Politics of Investment Treaty Arbitration

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On April 30th 2015, 4.30pm, the London offices of King & Spalding were the target of a staged 'exorcism' of corporate power conducted by a group of NGO activists led by Reverend Billy.[1] The Reverend and his followers asked the firm and its lawyers to repent for their cardinal sin: engaging in investment treaty arbitration. Although perhaps the most entertaining, this was but one of a growing number of protests against investment treaty arbitration in Western capitals in recent years.

Until the late 1990s, investment treaty arbitration was an obscure and little used corner of international economic law. That has changed drastically in recent years. Based on more than 3,000 investment protection treaties – most of which are bilateral – foreign investors have increasingly resorted to investment treaty arbitration when resolving disputes with host states. By 2017, more than 700 claims had been brought against more than 100 countries, and the vast majority has been filed in the preceding decade. Claims have been in a large number of sectors and covered a very wide range of public policies.[2] Some claims are about outright expropriation, but typically the broad and vaguely drafted treaties have been used to seek compensation for less intrusive forms of government behavior that would often be subject to broad judicial deference in domestic courts.[3] Most claims have been against developing countries, but also developed countries have been respondents – particularly in recent years. Investors have won or settled more than half of all known claims, including some claims against states with advanced legal systems and property right protections.[4] Awards have occasionally been substantial, with several exceeding billions of dollars.

The regulatory reach and financial implications of investment treaty arbitration has made it one of the most potent areas of international dispute settlement. Unsurprisingly, it has also become

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[1] The event can be seen here: www.youtube.com/watch?v=-tAztBns9jg. Last accessed 19th April, 2017.
[2] Williams 2016
[3] Landau 2011
[4] Wellhausen 2016

Electronic copy available at: https://ssrn.com/abstract=2955166

highly controversial. A leading arbitrator has lamented that, ‘the more [people] find out what we do and what we say, and how we say it, the more appalled they are.’[5] This includes not just opponents of globalization – like Reverend Billy - but also supporters of international trade and investment.[6] And apart from civil society groups mobilizing against the regime,[7] officials and politicians in some government offices have also begun to question the legitimacy of using a small clique of international arbitrators - typically commercial lawyers - to settle public law disputes.

The chapter will discuss the politics of investment treaty arbitration. Politics is understood very broadly for the purpose of the chapter, encompassing the domestic and international political drivers, effects, and justifications of investment treaty arbitration as well as the political reactions to the regime by relevant stakeholders. The chapter starts with focusing on two core political justifications for investment treaty arbitration.[8] The first relates to home state politics and diplomacy: the ability of investment treaty arbitration to de-politicize investor-state disputes. The second justification relates to host state politics and institutions: the ability of investment treaty arbitration to convince certain types of foreign investors to commit capital into certain types of host states. On this basis, the chapter will discuss the politics of investment treaty arbitration in recent years, particularly surrounding the unintended consequences of the investment treaty regime as well as the controversy surrounding investment arbitrators themselves.

I) POLITICAL JUSTIFICATION I: HOME STATE POLITICS AND DIPLOMACY

1) **The theory of de-politicization**

A core political justification for investment arbitration is that it provides an avenue for investor-state dispute settlement independent of inter-state politics. This is often referred to as the de-politicization thesis: by reducing home state involvement, the resolution of investor-state disputes is taken out of the realm of diplomacy and into the realm of law.[9] This theory provides a justification for resolving investment disputes through arbitration, regardless of whether the host state’s consent to arbitration is contained in investor-state contracts, investment laws, or investment treaties – but in line with the focus of the chapter, this section will focus on investment treaty arbitration.

Article 27 of the ICSID Convention provides that:

> (1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.
>
> (2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

[5] Comments by Johnny Veeder QC at Wilmer Hale seminar on international arbitration, 23 April 2014.

[6] E.g. Lester 2015.

[7] E.g. Olivier and Eberhardt 2012.

[8] In addition to investment protection treaties, consent to investor-state arbitration can also be given on an ad-hoc basis or in investor-state contracts and domestic laws. Yet while some of the observations in this chapter will also apply to investor-state arbitration more broadly, the focus is the politics of investment treaty arbitration.

[9] Puig 2014. The de-politicization argument often suffers from conceptual confusion. For a critique of its use in contemporary debates, see Paparinskis (2010).

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Unlike the ICSID Convention, only few investment protection treaties exclude diplomatic protection explicitly. Yet some investment protection treaties go even further than Article 27(2): unless there is no ICSID jurisdiction or the host state fails to abide with arbitral awards, some model BITs prohibit the pursuit of disputes 'through diplomatic channels'.[10] This language may prohibit even informal diplomatic exchanges, which – if followed - would entirely insulate investment disputes from inter-state relations. It is not clear that would necessarily be a desirable outcome.

Although the de-politicization thesis has been subject to little rigorous empirical testing (see below), many international lawyers are of the view that it is one of the main benefits of investment treaty arbitration. According to Reisman, for instance, the 'central achievement' of investment treaty arbitration is the isolation of investor-state disputes from 'the caprice of sovereign-to-sovereign politics.'[11] Equally, Lowenfeld is worth quoting at length:

> [T]he essential feature of investor-[s]tate arbitration, as it has developed since the ICSID Convention ... is that controversies between foreign investors and host states are insulated from political and diplomatic relations between states. In return for agreeing to independent international arbitration, the host state is assured that the state of the investor's nationality (as defined) will not espouse the investor's claim or otherwise intervene in the controversy between an investor and a host state, for instance by denying foreign assistance or attempting to pressure the host state into some kind of settlement. Correspondingly, the state of the investor's nationality is relieved of the pressure of having its relations with the host state disturbed or distorted by a controversy between its national and the host state. ... The paradigm in investor-States disputes, ... is a dispute between the first party (nearly always the investor) as plaintiff, and the second party (nearly always the host state or state agency) as respondent. There is no third party.[12]

Figure 1 provides an illustration of this theory. Here, a foreign investor (I) has been expropriated by a host state. To obtain compensation, the investor asks the executive of its home state (E) to impose sanctions against the host state. The use of force for the purpose of diplomatic protection ('Gunboat Diplomacy') was made illegal after the Second World War, but the executive of the home state could use trade sanctions, reduce aid flows, or other non-military means. Yet, the executive would prefer to avoid sanctions, when this conflicts with broader security and foreign policy goals. By contrast, the legislature or other core domestic constituents are keen on protecting private corporate interests, which means the executive will face domestic policy costs if it refuses to intervene. When these domestic policy costs are greater than the foreign policy costs of pursuing sanctions (as in this illustration), the home state will proceed with sanctioning the host state until it pays the investor compensation.

