The Political Economy of the Investment Treaty Regime

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About the book:

Investment treaties are some of the most controversial yet least understood instruments of global economic governance. Public interest in international investment arbitration is growing, and some developed and developing countries are beginning to revisit their investment treaty policies. The Political Economy of the Investment Treaty Regime synthesizes and advances the growing literature on this subject by integrating legal, economic, and political perspectives. Based on an analysis of the substantive and procedural rights conferred by investment treaties, it asks four basic questions. What are the costs and benefits of investment treaties for investors, states, and other stakeholders? Why did developed and developing countries sign the treaties? Why should private arbitrators be allowed to review public regulations passed by states? And what is the relationship between the investment treaty regime and the broader regime complex that governs international investment? Through a concise yet comprehensive analysis this book fills in some of the many 'blind spots' of academics from different disciplines, and is the first port of call for lawyers, investors, policymakers, and stakeholders trying to make sense of these critical instruments governing investor–state relations.

Endorsements:

With incisive analysis from the perspectives of economics, law, and political science, the authors deliver a singularly important work of clarity at a critical time for global economic order. With as much a domestic perspective as an international one, the authors illuminate highly politicized questions with a fairness that is refreshing.
Professor David D. Caron, member of The Iran-United States Claims Tribunal

This is the essential introduction to the field that we have been waiting for: a comprehensive account of the international investment treaty regime that integrates law with economic theory and political analysis. Highly recommended!
Professor Tom Ginsburg, University of Chicago

This is a unique book on the political economy of investment treaties. It combines the rigor of academic research with the exploration of a highly salient public policy debate. It is a must read for anyone interested in the study of foreign direct investment or how globalization shapes the policies of nation-states.
Professor Nathan M. Jensen, University of Texas at Austin

Chapter 9

LEGITIMACY AND GOVERNANCE CHALLENGES

INTRODUCTION*

The previous chapters showed that the rapid growth of investment treaty arbitrations in often sensitive policy areas has focused public attention on the investment treaty regime. Whereas the regime was little known just a few decades ago, it is now the subject of an often-heated debate. Supporters of the regime argue that it promotes the rule of law in international economic relations, and protects foreign investors from arbitrary state action (e.g. Schill 2016). Critics, however, label the regime a 'bill of rights for multinational corporations' (Klein 2001) that limits the ability of states to regulate in the public interest (Sornarajah 2006). They describe investment treaty tribunals as 'secret courts' (DePalma 2001) comprised of 'biased' arbitrators (Eberhardt and Olivet 2012) that empower corporations 'to bend countries to their will' (Hamby 2016a). The system, according to US senator Elizabeth Warren, is 'rigged' in favor of big capital and corporate lawyers (quoted in Hamby 2016e). Taken together, these criticisms are said to amount to a 'legitimacy crisis' of the investment treaty regime (Brower, Brower and Sharpe 2003; Franck 2005), much like the legitimacy crisis of the international trade regime around the time of the WTO Ministerial Conference in Seattle in 1999 (Keohane and Nye 2001; Esty 2002).

The use of the concept of 'legitimacy' to frame debates about investment treaties reflects the centrality of that concept in the global governance literature over the past two decades (e.g. Keohane 2011). However, 'legitimacy' has multiple related meanings, creating potential for confusion (Crawford 2004; Koskenniemi 2009; Thomas 2014). For example, 'legitimacy' in a *normative* sense refers to the desirability or appropriateness of legal rules and institutions. 'Legitimacy' in a *descriptive* sense also refers to desirability or appropriateness but is focused on the beliefs of relevant actors (e.g. Brower and Schill 2009). While the two are related, the distinction is significant. Regardless of whether they are justified, the beliefs of governments are important – for example, in explaining patterns of compliance with international law (see generally, Franck 1990; Brunnée and Toope 2010). Similarly, popular beliefs about the investment treaty regime matter, even if they are based on misunderstandings. Some critics argue that investors can win investment treaty arbitrations purely based on lost profits, for instance, which is a mischaracterization of the substantive rights in the treaties. And some proponents argue that investment treaty arbitration is primarily concerned with redressing expropriation and discrimination, which is equally misleading. Yet, even if incorrect, such beliefs can have important political ramifications for the regime, particularly when they diffuse to policy-makers and officials. Although this chapter refers to beliefs about the

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investment treaty regime, we are primarily interested in whether criticisms of the investment treaty regime are justified. Accordingly, we focus on debates about legitimacy in the normative sense.

