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Summary of Young-OGEMID Symposium No. 21: "The Changing Landscape of State Defence Strategies in ISDS" (November 2025) by A. Mazuera

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by Andrés Mazuera[1]

Executive Summary

Young-OGEMID conducted its twenty-first virtual symposium, The Changing Landscape of State Defence Strategies in ISDS, from 17 and 24 of November 2025. It addressed how State responses to ISDS have evolved, focusing on recent trends, the relationship with external counsel, the growing role of inter-agency coordination, and capacity building strategies.

Over the years, as the number and footprint of investor-State dispute settlement (ISDS) proceedings have expanded, States have been working in parallel to strengthen their institutional capacity to manage these matters. In many cases, States continue to retain prominent external counsel to advise and assist them. However, nowadays, more and more sovereigns are establishing dedicated governmental agencies to coordinate legal strategy and to implement a deliberate and organised approach to international dispute resolution, informed by experience and institutional learning.

The structure of the symposium and list of speakers who kindly agreed to share their insights, as well as their respective topics, are as follows:

17 Nov 2025	Mallory Silberman, MS ARBITRATION (and Young-OGEMID Moderator, filling in for one of the speakers)
19 Nov 2025	Baiju Vasani, Twenty Essex
21 Nov 2025	Vanessa Rivas Plata, Republic of Peru, Ministry of Foreign Trade and Tourism - Director for Multilateral Affairs

Andres Mazuera (Senior Young-OGEMID Rapporteur) acted as moderator of the Symposium.

[1] Andrés Mazuera, Young-OGEMID Co-Senior Rapporteur. Colombian-qualified disputes and arbitration lawyer and an Associate at Tobar & Romero Legal.

First Question – 17 November

Andres Mazuera officially opened the first day of the symposium by introducing the speakers: **Baiju Vasani**[2] and **Vanessa Rivas Plata**.[3] Young-OGEMID Moderator Mallory Silberman joined as a third speaker when another panelist was called away.[4]

Andres Mazuera opened the symposium with the first question:

> *Over the years, as the number of investor-State cases has increased (both globally and for individual sovereigns), States have moved from (i) approaches that might broadly be characterised as "ad hoc" and responsive, to (ii) approaches that, nowadays, are more coordinated and proactive. Do you agree with that observation? If so, what do you see as the most significant drivers behind this evolution—are they political, economic, legal, or something else? And how have you seen the change manifest?*

Vanessa Rivas Plata shared her opinion, agreeing with the observation and describing the various institutional and legal arrangements that States have adopted:

> "*I agree with the observation. As international investment law and ISDS evolve, States have indeed adopted a coordinated approach to deal with ISDS disputes to address not only the financial costs of participation in the system, but more importantly, the systemic implications of any arbitral decision that might represent a precedent with potential lasting effects on domestic policymaking. In my personal view, the evolution of the approaches adopted by States has been driven by a deliberate decision to secure an adequate defense in ISDS disputes as a critical component to safeguard the correct interpretation of international law and investment treaties, and to preserve the domestic powers to regulate in the public interest.*

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[2] Baiju is a renowned leader in ISDS, international commercial arbitration, and public international law as both c ounsel and arbitrator. His treaty practice has encompassed the representation of States and investors under both I CSID and UNCITRAL Rules. Until February 2022, Baiju split his time between Moscow and London, leading t he Russian Federation's defence in six major investment treaty arbitrations. He has also advised States on the neg otiation and drafting of investment treaties. Prior to that, he led the international arbitration practices of major A merican law firms in London and Washington, DC. In those roles, he won several high-profile treaty awards, wit h particular experience in creating and managing winning global strategies for investors in high-stakes, sensitive disputes involving geopolitical issues or major criminal allegations. His international investment law experience has also been at the forefront of the intersection of international arbitration and public international law, having a cted as lead counsel on seminal cases on treaty succession, disputed territories, and the effect of alleged illegality on arbitral jurisdiction.

