Managing Backlash
The Evolving Investment Treaty Arbitrator?

Malcolm Langford[*] *and Daniel Behn*[**]

6 September 2016

Forthcoming, *European Journal of International Law*

ABSTRACT: *Have investment treaty arbitrators responded to the so-called 'legitimacy crisis' that has beleaguered the international investment regime in the past decade? There are strong rational choice and discursive-based reasons for thinking that arbitrators would be responsive to the prevailing 'stakeholder mood.' However, a competing set of legalistic and attitudinal factors may prevent arbitrators from bending towards the arc of enhanced sociological legitimation. This article draws upon a newly created investment treaty arbitration database to analyze the extent and causes of a shift in treaty-based arbitration outcomes. The evidence suggests that arbitrators are conditionally reflexive: sensitive to both negative and positive signals from states, especially vocal, influential and developed states.*

[*] Associate Professor, Faculty of Law, University of Oslo and Co-Director, Centre on Law and Social Transformation, University of Bergen and CMI. Email: malcolm.langford@jus.uio.no. The authors would like to thank Daniel Naurin, Anne Van Aaken, Andreas Føllesdal, Geir Ulfstein, Alec Stone Sweet, Gus van Harten, and Stavros Brekoulakis for comments on an earlier version and participants at various workshops for comments, particularly Jose Alvarez, Joseph Weiler, Benedict Kingsbury, Larry Helfer, Laurence Boisson de Chazournes, Ole Kristian Fauchald, and Christina Voigt. This paper won the Young Scholar Prize at the 2015 European Society of International Law conference.

[**] Postdoctoral Researcher, PluriCourts Centre of Excellence, Faculty of Law, University of Oslo. Email: d.f.behn@jus.uio.no.

1 Introduction

The development of the modern investment treaty regime represents one of the most remarkable extensions of international law in the post-war period. Largely built on a network of more than 3500 signed bilateral investment treaties (BITs), regional free trade agreements (FTAs),[1] and a handful of plurilateral investment treaties,[2] foreign investors are granted beneficiary rights primarily aimed at the protection of their investments. While each international investment agreement (IIA) is a stand-alone agreement with considerable diversity, agreements typically include similar standards of protection,[3] including most importantly, investor-state dispute settlement (ISDS) provisions. Combined, it has been claimed that 'no other category of private individuals' is 'given such expansive rights in international law as are private actors investing across borders.'[4]

For a number of reasons, the development of this regime has precipitated a backlash from some states, various civil society actors,[5] and scholars.[6] Commonly referred to as a 'legitimacy crisis,'[7] even some prominent insiders and expected supporters in the media have expressed disquiet.[8] Primarily, this phenomenon is not about the expansiveness of the substantive rights granted to foreign investors under IIAs, but rather the combination of such rights with the robustness of the ISDS mechanisms embedded within them. The result has been an explosion of litigation. With over 796 known investment treaty arbitrations initiated to date (almost all coming in the last 15 years),[9] as well as a significant number of instances in

[1] UNCTAD provides an extensive database on IIAs <http://investmentpolicy hub.unctad.org/IIA> accessed 5 September 2016.

[2] See eg *Energy Charter Treaty, North American Free Trade Agreement*, *Association of South-East Asian Nations Comprehensive Investment Agreement, Central American-Dominican Republic Free Trade Agreement* (DR-CAFTA), as well as, recently concluded or late-round negotiated treaties: *Trans-Pacific Partnership Agreement* and the *Regional Comprehensive Partnership Agreement* .

[3] IIAs typically include: prohibitions against expropriation without adequate compensation, full protection and security, fair and equitable treatment (FET), most-favored nation (MFN) treatment, and national treatment.

[4] B. Simmons, 'Bargaining over BITS, Arbitrating Awards: The Regime for Protection and Promotion of International Investment' 66 *World Politics* (2014) 12, 42.

[5] See eg P. Eberhardt and C. Olivet, 'Profiting from Injustice: How Law Firms, Arbitrators, and Financiers are Fueling an Investment Arbitration Boom' *Corporate Europe Observatory* (November 2012).

[6] M. Langford, D. Behn, and O.K. Fauchald, 'Tempest in a Teacup? The International Investment Regime and State Backlash' in T. Gammeltoft-Hansen and T. Aalberts (eds) *The Changing Practices of International Law: Sovereignty, Law and Politics in a Globalising World* (forthcoming 2017).

[7] For an overview, see D. Behn, 'Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-the-Art' 46(2) *Georgetown Journal of International Law* (2015) 363.

[8] See eg Z. Douglas, 'The MFN Clause in Investment Arbitration: Treaty Interpretation off the Rails' 2 *Journal of International Dispute Settlement* (2011) 97; G. Kahale, 'Is Investor-State Arbitration Broken?' 7 *TDM* (2012) <www.transnational-dispute-management.com> accessed 5 September 2016; 'The arbitration game: governments are souring on treaties to protect foreign investors' *Economist* (11 October 2014).

[9] PluriCourts Investment Treaty Arbitration Database (PITAD) through 1 August 2016.

which the threat of treaty arbitration has been used as a bargaining tool, states hosting foreign investors are increasingly finding themselves having to defend their laws and policies before and in the shadow of international arbitral tribunals. Many of the concerns about the regime are tied specifically to outcomes of this litigation: they include claims that investment treaty arbitration is pro-investor, or anti-developing state; that the jurisprudence is incoherent, riddled with contested interpretations; and that the levels of monetary compensation are too high.[10]

While critical perspectives grab the headlines, the regime also has its supporters. Some claim that individual arbitral decisions are not as expansive or pro-investor as imagined;[11] that arbitral tribunals provide a relatively predictable legal framework;[12] that investment treaty arbitrators are not insensitive to other branches of international law;[13] and that investment treaty arbitration assists in depoliticizing international disputes by providing a significant alternative to the pre-war era of gunboat diplomacy.[14] Thus, any efforts to 're-statify' (or re-balance) international investment dispute resolution should be resisted.[15]

Between these critics and supporters, one finds an alternative evolutionary position: that the legitimacy crisis in investment treaty arbitration is merely a *'*crise de croissance*'* – 'growing pains,'[16] and as the system matures, it will evolve and adapt into a more legitimate, consistent, and effective form of international adjudication. A central part of this expected evolution will come from the arbitrators themselves. Indeed, certain empirical theories suggest that adjudicators are responsive to material and symbolic signals from other actors.[17] However, the existing empirical literature on the legitimacy crisis in investment treaty arbitration has focused primarily on proving the existence or non-existence of bias[18] with only a nascent

[10] See, e.g., G. Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' 50 *Osgoode Hall Law Journal* (2012) 211, 251; M. Langford, 'Cosmopolitan Competition: The Case of International Investment' in C. Bailliet and K. Aas (eds) *Cosmpolitanism Justice and its Discontents* (2011).

[11] D. Collier, 'Book Review: *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* by D. Schneiderman' 68 *Cambridge Law Journal* (2009) 231.

[12] O.K. Fauchald, 'The Legal Reasoning of ICSID Tribunals: An Empirical Analysis' 19 *European Journal of International Law* (2008) 301.

[13] J. Fry, 'International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity' 18 *Duke Journal of International and Comparative Law* (2007) 77.

[14] D. Behn, 'The Worst Option but for All the Others? The Performance of Investment Treaty Arbitration in Historical Context' in T. Squatrito et al (eds) *The Performance of International Courts and Tribunals* (2016 forthcoming).

[15] C. Brower and S. Blanchard, 'From "Dealing in Virtue" to "Profiting from Injustice:" The Case against "Re-Statification" of Investment Dispute Settlement' 55(1) *Harvard International Law Journal Online* (2014) 45.

[16] A. Bjorklund, 'Report of the Rapporteur Second Columbia International Investment Conference: What's Next in International Investment Law and Policy?' in J. Alvarez et al (eds) *The Evolving International Investment Regime: Expectations, Realities, Options* (2011) 219.

[17] See Section 3 below.

[18] Van Harten (n 10); S. Franck, 'Conflating Politics and Development: Examining Investment Treaty Outcomes' 55 *Virginia Journal of International Law* (2014) 1; T. Schultz and C. Dupont, 'Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study' 25 *European Journal of International Law* (2014) 1147.

doctrinal literature examining whether arbitrators might be leading a shift in response to the legitimacy crisis.[19]

This backdrop provides an opportunity to explore how adjudicators respond to systemic critiques and how such responses might be measured. In this article, we ask whether there is (or has been) a reflexive and evolutionary self-correction by arbitrators. Do arbitrators seek to build both the normative and sociological legitimacy of the regime by adopting more state-friendly approaches to the resolution of substantive and procedural questions? Or do we find that the behavior of arbitrators is largely unresponsive to the storm outside?

We begin by mapping the trajectory of the legitimacy crisis and shift(s) in stakeholder mood (Section 2) and then theorizes as to how, why, and when investment treaty arbitrators might be sensitive to the legitimacy crisis (Section 3). After briefly examining the doctrinal literature, we use our PITAD dataset to examine whether there has been an aggregate shift in the outcomes of investment treaty arbitrations and whether the shifts can be explained by arbitrator behavior (Section 4).

2 Charting the Legitimacy Crisis

In order to understand the potential reaction of arbitrators to the legitimacy crisis in investment treaty arbitration, we need to chart its trajectory. We are particularly interested with *what* sort of 'signals' from this crisis might be communicated to arbitrators, *who* communicates these signals, and *when*. As the primary principals in the international investment treaty regime, states may be particularly influential in affecting arbitrator behavior, whether intentionally or otherwise, through particular signals.[20] This would include: *exit* actions such as the denouncement of the *ICSID Convention*[21] and the termination of IIAs; *voice* actions such as the adoption of more sovereignty-sensitive model IIAs; or *mixed* actions such as moratoriums on the signing of new IIAs, demands for renegotiations of IIAs, or increasingly aggressive litigation tactics in defending arbitration claims.

Other stakeholders may also signal displeasure with the regime. Civil society actors might submit amicus curiae briefs and publicly mobilize against particular arbitrations or new treaty negotiations; academics may criticize awards or issue collective statements; and national court judges may decline to enforce awards at the domestic level. An additional type of signal that appears to have fueled the legitimacy crisis discourse are the controversies stirred by 'public interest cases;' cases where the claims made by foreign investors are pitted against measures taken by the respondent state that are alleged to be in the broader public interest.

A Pre-Crisis (1990-2001) and Building Crisis (2002-2004)

Initially, investment treaty arbitration was an obscure and largely unknown specialization that attracted little attention. Early cases were lumped together with the practice of international

[19] D. Schneidermann, 'Legitimacy and Reflexity in International Investment Arbitration: A New Self-Restraint' 2 *Journal of International Dispute Settlement* (2011) 471.