The use of sanctions benefits the investor but harms the home state. It is therefore in the interest of the home state to negotiate an investment treaty with the host state providing direct recourse to investor-state arbitration. This gives the executive branch a justification to domestic constituencies for refusing to involve itself in investment disputes abroad. Once investment treaty arbitration is available, the investor can obtain full compensation without the home state incurring foreign policy costs. Note also from Figure 1 that if the de-politicization thesis holds true, investment treaty arbitration may be particularly beneficial for host states. For while investment treaty claims can result in reputation costs for host states[13] as well as significant

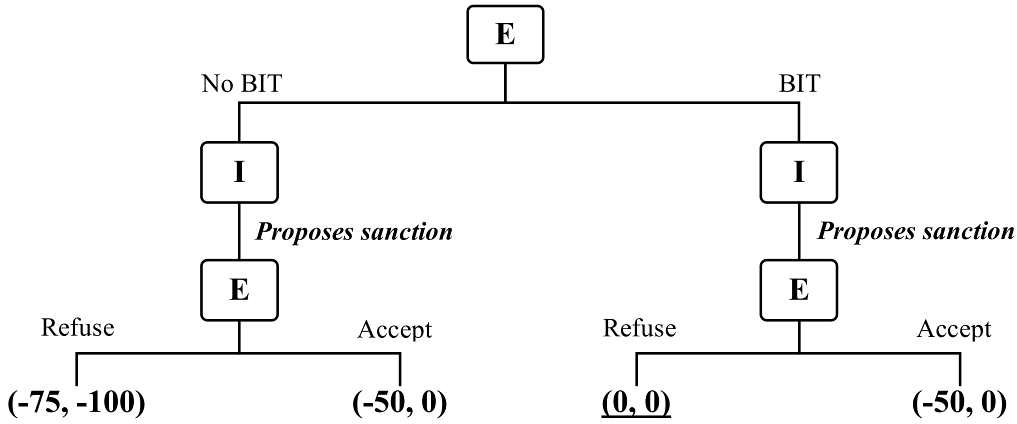
[10] Juratowitch 2008, 16-22.

[11] Ecuador v. United States, Expert Opinion of Professor W. Michael Reisman, 20-21, Permanent Court of Arbitration, April 4, 2012.

[12] *Corn Products. Int'l, Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/01 (NAFTA), Separate Opinion of Andreas Lowenfeld, par 1–4 (Jan. 15, 2008).

[13] Peinhardt and Allee 2011.

legal costs,[14] these may be smaller than the cost of diplomatic sanctions. In this sense, investment treaty arbitration acts as a solution to a 'game of chicken', where both states have an interest in consenting to investment treaty arbitration so as to avoid escalation of the investment dispute to the worst-case scenario of diplomatic conflict.[15]



Executive
Domestic policy costs of leaving investor unprotected: -75
Policy costs of sanctioning host state: -50
Policy costs of refusing sanction if ITA is available: 0

Investor
Cost of expropriation if no protection: -100
Cost of expropriation after sanction or ITA: 0

NOTES: Payoffs: (Executive, Investor). ITA: Investment Treaty Arbitration
SOURCE: Bonnitcha, Poulsen, and Waibel 2017, figure 7.1.

FIGURE 1. INVESTMENT TREATY ARBITRATION AS DE-POLITICIZATION

Three questions arise from this theory. First, the assumption in Figure 1 is that the home state is bound to get dragged into the dispute to protect the foreign investor. Yet, we know from empirical literature on trade disputes that a 'government filter' make political considerations important when states consider which disputes are worth scarce political capital.[16] One thing is that formal *diplomatic protection* – i.e. espousal – may be rare in the modern investment regime, but to what extent have home states used their wider range of diplomatic tools to resolve investment disputes in the absence of investment treaty arbitration? And if they have, was de-politicization an important factor among the architects of the investment treaty regime? Finally, has investment treaty arbitration de-politicized investment disputes in practice? Given the short supply of empirical evidence, there are no easy answers to these questions but as a starting point it is useful to briefly consider the historical context of the investment treaty regime.

2) De-politicization as a Partial Driver of Investment Treaty Adoption

During the colonial era, foreign investment protection was generally in the hands of home states. Disputes with governments outside of formal Imperial control were occasionally settled

[14] Hodgson 2014.
[15] Bonnitcha et al. 2017.
[16] Allee and Huth 2006; Davis 2012.

through political and military means.[17] An extreme example was the so-called 'Pastry War' between Mexico and France. Relations between the two governments were sour at the time, so when a French pastry shop in Mexico City was looted in 1838 the French government used it as an excuse to block, bomb, and seize Mexican ports and cities until compensation was paid in full.[18] Although extreme, other investment disputes also resulted in inter-state conflicts during the 19th century.[19]

Up through the 20th century as well, investment disputes often spilled over into diplomatic relations. Not only some home states (see below), but also the World Bank kept getting dragged into investment disputes as a mediator during the 1950s – much to the frustration of the leadership of the Bank.[20] One of the most notable instances was when Iran nationalized the oil industry and cancelled concession agreements of the Anglo-Iranian Oil Company. Subsequent to the overthrow of Mosaddeq in 1953, the Bank was called upon as an intermediary in an attempt to find a settlement between the parties. A few years later, the Bank became involved in yet another prominent dispute trying to facilitate a settlement between the Egyptian government and French and British shareholders of the nationalized Suez Canal Company. One of the core reasons for this part of the Bank's work was that a significant share of its financial resources came from private capital markets, and the Bank would risk higher lending rates if its funds went to governments that failed to settle expropriation disputes (or debt defaults). As a result, the Bank developed a policy of withholding aid from developing countries not providing foreign investors adequate compensation for expropriation.[21] The policy was implemented in practice on several occasions.[22]

This involvement in investment disputes detracted from the broader mission of the World Bank. And since it was already under pressure from developed countries to assist with a safer international investment climate, the management sought to address the issue of dispute resolution.[23] The end result was the ICSID Convention, which fulfilled a long-standing wish of the Bank, since 1947, that there should be some 'impartial body of technical experts' involved in the settlement of investment disputes.[24] As noted in the *travaux préparatoires* of the ICSID Convention, one of the key purposes of the ICSID system was thereby 'to remove disputes from the realm of diplomacy and bring them back to the realm of law'.[25] Similarly, the World Bank's General Counsel who chaired the ICSID Convention meetings, Aron Broches, argued that ICSID would 'remove disputes from the atmosphere of inter-State

[17] Lipson 1985.

[18] Robertson 1944.

[19] By contrast, Tomz (2007, chs. 6-7) shows convincingly that in contrast to widely held beliefs that neither gunboat diplomacy or trade sanctions were important for sovereign debt collection.

[20] Parra 2012, 21-24; St John forth. More precisely, it was the International Bank for Reconstruction and Development (IBRD), here merely referred to as the Bank.

[21] IBRD 1969, 31.