[3] Vanessa — who is the former President of the Special Commission representing Peru in International Investme nt Disputes — holds a Master's degree in International Economic Law and International Business from Georgeto wn University Law Centre, and has considerable experience in the development and implementation of public po licies and regulatory frameworks for the protection of foreign investment and the opening of international marke ts. She also has deep expertise in providing legal advice on international investment law, investor-State arbitratio n, and international trade law, with a focus on responsible corporate governance in extractive industries, includin g mining and hydrocarbons.

[4] Mallory "is among the world's most experienced young practitioners of investment arbitration — an extremely skilled advocate"* who has acted as counsel to 17 States and roughly a dozen investors, across approximately 50 cases involving 35 different BITs, five FTAs, two TPAs, the Energy Charter Treaty, the Moscow Convention, fo reign investment laws, contracts, the ICSID Convention, and three editions (apiece) of the ICSID and UNCITRA L Arbitration Rules. **WWL* (2021).

States have adopted various institutional and legal arrangements to ensure a coordinated defense, including:

(i) Establishing a team of government attorneys who collaborate with external counsel in defending the State in an ISDS dispute.

(ii) Appointing a governmental contact point to manage ISDS disputes to ensure that decisions are taken effectively and efficiently.

(iii) Implementing cooperation between investment treaty partners (e.g., joint commissions, submissions by non-disputing parties).

(iv) Developing rules to gather and preserve the evidentiary record.

(v) Establishing a clear communications protocol in dealing with the press, parliamentarians, civil society, NGOs, and others.

The question of an adequate legal defense is a timely one. States continue to actively engage in investment treaty negotiations as part of a policy toolkit to promote development by attracting foreign investment. When a dispute arises, States require to be well equipped to adopt informed decisions on a wide range of substantive and procedural matters (e.g., choosing whether to hire external counsel; selection of arbitrators; litigation strategy; evidence gathering; among others). As the saying goes, "one size does not fill all", but regardless of the institutional and legal arrangements that States decide to put in place to defend themselves in an ISDS dispute, coordination remains imperative when the stakes are high."

Mallory Silberman responded by adding some insights:

"*In his question below, Andrés used the term "evolution" — and, to me, that's the perfect descriptor. Over the past 15 years, what I've witnessed (in the aggregate) from my vantage point in these cases, in essence, has been a long series of incremental refinements. Little changes here and there; States adapting to the circumstances.*

For my part, I see "the circumstances" as a driver. Perhaps not an exclusive one, but no doubt in the mix. (This seems plain, for example, from the number of States that have created or grown their in-house teams this past decade: if factors such as "global and individual caseload" played no role whatsoever, then why would this happen now, instead of in the system's early years?)

Personally, I find the evolution logical, especially bearing in mind (i) the age of the system; and (ii) the practical realities of government.

As to the former: remember, investor-State arbitration is a relatively young phenomenon. The ICSID Convention is a member of Gen X, and the award in the Centre's first BIT case is younger than Taylor Swift. All *of the stakeholders and participants are continuing to work out best practices. States are no exception to this.*

Regarding the latter: it seems only natural that the growth of in-house defense teams is *tethered to States' needs. Given that taxpayer funds are at stake, I'd imagine that it would be difficult to create an in-house program absent a showing of need.*"

Andres Mazuera thanked for the answers, and followed up with the next question:

> "*It seems to me that this relationship between in-house counsel and external counsel may become a difficult one when deciding strategy, preparing evidence, or even drafting submissions. Do you have any tips or best practices for external counsel on how to work best with their government clients, and for government teams on how to work well with external counsel?.*"

Baiju Vasani joined the conversation posing further questions suggesting that the evolution discussed is in fact slower than it should or could be:

> "*These are interesting questions but also lead to some further thoughts on the relationship between in house Government lawyers and external counsel. Historically, I haven't done as much Respondent work (at least comparatively to Claimant side) so would welcome the input of those who have/do.*
>
> *Why don't States do so much more to build their in-house capacity when they get sued? Some do, most don't. I could imagine that part of a law firm's mandate could be to train and employ in house lawyers at the same time, whether by interning their lawyers in the firm or key lawyers spending their time in the Ministry. It always strikes me as a missed opportunity. Does anyone work at a law firm for whom this is a formal part of their mandate?*
>
> *Why do States still use Big Law when there are scores of great law firms that would love to defend the State for a quarter of the price. Or even local in-country lawyers with barristers or independent legal experts? For claimants, it's harder to get quality representation for less money; for states, the prestige of representing a state means it's much easier.*
>
> *Equally, and opposite to the above, why do some states not lawyer up properly at all? I've seen States literally not make an appearance at all or others that have lawyers who know nothing about ISDS. Why is that even possible when so many quality lawyers are available, at a great price or even pro bono?*
>
> *All of the above, if right, seems to suggest that the evolution that Mallory discusses is in fact much slower than it should or could be….*"

Christian Campbell, *Center for International Legal Studies (CILS), FDI Moot,* offered a view to Baiju's questions:

> *"Re building more inhouse capacity: too specialized; a state that is frequently sued by foreign investors may want to have government lawyers who know what ISDS is, how to manage a case and hire and monitor/support good counsel, maybe even how to avoid a case in the first place (attaining the same goals through different means that don't violate IL obligations), but to actually prepare pleadings and conduct hearings, I don't think so …*

> *Re reliance on "Big Law": it's not my money paying those fees; no one will fault me for hiring [insert Big Law brand].*
>
> *Re not lawyering up at all: head in the sand, it's not my money paying any award; they will never collect the (full) award anyway; it suits me politically to ignore ISDS, to delegitimize the system under which the claim was brought (even if I know the alleged injustice is genuine - raison d'état) … just like we see more governments seeking to delegitimize their own courts when it suits them politically."*

Mallory Silberman then responded, welcoming Baiju back to Young OGEMID (and explaining that he is one of the listserv's co-founders). Substantively, she added:

> *As to your questions, here's my take on the first few:*
>
> *BV: Why don't States do so much more to build their in-house capacity when they get sued? Some do, most don't.*
>
> *Wait, when? During the life of a case?*
>
> *If so, then I'd imagine one issue is timing:*
>
> *For example, if an investor were to bring a claim against Narnia — and Narnia didn't yet have a designated in-house team — the first step for the government would be to put someone in charge internally.*
>
> *This alone can be a complex exercise for a government, which (i) may well be constrained by organic laws that delineate agency mandates; and (ii) may wish to consider the policy angles, and be bound to adhere to a particular process when doing so.*
>
> *But, even setting these aspects aside: the "someone" that the government chooses is human (for now, at least). And it isn't all that easy to handle the responsibility of being the government "point person," especially if it's on top of other existing duties. To cite one example: at the outset of a case, the person selected may have only 90 days in which to (i) get an initial handle on the case (which potentially will involve liaising with and requesting and collecting documents from multiple levels and parts of the government); (ii) determine how best to approach and then actually undertake a public bidding process (including by requesting proposals from and possibly interviewing counsel teams); (iii) negotiate a contract with the attorneys selected and obtain any necessary internal approvals; (iv) secure funding (which, in some situations, may require petitioning the legislature for a special apportionment); (v) begin working with the external counsel team; (vi) request and evaluate the attorneys' recommendations on arbitrator candidates; (vii) convene an inter-agency meeting to relay and discuss the recommendations; (viii) approve the choice of arbitrator; and (ix) deal with any media inquiries.*
>
> *I know that there's a lot of discussion about investor-State cases taking too long (and some do). But on the day-to-day level, there's so much work to be done. My sense is that, because of this, it can be somewhat difficult to find time and resources for the*

aspects of capacity building that take place outside of casework.