[20] Langford, Behn, and Fauchald (n 6).

[21] *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (*ICSID Convention*), 18 March 1965, 5 ILM 532.

commercial arbitration. Building on some of the perceived problems already existing in relation to the protection of foreign investments, the modern international treaty regime began primarily in the post-war period as a response to decolonization through the signing of BITs between capital-exporting states and capital-importing states. The first modern BIT was signed in 1959,[22] but it was not until 1968 that the first BIT providing for ISDS was signed.[23] The *ICSID Convention* was signed in 1965 and while the first ICSID arbitration was filed in 1972,[24] the first treaty-based arbitration was submitted in 1987 and decided in 1990.[25] There was thus a 20-year gap between the signing of the first BIT with ISDS and the first treaty-based arbitration.

Throughout the 1990s there were just a few investment treaty arbitrations resolved; and it was not until the early part of the 2000s that the first controversial investment treaty arbitrations occurred. These were raised under NAFTA against developed states, the most prominent being the *Loewen* case. Although dismissed on jurisdiction, this case revealed that the justice system of the United States (US) had embarrassing shortcomings that might be remedied under international law.[26] Together with other NAFTA cases against the US, Canada, and Mexico, these early arbitrations also highlighted a perceived threat to sovereignty and the regulatory autonomy of states. Significantly, these cases catalyzed the production of a corrective interpretive note by the NAFTA Free Trade Commission in 2001 (with a more minimalist approach to the FET standard)[27] and a new US model BIT in 2004 (that was more deferential to state interests, particularly in regard to the expropriation standard). [28]

Beyond NAFTA, several other cases in the early 2000s raised significant and specific concerns regarding the relationship between IIA standards and environmental or human rights-based policy measures.[29] This included the *Aguas del Tunari* case[30] against Bolivia that resulted in the infamous 'water wars of Cochabamba,' which prompted a global civil society campaign against the arbitration and the first-ever submission of an amicus curiae brief in an investment treaty arbitration. It also saw some controversial examples of inconsistent case law, in particular exemplified by the *SGS* cases – two different tribunals arrived at

[22] *Pakistan-Germany BIT* (1959).
[23] *Indonesia-Netherlands BIT* (1968).
[24] *Holiday Inn and Others v Morocco*, ICSID Case No. ARB/72/1, Settled.
[25] *Asian Agricultural Products v Sri Lanka,* ICSID Case No. ARB/87/3, Award (27 June 1990).
[26] *Loewen Group and Raymond Loewen v United States,* ICSID Case No. ARB(AF)/98/3, Award (26 June 2003). See also A. DePalma, 'NAFTA's Powerful Little Secret; Obscure Tribunals Settle Disputes, But Go Too Far, Critics Say' *New York Times* (11 March 2001).
[27] *Notes of Interpretation of Certain Chapter 11 Provisions,* NAFTA Free Trade Commission (20 July 2001), see G. Kaufmann-Kohler, 'Interpretive Powers of the Free Trade Commission and the Rule of Law' in F. Bachand (ed) *Fifteen Years of NAFTA Chapter 11 Arbitration* (2011) 175, 181-185.
[28] See *Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment*, US Department of State (2004).
[29] See O.K. Fauchald, 'International Investment Law and Environmental Protection' in O.K. Fauchald and D. Hunter (eds) *Yearbook of International Environmental Law*, Vol. 17 (2006) 3, 11-25.
[30] *Aguas del Tunari v Bolivia*, ICSID Case No. ARB/02/3, Settled.

contradictory interpretations of the umbrella clauses in the relevant IIAs,[31] as well as the *Lauder* and *CME* cases – in which two awards were issued on essentially the same subject matter in which the tribunals came to different conclusions.[32]

Overall, these initial periods are exemplified by a transition from obscurity to increased awareness, with the some signals, rumblings of discontent – with controversial cases, and an emerging critical scholarship and general commentary – indicating that the international investment regime had a number of shortcomings and if not properly managed could produce unjust and illegitimate results. Notably, the dissent included some pushback by the US, which not only represented the most powerful state in the system but also one of the regime's most dominant norm-setters.[33]

B Legitimacy Crisis (2005-2010)

In 2004 and 2005, the phrase 'legitimacy crisis' emerges in the academic scholarship for the first time and the crisis discourse extends clearly beyond its NAFTA origins. The awards rendered as a result of the Argentinian economic crisis of 2001 were particularly prominent (and numerous) and they produced a large amount of commentary.[34] They continued to fuel the perception that investment treaty arbitration might favor foreign investors disproportionately and that IIAs illegitimately restrict a state's regulatory autonomy in times of national emergency.

Elsewhere, controversial cases drove the legitimacy crisis discourse and elicited direct responses by states. Examples include a large number of cases filed against Venezuela, Bolivia, and Ecuador following the passage of various nationalization laws; and the *Foresti* case against South Africa.[35] The result was not only expressions of displeasure but partial exit strategies. Bolivia (2007), Venezuela (2009), and Ecuador (2012) denounced the *ICSID Convention* as a response to being sued under various IIAs; Ecuador and Bolivia terminated many of its BITs; and South Africa placed a moratorium on the signing of new IIAs pending an extensive policy review.[36] In turn, this sent signals to other stakeholders that the status quo might not sustainable.

By the end of the first decade of the new millennium, the legitimacy crisis discourse and the practice of investment treaty arbitration is reaching maturity. One prominent example of such literature is the publication of the first book with the word 'backlash' in the title.[37] This period

---

[31] *SGS v Pakistan,* ICSID Case No. ARB/01/13, Award (6 August 2003); *SGS v Philippines,* ICSID Case No. ARB/02/6, Award (29 January 2004).

[32] *Lauder v Czech Republic,* UNCITRAL, Award (3 September 2001); *CME v Czech Republic,* UNCITRAL, Final Award (14 March 2003).

[33] See J. Alvarez, 'The Return of the State' 20 *Minnesota Journal of International Law* (2011) 223, 235.

[34] See eg J. Alvarez and K. Khamsi, 'The Argentine Crisis and Foreign Investors. A Glimpse into the Heart of the Investment Regime' in K. Sauvant (ed) *Yearbook on International Investment Law and Policy 2008-2009* (2009) 379.

[35] *Piero Foresti and Others v South Africa*, ICSID Case No. ARB(AF)/07/01, Discontinued.

[36] *Bilateral Investment Treaty Policy Framework Review,* Republic of South Africa, Department of Trade and Industry (June 2009).

[37] M. Waibel et al (eds) *The Backlash Against Investment Arbitration: Perceptions and Reality* (2010).

is also marked by significant signals from academia, primarily exemplified by the *Public Statement on the International Investment Regime*.[38] It states in part:

> [w]e have a shared concern for the harm done to the public welfare by the international investment regime, as currently structured, especially its hampering of the ability of governments to act for their people in response to the concerns of human development and environmental sustainability… There is a strong moral as well as policy case for governments to withdraw from investment treaties and to oppose investor-state arbitration, including by refusal to pay arbitration awards against them where an award for compensation has followed from a good faith measure that was introduced for a legitimate purpose.

C Diverging Discourses: Late Crisis and Counter-Crisis (2011-2016)

The last six years have witnessed a divergence in the discourses. The narrative of crisis became entrenched amongst a broader set of stakeholders, but the period also witnessed countervailing narratives and policy positions from many states.

The period sees a dramatic increase in new publications mentioning the legitimacy crisis from 2010 to 2011 onwards and produces globally prominent cases that further stoke the fires of controversy. Phillip Morris files cases against Australia[39] and Uruguay,[40] the energy utility Vattenfall files cases against Germany,[41] and Chevron files an 18 billion US dollar (USD) denial of justice case against Ecuador.[42] This in turn triggers new partial exit strategies. The tobacco packaging case brought against Australia led to the Gillard government announcing in 2011 that no future IIA with Australia would include ISDS provisions.[43] Similarly, after being subject to a wave of cases, the Czech Republic initiated an internal policy review, mutually terminated some IIAs and renegotiated many others.[44]

In 2014, the discourse on the legitimacy of investment treaty arbitration moves into the public sphere for the first time[45] and a number of high profile awards are rendered in 2014 and 2015 against inter alia, Venezuela,[46] Zimbabwe,[47] Canada,[48] and Russia.[49] The number of new

---

[38] 31 August 2010 <http://www.osgoode.yorku.ca/public-statement/documents/Public%20Statement%20%28June%20201129.pdf> accessed 5 September 2016.

[39] *Philip Morris Asia v Australia*, PCA Case No. 2012-12, Jurisdiction Award (27 December 2015).

[40] *Philip Morris Brands v Uruguay,* ICSID Case No. ARB/10/7, Award (8 July 2016).

[41] *Vattenfall and Others v Germany (Vattenfall I),* ICSID Case No. ARB/09/6, Settled; *Vattenfall and Others v Germany (Vattenfall II),* ICSID Case No. ARB/12/12, Pending.

[42] *Chevron Corp and Texaco Petroleum Corp v Ecuador (Chevron II),* PCA Case No. 2009-23, Pending.

[43] *Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity*, Australian Government, Department of Foreign Affairs and Trade (November 2011).

[44] K. Gordon and J. Pohl, 'Investment Treaties over Time: Treaty Practice and Interpretation in a Changing World' *OECD Working Papers on International Investment* (2015).

[45] Partly as a result of TTIP. See eg *Economist* (n 10); 'Trade agreement troubles,' *New Yorker* (22 June 2015); 'TTIP will not be approved unless ISDS is dropped' *Financial Times* (27 October 2014).