[22] Mason and Asher 1973, ch. 11. In other cases, however, the Bank was unable to credibly commit to its policy. The International Association for the Promotion and Protection of Private Foreign Investment complained about continued lending to a number of countries, which had expropriated foreign capital without providing compensation. Then President of the Bank, Robert McNamara, replied that while this was unfortunate, there was little the Bank could do, when the home states of the aggrieved investors didn't seek to block the loans through their representatives on the Bank's Executive Board; see FCO 59/941.

[23] Broches 1984.

[24] IBRD 1946-1947, 13.

[25] ICSID 1970, 273. See also; Consultative Meeting of Legal Experts, Summary Record of Proceedings, 1963, *in* History of the ICSID Convention, Vol. II-1, 242 (1968).

relations'.[26] De-politicization was not the only driver of the ICSID Convention, but for the World Bank it was an important one.

For Western states themselves there is only little literature on the politicization of investment disputes. An exception is Maurer, who shows how the American government repeatedly intervened on behalf of American investors during the 19th and 20th centuries.[27] The executive branch, particularly the State Department and the CIA, opposed this practice as diplomatic protection often came at the expense of broader foreign policy goals. Yet, American companies managed to convince Congress to fight for their interests, who in turn twisted the arm of shifting American administrations. After revolutionary Cuba initiated land reforms in 1959, for instance, American sugar firms lobbied Eisenhower to cut Cuba's sugar quota. He hesitated, as State Department officials warned that 'keeping Cuba out of the Sino-Soviet orbit … is more important than salvaging of the U.S. investment in Cuba to the complete satisfaction of the U.S. business community'.[28] After a series of subsequent expropriations, Congress decided otherwise and retaliated by blocking the entry of Cuban sugar into the United States – a move which further pushed Castro into Soviet hands.[29] A few years later, in 1962, the story repeated itself. An expropriation in Brazil prompted a number of major American companies to lobby Congress to cut off all American aid to countries expropriating American capital. The Kennedy administration objected, but to no avail. Congress passed the Hickenlooper amendment to the Foreign Assistance Act requiring the executive to cut all foreign assistance to governments expropriating American capital.

Over the coming decades, American Presidents managed to (mostly) stay clear of invoking the Hickenlooper amendment. But the only way possible was to reduce American aid to expropriating nations and threaten economic sanctions. The end-result was a success for expropriated American firms, who almost always managed to receive compensation at fair value, but a failure for American foreign policy as ardent protection of American corporate interests often contradicted broader strategic considerations.

According to Maurer, this was a key reason the United States supported ICSID and the initiation of its BIT-program: investor-state arbitration gave the executive a credible excuse to say *no* to American investors asking for diplomatic aid. Some negotiators of U.S. investment treaties have made the same argument. Vandevelde, a former U.S. negotiator, notes that:

> the situation in which an investor's remedies are *dependent* on upon the United States government is an unsatisfactory one both for the investor and for the government. From the perspective of the United States government, the situation is unsatisfactory because it may complicate or even impede the conduct of foreign policy in the broad national interest.[30]

A U.S. negotiator of NAFTA's investment chapter equally notes that investor-state arbitration allows 'the investor's sovereign to distance itself from the dispute.'[31] Today, as well, U.S. federal agencies argue that one of the main benefits of investment treaty arbitration is to 'resolve investment conflicts without creating state-to-state conflict.'[32]

[26] ICSID 1970, 527.
[27] Maurer 2013.
[28] Quoted in Maurer 2013, 322.
[29] Maurer 2013, 328.
[30] Vandevelde 1993, 22-23.
[31] Price 2000, 112.
[32] https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds. Accessed 2 June 2016.

Compared to other aims of the U.S. BIT program, however, de-politicization rarely took center stage. With respect to the U.S. adoption of the ICSID Convention, St John shows that except for a brief statement by Senator Morse on the de-politicizing promise of the Convention, the main concerns were about promoting and protecting American capital.[33] And with respect to Washington's choice of investment treaty partners, empirical evidence suggests that de-politicization has not been a particularly important driver either. Instead, American investment treaties were used primarily for the protection of American capital and cementing diplomatic relations with politically important countries.[34]

De-politicization appears to have played an even smaller role in European investment treaty programs. In the case of the U.K., sanctions were used after the Suez crisis in Egypt, Libya's nationalization of BP, and other instances. The overthrow of the Iranian regime was linked to the expropriation of the Anglo-U.S. concession, mentioned above, in which British security forces played an instrumental role. Unlike the U.S. government, however, the British executive branch was more successful in saying 'no' to British firms wanting to escalate investment disputes. The Foreign and Commonwealth Office refused to use aid flows as an instrument of investment diplomacy during the latter part of the Cold War, partly because of the negative experiences with this policy across the Atlantic.[35] Perhaps for this reason, de-politicization was not used by Britain to justify the adoption of the ICSID Convention nor the initiation of the British BIT program in the early 1970s.[36]

De-politicization was not important for the initiation of German BIT program either. This should come as no surprise as the German government didn't have any significant tools of diplomatic pressure in the early Cold War period. Interestingly, however, German officials initially rejected the inclusion of investment treaty arbitration in early German BITs, as they feared it 'could turn every case of expropriation into an international litigation with political relevance.'[37] Allowing investors direct recourse to arbitration could drag the German government into disputes it would have preferred to stay clear off – the opposite scenario of the de-politicization thesis. There is little evidence on other European investment treaty programs, but the evidence available does not point to de-politicization being a crucial driver either.[38]

Similarly, de-politicization was hardly ever a core justification for consenting to investment treaty arbitration for developing countries. An exception is Costa Rica. In the early 1990s, a multilateral loan from the Inter-American Development Bank had been delayed until an (unrelated) investment dispute involving an American investor in Costa Rica was referred to arbitration.[39] A foreign policy advisor to Senator Helms, who intervened on the company's behalf, noted in 1993 that this 'will scare the living daylights out of them'.[40] It did. Costa Rica ratified ICSID that year and subsequently consented to the arbitration in order to stop American

[33] St John forth.

[34] Chilton 2016.

[35] Poulsen 2015.

[36] Denza and Brooks 1987; Poulsen 2015.

[37] Quoted in Poulsen 2015, 52-53.

[38] Bonnitcha et al 2017.

[39] ICSID Case No. ARB/96/1.

[40] Quoted in Brower and Young 2005, 5. Note that IADB is the only multilateral organization where the United States can veto an individual loan – and that too only, if it is provided through its Fund for Special Operations. When in 2012, the United States was joined by Germany and Spain wanting to block a 'hard' IADB loan to Argentina - partly due to its stalling on payment of ICSID awards - the loan went ahead anyway.

pressure. Yet, Costa Rica was an outlier in this respect. Archival records and interviews with core policymakers suggest that few other developing countries appear to have found de-politicization a crucial justification for investment treaty arbitration.[41]

3) De-politicization as a Result of Investment Treaty Arbitration?

