACHR is, as a result, “on the brink of asphyxiation”).

The investment law system also doesn't suffer from a supply of qualified adjudicators limited by anything else than the market—individuals good enough and willing enough to do the job. Domestic legal systems tend to strictly limit the number of lawyers who are allowed to serve as judges. For example, the U.S. federal court system has consisted of just 179 appellate judges since 1992, a number set in statute and increased only with great difficulty.²⁰ In contrast, virtually anyone can serve as an arbitrator in the investment law system. The parties are the only real gatekeepers to arbitral service, and they can—within limits which don't limit—choose anyone they like.²¹ Most arbitrators will have expertise in international law and/or international litigation, but the global pool of such expertise is large and growing at a rapid clip.

And finally, the investment law system doesn't depend on a fixed quantity of marble-clad courtrooms or other physical infrastructure. Investment law arbitrations can and do take place anywhere in the world, the possibilities limited only by the lawyers' willingness to take a connecting flight or to stay in four-star rather than five-star hotels.

That said, we may admittedly see some volume-related stress at the margins of the system's operations. In the short term, the supply of highly sought-after arbitrators may be relatively inelastic. The result, arguably, is that a small core of usual suspects is finding itself increasingly stretched thin, as more and more parties demand their services.²² However, the rewards of participating in the system as an arbitrator are easily great enough that there is a ready supply of individuals willing and able to meet this increased demand. Those rewards are undoubtedly at least partly psychological, but they are clearly monetary as well. Investment law arbitrators can make many hundreds of dollars an hour, and unlike salaried judges, their income climbs as they take on more work. Just as importantly, they can use their service as arbitrators to help win other, more lucrative legal business, serving as counsel

²⁰ The U.S. court system is hardly the only one in the world to suffer from perceived problems of congestion and inefficiency due to limited numbers of judges and expanding caseloads. Such problems are also endemic in the developing world, and in other developed economies, such as France. For a comparative perspective, see Maria Dakolias, "Court Performance Around the World: A Comparative Perspective", 2 *Yale Human Rights & Development Journal* 1 (1999).

²¹ The ICSID Convention (Art. 14) does require that arbitrators "be persons of high moral character and recognized competence". But the requirement is too vague to have much bite, and we are not aware of any successful challenges to a party-selected arbitrator under it.

²² Sergio Puig, 'Social Capital in the Arbitration Market', 25 *European Journal of International Law* 387 (2014).

or experts in other disputes.²³ Supply, then, certainly isn't a problem in the longer run. And on the demand side, at some stage the mimetic desire (I want what you want because you want it) that appears to drive appointments (I choose a well-known arbitrator because he is well known because he is often chosen) is likely to yield to more efficiency-based considerations, thus reducing the strain on the small core of key go-to individuals. In sum, it isn't a plausible proposition that there will be serious volume-related stress in the form of a want of available and competent investment arbitrators, almost regardless of the heights the system's caseload may reach.

If we flip the perspective, there are two points of worry however. First, it is possible that volume-related stress may arise as to particular host states subject to mass claims in the face of serious political and/or economic crises. For example, Argentina notoriously suffered through numerous high-value investment-law claims in the wake of the 2002 peso crisis, and continues to resist honouring certain awards. Post-Khadaffi Libya, with a barely functioning economic and political system and severe internal and external security problems, is currently facing numerous diverse claims which, if successful, may seriously hobble the country's long-term prospects for stability. And Venezuela lurks in the background as a worst-case scenario—a populous, starving country likely soon to be beset by mass investment-treaty claims brought by disappointed sovereign debt holders. These are all situations of major stress for the host states, which do translate into degree of stress for the system as a whole.

Second, proposed changes to the current system, if implemented, threaten to create volume-related stress in specific parts of the system—in the investment law system as a whole, not specifically in investment arbitration. The European Union's "investment court" proposal would replace the current ad hoc system of arbitration by establishing a permanent court staffed by a fixed roster of appointed judges. The court's jurisdiction is likely to cover a large volume of foreign investment, and the court's docket would, accordingly, likely be quite active. Depending on the amounts of cases brought, it is easy to envision the court's meagre roster of permanent judges easily overwhelmed. That court, part of the broader system of investor-state dispute settlement, would almost certainly face volume-related stress.

²³ Malcolm Langford, Daniel Behn, & Runar Lie, *The Revolving Door in International Investment Arbitration* 20 *Journal of International Economic Law* 301 (2017).