[46] See eg *ConocoPhillips v Venezuela,* ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits (3 September 2013); *Gold Reserve v Venezuela,* ICSID Case No. ARB(AF)/09/1, Award (22 September 2014); *Venezuela Holdings v Venezuela,* ICSID Case No. ARB/07, Award (9 October 2014).

cases being filed each year grows and stabilizes at an average of approximately 50, which includes more than 45 claims against European Union (EU) Member States in relation to subsidization schemes for the promotion of solar energy.[50] Certain states continue to terminate and/or renegotiate their IIAs as a response to defending against treaty-based arbitration, including the Czech Republic, Romania, Indonesia, India, and most recently Poland.[51]

However, the last three years also produce contradictory shifts in sovereign state policy towards the regime, reflecting a countervailing mood. The vast majority of states with IIA practices have chosen to leave their IIAs unaltered (even after being subject to disputes); and most prominently, between late 2011 and early 2013, negotiations on new regional mega-agreements including ISDS provisions burst into life: the US and the other NAFTA states formally joined (and largely took over) the negotiations for the *Trans-Pacific Partnership* (TPP), negotiations for the *Regional Comprehensive Economic Partnership* (RCEP) amongst almost all south and east Asian states was launched, and negotiations for the *Transatlantic Trade and Investment Partnership* (TTIP) between the EU and US were invigorated after the release of a high-level expert report on 11 February 2013.[52] The EU emerged as an IIA negotiator with third states following the entry into force of the *Lisbon Treaty*, and is using this new competence to actively negotiate and sign new EU FTAs.[53]

In the ensuing years, the European Commission has continued to negotiate and sign new FTAs (including with Brazil, Canada, China, India, Indonesia, Japan, Singapore, and Vietnam). China continued to renegotiate IIAs with stronger protections for foreign investors (as have Germany and the Netherlands) and also closes in on completing negotiations on BITs with the US and the EU. The Norwegian government (long absent in new investment treaty developments) released a new model BIT in 2015; Brazil started signing new IIAs (with Angola, Chile, Colombia, Malawi, Mexico, and Mozambique) after famously refusing to ratify any of their previously signed agreements from the 1990s;[54] and Australia reversed their anti-ISDS policy and signed the TPP in February 2016.

---

[47] *Bernhard von Pezold and Others v Zimbabwe,* ICSID Case No. ARB/10/15, Award (28 July 2015); *Border Timbers v Zimbabwe*, ICSID Case No. ARB/10/25 (28 July 2015).

[48] *Bilcon of Delaware and Others v Canada,* PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015).

[49] The three landmark cases collectively granting 50 billion USD to Yukos shareholders: *Yukos Universal v Russia,* PCA Case No. AA 227, Award (18 July 2014); *Hulley Enterprises v Russia,* PCA Case No. AA 226, Award (18 July 2014); *Veteran Petroleum v Russia,* PCA Case No. AA 228, Award (18 July 2014).

[50] See D. Behn and O.K. Fauchald, 'Governments under Cross-Fire: Renewable Energy and International Economic Tribunals' 12(2) *Manchester Journal of International Economic Law* (2015) 117.

[51] See overview in Langford, Behn, and Fauchald (n 7); T. Jones, 'Poland Threatens to Cancel BITs' *Global Arbitration Review* (26 February 2016).

[52] Mention of the TTIP was included in the US President's State of the Union address on the next day, and an announcement of new talks by the European Commission President came the day after that.

[53] The *Lisbon Treaty* conferred competence to the EU in the area of foreign direct investment for the first time: *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007, 2007/C 306/01.

[54] P. Martini, 'Brazil's New Investment Treaties: Outside Looking … Out?' *Kluwer Arbitration Blog* (15 June 2015).

3 Theorizing Arbitrator Reflexivity

We now turn from this depiction of legitimacy crisis to interrogate its effects and, specifically, whether it has impacted arbitrator behavior in investment treaty disputes. In other words, do arbitrators seek to manage, consciously or unconsciously, their sociological legitimacy?

The techniques available for managing legitimacy are common to all international courts and arbitral bodies,[55] and perhaps even more so to investment treaty arbitration where a formal doctrine of precedent is absent. These techniques might include tightening jurisdictional criteria, exhibiting greater deference to respondent states on the merits, reducing the number of claims upon which a claimant-investor wins, reducing the amount of compensation awarded, shifting legal costs on to claimant-investors more frequently, or a combination of all of these. However, we need to establish theoretically why arbitrators would turn to such techniques. Below we set out two competing sets of hypotheses as to why and how this might be the case.

A 'Trustee' Null Hypothesis: Status Quo

Some scholars argue that adjudicators on international courts and arbitral bodies largely act as 'trustees,' They adjudicate through delegated authority and according to their own professional judgments on behalf of states and other beneficiaries.[56] This conception suggests that an external legitimacy crisis would exert little influence on adjudicative decision-making.

Investment treaty arbitrators, particularly the president of an arbitral tribunal, would arguably fall into this category, 'selected because of their personal reputation, and/or because the norms of decision-making in the Trustee's profession are perceived as "good" by the wider public.'[57] Thus, we would expect that *legal positivism* would foreground arbitral decision-making as IIA provisions are applied in good faith to the specific facts of the case. Indeed, the fact that arbitrators regularly find for respondent states as much as claimant-investors may suggest a certain even-handedness.[58] The public debate often centres on a few controversial cases which may be unrepresentative to the vast majority of investment treaty arbitrations.

Accordingly, any change in arbitral behavior could only be explained by legal shifts in the regime's substantive rules or a significant shift in the average set of factual circumstances. Yet, it is hard to say that there has been a change in either. For instance, while some recent and revised IIAs include general but vague clauses concerning the right to regulate or greater exceptions for domestic environmental and labor policies, it is not clear how relevant these

[55] See eg M. Madsen, 'The Legitimization Strategies of International Courts: The Case of the European Court of Human Rights' in M. Bobek (ed) *Selecting Europe's Judges* (2015); J.H.H. Weiler, 'Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration' 31(4) *Journal of Common Market Studies* (1993) 417; S. Dothan, 'Why Granting States a Margin of Appreciation Supports the Formation of a Genuine European Consensus' *iCourts Working Paper Series No. 22* (2015).

[56] See eg K. Alter, 'Agents or Trustees? International Courts in their Political Context' 14(1) *European Journal of International Relations* (2008) 33.

[57] Ibid, 42.

[58] Behn (n 7); Franck (n 18).

changes are.[59] A recent study suggests that renegotiations of IIAs actually tend to result in less room for state regulatory powers and more investor-protective ISDS provisions.

Paradoxically, an *attitudinalist* perspective of adjudicative behavior would suggest the same static hypothesis. Here, adjudicators make decisions according to their sincere ideological attitudes and values[60] (ie their personal – rather than professional – judgment) because they are relatively unconstrained by other actors, including states.[61] As investment treaty arbitrators represent a particular elitist and largely Western-based epistemic community, the commitment to promoting and protecting foreign investment may be particularly strong. Arbitrators from Western Europe and North America make up a total of 70% of all appointees to investment treaty arbitrations through 1 August 2016.[62] Such differences can matter. In the context of the International Court of Justice, Posner and Figueredo report that permanent judges are more likely to vote for a disputing state that shares a similar level of economic development and democracy with their home state; with the pattern repeating, to a lesser extent, for shared religion and language.[63] In the context of investment treaty arbitration, there has been a slight uptick in the appointment of arbitrators hailing from lesser developed states but many them tend to come from a similar 'epistemic community' and some suggest that aspiring arbitrators need to adhere to the 'rules of the club' in order to gain appointments.[64] Further, the risk that awards will be overridden at a later stage in the proceedings is relatively low. There are very limited grounds for appeal – either through annulment procedures (ICSID) or domestic court set-aside proceedings (non-ICSID); and it is difficult for states to amend treaty provisions to avoid any precedential effects that an award may have on future cases with a similarly-placed investors.[65] Thus, arbitrators are relatively unconstrained in imposing their preferences even if they think strategically. Moreover, Lupu argues that international adjudicators are relatively insulated from the signals of states as they 'serve publics with diverse and often conflicting preferences.'[66] Thus, the expectation that investment treaty arbitrators will act reflexively overrates their ability to appreciate the existence, extent, and nature of any legitimacy crisis.

---

[59] T. Broude et al, 'Who Cares About Regulatory Space in BITs? A Comparative International Approach,' in A. Roberts et al (eds) *Comparative International Law* (2016 forthcoming). See further discussion in Section 5B.

[60] See generally J. Segal and H. Spaeth, *The Supreme Court and the Attitudinal Model* (1993).

[61] J. Segal, 'Separation-of-Powers Games in the Positive Theory of Congress and Courts' *91 The American Political Science Review* (1997) 1, 28.

[62] PITAD; see also *ICSID Caseload: Statistics*, Issue 2016-1 (January 2016) 18.

[63] E. Posner and M. de Figueiredo, 'Is the International Court of Justice Biased?' 34 *Legal Studies* (2005) 599. Together, these correlations explained a remarkable 60% to 70% of variance amongst individual judicial votes.

[64] Y. Dezalay and B. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (1998).

[65] Gordon and Pohl (n 44).

[66] Y. Lupu, 'International Judicial Legitimacy: Lessons from National Courts' 14(2) *Theoretical Inquiries in Law* (2013) 437, 438. Some scholars claim that the problem even extends to domestic courts. National judges will only have 'vague notions,' for example, about parliamentary preferences and the risk of legislative override. Segal (n 61) 31.

B 'Agent' Reflexivity Hypothesis: The Evolving Arbitrator

The alternative to these static predictions is to suggest that investment treaty arbitrators do follow the mood shifts of states and other actors – as agents rather than trustees. A *rational choice* perspective holds that adjudicators: (1) may hold diverse preferences that extend beyond political ideology or good lawyering; (2) 'take into account the preferences and likely actions of other relevant actors, including their colleagues, elected officials, and the public;' and (3) operate in a 'complex institutional environment' that structures this interaction.[67] Evidence from various domestic jurisdictions suggests that judges are strategically sensitive to signals from the executive and legislature,[68] although the scholarship is divided on the extent of this shift.[69] As to public opinion, there is consensus that it has an *indirect* influence on judgments though judicial appointments but is divided over whether it exerts a *direct* influence on judges.[70] At the international level, empirical and doctrinal scholarship suggests that the Court of Justice of the EU (CJEU)[71] and the WTO dispute settlement body[72] are sensitive to the balance and composition of member state opinion within institutional constraints.

Turning to investment treaty arbitrators, a strategic account would imply that a behavioral correction in response to legitimacy critiques could forestall certain material and reputational 'costs.' First, arbitrators may be concerned *collectively* about such costs at the regime level. A failure to address legitimacy deficits may increase the risk of non-compliance by states, greater exits from the regime, and a substantial 'pro-state' re-orientation in future and/or revised IIAs. Such state behavior would inhibit the ability of arbitrators to impose their political preferences (comparable to the concern with 'overrides' in the judicial context)[73] and maintain their general reputational standing. Second, investment treaty arbitrators may be

---

[67] L. Epstein and J. Knight, 'Reconsidering Judicial Preferences' 16 *Annual Review of Political Science* (2013) 11, 11. On diverse goals, see in particular L. Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (2008).

[68] See eg J.C. Rodriguez-Rada, 'Strategic Deference in the Colombian Constitutional Court, 1992-2006' in G. Helmke and J. Rios-Figueroa (eds) *Courts in Latin America* (2011) 81-98; Epstein and Knight, ibid; D. Kapiszewski, 'Tactical Balancing: High Court Decision Making on Politically Crucial Cases' 45 *Law and Society Review* (2011) 471.