BV: I could imagine that part of a law firm's mandate could be to train and employ in-house lawyers at the same time, whether by interning their lawyers in the firm or key lawyers spending time in their Ministry. It always strikes me as a missed opportunity. Does anyone work at a law firm for whom this is a formal part of their mandate?

Many law firms do offer training programs (and some States specifically ask for it). However, as you note, it may well be more helpful to assist via on-the-job guidance.

In that vein, I know that, sometimes, State officials are seconded to law firms for particular stretches of a matter. But I'd imagine that, in most of these situations, the government would continue to pay the official's salary (and perhaps also give a travel and housing allowance) because of FCPA rules etc.

I'm not sure why it doesn't happen more often, though. Perhaps too expensive to send someone abroad for that long?

Sergiy Gryshko noted that while the first respondents under ISDS were developing States, developed countries in North America and Western Europe have started to being sued as well:

"To follow up on this question, we all know that the first respondents in the ISDS cases were developing countries. However, with time, the developed countries in North America and Western Europe have started to feature prominently in the ISDS cases, major examples being USA and Canada under NAFTA and Spain under the ECT.

So the question to our panelists and everyone else on this listserv is as follows: was there any perceived difference between legal and policy responses to the ISDS claims of the developing and developed States?"

Second Question – 19 November

Andres Mazuera introduced the second question of the symposium:

The shift by more States toward "in-house" and "hybrid" models of defence is perhaps one of the most visible changes in these cases. However, what other changes have you seen in how States defend themselves? Have arguments evolved? Approaches to procedure or practice?

Aayushi Singh, *Young-OGEMID Rapporteur*, based on the previous question, asked the following:

"in recent years, we've seen a notable increase in States developing in-house expertise and institutional mechanisms for managing ISDS cases. How do panellists see this trend affecting the role and strategic influence of external counsel? Specifically, are we moving toward a more collaborative model where external advisers act as strategic partners to State agencies, or do you foresee potential tensions in authority and

decision-making emerging as States internalise more of the process?"

Baiju Vasani responded as follows:

Isn't one the most disappointing aspects of evolution the increasing use of the so-called defensive "playbook"? Where States now run every conceivable argument and use every possible opportunity to defend themselves - from ICSID Rule 41 to objections to jurisdiction to admissibility to zero damages to challenges to arbitrators etc? For instance, I recall when ICSID annulment was incredibly rare; I recently added up a certain State's annulment challenges, and it turns out that it had sought ICSID annulment for every single award against it (and there were many) for the last 20 years. In other words, it stopped being a judgment call on an exceptional remedy and started to become a default tactic.

But perhaps that's not surprising. If there are counsel who only represent states that run their firm's usual playbook for all clients, and government changes of administration that might look at "not taking an argument" as a potential hook for criminal or political liability for their predecessors in interest, then overly defensive lawyering is rewarded and deviation from anything other than absolutism is seen as a risk.

Of course, some claimants are far from blameless with their conduct too, but this is an event looking at States!

Vanessa Rivas Plata shared her insights stating that:

"From my perspective, both government attorneys and external counsel do have a critical role in securing an adequate defence of the State, with distinctive functions throughout the various stages of an ISDS dispute. Nowadays, you can see how the sophisticated knowledge that external counsel brings to the table is masterfully coupled with the comprehensive understanding on the challenges and sensitivities of the relevant country that a government attorney possess. We must always bear in mind that an ISDS dispute is much more than a legal battle with economic implications: in every submission and memorial, States become central actors of the system by shaping international law as masters of the treaties they negotiate.

Based on my experience, a quote from the book "Checkmate" by Dorothy Dunnet describes the joint collaboration between government attorneys and external counsel: "We are here. We will work together for what purpose seems to us right. We will work with calm, and with tolerance and, please God, with saving laughter."