Irrespective of the intent of treaty drafters, the investment treaty regime may have de-politicized investment disputes nevertheless. In the *Diallo* case, the International Court of Justice noted that because of investment treaties, 'the role of diplomatic protection has somewhat faded, as in practice recourse is only made to it in rare cases where treaty regimes do not exist or have proved inoperative.'[42] Espousal through diplomatic protection is what the ICJ had in mind and it is of course not the same informal diplomatic exchanges or threats of sanctions. Politicization is not a binary variable. But again, notable international lawyers argue that investment treaty arbitration has indeed replaced power politics with legalized procedures in the resolution of investment disputes. Recall that for Lowenfeld, for instance, the treaties have 'insulated' investment disputes from diplomacy and inter-state relations.

Some anecdotal evidence lends support to this. In the absence of ratified investment treaties Brazil appears to have been more inclined to use 'old-fashioned' foreign policy tools to defend Brazilian investors in neighboring states.[43] After nationalizations of Brazilian assets, Brasilia has threatened to stop paying for gas exports, block development loans, and in one case the Defense minister even subtly threated to support secessionist movements in east Bolivia. According to Maurer, the Brazilian government would have been less muscular in its approach had investment treaty arbitration been available. A similar argument is made by Schwebel, who notes that if the Iranian government had just consented to investment arbitration in 1951 (pursuant to a concession agreement), the political fallouts of the expropriation of the Anglo-Iranian oil company would not have taken place.[44] More generally, Maurer suggests that U.S. investment treaties have made the U.S. government much less involved investment disputes over the last two decades.[45] This, of course, is also the argument made by Lowenfeld and Reisman above.

As with all counterfactuals, however, these claims are difficult to show in practice. Maurer's work is the most comprehensive, yet his empirical inquiry primarily precedes the rise of investor-state arbitration, so it is unclear whether the reduction in aggressive forms of (American) diplomatic protection has been due to other factors than investment treaty arbitration. One empirical study suggests this may be the case. Here, Gertz and co-authors use leaked diplomatic cables to show that during the late 1990s and early 2000s, the U.S. government hardly ever used threats of sanctions to settle investment disputes and the presence of an investment treaty had no impact on whether the U.S. chose to escalate the dispute.[46] In some of the few cases where the U.S. government did decide to threaten economic sanctions, the investor already had recourse to investment treaty arbitration. The Occidental case against Ecuador is a case in point. Here U.S. officials were told by the firm early on that it would file an investment treaty claim if the contract dispute was not settled, yet the American government

[41] Poulsen 2015.

[42] *Case Concerning Ahmadou Sadio Diallo* (Republic of Guinea v. Dem. Rep. of the Congo), Preliminary Objections, ICJ, May 24, 2007.

[43] Maurer 2013, ch. 11.

[44] Schwebel 2015, 181-182.

[45] Maurer 2013, 428-433.

[46] Gertz, Jandhyala, and Poulsen 2016.

nevertheless proceeded to cancel negotiations over a free trade agreement because of that dispute.[47]

The authors argue that the reduction in diplomatic threats to solve investment disputes is more likely to other factors than the rise of investment treaty arbitration. Firstly, the types of disputes ICSID and investment treaties were intended to de-politicize – outright expropriation – rarely occur anymore. And when host state measures directly target U.S. investors, for instance in contract disputes, the U.S. government still involves itself both with and without investment treaties.[48] Secondly, commercial diplomacy has been at the forefront of the American diplomatic corps after the end of the Cold War, and the U.S. government increasingly use investment disputes as opportune moments to promote foreign policy agendas with host states. Rather than seeking to avoid politicization of investment disputes, the executive branch has often explicitly encouraged it.[49] Anecdotal evidence suggests that the American case is not unique in this respect. Governments in Europe, Canada, and Russia have also escalated investment disputes politically, even in the presence of investment treaties with recourse to investment treaty arbitration.[50] At a minimum, this suggests that more detailed studies are needed to adequately assess the de-politicization thesis, and whether it may have been taken too far as a justification for investment treaty arbitration.

II) POLITICAL JUSTIFICATION II: HOST STATE POLITICS AND INSTITUTIONS

Whereas the de-politicization thesis relates to domestic politics in the home state as well as relations between home and host states, another set of political justifications focus on the domestic politics and institutions of the host state. From this perspective, investment treaty arbitration helps host states facilitate investment by (i) offering a credible commitment of property right protections; (ii) sending a costly signal about the nature of the investment regime; and/or (iii) improving decision-making among host state administrative and judicial institutions. The first mechanism should promote investment by investors protected by investment treaties adopted by the host state, the second should promote investment also from states not party to investment treaties with the host state, and the third mechanism should promote both foreign and domestic investment.

1) **Three Theories of Investment Treaty Arbitration and Investment Promotion**

The most prominent justification for investment treaty arbitration is that it can help resolve so-called hold-up problems.[51] Once a foreign investment is made, an initial share of the costs is often used up front and cannot be recovered; i.e. it is 'sunk' within the host state. After the investment has been made, the host state therefore has an opportunity to expropriate the investment. This will allow the government to keep the entire surplus of the investment to itself (assuming it can operate the project as efficiently) as well as 'steal' the investment that was sunk. The host state is thereby faced with a 'time-inconsistency' problem – it would like to attract the investment, but is unable to credibly commit against appropriating a larger share of the investment after it has been made. The rational and fully informed investor knows this and therefore decides not to invest, which leaves both the investor and the host state worse off than if the investment had been made and the state had not expropriated it. An investment treaty

[47] *Ibid.*

[48] *Ibid.*

[49] See generally; Gertz 2016

[50] Gertz et al. 2016.

[51] E.g. Van Aaken 2009; Bonnitcha 2016; Yackee 2016.

with recourse to investment arbitration offers a credible commitment against such opportunistic state behaviour, as the state will now have to pay full compensation for expropriation along with additional legal and reputation costs of responding to investor claims. Knowing this, the investor now decides to proceed with the investment to the benefit of the investor and the host state.

Hold-up problems do not necessarily involve outright expropriation. In obsolescent bargaining models, for instance, the state renegotiates initial project terms or increase the tax rate after an investment has been made. Such measures allow the investor to still operate the investment – perhaps more efficiently than the host state – but appropriate a larger share of the surplus to the host government. The government can do this because the investor would suffer a significant loss should it decide to leave (due to sunk costs) and therefore has significantly less bargaining power post-establishment.[52] Here, again, investment treaty arbitration can prevent such behaviour, provided the treaty includes protections against indirect expropriation, unfair and inequitable treatment, and/or breaches of state contracts or other specific obligations (umbrella clause).