[69] Compare eg M. Bergara, B. Richman, and P. Spiller, 'Modeling Supreme Court Strategic Decision Making: The Congressional Constraint' 28(2) *Legislative Studies Quarterly* (2003) 247 with Segal (n 71).

[70] R. Flemming and D. Wood, 'The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods' 41 *American Journal of Political Science* (1997) 468, 480. See also B. Friedman, *The Will of the People: How Public Opinion has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (2009); L. Epstein and A. Martin, 'Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)' 13 *University of Pennsylvania Journal of Constitutional Law* (2010) 263, 270; I. Unah et al, 'U.S. Supreme Court Justices and Public Mood' 30 *Journal of Law and Politics* (2015) 293.

[71] O. Larsson and D. Naurin, 'Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU' 70(2) *International Organisation* (2016) 377-408; M. Pollack, *The Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU* (2003).

[72] C. Creamer, 'Between the Letter of the Law and the Demands of Politics: The Judicial Balancing of Trade Authority within the WTO' *Working Paper* (2015).

[73] Larsson and Naurin (n 71).

concerned about their own *individual* reputation and material chances of future appointment.[74] If they experience reversal through annulment procedures,[75] set-asides in domestic courts, or criticism by their colleagues or scholars, behavior may adjust.

The notion that investment treaty arbitrators can be consequential in their decision-making has some empirical support. In a recent survey, 262 international arbitrators, which included a subset of 67 with experience in investment treaty arbitration,[76] were asked whether they considered future re-appointment when deciding cases.[77] A remarkable 42% agreed or were ambivalent. Given the sensitive nature of the question, it is arguable that this figure is understated.[78]

These predictions may be enhanced by sociological forces, which are sometimes difficult to empirically disentangle from strategic behavior.[79] The theory of *discursive institutionalism* proposes that discourse is not simply a static, internalistic, and slow-moving phenomenon but also an independent, dynamic, and liminal phenomenon. Shifts to stakeholder discourse may firstly shape the 'background ideational abilities' of judicial agents.[80] Or as Cardozo put it, 'the great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.'[81] Arbitrators may shift their background individual opinions as they become acquainted or engaged in the legitimacy debate. The crisis may also affect their 'foreground discursive abilities,' which 'enable them to communicate critically about those institutions, to change (or maintain) them.'[82] Arbitrators may simply adapt to a different palette of legitimate reasons that can be foregrounded in their decision-making. Thus, changes in arbitrator behavior may not only be strategic. It may also be a process of rapid adjustment to a new social norm – 'acculturation' – that affects the strength of arbitrator preferences and their articulation.

Taking into account the particular context of investment treaty arbitration, these institutionalist perspectives suggest a number of hypotheses, which can be divided into two categories: (1) general hypotheses and (2) specific hypotheses.

---

[74] Studies of domestic judges that are subject to reappointment processes reveal higher levels of strategic behavior amongst this group. See I. Lifshitz and S.A. Lindquist, 'The Judicial Behavior of State Supreme Court Judges' *APSA 2011 Annual Meeting Paper* (2011).

[75] A. Van Aaken, 'Control Mechanisms in International Investment Law' in Z. Douglas et al (eds) *The Foundations of International Investment Law: Bringing Theory into Practice* (2014) 409.

[76] S. Franck et al, 'International Arbitration: Demographics, Precision and Justice' *ICCA Congress Series No. 18, Legitimacy: Myths, Realilities, Challenges* (2015) 33.

[77] Ibid, 91.

[78] Ibid.

[79] On this empirical conundrum, see A. Gilles, 'Reputational Concerns and the Emergence of Oil Sector Transparency as an International Norm' 54 *International Studies Quarterly* (2010) 103.

[80] V Schmidt, 'Discursive Institutionalism: The Explanatory Power of Ideas and Discourse' 11 *Annual Review of Political Science* (2008) 303, 304.

[81] B. Cardozo, *The Nature of the Judicial Process* (1921) 168.

[82] Schmidt (n 80), 304.

General Hypotheses

In light of domestic research, we might expect only states to exert any really influence on arbitrator behavior because it is only states that can impose material costs. As principals (treaty parties), states are essential for the institutional survival or development of the regime; and, as litigants (respondents); participate in the appointment of arbitrators;[83] and decide on whether to comply with an adverse arbitral award. We therefore hypothesize:

> *Hypothesis 1– State Signals: Arbitrators will respond strongly to the signals of states compared to other actors.*

Alternatively, we can hypothesize that investment treaty arbitrators would respond to the general stakeholder mood.[84] The multiplicity of 'micro-publics' (investors, lawyers, arbitral institutions, academics, civil society, and national judges) can all affect regime reputation and discourse, and arbitrators may be conscious that these stakeholders can also affect state positions in the medium-to-long run. We therefore hypothesize that:

> *Hypothesis 2 –Stakeholder Signals: Arbitrators will respond strongly to the general stakeholder mood.*

Specific Hypotheses

However, these two broad general hypotheses or related measurements may be too imprecise to capture the specific patterns of adjudicative reflexivity. We can thus formulate a number of focused or specific hypotheses.

First, we hypothesize that investment treaty arbitrators are particularly responsive to the views of certain audiences, namely large, powerful, or particularly influential states.[85] Displaying such sensitivity may be strategic for reputational reasons and it possibly enhances the prospect of more arbitrations entering into the pipeline (particularly due to the large capital exports of these states' investors). Moreover, the views of these states are more likely to be publicized in various communication channels.[86] Thus we could state:

> *Hypothesis 3 – Influential State Signals: Arbitrators will respond strongly to the signals of large, powerful, or particularly influential states.*

Second, investment treaty arbitrators may be only reflexive to certain types of cases. State deferentialism may be a safer strategy in cases that are more thematically controversial

[83] In most cases, states solely appoint one of three arbitrators; and in many cases jointly appoint, along with the claimant-investor, the presiding arbitrator.

[84] Yates et al find that these judges are sensitive partly to shifts in changes in opinion in their home state, parties to which they are ideologically aligned, and a longer period of residence in the more liberal Washington DC. See '"For the Times they Are A-Changin:" Explaining Voting Patterns of U.S. Supreme Court Justices through Identification of Micro-Publics' 28 *BYU Journal of Public Law* (2013) 117.

[85] By large and powerful, we specifically include influential states actors in the system: the US, the EU (including its Member States), and China. We note that Larsson and Naurin (n 71) found that influential states had a greater influence on the CJEU, although they theorized that this occurred through greater voting weights in potential overrides of judgments in the Council of Ministers.

[86] However, the actions of small Latin American states in partially exiting the international investment regime have also been communicated widely.

because they court public or scholarly scrutiny that resonate with the underlying values of regulatory autonomy expressed in the legitimacy critiques. Many of these 'public interest' cases also raise questions of coherence with other branches of international law (eg international environmental and human rights law) in a way that shapes the surrounding discourse and the relevant institutional-legal environment. Thus, we hypothesize that:

> *Hypothesis 4 – Public Interest Cases: Arbitrators will act more deferentially towards states in high-profile cases that court public or scholarly scrutiny.*

Third, greater arbitrator reflexivity may be shown to certain categories of respondent states that have experienced a stronger pattern of losing in investment treaty arbitration: ie certain lesser developed states. With Berge, we have demonstrated that claimant-investors are less likely to win the higher the respondent state's gross domestic product (GDP) per capita, regardless of the level of a state's democratic governance.[87] Given this phenomenon, we might expect that over time investment treaty arbitrators would moderate asymmetries in outcomes between these different classifications of states. We thus hypothesize:

> *Hypothesis 5 – Development Status Asymmetries: Arbitrators will narrow asymmetries in arbitral outcomes between more developed and lesser developed states*

Fourth, and unlike other international courts, investment treaty arbitrators are quite limited in their ability to communicate and act in a collective fashion. The polycentric and ad hoc nature of investment treaty arbitration may prevent arbitrators from acting in a *systemic* manner, even if they wish to do so. Unlike a centralized court, an individual arbitral tribunal may feel it can make little contribution to signaling a systemic shift – it is merely one of many tribunals. The incentive to take extra inter partes action is thus minimal.[88] Moreover, arbitrators may be doctrinally constrained in considering general concerns. One line of investment treaty jurisprudence suggests that individual arbitrators should not systemically reflect and act as they are constituted as specialist not general adjudicative bodies.[89]

However, it is not clear that this constraint applies equally to all investment treaty arbitrators. Repeat arbitrators (especially repeat tribunal presidents) are likely to be more sensitive to systemic threats and opportunities in comparison to one-shot arbitrators. They might constitute 'the guardians of the regime,' engaged in wider discussions over investment treaty law practice, development, and legitimacy. As tribunal presidents exert tremendous influence over the arbitral process, we propose a final hypothesis:

> *Hypothesis 6 – Prominent Arbitrators: Repeat tribunal presidents will respond to signals from states and/or other stakeholders.*

---

[87] D. Behn, T. Berge, and M. Langford, 'Poor States or Poor Governance: Explaining Outcomes in Investment Treaty Arbitration' *SSRN Working Paper* (2016) <http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2740516> accessed 5 September 2016.

[88] On this challenge at the domestic level in civil law courts, see K. Young and J. Lemaitre, 'The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa' 26 *Harvard Human Rights Journal* (2013) 179.

[89] M. Reisman, 'Case Specific Mandates versus Systemic Implications: How Should Investment Tribunals Decide? The Freshfields Arbitration Lecture' 29 *Arbitration International* (2013) 131.

4 Measuring Arbitrator Reflexivity

How can we determine if investment treaty arbitrators adjust their behavior in response to the legitimacy crisis without asking arbitrators to disclose their approaches? The first approach is doctrinal. Recent jurisprudential scholarship in investment treaty arbitration suggests a potential reflex on a number of critical areas, whether it is cases involving an environmental component[90] or how investment treaty arbitral tribunals analyze particular IIA standards such as the criteria for a breach of the (indirect) expropriation standard,[91] the FET standard,[92] the FPS standard,[93] MFN provisions,[94] or the jurisdictional requirements relating to the definition of a 'foreign investor.'[95] While this research often points to an evolution of the jurisprudence – such as a move towards proportionality analysis in indirect expropriation cases[96] (which recognizes more clearly a state's regulatory autonomy) – the development is partial. Some arbitral tribunals criticize or ignore these doctrinal advances.[97]

The advantage of such a doctrinal approach is that it provides a fine-grained perspective on the legal mechanics of change and permits a swift focus on those areas which have attracted the most criticism. It is also a field that can be developed, for example through longitudinal doctrinal studies of repeat arbitrator decisions on the same topic. However, the disadvantage of a doctrinal lens is that one may be tracking unwittingly a subterfuge of verbiage: arbitrators may simply craft and tweak their foregrounded discourse without visiting any material consequences upon the actual decision-making.