The chapter draws together several strands of the book to focus on two central debates about the investment treaty regime. The first section considers the impact of investment treaties on national governance. In particular, it assesses criticisms that investment treaties unduly fetter democratic decision-making and discourage states from regulating in the public interest. The second section examines the legitimacy of investment treaty arbitration – the regime feature that has come under closest scrutiny over the last decade (e.g. Tribe et al. 2016). It assesses debates about transparency and consistency in investment treaty arbitration, its impact on the broader investment regime complex, the selection, identity, and alleged biases of arbitrators, as well as the lack of investor obligations.

The chapter does not examine every issue relevant to debates about the legitimacy of investment treaties. For example, questions of whether, and under what circumstances, investment insurance, investor-state contracts, domestic courts, or inter-state dispute settlement are alternatives to investment treaty arbitration are also central to debates about normative legitimacy. Analysis of the economic effect of investment treaties is also relevant, but we have already covered these, and several other, relevant debates elsewhere in the book (see Chapters 3, 5 and 6).

THE INVESTMENT TREATY REGIME AND NATIONAL GOVERNANCE

One of the most powerful criticisms of the investment treaty regime focuses on its relationship to, and implications for, democracy. This criticism concerns the relationship between the investment treaty regime and political decision-making at the national level. A related criticism is that the regime interferes with the ability of states to regulate in the public interest by excessively constraining national policy autonomy – for example, with respect to measures intended to protect the environment or public health. This section examines each in turn.

Democracy

Subject to the limited carve-outs and defenses discussed in Chapter 4, investment treaties apply to all state conduct affecting covered foreign investments. As such, investors can seek review in investment treaty arbitration of legislation enacted by democratically elected parliaments and of the exercise of administrative power that elected officials validly delegated to agencies. It is no defense for host states to argue that they enacted the measure in question according to a democratic process. According to some critics, this feature of the investment treaty regime unduly constrains majoritarian politics (e.g. Schneiderman 2008).

This argument must be qualified in three important respects. First, the description of investment treaties as constraints on majoritarian politics could apply equally to any regime of international law backed by binding dispute settlement, such as the ECHR or the WTO. This observation does not answer the substance of the criticism against investment treaties, but it does provide important context. Second, recall from Chapter 3 that, in practice, investment treaty tribunals invariably award compensation to foreign investors, rather than ordering states to abandon measures. Of course, the award of compensation may have the practical effect of precluding states from adopting or maintaining particular measures, but because states retain the *option* to maintain measures subject to challenge and pay compensation, investment treaties do not foreclose democratic decision-making as such. Third, the criticism only applies when investment treaties bind democracies and states transitioning to more democratic forms of government (Van Harten 2000; Bonnitcha 2014b). Yet many states bound by investment treaties are not democratic or only partially so (Alvarez 2008).[2]

The extent to which legal rules should circumscribe democratic decision-making is the subject of a rich and sophisticated literature in other legal regimes.[3] Such questions are central to debates about whether national constitutions should protect individual rights from the interference of majoritarian politics (e.g. Waldron 2006) and debates about the so-called 'democratic deficit' in the European Union (e.g. Follesdal and Hix 2006; cf. Majone 1998). In these debates, most accept that there are at least some circumstances in which constraints on democratic decision-making are justified – for example, when international legal constraints are, themselves, adopted through democratic processes at the national level and are necessary to achieve the instrumental benefits arising from international cooperation (Kurtz 2014). Investment treaties to which democratic states have consented in accordance with their constitutional requirements meet the first condition of indirect democratic legitimation. Whether the second condition is met depends on the effect of investment treaties on investment flows or other expected benefits, such as the promotion of 'good governance' (see Chapter 6). Unlike literature on other legal regimes, however, questions about