A related, but distinct, hypothesis is that consent to investment treaty arbitration allows the host state to send a costly signal about the nature of its investment regime. Rather than acting as a 'substitute' for poor domestic institutions – as in the credible commitment hypothesis – the consent to investment treaty arbitration is here used to inform imperfectly informed investors about the fact that the government is 'serious' about property right protections. In this theory, countries with 'poor' investment climates are assumed to be most likely targets of investment treaty claims and investors therefore expect that only well-governed countries would be willing to sign the treaties.[53] Importantly, the treaties thereby send a signal to all foreign investors about the nature of the domestic investment climate - including those investors not covered by a treaty with the host state.

Finally, investment treaty arbitration may promote investment through improvements in government decision-making. Although investment treaty arbitration rarely involves primary remedies (such as changing laws and regulations), the significant monetary awards imposed by tribunals can nevertheless incentivise states to promote domestic administrative and judicial practises that conform with their investment treaty obligations.[54] This, in turn, should help promote foreign *as well as* domestic investment.

2) Investment Promotion as an Important Driver of Investment Treaty Adoption

Unlike the de-politicization thesis, there is ample evidence that investment promotion was a crucial driver for investment treaty adoption – at least in developing countries.[55] North-South investment treaties were premised on a Grand Bargain: 'a *promise* of protection of capital in return for the *prospect* of more capital in the future'.[56] And indeed, the vast majority of developing country governments justified their consent to investment treaty arbitration with the argument that it would promote foreign investment.[57]

[52] Vernon 1971.
[53] Desbordes and Vicard 2009.
[54] Schill 2012: 137. See also Dolzer 2006; Echandi 2011.
[55] Elkins, Guzman, and Simmons 2006; Betz and Kerner 2016.
[56] Salacuse and Sullivan 2005, 77.
[57] Poulsen 2015.

In some cases, the logic of credible commitments was used. In the case of NAFTA's Chapter 11, for instance, Mexico explicitly made reference to the fact that the obligations 'tied in' the government (and future governments) from backtracking on its promises to protect foreign investors.[58] In other cases, signaling was the main justification. The first BIT signed by South Africa, for instance, was justified by its ability to 'prove to foreign investors … that South Africa is an investor-friendly country'.[59] More generally, a former U.S. negotiator notes about the 1990s that 'many developing countries [now saw] the BIT [as] a tangible way of signaling their captivity to foreign investment, and thus may seem to assist in attracting capital from the United States and other developed countries'.[60] This view has also been promoted to developing countries by organizations such as ICSID[61] and UNCTAD.[62]

There is little evidence that developing countries explicitly saw investment treaty arbitration as a tool to promote better administrative and judicial decision-making (which in turn would attract investment). To the extent there was an explicit link between treaty obligations and domestic reforms, it operated through a different mechanism: many governments began consenting to investment treaty arbitration at the same time as they were implementing similar investment protection reforms in their national investment regimes.[63] The causality is here reversed, as changing domestic policies towards foreign investment resulted in the adoption of investment treaties rather than the other way around. In some cases, the causal pathway is even more complex as national investment laws were inspired by the World Bank Guidelines on the Treatment of Foreign Direct Investment, which in turn were directly inspired by investment treaty obligations.[64] Here, investment treaties may have had an indirect impact on the content of domestic laws, which in turn may have helped facilitated investment, but this was not because of the shadow of investment treaty arbitration.

3) Investment Promotion as a Result of Investment Treaties?

Despite investment promotion being a core driver for developing countries participation in the investment treaty regime, empirical literature has questioned the extent to which consent to investment treaty arbitration has in fact helped developing countries attract investment.[65] Survey evidence suggest that a very large share of foreign investors find consent to investment treaty arbitration irrelevant when investing in otherwise risky jurisdictions. A 1991 survey of investors from the United States and Western Europe conducted by the World Bank, concluded that '[p]rofessional advisors, such as accountants or merchant bankers, would be people to concern themselves with such minutia, only after detailed project planning was already underway.'[66] Two decades later, a survey of in-house legal counsel in large American firms found that foreign investment decisions hardly ever depend on investment treaties.[67] Equally, by 2010 underwriters in the political risk insurance industry rarely considered the treaties important for availability and pricing of political risk insurance.[68]

[58] Pastor and Wise 1994, 484; Cameron and Tomlin 2000, 101.
[59] Quoted in Poulsen 2014, 8.
[60] Vandevelde 1993, 638.
[61] E.g. Dolzer and Stevens 1995, 12.
[62] Poulsen 2015, 91-96.
[63] Alvarez 2011; Poulsen 2015.
[64] Shihata 1993.
[65] E.g. Aisbett 2009; Yackee 2010; 2016; Peinhardt and Allee 2012; Kerner and Lawrence 2014; Jandhyala and Weiner 2014; Danzman 2016.
[66] MIGA 1991, 92.
[67] Yackee 2010.
[68] Poulsen 2010.

The treaties are undoubtedly important for investment decisions by some investors in some jurisdictions and they may have become more important in recent years after the rise of investment treaty arbitration. Yet, the effect of the treaties on foreign investment is less than what was expected by many developing country governments when joining the regime. This is for a number of reasons, some of which has to do with the underlying assumptions of the theories presented above.

With respect to credible commitment hypothesis, hold-up problems vary significantly across contexts. Mobile investments with a low share of sunk costs – e.g. light manufacturing – are much less prone to hold-up problems than natural resource or infrastructure investments.[69] Secondly, investment management can reduce the likelihood that investor-state bargains obsolesces, for instance by withholding certain benefits from the state over time[70] or making links with the domestic economy.[71] Third, hold-up problems are 'one-shot' games, whereas in practise investor-state relations are repeated games, which mean the host state is concerned with the negative reputation effects of mistreating foreign investors. Finally, hold-up problems vary depending on the nature of the host state. Empirical literature suggests that expropriation is less likely to occur in democracies, for instance, due their greater property right protections and higher number of 'veto-players' that in turn increase policy stability.[72] Equally, the presence of independent and effective courts lowers the likelihood of uncompensated expropriation.[73] To the extent investment treaty arbitration acts as a crucial credible commitment device, it is thereby only in very specific circumstances.

The signalling thesis is not without its challenges either. Practically all states have consented to investment treaty arbitration – including many with 'poor' investment climates - so it is unclear whether the treaties do in fact offer a useful signal about the nature of a state's domestic investment regime. Equally, whereas early investment treaties may have allowed some countries to 'stand out', there are today more than 3,000 so yet another treaty is unlikely to send a particularly costly signal about the nature of a government's investment regime.