Tracking the ongoing interaction between doctrine and factual and political context therefore requires also a broader aggregative perspective. Thus, our approach is outcome-based. It is decidedly more quantitative in orientation and requires an analysis of patterns in the decisions over time. Its advantage is enhanced objectivity. Decisions and remedies have a more concrete character that cannot be obscured by written reasoning or oral speech.

[90] J. Viñuales, 'Foreign Investment and the Environment in International Law: The Current State of Play' in K. Miles (ed) *Research Handbook on Environment and Investment Law* (2016 forthcoming).
[91] C. Henckels, 'Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration' 15(1) *Journal of International Economic Law* (2012) 223.
[92] R. Dolzer, 'Fair and Equitable Treatment: Today's Contours' 12 *Santa Clara Journal of International Law* (2014) 7.
[93] S. Alexandrov, 'The Evolution of the Full Protection and Security Standard' in M. Kinnear et al (eds) *Building International Investment Law: The First 50 Years of ICSID* (2015) 319.
[94] J. Maupin, 'MFN-Based Jurisdiction in Investor-State Arbitration: Is There Any Hope for a Consistent Approach' 14(1) *Journal of International Economic Law* (2011) 157.
[95] Van Harten (n 10) 251.
[96] See eg *Tecmed v Mexico,* ICSID Case No. ARB (AF)/00/2, Award (29 May 2003) para 122.
[97] J. Waincymer, 'Balancing Property Rights and Human Rights in Expropriation' in Pierre-Marie Dupuy et al (eds) *Human Rights in International Investment Law and Arbitration* (2009) 275; Henckels (n 91) 237.

A Raw Data

Using a range of output variables, we firstly ask whether there is change in outcomes across different periods of time. The measured outcomes are win/loss ratios, including for finally resolved cases, jurisdiction decisions, and liability/merits decisions, together with compensation ratios.

The data is obtained from a new and first-of-its-kind database (PITAD) that codes all investment treaty arbitration proceedings since their inception. We include only cases whose legal claim is treaty-based. Claims based exclusively on a contract or a host state's foreign investment law are excluded. Discontinued or settled cases are also omitted. With these conditions in place, and as at 1 August 2016, the dataset includes as at 343 finally resolved cases [98] and 651 discrete decisions (made up of 395 jurisdiction decisions [99] and 256 liability/merits decisions).[100] Both types of cases are useful in analyzing reflexivity. Finally resolved cases may capture *diachronic* strategic planning across a case (eg allowing a claimant-investor to win at the jurisdiction stage but not the liability/merits stage); and discrete decisions may better capture *synchronic* signals from actors at a point in time.

One issue in coding for outcomes in investment treaty arbitration relates to how and to what degree a claimant-investor can be said to win at the jurisdiction or liability/merits stage of the dispute. Our database makes a distinction between full wins and partial wins. This results in two different indictors. The first is *Any Win* (at least a partial win) and the second is *Full Win* (only full wins counted).[101] In this article, we conduct analysis for both outcome indicators although results for the latter (*Full Wins*) are only reported in full online.[102] The *Any Win* indicator is the most empirically reliable measure: distinguishing partial wins from full wins is not an exact science.[103] It is also a strong analytical measure: failing to award anything to a claimant-investor represents a strong signal to both stakeholders and states about the posture of an arbitral tribunal. Nonetheless, the complementary use of the *Full Win* indicator may help us discern reflexivity. A move towards partial wins – so-called 'splitting the baby' – may demonstrate a greater even-handedness by arbitrators.

---

[98] Finally resolved cases are where the claimant-investor wins on the merits, or loses on jurisdiction or the merits.

[99] The jurisdiction decisions include bifurcated and non-bifurcated cases. For a non-bifurcated case, a decision where the claimant-investor ultimately loses on the merits will be coded as two decisions: one jurisdiction decision counted as a win for the claimant-investor and one merits decisions counted as a loss.

[100] These liability/merits decisions do not count quantum awards. In other words, a liability award in favor of a claimant-investor is counted in the same way as a merits award where damages are included.

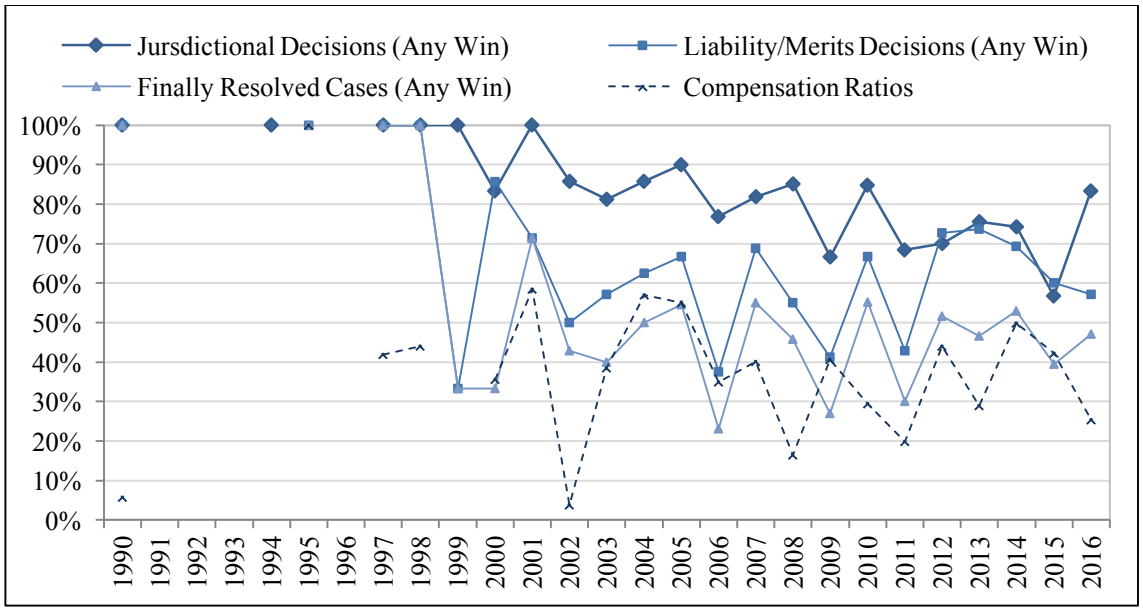
[101] For A*ny Win* (full and partials wins are coded as (1) and losses as (0)); and for a *Full Win* (full win coded as (1) and partial wins and losses as (0)).

[102] See <www.jus.uio.no/pluricourts/english/topics/investment/research-projects/database.html> accessed 5 September 2016.

[103] At the liability/merits stage, a full and partial win are not categorized according to the ratio of amount claimed and awarded or the number of successful claims. Rather, the distinction between full win and partial win is based on whether the claimant-investor – in a holistic assessment of the case – was made whole by the arbitral tribunal. At the jurisdiction stage, a full win is scored when no jurisdictional objections are sustained, and a partial win is scored where the jurisdiction of the tribunal is restricted in scope.

Figure 1 below shows the *Any Win* success ratios across time for the claimant-investor at the jurisdiction stage and the liability/merits stage of the dispute. It also tracks the *Any Win* success ratios for finally resolved cases. Eye-balling the trends, it is relatively clear that claimant-investors did well in the first decade of litigation. In the period 1990 to 2000, they rarely lost at the jurisdiction stage (94% success rate in 32 decisions) and they won in approximately 75% of finally resolved cases (23 cases) and liability/merits decisions (30 decisions). From 2002, an observable drop in claimant-investor success occurs in finally resolved cases and liability/merits decisions. The trend downwards appears to begin in 2002 and bottoms out a few years later. For the period 2002 through 2016, success rates in finally resolved cased drops to 44% for claimant-investors. For liability/merits decisions, the trends are slightly different. The success rates drops to 60% for the this period (2002 through 2016) overall, but there is a drift upwards in claimant-investor liability/merits decision successes from 2012 onwards.

Figure 1: Claimant-Investor Success Ratios (by year)

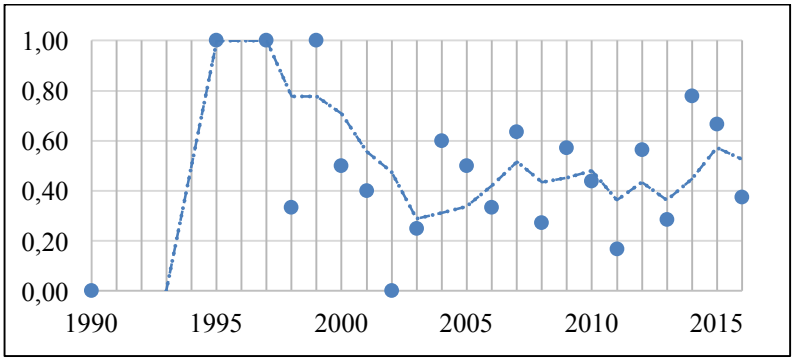


Jurisdictional decisions reveal a partially inverse pattern. There is a shift downwards to an average of 80% success in the period 2002 to 2010, but a further drop downwards to about 70% from 2011 onwards. These divergent patterns in recent years help explain why the success ratio for claimant-investors in finally resolved cases remains fairly steady at about 44% throughout the period of 2002 through 2016. In other words, claimant-investors are more likely to be stopped at the jurisdictional stage but, if they move through, they are more likely to succeed at the liability/merits stage. However, only so much can be read into this raw data as the outcomes are not controlled for structural features (an issue we address below).

In addition, we created a compensation ratio in cases in which the claimant-investor won on the merits. The ratio is the amount awarded divided by the amount claimed. However, it could only be calculated for a subset of 135 cases, since information on both the amount of compensation claimed *and* awarded was not always known. The ratio has a large amount of annual variation but a surprising amount of overall stability. Between 1990 and 2004, the ratio

was 43%; fell to 33% for the period 2005 through 2010; and rose to 38% between 2011 and 2016. The overall rate across all periods is 37%.

Figure 2: Splitting the Baby? – Full Win to Any Win Ratio in Finally Resolved Cases



The above figures only relate to *Any Wins*. Yet, as noted earlier, strategic arbitrator behavior may involve switching from full wins to partial wins. Figure 2 above shows the ratio of the *Full Win* indicator to the total number of cases where the claimant-investor was successful at least partially. As is apparent from the 4-year moving average (dotted line in Figure 2), there is a decline in the ratio in the early 2000s (after a period in which claimant-investors were almost always completely successful) with a slight drift upwards since 2012. On its face, the data is suggestive of a shift towards splitting the baby.