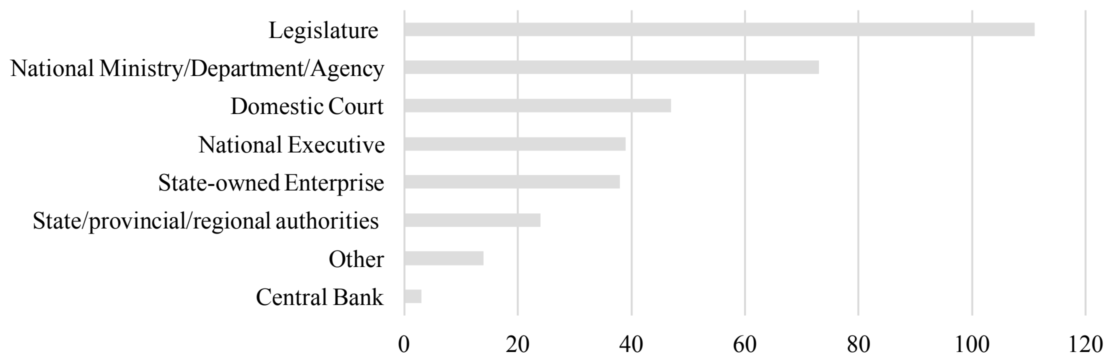
[2] An additional qualification is that states can exit the investment treaty regime altogether by terminating treaties. Yet, the effect of 'survival clauses' renders this a slow and potentially costly option (e.g. Voon and Mitchell 2016; see also Chapters 1 and 3). Even if all countries started to renegotiated all their investment treaties tomorrow, it would take up to twenty years to replace the existing stock of investment treaties.

[3] The architecture of other legal regimes also reflects concerns about the relationship between international legal constraints and democracy. For example, under the ECHR member states are entitled to interfere with some human rights recognised in the Convention if such interference is 'necessary in a democratic society'; claimants are required to exhaust local remedies before bringing an international claim to the ECtHR; and the ECtHR affords a margin of appreciation to its member states (Letsas 2006; Legg 2012). Recall from Chapters 3 and 4 that the default rule in the investment treaty regime is that investors do not need to exhaust local remedies before commencing investment treaty arbitration and that investment tribunals do not routinely afford a margin of appreciation to host states.

investment treaties and democracy have received little attention in scholarship on the investment treaty regime.

One basic question that requires attention is whether challenges to certain types of state measures involve distinct legitimacy concerns. Some scholars have argued that investment treaty arbitrations challenging administrative and executive conduct do not raise the same legitimacy concerns as challenges to legislative measures (Baetens and Tietje 2014). This argument requires qualification. As mentioned, democratically-elected legislatures often delegate powers to agencies. One example is environmental legislation that often confers powers on administrative agencies to determine whether individual investments meet legislative requirements. Investor challenges to such exercises of administrative authority also raise questions about the impact of the regime on democratic processes. Moreover, investment treaty arbitrations often relate to the combined effect of conduct of several different domestic institutions. This factor not only complicates coding in empirical studies (see below), but also affects normative debates about whether certain types of measures raise particular legitimacy concerns.

With these caveats in mind, Figure 9.1 shows that the majority of investment treaty arbitrations arise from administrative or executive action, although legislative measures are the single most common source of known investment treaty arbitrations (Williams 2016).[4] Interestingly, arbitrations involving developed countries are more likely to relate to legislative measures than those involving developing countries. Conversely, investment treaty arbitrations concerning the conduct of domestic courts are significantly more common against developing countries (Williams 2016).