Have arguments in ISDS disputes evolve? I consider that States play a critical role in ensuring coherence and consistency in the interpretation of investment treaty provisions. A shift towards more transparency in ISDS and the regulation of non-disputing party submissions in modern treaties have been key in ensuring that tribunals take into consideration the shared understanding of the treaty parties on the provisions invoked in the dispute and upon which consent to arbitration is based. So, any evolution or change of legal arguments should be influenced by the consent given by States in their investment treaties."

Momin Mohsin, *Young-OGEMID Rapporteur,* reflected on the growing role of artificial intelligence regarding how States defend themselves, and asked:

> *How do you see digital tools, artificial intelligence, and open-access databases shaping the way States manage investment disputes over time? And in what ways might these technologies influence the evolution of State strategies, arguments, or overall case management?*

Mallory Silberman agreed with **Vanessa Rivas Platas'** description of investor-State casework as a "*team sport*", and addressed the question posed by **Andres Mazuera** as follows:

> "*In ISDS, one of the main tasks for the State is to take a scenario that, in the investor's account, will sound extreme and unfair, and to persuade an audience of presumptively foreign arbitrators that it was normal. To do this, the team must paint a vivid mental picture — one that tells the State's story and translates it for the audience, bearing in mind that what sounds ordinary in one jurisdiction may well sound extraordinary in another. In practice, I've found that the exercise almost always requires input from both national and foreign attorneys.*
>
> *Taking a step back, though, and returning to Andrés' original question: for my part, one of the biggest changes I've seen is a practical one:*
>
> *When I was first starting out, the scope of each case was much smaller. For example, as Baiju has already mentioned, there were far fewer rulings to review. (I could have fit all of the annulment decisions in a single, reasonably-sized binder.) And the factual record in each case seemed more limited; in the olden days, we collected documents from filing cabinets and emails were only rarely exhibits. But nowadays there are thousands upon thousands of digital pages — and sometimes more — in the record.*
>
> *Despite this, the intervals between pleadings have held steady (e.g., four-ish months for a first-round submission). I think that this has created a time crunch that is increasingly becoming more palpable*"

Andres Mazuera thanked everyone for their answers and followed up with:

> "*As ISDS has become better known to the general public, it may appear that a government that does not take every opportunity to challenge the proceedings, dispute every arguable point, produce all useful, available evidence, and challenge the award if lost is not adequately defending the State's interests. In many cases, ISDS awards take a toll on domestic politics. This conduct may imply, in turn, that States are actually becoming more active in defending claims. However, do you see a risk of the system going astray, where States no longer defend cases, but weaponise procedure to delay justice? Do you think tribunals themselves have enabled this culture of defensive lawyering?*"

Mallory Silberman addressed the question offering some initial reactions:

> *"Investor-State cases, by their nature, do indeed attract public attention. The intensity of that attention tends to vary, though — e.g., sometimes, it feels like the public just wants access/to be kept in the loop.*
>
> *Occasionally, yes, there are times when observers have opinions on strategy. But it's rare (and especially rare for the general public; for example, did you know that, despite the big push to open up NAFTA hearings, the first time that they did so, only one or two members of the public even stayed for Day 2?).*
>
> *In light of this, I'm not sure I'm convinced on causation, but — moving away from the premise — as to the question itself:*
>
> > *- Given that I'm covering for the "State's counsel" panelist, it feels like I should defend against the assertion of defensiveness. Or, at least, gently flag that (instead of the neutral form of the term) the listserv has been using the negative connotation. It's interesting: for many years, the undertone in discussions about investor-State arbitration seemed to be something like "conglomerates are pushing around governments." But, at some point, the narrative shifted, and nowadays, the conversations seem to presuppose some ulterior State motive. To me, neither approach seems quite right as a general rule (and a defense lawyer might mention that most legal systems afford defendants the benefit of the doubt instead of assuming impropriety).*
> >
> > *- With that said, however, it is true that parties sometimes act abusively. The offender can be an investor or a sovereign, and — either way — as you note, justice suffers.*
> >
> > *- Eight or so years ago, Lucy Reed gave a lecture that she called "Ab(use) of Due Process," and it was about the very same point that you raise: the fact that certain parties use procedure as a sword instead of a shield.*
> >
> > *- I haven't decided what to make of this. On the one hand, the system has persisted, even though the phenomenon was already extant back then; but, on the other, it plainly isn't ideal to be having the same conversation eight years later.*"