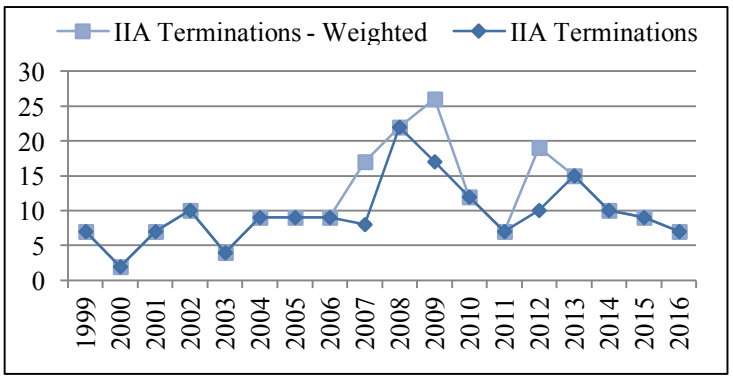
B General Hypotheses

Operationalization

We now turn to ask whether these downward shifts in outcomes in investment treaty arbitrations (for finally resolved cases, jurisdiction decisions, liability/merits decisions) can be explained by arbitrator reflexivity. In seeking to test the institutionalist expectations, we have operationalized the two general hypotheses into three different models. Each model tests the effects of a mood indicator with a lag of one year.

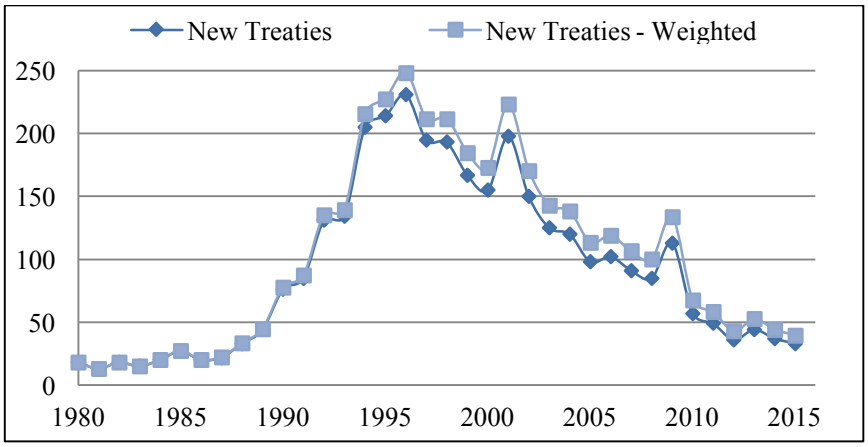
First, the *State Signals* hypothesis is captured by two separate indicators we have constructed to measure state mood in relation to the international investment regime. The *State Mood I* indicator for treaty exits records a unilateral withdrawal by one state party to an IIA, including the *ICSID Convention*. As Figure 3 below shows, this phenomenon begins in 2007, peaks in 2008 (with 19 treaty exits) and has remained at a steady annual average of about six treaty exits. An alternative version of this indicator weights the three *ICSID Convention* withdrawals by Latin American states (Venezuela, Ecuador, and Bolivia) by a factor of ten. This is because they received tremendous media and academic coverage, making their signaling power much stronger than a mere IIA withdrawal.

Figure 3: State Mood I – Number of Unilateral Treaty Exits (by year)



The treaty exits indicator is complemented by the *State Mood II,* which records the number of new treaties (IIAs) signed by year. Importantly, this indicator is weighted for remaining available treaties that could be signed. However, the effects of this weighting are not hugely significant as the number of possible IIAs that could be signed is still massive.[104] As Figure 4 below shows, the number trends steadily downwards throughout the 2000s.

Figure 4: State Mood II – Number of New Treaties Signed (by year)

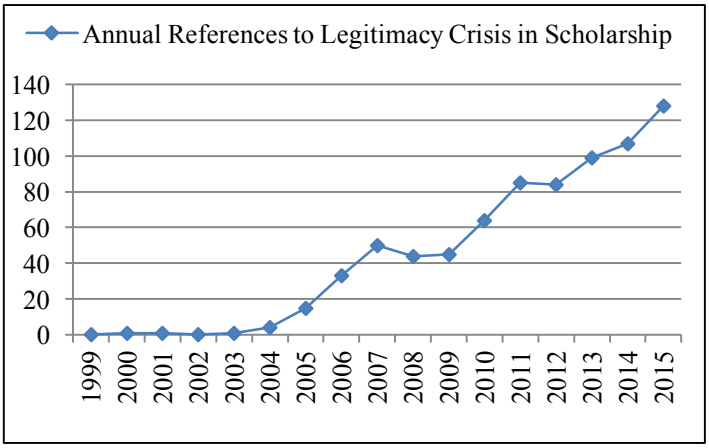


Second, the *Stakeholder Signals* hypothesis is tested with a general *Stakeholder Mood* indicator that measures the annual number of references to the legitimacy crisis in investment treaty arbitration in the scholarship. It records a Google Scholar search of the legitimacy crisis discourse in academic publications.[105] As Figure 5 below shows, this discourse commenced in 2004, spiked in 2009 and 2010, and has continued steadily upwards ever since.

[104] There are currently 3329 IIAs (mostly bilateral) that have been signed globally (through 1 August 2016). However, to receive the same coverage as the WTO agreements, for example, states would need to sign the equivalent of 13041 BITs.

[105] Entering We began by entering the Boolean search terms of 'legitimacy crisis,' 'investment treaty,' and 'arbitration' in with a custom range for each year, we identified. The 704 publications that appeared in the search were studied and further publications identified.

Figure 5: Stakeholder Mood – Legitimacy Crisis Scholarship (by year)



In order to avoid potentially misleading bivariate results for the correlation between these three indicators and investment treaty arbitration outcomes, we include a set of controls for each model. The basic attributes are summarized in Table 1 below alongside the independent variables. First, we include a dummy variable for treaty-based arbitration type, specifically *NAFTA-based Cases* and *ICSID-administered Cases*.[106] Second, we apply an *Extractive Industry Cases* dummy measuring whether the investment leading to a claim is in the extractive industries economic sector. These cases often involve varying degrees of nationalization with the dispute centering on levels of compensation not liability (and thus claimant-investors will be more likely to win). Third, we add a measure of *Law Firm Advantage* to control for the effect of the quality (or at least the expense) of legal counsel as measured by whether claimant-investors and respondent states retained counsel from a Global 100 law firm.[107] Fourth, we include a dummy variable for *State Learning* to control for the effect of previous exposure to investment treaty arbitration.[108] Fifth, to control for situations where specific events or circumstances create an artificially large caseload against a respondent state in a short space of time, we use a *Case Cluster* dummy.[109] Sixth, we include a *GDP Per Capita (Logged)* for respondent states as a control, particularly since states with lower GDP per capita are more likely to lose.[110] Finally, we have included a cubic year trend variable in all models.

---

[106] We include this dummy because NAFTA-based arbitrations matured earlier, while ICSID-administered arbitrations are based on a specific treaty (the *ICSID Convention*) with some specific structural features. ICSID-administered cases constitute 61% of all known treaty-based arbitrations registered through 1 August 2016.

[107] See *American Lawyer* <http://www.americanlawyer.com/id=1202471809600/2015-Global-100-TopGrossing-Law-Firms-in-the-World> accessed 5 September 2016. The dummy takes the value of (1) if only the claimant-investor counsel is from a Global 100 law firm; (-1) if only the respondent state retains a Global 100 law firm; or (0) if both the claimant-investor and the respondent state both have the same type of law firm representing them.

[108] We assume the marginal effect of state learning to diminish over time, and code how many cases any given respondent state has had filed against it at the time of case registration up until the tenth case.

[109] This measure takes the value (1) if a respondent state has had five or more cases registered against it in a given year, and (0) otherwise. The case clusters in the full set of cases registered are: Argentina (2002, 2003, 2004), Czech Republic (2005), Ukraine (2008), Egypt (2011), and Venezuela (2011, 2012).

[110] Behn, Berge, and Langford (n 87).

Table 1: Summary Statistics – Fully Resolved Cases

	Mean	Std. Dev.	Min	Max	Observations
Outcome Variables					
Any Win	0.47	0.50	0	1	343
Full Win	0.23	0.42	0	1	343
Independent Variables					
State Mood I (Treaty Exits)	13.15	6.32	2	26	343
State Mood (New Treaties)	80.65	43.77	33	198	343
Stakeholder Mood	59.42	38.98	0	128	343
Public Interest Case (Section 5C)	0.35	0.48	0	1	343
Prominent Arbitrator (Section 5C)	0.59	0.49	0	1	334
Controls					
NAFTA-based Case	0.10	0.30	0	1	343
ICSID-administered Case	0.63	0.48	0	1	343
Extractive Industry Case	0.17	0.38	0	1	343
Law Firm Advantage	-0.01	0.60	-1	1	343
State Learning	5.30	3.55	1	10	343
Case Cluster	0.11	0.32	0	1	343
GDP Per Capita (Logged)	8.34	1.17	5.00	10.70	341

Before turning to the results, it is important to note the limits of the explanatory model. Our approach is 'X' focused: we are testing whether specific mood variables could explain variation in outcomes in investment treaty arbitration, subject to a set of controls. We are not conducting a larger 'Y' based model that seeks to capture all reasons for claimant-investor success rates. This potentially limits the casual findings in two ways.

The first is that it is important to distinguish between *arbitrator* and *systemic* reflexivity. As principals, states may adopt strategies that *directly* affect the underlying legal framework (ie the IIAs themselves) in which investment treaty arbitrators operate. While we are developing measurements to capture this variable, we doubt however that the legal framework governing foreign investment has shifted by such a degree to solely explain the variance in arbitration outcomes. This is principally because almost all of the decisions under analysis in this article are based on IIAs that were drafted before the emergence of the legitimacy crisis. Moreover, even where there is an arbitration based on a newer generation treaty, we have found that expected outcomes are not always generated.[111]

The second danger is that the relationship between claimant-investor success and future litigation may be partly endogenous. The growing awareness of the open legal opportunity structure[112] of investment treaty arbitration may have prompted foreign investors to bring more dubious cases. If so, a possible consequence is a rise in the number of cases being lost; yet, this shift in outcomes does not signal arbitrator reflexivity to the legitimacy crisis. We

[111] For instance, where the respondent state has defended a challenged measure on environment-related grounds, and the dispute is based on a newer generation of IIAs mentioning environmental protection (eg DR-CAFTA and newer US bilateral FTAs (BFTAs)), outcomes do not appear strongly related to these provisions. In the seven such cases, the claimant-investors lost each time but almost always at the more technical jurisdictional stage (six of seven cases). See D. Behn and M. Langford, 'Trumping the Environment? An Empirical Perspective on Investment Treaty Arbitration' 18(1) *The Journal of World Investment and Trade* (forthcoming 2017).