Finally, the thesis that consent to investment treaty arbitration promotes better administrative and judicial decision-making comes with caveats as well. Here, a crucial assumption is that host states internalize the constraints imposed by investment treaties into national administrative and judicial systems. This proposition remains severely understudied but the work available to date suggest a very low awareness of investment treaty obligations among core officials.[74] Only few countries have institutionalized implementation of investment treaty obligations to ensure compliance – and that too only recently.[75] And with respect to promoting better judicial decision-making, one could make the opposite argument as well. By giving foreign investors the right to side-step domestic courts, investment treaty arbitration may reduces foreign investors' incentive to lobby for judicial reforms.[76] If evidence is found for that proposition the result could be that investment treaty arbitration reduces, rather than improves,

[69] Bonnitcha 2016; Bonnitcha et al. 2017.

[70] Ramamurti 2003.

[71] Henisz 2000; Johns and Wellhausen 2016.

[72] Albornoz, Galiani, and Heymann 2011; Jensen 2008. Note, of course, that only a minority of investment treaty claims relate to direct expropriation and Williams (2016) finds that democracies are not less likely to be targeted by investment treaty claims.

[73] North and Weingast 1989; Weingast 1993.

[74] Sattarova forth.

[75] UNCTAD 2010.

[76] Ginsburg 2005.

the quality of domestic legal institutions. Thus far, however, we know little about the relationship between investment treaty arbitration and the decision-making of host state authorities.

III) Recent developments: unintended consequences and the power of arbitrators

The politics of investment treaty arbitration has changed radically in recent years. Two factors are particularly important. The first are the unintended consequences of investment treaty arbitration, which have resulted in changes in treaty practise. In order to understand this development, we need to consider how investment treaties were negotiated in the past. Secondly, the very institution of investment treaty arbitration has become controversial, not least the use of private lawyers to settle public law disputes

1) Outcomes: The Politics of Unintended Consequences

Investment treaties have typically been drafted in vague and open-ended terms, which left considerable flexibility to arbitrators to 'fill in the blanks'. After the recent explosion in claims, many governments have thereby been taken by surprise about how far-reaching arbitrators have interpreted and applied vague terms, such as 'fair and equitable' or 'indirect expropriation'. The scope of jurisdiction, the lacking deference to national decision-makers, and particularly the size of some monetary awards have also prompted concerns about whether the costs – monetary, regulatory, or both – outweigh the benefits.

Given the few claims pursued at the time the investment treaty network expanded rapidly during the 1980s and 1990s, there is nothing inherently surprising about this development and unintended consequences stemming from 'incomplete contracting' in international law is not limited to investment treaty arbitration. What is unique to this regime, however, is that many governments did not just underestimate the scope of investment treaty arbitration due to imperfect information, they often entirely failed to appreciate the very nature of the regime itself due to imperfect processing of information (bounded rationality).

The fact that modern investment protection treaties were enforceable in practise through investment treaty arbitration was not appreciated in a large number of developing countries. Often it took a claim against governments themselves before they realised the treaties were more than just soft-law arrangements.[77] It was not just politicians who failed to appreciate the potency of the regime – including in developed countries[78] – but also many negotiators. Rather than carefully tailoring treaty obligations, officials often copy-pasted from template agreements of Western countries without much consideration and few stakeholders paid attention. Negotiations were typically quick, and in many cases developed country negotiators had serious doubts whether their counterparts took the process seriously. A former German negotiator notes that while some countries were well prepared, he often had the impression that developing country negotiators:

> … had very little knowledge about BITs. But that didn't make negotiations easy, because then we had to explain everything. And then there were countries who just wanted to sign – whatever the text, but these are extreme examples. In most cases, we were bombarded with questions. What does non-discrimination

[77] Poulsen and Aisbett 2013; Poulsen 2014; Poulsen 2015.
[78] See e.g. Alvarez and Park 2003, 386-383.

> mean? What does free transfer mean? And in each negotiation we had to explain not just one, but many times.[79]

A Dutch negotiator equally notes that "during the 1990s, developing countries often asked what even basic provisions meant",[80] and in Latin America an experienced negotiator recalls that:

> Many here in Latin America thought it was harmless to sign these treaties; no-one had an idea what they meant. Many who negotiated were not lawyers, so they just signed them off within a few days, hours, or even over email because travels are too expensive … Governments want to display co-operation, and one way to do that is to sign promotion treaties that sound nice … No discussion, analysis, goes into it .. And even if it gets a legal review, the lawyers don't have the experience what to check for … No-one cares until the dispute comes.[81]

Similarly, when treaties were 'negotiated' among developing countries themselves, the process occasionally went so fast that the final agreement was just a signed copy of a template. In an extreme case, officials even forgot to put the names of the two countries on the treaty.[82] As one arbitrator puts it, many developing country governments simply "had no idea that this would have real consequences in the real world."[83]

This may appear surprising, and to some supporters of investment treaty arbitration the suggestion that many developing country officials failed to appreciate the nature of what they were negotiating is outright offensive.[84] Yet many developing country officials work in under-resourced organisations that are often subject to a range of complex institutional pressures. Often investment treaty negotiations were only a small part of their job portfolio. In the case of South Africa, for instance, early officials involved with investment treaties were also responsible for customs unions, double taxation agreements, legal issues pertaining to Antarctica, and law of the seas.[85]

Moreover, opting in to 'default rules' with little consideration of the potential ramifications is a well-known phenomenon.[86] In the context of contract law, for instance, Korobkin notes:

> Many of the terms commonly specified in standard form contracts govern what will happen if a low-probability risk comes to pass . . . If these possible but unlikely outcomes are not readily 'available' to buyers, they are likely to respond to the risk of these harms by treating them as if they do not exist at all . . . [Buyers] might allocate their attention elsewhere, rendering the form terms that concern low probability risks non-salient . . . A form term calling for arbitration of disputes in an inconvenient state, for example, is likely to be non-salient to the vast majority of buyers unless the type of contract in question commonly results in disputes.[87]

Archival records, interviews, and statistical analyses suggest that a similar development took place in the investment treaty regime.[88] The combination of (i) few investment treaty claims up through the 1980s and 1990s; (ii) a lack of expertise among relevant developing country officials; and (iii) inflated expectations about the investment impact of the treaties made for a

[79] Quoted in Poulsen 2015, 156.
[80] Quoted in *ibid.*, 155.
[81] Quoted in *ibid.*, 148.
[82] *Ibid.*, 181.
[83] Schreuer quoted in ICSID Case No ARB/04/14, Award, 8 Dec 2008, par 85.
[84] Paulsson 2010, 344; Vicuna 2002, 31.
[85] Poulsen 2015, 170-171.
[86] Sunstein 2013; Galbraith 2013; Jupille, Mattli, and Snidal 2013.
[87] Korobkin 2003, 1233-1234.
[88] Poulsen 2015.

dangerous cocktail of risk-neglect and optimism bias. There were exceptions, of course, as some developing country governments did carefully consider the ramifications of consenting to investment treaty arbitration.[89] A country like China, for instance, more carefully calibrated its investment treaty network than many other developing countries and has in recent years pursued the treaties to protect Chinese investors abroad.[90] But for many, if not most, developing countries the rise of investment treaty arbitration has come as a surprise. Partly for this reason, a few countries have cancelled some of their investment protection treaties and left ICSID.[91]