Vanessa Rivas Plata responded in agreement with **Mallory Silberman**, as follows:

> "*I agree with Mallory's points, and I find the metaphor of shields and swords very descriptive of the phenomenon under debate.*
>
> *I firmly believe that every actor in the system (i.e., tribunal, counsel, investors, States) must act as guardians of the ISDS system. Over the last years, the central debate about ISDS has been focused on potential areas of reform to make the system more predictable, effective and efficient. In this context, it is also important to remind ourselves that the purpose of ISDS is a peaceful resolution of a dispute between foreign investors and host States with the objective of fostering the development of countries. The biggest*

achievement of ISDS is the depoliticization of an investment dispute, preventing any disruption of inter-State relationships. Dr. Ibrahim Shihata, who served as General Counsel of the World Bank and as Secretary General of ICSID, regarded ISDS as an instrument of international policy for the promotion of investments and of economic development.

Having in mind the foundations of ISDS, I am convinced that the system itself has in place its own mechanisms to prevent substantive and procedural abuses. And where such mechanisms are absent, the relevant actors must act immediately to correct any flaws or shortcomings they are able to identify. Any potential risk that one of the actors of the system deviates its conduct from a legitimate exercise of its rights, should be restrained by the institutional and legal architecture of the system if we aspire to protect its legitimacy. To sum up, and to respond to Andres´s question, I am very reluctant to think that the actors that participate in the system will succeed in weaponizing procedure to delay justice, as the system that has been built over time will act as a shield to preserve the rule of law and the pursuit of justice."

Dan Berstein, *Young-OGEMID Rapporteur,* in turn asked:

"*Does anyone have any reference resources available about what to do when the mechanisms to prevent abuses fail? I found this point to be extremely compelling:*

"And where such mechanisms are absent, the relevant actors must act immediately to correct any flaws or shortcomings they are able to identify. Any potential risk that one of the actors of the system deviates its conduct from a legitimate exercise of its rights, should be restrained by the institutional and legal architecture of the system if we aspire to protect its legitimacy."

And yet I also found myself wondering who are the relevant actors, what immediate actions are available to them, and what barriers are stopping them from acting. My rapporteur feed is focused on distress, misconduct, and accessibility. In my "day job" using dispute resolution tools to help parties with mental health needs overcome stigma and discrimination, and help everyone manage distress, I have seen a number of situations where the systems meant to protect people are not functioning well. The actors who might be the only ones in a position to theoretically take action get understandably uncomfortable because pursuing any kind of misconduct issue is not something most people have been prepared mentally and emotionally to do, especially if it's alleging abuses within a system they were predisposed to trust and rely on. It would be great to learn more ideas about the kinds of actions people can take, the obstacles to taking them, and ways we can make it easier for folks to take these important steps to protect legitimacy."

Mohit Dang, *Young-OGEMID Rapporteur,* noting **Vanessa Rivas Platas'** answer, made the following question, and reflected on how the issue of legitimacy of investment arbitration in India:

"*Taking a cue from Vanessa: With this evolution of States' responses as discussed in the Symposium, where do you think we stand today on the question of investment arbitration's legitimacy? Are these developments reflective of a greater trust in the* *process? Or is this evolution of defences (and of the defence teams) evidence of States' deepening concerns?*

Here in India, policy observers have prominently felt the weight of the legitimacy question. After terminating 77 BITs in 2017 (undoubtedly as a result of losses in White Industries, Vodafone, Devas, which spooked policy-makers), in light of recent trade disruptions, India has been proactively negotiating and signing BITs and FTAs. However, the scepticism of ISDS remains; whereas the India-Brazil BIT (2020) omits Investor-State arbitration altogether, the India-Uzbekistan (2024) and India-UAE (2024) impose significant (perhaps prohibitively restrictive) local remedies carve-outs before recourse to Investor-State arbitration can be made."