[112] C. Hilson, 'New Social Movements: The Role of Legal Opportunity' 9 *Journal of European Public Policy* (2002) 238.

have only begun to develop a legal strength indicator for each case yet we are uncertain as to whether there has been a recent uptick in dubious cases, at least at the liability/merits stage. The likelihood of claimant-investor success dropped quite early – well before the possibility of a wave of dubious cases entering the system – and has remained quite steady across time until very recently. In the case of jurisdiction decisions, this endogeneity argument may have more explanatory power. Here, there has certainly been a recent decrease in claimant-investor success rate; although, even here this might be explained by reflexivity – with arbitrators tightening jurisdictional criteria as a response to the legitimacy crisis. In any case, trying to separate out these effects is a clear task for a future research agenda on investment treaty arbitrator behavior.

Results

Table 2 below sets out the logit regression results. The controls in Model 1 are largely as expected. *Law Firm Advantage* and *Extractive Industry Case* controls are positively correlated with claimant-investor success while respondent state development status (as measured by *GDP Per Capita (Logged)*) is negatively correlated. The remaining control variables are not statistically significant and surprisingly respondent states do not gain an advantage from facing repeat litigation (the *State Learning* control). However, the *NAFTA-based Case* control is significant in the full Model 4 and the control variables otherwise carry the expected sign.

However, the *Stakeholder Mood* indicator is not statistically significant. Moreover, the coefficient is surprisingly positive. Testing with alternative outcome indicators (*Full Wins*, jurisdiction decisions, liability/merits decisions), we only find a significant and negative relationship at the jurisdictional stage.[113] This may reflect the recent decline in jurisdictional successes for claimant-investors and the ongoing rise in the amount of legitimacy crisis scholarship annually. However, while there is some doctrinal evidence that investment treaty arbitrators may be increasingly restricting interpretations of jurisdictional criteria in investment treaty arbitration (suggesting reflexivity), we are somewhat reluctant to suggest that the recent drop in jurisdictional success rates for claimant-investors can be fully explained by reflexive arbitral behavior. This is particularly so when there has been an upwards drift in claimant-investor success at the liability/merits stage of the dispute (especially in the period of 2012 to 2014).

Turning to the *State Mood I* indicator*,* the coefficient is as expected, namely negative. An increase in unilateral IIA exits corresponds with a decrease in claimant-investor success. While this indicator is not significant in Model 1, it is so in the full Model 4, and also for the subset of liability/merits decisions.[114] The *State Mood II* indicator is positive as expected and significant in Model 2. A rise in the number of IIAs signed correlates with investor success. However, the indicator is just outside the zone of significance in the full Model 4.

[113] Ibid.

[114] See extra Tables at <www.jus.uio.no/pluricourts/english/topics/investment/research-projects/database.html> accessed 5 September 2016.

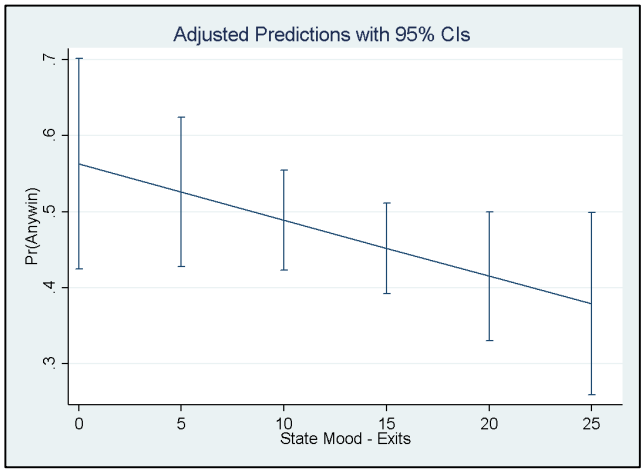
Table 2: Logit Regression Results for State and Stakeholder Mood (Any Win)

	Controls	**Treaty Exits**	**New Treaties**	**Stakeholder**	**All**
	Model 0	Model 1	Model 2	Model 3	Model 4
Independent Variables					
State Mood I (Treaty Exits)		-0.03			-0.04*
State Mood II (New Treaties)			0.01**		0.01
Stakeholder Mood				0.01	0.01
Controls					
NAFTA-based Case	-0.64	-0.70	-0.73	-0.64	-1.70**
ICSID-administered Case	-0.22	-0.22	-0.23	-0.22	-0.04
Extractive Industry Case	0.68**	0.70**	0.67**	0.69**	0.32
Law Firm Advantage	0.47**	0.45**	0.46**	0.48**	0.21
State Learning	0.03	0.04	0.04	0.03	0.11**
Case Cluster	0.57	0.53	0.57	0.55	-0.01
GDP Per Capita (Logged)	-0.35**	-0.37***	-0.37***	-0.35***	-0.30**
Cubic Year Trend	-0.00003	-0.00003	0.00006	-0.0001	-0.00005
Chi^2	36.99	39.16	41.11	37.33	24.10
Observations (Number of Cases)	341	341	341	341	341

* p<.10; ** p<.05; *** p<.01

Returning to the two *State Mood* indicators, we now look at the magnitude of the measured shift. This can be graphically observed in Figure 6 below which shows the predicted probabilities for 5-unit differences in the treaty exits (*State Mood I*) indicator. Holding all other control and mood variables constant at their means, the probability of a claimant-investor win is 56% when the treaty exit indicator is at zero, yet falls to 38% when the number of annual IIA exits rises to 25 (which occurred in 2009).

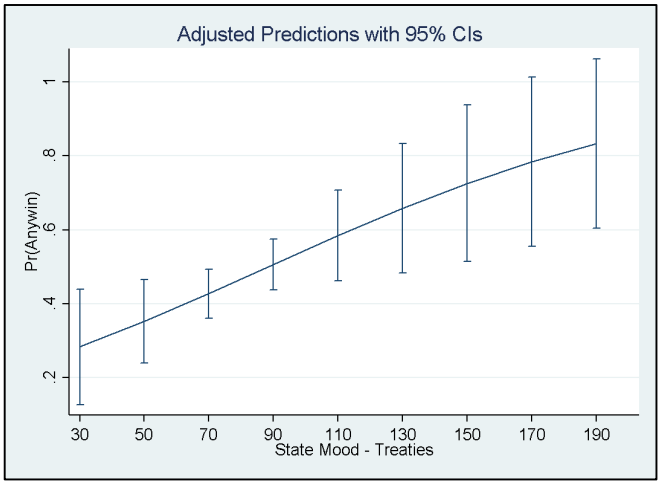
Figure 6: Predicted Outcomes for State Mood I (Treaty Exits)



In the case of the new treaties (*State Mood II*) indictor, the differences across the indicators' range are even more dramatic. Holding all other control and mood variables constant, claimant-investors achieved 80% success rates in years where there were close to 200 IIAs that were signed annually. But this drops to 30% in years where the number of annual IIAs signed bottoms out at 30 per year (see Figure 7 below). However, it is important to note that the confidence intervals at the ends of ranges for both *State Mood* indicators are large and, in the case of the treaty exits indicator, partially overlap. Thus, many claimant-investors are still able to achieve reasonable levels of success in these years but the proportion of such

successes is significantly lower. Nonetheless, the results indicate that the correlation between these two *State Mood* indicators and outcomes in fully resolved investment treaty arbitrations is significant.

Figure 7: Predicted Outcomes for State Mood II (New Treaties)



C Specific Hypotheses

We now turn to examine the four specific hypotheses that might shed further light on whether strategic arbitrator behavior is occurring.

Influential State Signals

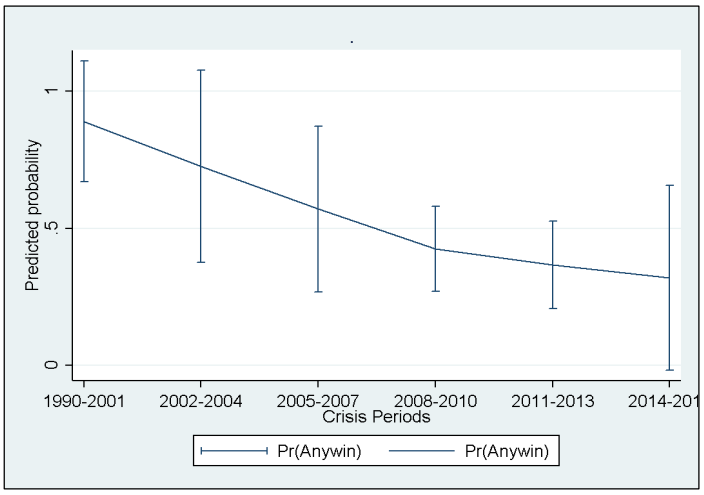
The *Influential State* hypothesis is measured (somewhat crudely) by breaking up outcomes according to five three-yearly crisis periods that follow 2001 and correspond to our analysis in Section 2. This disaggregation allows us to examine possible structural breaks after interventions by a small number of large influential states (primarily the US but also the EU) that we believe may have disproportionate signaling power. The first structural breaks relating to influential states are the pro-state signals sent by the NAFTA state parties after the issuance of the FTC Interpretive Note in 2001 and the release of the new US model BIT in 2004; and the pro-investor signals sent by the ramping up of negotiations[115] by the US, EU, and China for large-scale bilateral and plurilateral trade and investment treaties (that include ISDS), particularly after February 2013.

Controlling for the same factors as above, Figure 8 below shows the predicted probabilities in each period for claimant-investor success. It is notable that the probability of success does fall after the first break (after 2001) and the second break (after 2004) but the decrease in claimant-investor success is only statistically significant after the second break.[116] Turning to the last structural break (after 2013), the average success rate for claimant-investors is comparable to all the preceding periods. However, it is notably that claimant-investor success rates are not different (no statistical significance) from the period 1990 to 2001. While the p-

[115] A number of these large bilateral and plurilateral negotiations were officially launched prior to 2012, but we use 2012 as the year when these negotiations ramped up significantly.
[116] See (n 114).

scores hover close to the 10% level, the large confidence interval for 2014 to 2016 reveals the fact that a large number of claimant-investors are enjoying success that is almost comparable to the period 1990 to 2001. Caution should be exercised in reading too much into this crude measure but the pattern of structural changes suggests that influential states may be exercising a renewed subtle influence on investment treaty arbitrators; a factor paradoxically enhanced by the results for the *Development Status Asymmetries* below.