SOURCE: Williams (2016), Figure 2.6

NOTE: This figure has been modified from the original to include only investment treaty arbitrations (i.e. excluding arbitrations in which the host state consented by way of contract or domestic law). We thank Zoe Williams for providing the data.

FIGURE 9.1 DOMESTIC INSTITUTIONS INVOLVED IN INVESTMENT TREATY DISPUTES

[4] For an earlier attempt at coding the types of measures that give rise to investor-state arbitrations, see Caddel and Jensen (2014). Caddel and Jensen find that legislative measures account for a smaller percentage of disputes than Williams (2016). This could be due to differences in the way disputes are coded or due to Williams' more comprehensive data set. Her data is drawn from 568 disputes, compared to 163 disputes for Caddel and Jensen.

Apart from the measures targeted in investment treaty arbitration, a related set of tensions between investment treaties and political decision-making arise when arbitrators examine the political motivations behind state measures against foreign investors (Schneiderman 2010; van Harten 2013; Williams 2016). To illustrate the importance of this debate, consider the dispute in *Bilcon v. Canada* (2015). Recall that this dispute arose from the environmental impact assessment of a proposed gravel mine, in which a Canadian environmental review panel rejected the proposal of the investor. A majority of the tribunal held that the review panel gave too much weight to community opposition to the proposal, which the tribunal characterised as arbitratry behavior by Canada that in turn breached NAFTA's FET provision. In contrast, the dissenting arbitrator argued that it was legitimate for the panel to take into account the affected 'community's own expression of its interests and values' (*Bilcon v. Canada*, Dissent, para. 49).

The disagreement between the majority and the dissenting arbitrator in *Bilcon* illustrates differences in the way arbitral tribunals have evaluated state conduct motivated by public opinion, protests or electoral appeal. Some arbitral tribunals see a role for investment treaties in protecting foreign investors from state conduct driven by 'political' considerations of this sort (e.g. *Tecmed v. Mexico* 2003, para. 127; *Biwater v. Tanzania* 2006, para. 698). Conversely, other tribunals have noted that the willingness of legislatures and executive agencies to consider public opinion is a normal feature of democratic societies, and is not inherently inconsistent with the protections investment treaties grant to foreign investors (*AES v. Hungary* 2010, para. 10.3.24). This debate is crucial for growing concerns that investment treaty arbitration challenges democratic decision-making.

There are large unresolved questions about the relationship between democracy and the investment treaty regime that future research needs to address. Here, theoretical work might usefully draw on various bodies of literature to more explicitly consider whether the constraints that investment treaties place on democratic (and non-democratic) decision-making are justified. Empirical work on the extent to which investment treaties affect the deliberations of national and sub-national parliaments would also further our understanding of the impact of the regime on majoritarian politics. More broadly, it would be relevant to understand what role – if any – domestic regime type has for investment treaty arbitration. Williams (2016) finds that investors are more likely to target democracies with investment treaty arbitrations even after controlling for factors such as income levels. If this is the case, it raises questions as to why. Is it because democracies are less likely to settle claims informally due to domestic 'audience costs' (see a related argument in the trade regime by Davis 2012)? Or are democracies less prone to comply with investment treaties than authoritarian regimes (see generally Tomz 2002)?[5] Finally, further work examining systematic differences in the way arbitrators evaluate state conduct motivated by 'political' considerations (e.g. van Harten 2013, ch. 3), and the drivers of such potential differences, would be useful – a subject we return to later in this chapter.

[5] This would contradict the results of Jensen (2008) but be consistent with earlier work on the political economy of some forms of authoritarianism (O'Donnell, Schmitter and Whitehead 1986).