Aise Gül Akkoyun, *Young-OGEMID Rapporteur* posed a question focusing on how States learn from ISDS:

"*Reading the different perspectives made me think about another dimension that often stays in the background but matters a lot: how States actually learn from ISDS disputes.*

Over the past decade, it has been observed that new defence models, hybrid structures, institutional reforms—yet behind all of this is a quieter, internal process where States try to make sense of past cases and turn those lessons into treaty drafting, policy choices, and litigation strategy. In some countries, this learning is organised and intentional; in others, it's more ad hoc and very dependent on who is in office or which team happens to be handling the dispute.

So my question is:

How far are States really able to build and maintain institutional memory from ISDS cases?

Who drives this learning inside the State? And does this kind of internalisation make defences more coherent—or does it risk reinforcing overly defensive approaches, as several of you have pointed out?

I would love to hear your thoughts on whether this "learning process" strengthens the system's legitimacy, or whether it is creating new gaps between States with strong institutional capacity and those without."

Mallory Silberman addressed **Dan Berstein**'s question:

"*For me, there were two strands of this that jumped out:*

<u>What to do if/when safety nets fail</u>

This is a tough one, both substantively (as it's tricky to navigate the rare instances when this happens) and because the solution may not seem all that satisfying to the people/entities most directly impacted.

I should note: egregious behavior is definitely not the norm, and there are multiple *layers of safety nets built into the system to ward off, unwind, and remedy true abuses.*

However, every system has its share of unintentional loopholes. To cite one example:

Under the 2006 ICSID Arbitration Rules, if a party proposed the disqualification of an arbitrator, the proceedings automatically were suspended — and they were to remain that way until the challenge was decided. This made good sense; if, for example, an arbitrator with a conflict of interest could continue to work on the case, it could undermine the proceedings. The parties might lose faith in the outcome.

But let's say, hypothetically, that a party decides to mount 53 challenges, lodging each one sequentially — with the consequence that a new challenge is filed every time a decision on a prior challenge is issued. What then? It's not entirely clear. (For instance, the provision in the ICSID Convention that operates as a safety net for "any question of procedure . . . not covered by . . . the Arbitration Rules or any rules agreed by the parties" states that "the Tribunal shall decide the question," and in this particular situation, the tribunal itself isn't in a position to act).

I don't want to derail the symposium by doing a deep dive on this issue; I mention it just to say that, occasionally, there really are situations that are difficult for the parties to navigate.

In those situations, one option is reform (and I know that this loophole was discussed at length during the ICSID Rules amendment process). As noted, though, the hypothetical party in the example above — the side that wasn't bringing challenges — might not feel all that satisfied with this answer.

Barriers to action

Ah, the elephant in the room.

Within the past ten or so years, ISDS has been subject to much criticism, and some of that criticism has operated to dissuade a large cohort from speaking. Concerns about issue conflicts, for example, were met with decisions by arbitrators and counsel (both active and aspiring) to avoid taking stances in public. Similarly, allegations that practitioners are unable to speak about the system impartially were successful in terms of chilling speech. People who were already reluctant to go "on the record" became all the more so when faced with the chance that a good-faith comment might lead to an attack on their integrity.

To my mind, therefore, one of the challenges that we face when it comes to protecting the legitimacy of the system is how to ensure that we can have conversations with all of the various stakeholders. It certainly shouldn't just be parties and practitioners at the table, but equally, they shouldn't be sidelined. Legitimacy requires buy-in from all corners, and so our work should require input from them, too."