B. Content-related stress

Putting aside the investment court proposal, content-related stress is a great deal more likely than volume-related stress to be a serious issue in the modern system. This is because the modern system, while scalable in terms of its judicial infrastructure, is also characterized by a diverse set of key actors who input conflicting and sometimes complex demands, the aggregation of which into coherent output of widespread acceptability is increasingly difficult.²⁴ The problem with content-related stress is that if it crystallises into the wrong form, the entire system may be abandoned by those actors who feel let down by it. Simply put, if the system's contents goes too far in promoting the interests of one key actor at the expense of another key actor, the latter is likely, if rational, to simply walk away.

In the customary international law system, states were the primary actor; moreover, those states that mattered tended to be rich capital-exporting states, relatively few in number, and primarily concerned, in common, with ensuring that the international investment law system produced outputs that strongly protected their foreign investments. Given how customary international law is made, the disadvantaged actors in that system could barely simply walk away from it if they decided they didn't like the normative contents it produced. The modern system is different in four main ways, which make it more prone to content-related stress, to instability, and to eventual rejection.²⁵

First, the number of states who actively participate in the system's activities has greatly expanded, and now includes many developing countries: at least 181 countries, and 210 of the world's 234 economies, have signed at least one international investment agreement.²⁶

²⁴ Trakman makes a similar observation, noting that one of the system's major challenges is providing host states with "the capacity to identify, explore, and verify complex socio-economic data to defend against the claims of investors from wealthy states." Leon E. Trakman, *The ICISD under Siege*, 45 *Cornell Int'l L.J.* 603, 616 (2013). This means that tribunals themselves must also be capable, or made capable, of understanding and applying such "complex...data" in a desirable way. There is little reason to think that tribunals as currently staffed have any special expertise in this area, however.

²⁵ For an application of the same overall model to aspects of stability based on perceptions of legitimacy by the key actors, see Thomas Schultz, 'Legitimacy Pragmatism and Political Systems in International Arbitration Lawmaking: A Framework for Analysis', in Jean Kalicki and Mohamed Abdel Raouf (eds), *Evolution and Adaptation: The Future of International Arbitration* (ICCA Congress Series No. 20, Kluwer, forthcoming 2019).

²⁶ See UNCTAD, *International Investment Agreement Navigator*, <http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iialInnerMenu> and Mapping BITs, <http://mappinginvestmenttreaties.com/country>.

Government of these countries should, rationally, favour systemic outputs that preserve a greater degree of policy sovereignty since they tend to be rather capital importers than exporters. Their interests in the system thus diverge from those of the world's great capital exporters. If the old system was quite imperialistic in that those dominating countries that exported their capital also exported their norms about when and how such capital was protected, the modern system is at least formally somewhat more inclusive. To be sure, the content-related stress created by the diversity of demands now placed on the system, though technically indeed a stress, is to be welcomed the same way it is welcome that a domestic democratic system exhibits more political colours than just one.

But, regrettably, one may doubt how much exactly the demands of developing countries and capital importers—or perhaps rather the demands that these countries should rationally make—have so far fed into the system: renegotiated BITs typically do not make room for more policy sovereignty than before.²⁷ Path dependency may explain much of this underreaction by the system to the newly-understood interests of capital importing states: it seems likely that treaty negotiators find it difficult to break free from a certain way of thinking inherited from the most powerful players of the past.²⁸ Those who shaped the system in the early stages largely locked it into a given intellectual universe: the modern system isn't so different from the old intellectually, in regard to 'the right way to do things'. This would explain why current inputs into the system are so suboptimal from the perspective of the system's new participants.

Second, the system's most important actors—the major capital-exporting states, such as the United States, Canada, and Germany—have begun in recent years to experience the

²⁷ Tomer Broude, Yoram Haftel, and Alexander Thompson, 'Legitimation Through Renegotiation: Do States Seek More Regulatory Space in Their BITs?' in D. Behn, O.K. Fauchald, and M. Langford (eds), *The Legitimacy of Investment Arbitration: Empirical Perspectives*, CUP 2018, forthcoming: "Based on an original data set comprised of 161 renegotiated agreements, we find that states have not made a systematic effort over the years to recalibrate their BITs for the purpose of preserving more regulatory space." See also Alec Stone Sweet, Michael Yunsuck Chung, and Adam Saltzman, 'Arbitral Lawmaking and State Power: An Empirical Analysis of Investor-State Arbitration' 8 *Journal of International Dispute Settlement* 579 (2017).