Regulatory Chill

A second criticism concerns the investment treaty regime's impact on the ability of states to adopt measures in the public interest. Here, criticisms are articulated in a range of different ways. Some invoke the basic prerogative of states to regulate activity within their own territory and criticize investment treaties for unduly restricting this so-called 'right to regulate' (see generally Shaw 2008, Ch. 12; Crawford 2012, Ch. 21). This framing focuses attention on *legal* questions of whether various types of state measures breach investment treaties (e.g. Titi 2014). Others focus specifically on the impact of investment treaties on the ability of states to enact particular categories of regulatory measures, such as those intended to protect the environment (Wälde and Kolo 2001; Moloo and Jacinto 2011) or human rights (Mann 2008; Simma 2011). This framing draws attention to possible tensions between the interests of foreign investors and of individuals and groups *within* the host state, as opposed to the interests of the host state itself.

We adopt a different framing that encompasses both these issues – namely, the notion of regulatory chill. As we have seen in Chapter 5, regulatory chill refers to the possibility that investment treaties discourage states from adopting legitimate regulatory measures in practice (Tietje and Baetens 2014). Debates about regulatory chill are not unique to the investment treaty regime. For example, the WTO has known similar debates on the collision of private and public interests since its inception (e.g. Staiger 2003; Cass 2005). Yet, the extent to which investment treaties causes regulatory chill is one of the most controversial issues in contemporary debates about investment treaties (EFILA 2015; Schneiderman, Tienhaara and Van Harten 2015).

Concerns that investment treaties might discourage legitimate regulatory measures – i.e. what we refer to as regulatory chill – have been a significant driver of revisions in new investment treaties, particularly revisions responding to unexpectedly broad interpretations of existing investment treaties by arbitration tribunals (USTR 2015; Alschner 2016). Chapter 4 reviewed some of these reforms, including efforts to: (i) align investment treaty provisions with equivalent standards of national law; (ii) draft substantive provisions more precisely (e.g. FET); and (iii) include more carve-outs and exceptions, often modelled on those contained in the WTO. Concerns over regulatory chill have also prompted states to insert provisions in investment treaties that explicitly give states greater interpretative control over their treaties (Roberts 2010).[6]

Despite the centrality of regulatory chill to public debate and treaty practice, however, there is surprisingly little research on whether and to what extent concerns of regulatory chill are justified. This is partly because debates about regulatory chill raise a complex set of overlapping legal, normative and empirical questions. We address some of the difficult legal

[6] E.g. US Model BIT 2012, Article 21(2).

and normative considerations, before honing in on challenges in empirical work on regulatory chill.

First, Chapters 3 and 4 examined the *law* of the investment treaty regime. Yet the wide reach of investment treaties and investment treaty arbitration tells us little about whether the regime is a cause of regulatory chill, as several other legal institutions also constrain states. For example, if an investment treaty only precludes a state from adopting measures that are, in any event, unlawful under that state's own law, then the investment treaty is unlikely to cause regulatory chill. Conversely, if investment treaties require a state to compensate foreign investors for regulatory measures that are permissible as a matter of that state's domestic law, regulatory chill is more likely. Further research comparing the provisions of investment treaties and their interpretation by tribunals with the constraints of domestic law in various states would be helpful to inform debates about this aspect of regulatory chill (Poulsen, Bonnitcha and Yackee 2015).

Second, any assessment of the extent to which investment treaties discourage legitimate regulatory measures presupposes a *normative* theory that distinguishes between legitimate and illegitimate interferences with foreign investments. To illustrate why, consider a situation in which a state plans to seize a foreign investor's factory without compensation but abandons this plan when the investor threatens investment treaty arbitration. In this example, the investment treaty influenced state decision-making – yet few would consider it to be a case of regulatory chill as investment treaties are designed to protect foreign investors precisely against such forms of interference. This shows that one of the reasons why debates about regulatory chill remain so controversial is that different stakeholders have different, often unarticulated, normative theories of what constitutes illegitimate interference with foreign investment. Chapters 5 and 6 offered one possible basis for a normative theory of legitimate and illegitimate interferences with foreign investment based on the premise that legal rules and institutions should maximize societal welfare. Other scholars have argued that we should evaluate the constraints that investment treaties place on states in light of normative theories derived from 'the rule of law' (e.g. Vandevelde 2010; Schill 2010) or 'justice' (Kläger 2011) – both highly contested concepts.[7]