The majority of states have largely stuck with the regime, however, and instead sought to negotiate their agreements more carefully than in the past.[92] More recent treaties often include more precise provisions so as to provide arbitrators with more guidance.[93] Exceptions and carve-outs have also become more widespread to excuse breaches of investor rights. In a few cases, such clarifications have been issued by the parties through interpretative statements about past treaties as well[94] or through renegotiation.[95]

Some of these developments can be critically important in investor-state claims. Yet, like in the 1980s and 1990s investment treaties are still mostly negotiated around model agreements of developed states, which means that changes in treaty practise have primarily come from Western states.[96] The result is that most alterations remained incremental and path-dependent. Whether signed as stand-alone agreements or as part of broader free trade agreements, recent investment treaties continue to give foreign investors legal privileges that domestic investors do not have, the most important being the right to file claims outside of national courts.[97] With very few exceptions there has been no move towards binding investor obligations.[98] With the notable exception of India, there has been no move towards extensive local remedy requirements, and with the exception of a recent model treaty of Brazil no governments have suggested removing the option of direct investor standing and instead rely only on inter-state dispute settlement. Despite the recent politicization, most governments are primarily concerned with creating slightly more 'complete contracts' than significantly departing from the status quo.

2) Inputs: The Politics of Arbitrators

Apart from the unexpected consequences of the investment treaty regime, the very nature of the dispute settlement mechanism has become controversial as well. In Europe, in particular, the recent politicization of the regime has not simply evolved around the nature of the substantive protections afforded by investment treaties, but also the identity of the adjudicators and the use of arbitration to settle investment treaty disputes in the first place.

[89] *Ibid.*, 156-160; Nottage and Thanitcul 2016.
[90] Berger 2011.
[91] Wellhausen and Peinhardt 2016.
[92] UNCTAD 2007, 91-92.
[93] Alschner forth; Henckels 2016.
[94] Roberts 2010.
[95] Haftel and Thompson 2013.
[96] Manger and Peinhardt 2013.
[97] It is beyond this chapter to address whether the substantive rights afforded by investment treaties exceed those in national legal systems; see e.g. Montt 2009; Parvanov and Kantor 2011; Johnson and Volkov 2013. On investor standing and remedies in investment arbitration compared to domestic jurisdictions, see e.g. Gaudrodger 2014; Mestral and Morgan 2016.
[98] An arbitration practitioner has noted that many policy-makers seem to have an "uncritical adherence" to the belief that only investors should be able to file claims, not the other way around; Laborde 2010, 102-103.

Using arbitrators that work for a profit to rule on sensitive areas of public regulation with limited transparency and no real possibility for appeal has become increasingly contentious.[99] Attempts have been made to address some of these challenges, for instance with respect to opacity.[100] Yet, at the heart of the criticisms is the identity and selection of adjudicators themselves. Whether the critics are correct, misguided, or a bit of both, is beyond this chapter to address. From a political perspective, however, it is ultimately immaterial in practice, as a lack of perceived legitimacy can undermine claims to authority, which in turn may prompt non-compliance or even widespread exit from the regime. 'As the gulf deepens,' one arbitrator has lamented, 'the complaints get louder and the stability of the system gets undermined'.[101]

The role of arbitrators is not accounted for in the basic contract theory referenced above, as this assumes that third-party adjudicators are disinterested and neutral parties.[102] Yet, we know from a large literature that the identity of those deciding legal disputes matters.[103] And while methodological challenges make it difficult to assess causality, an emerging research agenda is testing whether, and to what extent, the identity of investment play a critical role in investment treaty arbitration.[104] Focus has been on the personal characteristics, motives, and selection processes of arbitrators.[105]

With respect to personal characteristics, it is notable that by 2011 only 37 individuals accounted for 50% of all ICSID appointments made since 1972[106] and more than half of all investment treaty claims had been decided by just 15 arbitrators.[107] Together, this small group of – mostly – white, wealthy, Western men trained at the same institutions have been delegated a remarkable concentration of power in global investment governance. Moreover, whereas WTO panellists tend to be former Geneva diplomats (who in turn are carefully nudged by the WTO secretariat), most investment arbitrators come from a corporate law background[108] with little embeddedness in law-making and diplomatic communities.[109] The collective biography of this small group of individuals has raised concerns whether adjudicators in the investment regime may be implicitly biased towards corporate actors, against judicial deference to national decision-makers, and against political considerations in investment decision-making.[110]

In addition to their personal characteristics, concerns have been raised that arbitrators may have financial or career incentives to expand the judicial scope of the regime.[111] A broad

[99] For critics within the legal academy, see e.g. Van Harten 2007; Sornarajah 2016.

[100] For instance, critiques about opacity have been partially addressed with transparency requirements in some recent investment protection treaties, as well as the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the 'Mauritius Convention on Transparency') (on transparency in investment arbitration, see generally Delaney and Magraw 2008).

[101] Landau 2011.

[102] Van Aaken 2009, 528.

[103] E.g. Sunstein, Schkade, Ellman, and Sawicki 2007; Voeten 2008. On investment arbitration, see also discussion in Franck, Freda, Lavin, Lehmann and Van Aaken 2015.

[104] See Franck 2007; 2009; Kapeliuk 2012; Van Harten 2012; Franck et al. 2015; Tucker 2016; Waibel and Wu 2016.

[105] E.g. Schultz 2015.

[106] Puig 2014, 407.

[107] Oliviet and Eberhart 2012.

[108] Waibel and Weu 2016.

[109] Pauwelyn 2015.

[110] Franck, Freda, Lavin, Lehmann and Van Aaken 2015.

[111] Van Harten 2007. An additional concern relates to the appointment of arbitrators. Whereas one view is that party appointments is a traditional right in arbitration, and may increase the chances of compliance, others have

interpretation of vague provisions will facilitate more claims by investors and thus more appointments for arbitrators. In addition, most arbitrators can earn more as counsel than as arbitrators, and the option of arbitrators to sit as counsel in similar claims have raised concerns of conflicts of interests.[112] Also, even in the absence of 'double-hatting' and revolving doors, the financial rewards for arbitrators can be significant. And in cases with particularly high fees, like the Yukos arbitration, it is not difficult to see the conscious or unconscious biases that can emerge, when a mere assistant to a tribunal can keep $1.7 million for himself.[113]

These concerns came to the fore in European controversies over the prospect of enshrining consent to investment treaty arbitration into the Transatlantic Trade and Investment Partnership (TTIP) agreement. As a result, the European Commission was forced to come up with a new proposal for investment treaty arbitration more palatable to European critics. This is a semi-permanent tribunal - including an appellate body - where members are appointed by the contracting parties (not investors), must have certain public law qualifications, and are paid a fixed salary. Tribunal members are also barred from acting as counsel in investment claims. At the time of writing, the model was included in a couple of EU investment treaties and was proposed by the Commission as a template for a multilateral court – which would be a path-breaking development - but it is unclear whether there is appetite for the model in other powerful states, notably the United States and China.