²⁸ Wolfgang Alschner, 'Locked in Language: Historical Sociology and the Path Dependency of Investment Treaty Design' in Moshe Hirsch and Andrew Lang (eds), *Research Handbook on the Sociology of International Law* (Edward Elgar, forthcoming): "path dependency [caused by efficiency considerations, sociological forces and cognitive biases] has prevented adaptations of superior treaty design alternatives and instead geared negotiators into reproducing or refining the [usual standards]. Differently put, negotiators have become locked in language." It is, of course, not in language per se that they are locked, but in the ideas and intellectual horizons that language expresses.

system's outputs as *capital importers*. This experience—of being sued by foreign investors under international investment law—seems to have caused those countries to begin to rethink whether the system's outputs should reflect such a pro-investor orientation: generally speaking, governments seem to only really question the benefits and legitimacy of investment treaties and their contents, or indeed even their legal and political consequences, when they have been bitten by an investment arbitration.²⁹

Then again, some traditionally capital-importing countries, and China in particular, now seem quite content with the status quo as they are becoming ever more capital-exporting countries: the greater the rise of their FDI outflows, the more they insist on maintaining the current state of affairs.³⁰ In other words, as states realize what the consequences of the investment regime are for them, they tend or should tend to change their input into the system, unless their own interests happen to evolve and become more aligned with the system's output: some governments, bowing to the then major capital-exporting states, probably signed investment agreements which did not further their interest much at the time of signing, not realizing what they were doing,³¹ but now insist on keeping them as the treaties turn out to be in their new, current interests. Roughly simplified, the targets of the imperialism of old are now the protectors of the system it produced.

Third, investors have increasingly used the system to make complex claims of mistreatment that raise sensitive political questions. In the earlier era, investment arbitration was primarily contract-based, and often involved blatant, expropriatory violations of the basic principle of *pacta sunt servanda*. While disputes over state breaches of contract can obviously raise important issues of public policy (such as, for example, the extent to which obligations might survive transitions from autocracy to democracy; or the extent to which obligations might be re-adjusted in light of other radically changed circumstances), expropriatory breaches of contract are often successfully and uncontroversially resolved by

²⁹ Yoram Haftel and Alexander Thompson, 'When Do States Renegotiate Investment Agreements? The Impact of Arbitration' 13 *Review of International Organizations* 25 (2018): "states renegotiate when they learn new information about the legal and political consequences of their treaty commitments, and ... such learning is most likely to take place when states are involved in investor-state dispute settlement cases."

³⁰ Yoram Haftel, 'BRICS and the Global Investment Regime', in Soo Yeon Kim (ed.), *BRICs and the Global Economy*, World Scientific Publishing, 2018, forthcoming.

³¹ Lauge N. Skovgaard Poulsen and Emma Aisbett, 'Diplomats Want Treaties: Diplomatic Agendas and Perks in the Investment Regime' 7 *Journal of International Dispute Settlement* 72 (2016).

application of the relatively simple principle that formal and specific state promises should almost always be kept.³²

In contrast, in the modern era investors have begun to use the investment law system to demand protections that go well beyond damages for breach of contract; in particular, they have demanded, and often obtained, the recognition of expansive conceptions of fair and equitable treatment and indirect expropriation—the two key vehicles of investor-right agendas—that would allow them to challenge public-interested government policies that fail to live up to high standards of substantive and procedural due process.³³ Investors making these kinds of demands have used the investment law system to challenge anti-smoking measures,³⁴ the phase-out of nuclear energy production,³⁵ and the reversal of controversial public water utility privatizations.³⁶ These demands effectively ask the system—and particularly its tribunals—to play a role that looks suspiciously political and public, rather than purely legal and private. Tribunals are tasked not with quietly settling discrete, self-contained disputes on the basis of generally uncontested legal principles, but of deciding in a public forum, and on the basis of vague standards and balancing tests, matters of international political economy, limits of state sovereignty, the admissibility of a wide array of public policies, and all manner of policy-tinged disputes that legitimately interest society at large.

Fourth, as the system's outputs have become more politically salient, actors formally outside of the traditional system have fought to obtain a seat at the system's table. That fight has been partially successful, on two main fronts: transparency and participation.

³² Jason Webb Yackee, *Pacta Sunt Servanda in the Era before Bilateral Investment Treaties: Myth & Reality*, 32 *Fordham Int'l L. J.* 1550 (2009).

³³ See e.g. M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015) 191ff, 246ff and benedict Kingsbury and Stephan Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law' in *ICCA Congress Series 14* (Kluwer 2009) 5.