These legal and normative considerations are not only important in themselves, they are also critical for the framing of *empirical* questions about the impact of investment treaties on host state decision-making. Such research raises distinct challenges on its own, which form the subject of the remainder of this section. As in the discussion about the impact of the regime on democracy, a first question is whether to focus on the interaction between investment treaties and particular types of state action. Critics of investment treaties are particularly concerned with the implications of investment treaties for measures of general application, such as tobacco control measures, environmental regulation or the banning of products on public health grounds (e.g. Schneiderman 2008; Johnson and Volkov 2013). This concern

[7] For a critique of Kläger and an alternative normative framework, see Bonnitcha (2014a).

reflects an implicit assumption that legitimate public policy objectives are more likely to be behind measures of general application than measures targeted at individual foreign investors.

According to one analysis, approximately one in three investment treaty arbitrations concern measures of general application (Williams 2016).[8] Yet distinguishing 'general' from 'specific' measures is tricky, as the latter may be associated with broader policy changes. For instance, the cancellation of an individual mining permits may result from a *general* shift in state policy towards mining. Moreover, even conduct that is limited to a single investor may be motivated by a legitimate regulatory objective – for example, if an investor's permit to operate in a regulated industry is cancelled for persistent failure to comply with environmental conditions attached to that permit. Conversely, measures of general application include sector-wide takings of property that may fall outside most conceptions of legitimate public-interest regulation (Williams 2016).

A second critical question for empirical research relates to the underlying *causal mechanisms* that drive regulatory chill. Investment treaties can influence host state decision-making in two ways (Tienhaara 2011). First, various host state actors may internalize the constraints of investment treaties, in which case these constraints may influence state decision-making even in the absence of specific disputes with foreign investors. Second, a foreign investor's threat of an investment treaty arbitration in relation to a particular dispute may also influence host state decision-making by encouraging the host state to modify or abandon the measure in question. Recall from Chapter 6 that empirical evidence on the extent to which investment treaties influence state decision-making through internalization is very limited. In the following sections, we therefore focus on evidence of regulatory chill arising from threats of investment treaty arbitration.

Some arbitrators suggest that no evidence of regulatory chill exists (e.g. Paulsson in Hamby 2016b). And indeed, many investment treaty disputes result from state decisions to maintain regulatory measures in the face of the *known* risk of investment treaty arbitration (Williams 2016). For example, South Africa maintained and applied its affirmative action policies in the mining sector, notwithstanding the decision of an Italian mining company to initiate investment treaty arbitration (*Foresti v. South Africa,* 2010). Similarly, Canada and the US went ahead with bans on chemicals harmful to human health in the face of investment treaty arbitrations (*Methanex v. US,* 2005; *Chemtura v. Canada,* 2010).

But while the risk of investment treaty arbitration does not *nesessarily* lead to regulatory chill, we do have evidence that it has done so on at least some occasions. One example is when New Zealand delayed the implementation of tobacco plain packaging for several years while the investment treaty arbitration arising from Australia's tobacco plain packaging legislation remained pending (Turia 2013). Following Australia's successful defense against

[8] Williams (2016) also includes 16 arbitrations based on investor-state contracts and domestic laws, but the statistic does not change when excluding them from the sample (correspondence with Zoe Williams, on file with authors).

Philip Morris (2015), New Zealand proceeded with its plans, so the chilling effect in this case was only temporary [to be checked again during page proofs].

The more interesting and policy-relevant question is not whether regulatory chill has ever occurred – it has – but the extent to which regulatory chill occurs in practice. Surprisingly little empirical research exists on the extent to which states respond to threats of investment treaty arbitration by modifying or abandoning measures under consideration.[9] This is due, in part, to three significant challenges associated with such research. First, neither host states nor foreign investors have obvious incentives to publicize situations in which states responded to threats of arbitration by abandoning the measures under consideration. Attempts to determine the frequency with which such events occur through interviews with government lawyers or freedom of information requests regularly run up against confidentiality constraints (van Harten and Scott 2016).