Baiju Vasani accepted that there is now a culture of fear around ISDS discourse:

> "*Mallory - Yes, there is a culture of fear that now surrounds ISDS discourse. The field has become so reputationally fragile that practitioners have effectively been cowed into silence. If you defend the system, you're self-interested; if you criticise it, you're jumping on the bandwagon; and if you say anything important on substance, you're inviting an "issue conflict" allegation that could cost you appointments. This is not a healthy environment for a legitimacy debate for a young, growing system. The uncomfortable reality is that ISDS cannot fix its safety nets while simultaneously policing its own community into silence. Legitimacy requires people to talk honestly about where the system fails, and right now, the biggest threat to that honesty is the system's own anxiety about how it is perceived. Can you imagine if in the last 10 years people had been able to speak openly and honestly about the systems successes and failures? How much further along might it have become in its maturity***.**"

Vanessa Rivas Plata closed the topic by underscoring the ISDS reform discussions underway to address the current backlash against ISDS:

> "*I agree with Mallory and Baiju on the challenges that the system currently faces. In an attempt to address some of the most pressing issues in the current backlash against ISDS, some discussions are underway to reform various areas of the system. At the very center of this discussion, I consider that transparency is the cornerstone for strengthening ISDS legitimacy. Jeremy Bentham, English legal philosopher, once said: "Publicity is the very soul of justice". This quote resonates to me in the middle of this discussion, as we can only fear what is unknown and opaque. Where procedural decisions, hearings, and awards become available to the public, we all can protect the system from abuses, and undertake any remedies to avoid an irreparable harm.*
>
> *What type of mechanisms to prevent abuses are we talking about? There is a range of available mechanisms to address any deviations from the very purpose of ISDS. To mention one of them, we can focus on the submissions of a "non-disputing Treaty Party", which allows treaty parties to provide their interpretation of the substantive provisions that will govern the resolution of an investment dispute. In this respect, Rule 68(1) of the 2022 ICSID Rules provides that: "The Tribunal shall permit a Party to a treaty that is not a party to the dispute ("non-disputing Treaty Party") to make a submission on the interpretation of the treaty at issue in the dispute and upon which consent to arbitration is based. The Tribunal may, after consulting with the parties, invite a non-disputing Treaty Party to make such a submission". This mechanism can safeguard the interpretation of investment treaties in accordance with the Vienna Convention on the Law of Treaties, avoiding the expansive readings that contradict the consent given by the treaty signatories.*
>
> *To address Andres´s third question, I want to emphasize how important it is to conceive international investment law as part of public international law. ISDS disputes address cross-jurisdictional legal issues and multidisciplinary matters, including the interplay between international investment law and human rights, environmental governance, indigenous communities' frameworks, among others. In order to secure an adequate management of an ISDS case, a comprehensive view on the interplay between various fields of practice, and a holistic analysis of the dispute, will play a crucial role in*

achieving an outcome in justice.”

On the final day, **Andres Mazuera** officially closed the symposium by thanking the speakers—and everyone in the listserv—for sharing their time, insights, and interventions.

Conclusion

The twenty-first virtual symposium underscored that State defence strategies in ISDS are no longer defined by reactive strategies, but rather—even if gradually—by a shift toward coordination, institutional learning, and long-term approaches. Across the discussion, a common idea emerged: States are increasingly aware that ISDS has significant, deep implications for public policy, regulatory autonomy, legitimacy, and the evolution of international investment law itself. This awareness is reflected in how States have changed their defend strategies.

Speakers highlighted that the rise of in-house and hybrid defence models reflects practical necessity, accumulated experience, and limited budget. While external counsel remain indispensable, their role is evolving toward that of strategic partners tasked with cooperating with government officials and in-house teams.

The symposium also highlighted the tension between vigorous defence and the risk of procedural weaponisation. Participants largely agreed that while defensive lawyering is often a rational response to political scrutiny and public expectations, it can strain the system if unchecked. There was also cautious optimism that ISDS retains internal correctives—through tribunal practice, transparency, treaty party interventions, and ongoing reform efforts.

The discussions suggest that the future of State defence in ISDS will depend less on any single institutional model and more on States’ ability to be flexible.