³⁴ Sergio Puig, *Tobacco Litigation in International Courts*, 57 *Harv. Int'l L.J.* 383 (2016).

³⁵ Valentina Vadi, *Energy Security v. Public Health: Nuclear Energy in International Investment Law and Arbitration*, 47 *Geo. J. Int'l L.* 1069 (2016).

³⁶ Julien Chaisse & Marine Polo, *Globalization of Water Privatization: Ramifications of Investor-State Disputes in the Blue Gold Economy*, 38 *B. C. Int'l & Comp. L. Rev.* 1 (2015).

On the first (i.e. transparency), system practice and system rules increasingly allow outsiders to attend tribunal proceedings and to have access to tribunal awards.³⁷ What was previously a “secret” (or at least confidential) process now largely takes place in the open. Moreover, NGOs highly critical of international investment law’s pro-investment orientation have succeeded in gaining the right to participate in investment-treaty litigation through the submission *amicus curiae*-type memoranda. In the sense of Easton’s model, they have successfully challenged the “gatekeeping” function of the system’s traditional actors (primarily, states and investors) who insisted that only they should have the right to formally input demands into the system by virtue of their status as parties to essentially private legal disputes.³⁸

The right to participate means that the “public”—as represented by NGOs, and, occasionally, by motivated individuals—is now in a position to directly place demands (in the form of legal arguments) before an investment treaty tribunal. Those demands are likely to complicate the tribunal’s task by presenting demands that the Parties proper—the host state government and the investor—have failed to present and may not want presented. The NGO’s point of view may diverge from state and investor preferences as to how a particular dispute should be resolved, and may thus add another “interest” that the tribunal must try to balance and address, complicating the tribunal’s tasks. Moreover, NGOs are likely to urge tribunals to take into consideration the larger social implications of their decisions, further pushing tribunals away from pure law-based adjudication (if there is such a thing) into the more sensitive arena of policy-making.

NGO success in prying open the tribunal process has also been accompanied by successful moves to open up the *investment treaty-making process* itself to public participation.³⁹ While the treaties are still largely negotiated in secret by close-lipped diplomats, the EU administered a novel “public consultation” on its nascent investment-

³⁷ On this move toward greater transparency, see Stephan W. Schill, *Five Times Transparency in International Investment Law*, 15 *J. World Investment & Trade* 363 (2014).

³⁸ In Easton’s theory, some measure of successful gatekeeping is essential to preventing excess demands from being placed upon the system. Easton [1965], 90. Note however that NGOs do not have an absolute right to participate as friends of the court. Rather, tribunals have been given the discretion to allow non-party submissions if the tribunal views such submissions as likely to be helpful.

³⁹ Esmé Shirlow, ‘Three Manifestations of Transparency in International Investment Law: A Story of Sources, Stakeholders and Structures’ 73 *Goettingen Journal of International Law* 73 (2017).

treaty policy, inviting the public at large to submit written comments in response to a set of questions concerning a proposed EU approach to investment protection.⁴⁰ The result was a deluge of comments (nearly 150,000, almost all submitted collectively through NGOs) indicating deep divisions in public opinion about the proper contours of the EU investment law agenda. The extent to which the consultation process has impacted the evolution of EU policy is unclear, but the point for our purposes is that this type of public consultation risks even further complexifying the set of demands placed upon the international investment law system, as it presents the system with a multitude of unfiltered and disaggregated views as to what values the system should produce, and of how it should produce them. While such public comments are obviously not *direct* inputs into the system, they have the possibility of filtering into the system through states, whose own demands on the system will increasingly need to balance as best they can the competing demands of “the public” for a system that outputs pro-policy-space rules and of business interests for a system that prioritizes “protection” in the form of restrictions on policy space.

Greater transparency and participation are often presented in the investment law literature as reforms of obvious good effect, serving both to build support for the system (by showing that international investment law is not the product of an evil, scheming cabal) and also to hold those who create it accountable to the *demos*. In that vision, transparency and participation promote system outputs that are, or will be, an equilibrated and widely tolerated set of international investment rules that reflects and maintains an acceptable balance between investor rights to property and state rights to regulate.

But a political-systems approach suggests an offsetting if not opposite view of greater transparency and participation as potentially serving to augment, rather than to mitigate, system stress. We have suggested above that as more and more actors win the right to have a say—that is, to place demands in the system—the basic task of the system—to filter, aggregate, reject, and reconcile those conflicting demands into acceptable outputs—risks becoming significantly more difficult to perform. Increased transparency is surely driving demands by actors formerly outside of the system to be allowed to play a more insider role:

⁴⁰ European Commission Staff Working Document, “Report: Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)”, Jan. 13, 2015.

the more “the public” is aware of ability of the system to authoritatively allocate investment-related values, the more it sees an interest in having a seat at the table.