Even when evidence surfaces that a state abandoned or modified a proposed course of conduct following a threat of arbitration, a second challenge is to establish causality. For example, the *Ethyl v. Canada* (1998) case introduced in Chapter 7 arose out of Canada's ban on the import of a fuel additive on environmental grounds. Canada reversed the ban after Ethyl – a US investor – initiated arbitration under NAFTA's Chapter 11. While this suggests the investment treaty arbitration resulted in the reversal of the ban, concurrent domestic legal proceedings played a role as well (Tienhaara 2009). Isolating the role of investment treaty arbitration, as in *Vattenfall v. Germany I* (2011) described in the Foreword, raises a similar challenge. In that case, Germany relaxed the environmental requirements on a coal-fired power plant in exchange for the Swedish investor dropping an ICSID arbitration and proceedings in German courts.

In other cases, it is unclear whether the risk of investment treaty arbitration or the risk investor-state arbitration under a contractual consent to arbitration was responsible for a modification or abandonment of a measure. For example, in 2004 Indonesia decided to exempt foreign mining companies from a new environmental law for protected forestlands following investor threats of investor-state arbitration (Hamby 2016b). Yet, at the time of writing it remains unclear whether the threats were based on investment treaties, investor-state contracts, or both. In addition, lobbying by an investor's home state could be a separate source of regulatory chill. In cases where a host state responds to diplomatic pressure from the home state, the risk of investment treaty arbitration might not play a significant role. In sum, the treaties could have complex, and as yet unstudied, effects in reducing some forms of

[9] See Howse (2017) for a compilation of the terms of settlement in investment treaty arbitrations that settled prior to a final decision by the arbitral tribunal. Howse notes that 'Of the settlements for which public information was available, almost all appeared to involve either significant monetary relief for the investor (almost always in the multiple millions and in some cases reaching the billions); or significant adjustment of the regulatory framework to the benefit of the [investor].' This data provides an important point of reference in debates about regulatory chill, but does not cover situations in which a state responds to a threat of arbitration before the investor commences proceedings.

regulatory chill (e.g. from diplomatic pressure by the investor's home state) while increasing others (e.g. from threats of investment treaty arbitration).

Apart from access to information and the difficulty of establishing causality, a third challenge arises because countries may respond differently to threats of investment treaty arbitration. This would limit our ability to draw generalizable conclusions from the study of one particular country. Country responses to threats of arbitration may differ for a range of reasons, including political priorities, internal legal constraints and institutional capacity. In particular, some critics have argued that developing countries are more vulnerable to regulatory chill, both due to lower levels of capacity to evaluate the legal and financial risks associated with threats of arbitration (Tienhaara 2011) and due to the greater size of the amounts at stake relative to national budgets (Mann 2007).

These are plausible arguments but they are difficult to assess, particularly in light of the first two challenges already noted. For example, Uruguay successfully defended its own tobacco control measures against Philip Morris (2016) but its ability to do so depended on millions of dollars of legal and technical support provided by Michael Bloomberg and the Gates Foundation (Council of Foreign Relations 2012).[10] This is relevant when considering that tobacco companies have threatened several other developing countries with investment treaty arbitration in response to proposals to introduce new tobacco control measures (e.g. Tavernise 2013; Puig 2016).[11]

The potential for regulatory chill, and the public concerns surrounding it, makes it an important area for further research. This research agenda could be organized around four sets of questions. First, *legal* studies comparing the constraints arising from investment treaties with those arising from domestic regimes are few and far in between. Chapter 5 reviews the few studies that have attempted partial comparisons of this sort. This is an important, albeit difficult, area for further research as it requires analysis of the entire array of domestic laws, regulations and principles that potentially apply in foreign investment disputes.