Finally, it is worth noting that there is an additional political dimension of investment arbitrators that is often overlooked in policy debates and scholarship. Many investment arbitration practitioners do not just settle legal claims but also advise governments on their investment treaty policies.[114] The most notable historical case was when the American Bar Association sent arbitration practitioners to the former Soviet block to advice on investment law reforms there.[115] Governments were typically told by investment lawyers to sign up to ICSID and investment protection treaties as crucial instruments to attract investment. Arbitrators have also acted as policy advisors to governments on whether and how to draft investment treaties (see Table 1 below), and some governments have appointed arbitration practitioners as their representatives to inter-state deliberations, as was the case in deliberations of the Mauritius Convention on Transparency. This political agency of investment arbitrators remains understudied however. Whereas we know that some law-firms specialised in investment arbitration have begun to fund political activism – most visibly in the organization EU Investment Law and Arbitration (EFILA) – there is little available evidence on the informal interaction between arbitrators and policy-makers designing the future of the investment treaty regime.

raised concerns that it generates a 'market' for different arbitrator profiles and thereby fails to ensure neutrality and independence in the dispute settlement process. See e.g. Paulsson 2010.

[112] Buergenthal 2006; Sands 2011.

[113] The Cost of Yukos,' Global Arbitration Review, 29 July 2014.

[114] Eberhardt and Olivier 2012.

[115] Poulsen 2015, table 4.5.

Firm/Chambers	Examples of policy advice to developing countries	Lawyers with background in government or IO as investment treaty advisor or negotiator (n)
20 Essex Street	AILA; member of advisory committee of Chile's Ministry of Foreign Affairs.	USA, Canada, Chile
Allen & Overy	UNCTAD; AILA; Allen & Overy course to Rwanda on investment arbitration; advised "states in Europe, Central Asia and Middle East" on negotiation and drafting investment treaties.	
Arnold & Porter	UNCTAD; advised fifteen CARICOM countries on investment chapter for external PTAs.	USA, Colomba (n), Costa Rica, ICSID
Baker Botts	UNCTAD and AILA; advised Caribbean government on its arbitration law.	ICSID
Clifford Chance	UNCTAD; IISD; AILA.	Argentina
Crow. & Moring	UNCTAD; one co-director of ILI's International Investment Law Centre.	USA (n), Canada
Curtis	UNCTAD; one co-director of ILI's International Investment Law Centre.	ICSID
DAP LLC	UNCTAD; advised Colombia on implementation of BIT obligations, Chile on its model BIT, and Morocco on investment provisions in US PTA.	USA (n)
Dechert	UNCTAD; ILI.	Ecuador, ICSID
Essex Court	AILA; BHR; advised Pakistan and Mauritius on their arbitration laws; advised arbitration office of Thai Ministry of Justice; UNCITRAL delegate of Mauritius.	USA, UK (n)
Foley Hoag	UNCTAD; advised South Africa on its arbitration law.	USA (n), Canada (n), Ecuador, Argentina, Ukraine (n), Inter-American Development Bank, UNCTAD
Freshfields	AILA; advised Mexico on negotiation of NAFTA Chapter Elleven and South Africa on its arbitration law; UNCITRAL delegate of Bahrain.	USA
Hogan Lovells	UNCTAD; AILA.	Austria
King & Spalding	UNCTAD.	ICSID, Mexico (n)
Lalive	UNCTAD; UNITAR.	
Matrix	UNCTAD; AILA; advised "numerous Latin American governments" on their model BITs.	MEX (n)
McNair	UNCTAD.	Germany
Salans	UNCTAD and AILA.	USA
Sidley Austin	UNCTAD; IISD; CEELI; ILI; advised several countries on investment treaty arbitration clauses.	USA (n), Bulgaria (n)
Shea. & Sterling	UNCTAD; ILI; AILA.	USA (n)
Steptoe	Advised several countries, incl. one in Asia, on BIT and PTA investment chapter negotiations.	
Weil	UNCTAD; advised on NAFTA arbitration provisions (unclear for which party).	USA (n)
White & Case	UNCTAD; ILI; AILA.	USA (n), Germany (n)

NOTES: Apart from UNCTAD, list includes technical assistance for: International Law Institute (ILI); African International Legal Awareness (AILA); International Institute for Sustainable Development (IISD); United Nations Institute for Training and Research (UNITAR); and CEELI. Countries identified when possible.
SOURCE: Poulsen 2015, table 4.2. Note that many lawyers refrain from making their advisory work public.

TABLE 1. PRIVATE LAWYERS AS GOVERNMENT ADVISORS

Conclusion

Whereas few had heard of the investment treaty regime a decade ago, investment treaty arbitration has become one of the most politicized aspects of global economic governance in recent years. Given the potential distributive consequences and the fundamental rule-of-law questions that arise from the dispute settlement mechanism, the growing body of work on its political drivers and effects can offer useful insights to the often-divisive discussions about the future of the regime.

Yet, compared with the more sophisticated literature on the politics of the trade regime, scholarly attention on the politics of the investment treaty regime has just begun. Among the many outstanding questions that have yet to be addressed adequately, this chapter alluded to four in particular. The first is the relationship between investment treaty arbitration and diplomacy. How, and to what extent, does the massive increase in investor claims influence inter-state relations? Much has been said about this question – often to defend investment treaty arbitration – but very little empirical evidence has been brought to the debate. Second, what is the relationship between investment treaties and administrative and judicial decision making in host states? This is a much more important question than the investment-impact of the treaties, yet it has received hardly any scholarly attention to date. For instance, much of the debate about whether the investment treaty regime results in 'regulatory chill' remains largely abstract. Also, whereas some recent work on settlements suggest that investors often achieve either compensation or regulatory changes in return for withdrawing their claims (Howse 2017), we have only the most superficial understanding of how the politics of foreign investment and investor-state bargaining is shaped by 'the shadow' of international investment law. Third, and related, how do different states - and stakeholders within them - respond to decisions by arbitral tribunals? Which types of claims have political fall-outs, and why? Some interpretations and outcomes have taken not just developing countries but also developed countries by surprise, which in turn raises questions about what exactly was expected by different states when they consented to investment treaty arbitration. Historical work on this question has just begun. Finally, given that much of the controversy of the investment treaty regime hones in on the identity and actions of investment arbitrators, we need a better understanding of the political roles played by arbitration practitioners and firms in shaping the investment treaty regime.

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