Somewhat differently, though also problematically, increased transparency may actually rigidify the system, making it *less* responsive to demands for change, and making the stakes involved in single allocative decisions especially high. As Stephan Schill puts it,

Transparency not only serves to control the governance function of investor-state arbitration, but reinforces it. Transparency is not only a condition for allowing better accountability of treaty-makers and dispute-resolvers and hence an instrument to constrain the exercise of public authority in international investment relations. It also is an instrument that furthers the governance function of investment treaty arbitration. After all, more transparent arbitral decisions mean more precedent and more impact of those decisions on future behavior of arbitral tribunals, states and investors.⁴¹

Greater transparency of system outputs transforms those outputs even more from discrete acts resolving particular disputes into authoritative allocations not just of the case of the day, but of future cases. Once awards are made public, they are more likely to be of public significance, precisely because they enunciate a general rule that claims the authority, even implicitly, to restrict the bounds of how similar disputes must be resolved in the future. Transparency thus serves not simply to make what’s at stake in international investment law more obvious; it serves to make what’s at stake in each discrete investment arbitration even more important.

In that way, greater transparency may worsen system stress both by giving various factions a focal point around which to challenge and defend the system’s outputs, but also by making the outcomes of those struggles much more worth fighting about. And once those struggles are “won” by a particular faction, the victory may become ossified, embedded as it is in a difficult-to-change regime of multilateral treaty text and arbitral jurisprudence that, once unleashed, is difficult to recall.

⁴¹ Schill, *supra* note 37, at 364 n. 5.

If that admittedly and perhaps unrealistically pessimistic vision comes to pass, the result is likely to be the abandonment of the system, perhaps akin to what Laurence Helfer calls “regime shift”,⁴² and characterized by, in Eastonian terms, a withdrawal of support. What may prevent the current system from going off the rails is, in a sense, precisely that threat of exit. The system continues to depend on the willingness of states to consent to be bound by its outputs, and on the willingness of investors to initiate disputes to be resolved under its rules. Just as it takes two to dance, it takes two to arbitrate. If one of these two actors is dissatisfied for too long with the normative contents produced by the system, which would be a possible result of poorly equilibrated inputs into the system by its many actors, the dance will end. As the investment arbitration industry continues to promote transparency, thereby making the system’s normative contents more readily identifiable, it may be preparing its own demise.

In this regard, what the Eastonian model suggests is that, in the long run, the investment arbitration system will either change to adapt its output to the interests of its key players, or it will lose support and be replaced by something new. Given path dependencies and the ossification of multilateral treaty texts and arbitral jurisprudence, it is not obvious that adaptation is indeed the system’s most likely future.

III. Conclusion

Will the international investment law system, understood as a political system, evolve in such a way that investment treaty arbitration of the future continues to exist in a form much as it exists today? Or will the system evolve, or devolve, into something quite different? Easton’s theory is far from specific enough to allow us to make a confident prediction. On the other hand, the theory is useful for at least highlighting the potential for significant dynamism. Far from being a system in equilibrium—the stable solution to an iterated Prisoner’s Dilemma, in Andrew Guzman’s law-and-economic telling⁴³—or a system in the midst of a teleological march toward an idealized rule of international law—the international

⁴²Laurence Helfer, *Regime ShiftinL: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 *Yale J. Int’l L.* 1 (2004).

⁴³ Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties* 38 *Va. J. Int’l L.* 639 (1998).

investment law system can be viewed as a *political* system, subject to demands and stresses as actors react and respond to the system's outputs.

Our discussion has highlighted some of the ways in which an Eastonian approach can frame the analysis of international investment law in useful and interesting ways. As we have shown, Easton's model encourages us to examine the potential sources of stress on the system, an exercise that can lead to surprising conclusions, such as our sense that expanding transparency and participation rights may pose largely unappreciated dangers of content stress, or that the EU investment court proposal risks suffering from serious volume-related stress. But Easton's underlying theory is more complex and nuanced than we have presented, and it is capable of more than we have demonstrated. For example, in the present chapter we have not used the theory to focus on the reactions of actors to systemic feedback. There is a rich story to tell there too, but in the interest of space we save it for a future publication.

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