Figure 8: Influential State Signals and Structural Breaks



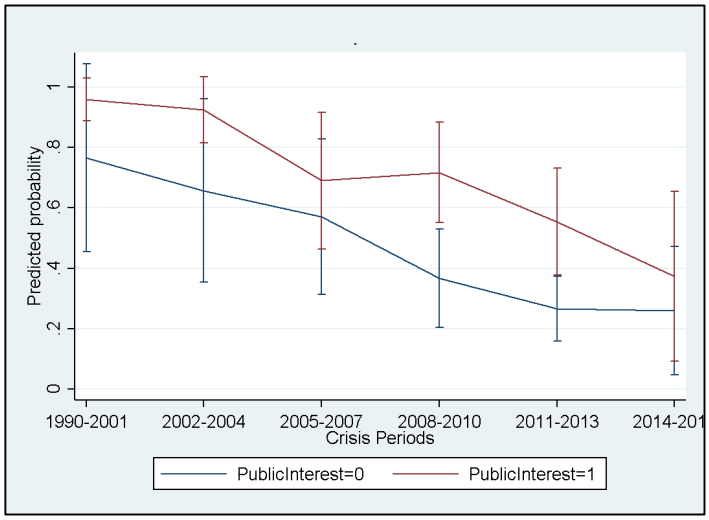
Public Interest Cases

For the *Public Interest Cases* hypothesis, it was hypothesized that investment treaty arbitrators may display greater state deferentialism in cases raising public interest concerns. These are cases that have gained notoriety during process of being litigated because they involve very large compensation claims, challenges to human rights-related or environment-related measures, or challenges to legislative rather than administrative (executive branch) action. Extreme examples would include, inter alia: the Phillip Morris,[117] Vattenfall,[118] and Yukos shareholder cases.[119] Less extreme examples include, inter alia, cases discussed largely on points of law such as the *Salini* case,[120] the Argentinian bondholder cases,[121] and some of the early NAFTA-based arbitrations like *Metalclad*[122] and *Methanex*.[123] We have thus created a binary *Public Interest Case* indicator for all investment treaty arbitrations that fall into these categories and in which we would expect arbitrators to be aware of the public interest dimension involved in these cases: 69 of the 343 finally resolved cases in our dataset meet this criteria.

[117] See (n 39, 40).
[118] See (n 41).
[119] See (n 49).
[120] *Salini Costruttori and Italstrade v Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (30 July 2001).
[121] See *Abaclat and Others v Argentina*, ICSID Case No. ARB/07/5, Settled; *Ambiente Ufficio and Others v Argentina*, ICSID Case No. ARB/08/9, Discontinued; *Alemanni and Others v Argentina,* ICSID Case No. ARB/07/8, Discontinued.
[122] *Metalclad v Mexico,* ICSID Case No. ARB(AF)/97/1, Award (30 August 2000).
[123] *Methanex v United States*, UNCITRAL, Final Award (19 August 2005).

Turning to measurement, we created an interaction term between *Public Interest Cases* and the different crisis periods. This enables us to measure both the general trend in these cases and whether arbitrator reflexivity is comparably grater than in all other investment treaty arbitrations. Figure 9 below sets out the results.[124] As is clear, claimant-investors consistently do better in *Public Interest Cases* as we have defined them. This is largely because such cases disproportionately occur in the extractive industry economic sector where claimant-investor success rates are consistently high. Turning to reflexivity, the rate of claimant-investor success in *Public Interest Cases* has fallen in *parallel* with the general decline in claimant-investor success. This is notable given that we might suppose that claimant-investors will generally have consistently good chances in the subset of extractive industry cases. However, it is nonetheless difficult to discern any significant change between *Public Interest Cases* and all other cases over time. Only in the periods of 2005 through 2007 and 2014 through 2016 do we notice a contraction in the difference between these two categories. But this difference is not statistically significant.

Figure 9: Public Interest Cases Across Crisis Periods

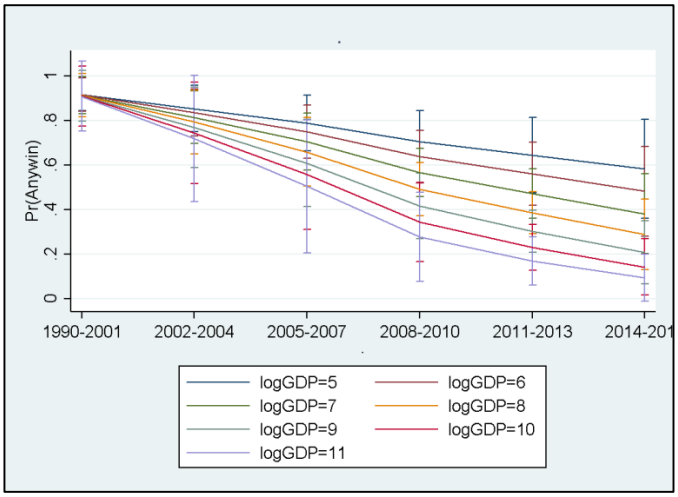


Development Status Asymmetries

For this hypothesis, we predicted that investment treaty arbitrators might be more deferential to less developed states after the emergence of concerns about an alleged anti-developing state bias. We measured this by breaking up the sample into the five three-yearly crisis periods and examining the claimant-investor success rates for various levels of development. The results were the opposite of what might be expected. As Figure 10 below demonstrates, states with higher levels of development enjoyed most of the decline of claimant-investor success over time. Thus states at the high end of the scale (*GDP Per Capita (Logged)* between 9 and 11) had seen claimant-investor success rates drop from 90% to around 15 to 20% over the last two decades but the poorest states (between 5 and 7) were facing claimant-investor success rates of 40 to 60%. This suggests that some states matter more than others and lends some further and indirect support to the *Influential State* hypothesis.

[124] See (n 114).

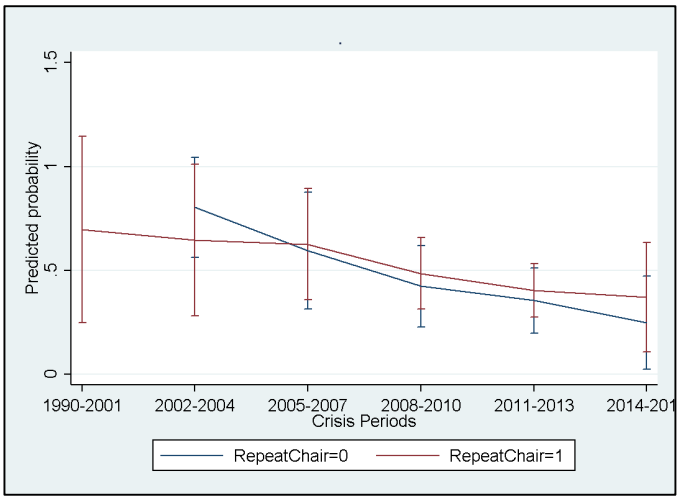
Figure 10: Development Status Across Crisis Periods



Prominent Arbitrators

Finally, with regard to the *Prominent Arbitrator* hypothesis, we code for the presence of a tribunal president who has rendered five or more decisions (as a tribunal president). Using an interaction term, we test whether the presence of a prominent tribunal president decreased the chances of claimant-investor success in the different periods after 2001 relative to other cases. As Figure 11 shows, investment treaty arbitrations with a prominent tribunal president were slightly more likely to award claimant-investors any success from 2005 onwards – the reverse of what was expected. However, the differences are not statistically significant suggesting that prominent tribunal presidents are not acting in any importantly different way than other tribunal members.

Figure 11: Prominent Arbitrators Across Crisis Periods



5 Conclusion

Since the mid-2000s, the international investment regime has been subject to a 'legitimacy crisis.' While the regime has its ardent supporters, the mood of various stakeholders from a diverse group of states, scholars, and global social movements has tilted towards viewing the regime as pro-investor, pro-Western, and jurisprudentially incoherent. We have not tried to

solve this normative debate in this article but instead focused on its effects. We have asked whether investment treaty arbitrators are reflexively evolving and helping the system adapt to more legitimate and effective forms of international adjudication (by becoming more deferential to respondent states in investment treaty arbitration).

The article set out various rational choice and discursive-based reasons for thinking that investment treaty arbitrators would be sensitive and adaptive. We counter these reasons with a competing set of legalistic (and attitudinal) reasons that may inhibit investment treaty arbitrators from acting in such a fashion. Drawing upon a newly developed investment treaty arbitration database (PITAD), we demonstrated that there has been a significant drop in claimant-investor success across time and found some initial evidence that investment treaty arbitrators have shifted their behavior on some types of outcomes.

Our main finding is that states matter. Indicators measuring general state mood (IIA exits and new IIAs signed) and the intervention of influential states were the most strongly correlated with the variations in claimant-investor success (or lack thereof); while our indicator for the general stakeholder mood tracked investment treaty arbitration outcomes poorly. Notably these results resonate with the general doctrinal developments in international investment law and cohere with research on domestic courts, where judges are found sensitive to influential state actors but less responsive to broad diffuse public opinion.

However, the research represents only a first take on the question of reflexivity in investment treaty arbitration. The field is ripe for further quantitative and qualitative research. We have only touched the surface and our findings remain tentative. There is room for improvement of the dependent and independent variables as well as the use of qualitative methods. A particular issue is why some of our specific hypotheses were not confirmed. Why were prominent arbitrators no more reflexive than their counterparts? Why was there not a greater drop in claimant-investor success rates in public interest cases than in all other cases? Is it because the reflexivity effect is not so strong? Or is it because reflexive arbitral behavior is fragmented throughout the international investment regime, such that only *some* arbitrators act in a strategic manner? This latter speculation would certainly cohere with the patchwork nature of doctrinal development, but remains a question to be investigated.

Returning to the normative debates with which we began, our research presents a divergent contribution. On one hand, we have shown that the system has adjusted considerably since its infancy. Claimant-investor success rates have fallen dramatically and hover around 40% today. This is certainly much lower than the comparable figure of 90%-plus for applicant states in WTO litigation. On the other hand, we have found a clear asymmetry in the distribution of the reflexive gains for states. It is developed states that are the beneficiaries of the large drop in claimant-investor success rates; less developed states have only registered marginal benefits. Moreover, if we compare claimant-investor success rates in the international human rights regime with those of investment arbitration, the latter appears rather high. The result is a mixed picture. The investment treaty arbitration system has been able to enhance effectively its respect for state sovereignty (and partly regulatory autonomy) but some states are more equal than others.