Second, as this section showed, more *empirical* research is required. Here, further detailed studies would be useful to assess when states respond to threats of investment treaty arbitration by amending or abandoning measures under challenge (e.g. Tienhaara 2009) and when they maintain measures notwithstanding the threat of arbitration (e.g. Williams 2016). Comparative studies could also consider whether the breakdown of general vs. specific measures in investment treaty arbitration is similar to disputes in which arbitration is only threatened.

[10] As we saw in Chapter 3, given the high average costs of arbitrations, third-party funding has been a growing trend in the investment treaty regime, particularly on the investor side.
[11] The authors also have direct personal knowledge of further threats of investment treaty arbitration by tobacco companies against developing countries in cases that have not been publicly reported. Note that regulatory chill of future tobacco control measures may be less likely following Australia's and Uruguay's successful defenses of investment treaty arbitrations by Philip Morris. It is also unclear whether the tobacco industry is an outlier in its willingness to aggressively invoke investment treaties in regulatory disputes with developing countries.

Third, research into the institutional mechanisms by which states manage threats of arbitration could give a better picture of why regulatory chill does or does not occur in relation to particular types of threats of arbitration against particular states.[12] Government lawyers speak privately about the challenges of coordinating responses to threats of investment treaty arbitration across different arms of government. Institutional dynamics – such as the relationship between lawyers with whole-of-government responsibility and line ministries with the primary responsibility for measures under challenge – affect decisions about whether to amend challenged measures or to risk litigation in response to such threats. Unfortunately, these questions have received little attention to date.

Fourth and finally, research into investor-state contract negotiations, as well as contract renegotiations in response to changed circumstances, could give a better picture of how investment treaties affect investor-state bargaining.[13] We know from other areas that legal options for dispute resolution shape the way that parties bargain toward agreed settlements outside formal adjudication (e.g. Mnookin and Kornhauser 1979; Busch and Reinhardt 2001). Lawyers who act for foreign investors also privately confirm the importance of investment treaties in shaping investor-state bargaining, yet there has again been little published academic work on such questions.

In sum, debates about the impact of the investment treaty regime on national governance have become heated in recent years. While some of the strong claims made on both sides of the debate are incorrect, the lack of scholarship on several important questions makes a more nuanced appraisal difficult. Further research into normative, legal, and empirical questions is required to better understand the impact of the regime on democracy and the adoption of legitimate regulatory measures.

Investment Treaty Arbitration as a System of Dispute Resolution

Apart from the impact of the regime on national governance, a second set of debates focuses on investment treaty arbitration as a way of resolving disputes between states and foreign investors. This topic has become particularly pertinent after the EU proposed in September 2015 to replace the existing system of party-appointed arbitrators with standing investment tribunals, which in turn are meant to provide the template for a multilateral investment court. The EU's new PTAs with Canada and Vietnam reflect this proposal.[14] The European Commission justifies the new policy as a way to address what it sees as the 'fundamental lack of trust' by the public in the investment treaty regime and to provide for dispute settlement 'in full accordance with the rule of law' (European Commission 2016). It launched a public consultation on its multilateral investment court project in December 2016. While the

[12] Such institutional mechanisms include central, inter-departmental monitoring and warning systems (as in Peru) and a dedicated team of in-house investment lawyers (as in Argentina and Poland).
[13] See also Chapter 5 generally, and Figure 5.2 on the distributive impact of investment treaties specifically.
[14] EUVFTA, Articles 13 and 28; CETA, Article 8.28(1).

outlines of the investment court system are known, many details still need to be worked out at the time of writing.

The new model for investment treaty dispute resolution seeks to address several of the criticisms of investment treaty arbitration that we review in this section. Specifically, the selection of arbitrators at random from a pool of salaried individuals appointed by the state parties is intended to address concerns about arbitrator selection and the inclusion of an appellate mechanism is intended to ensure consistency across rulings. The EU has also followed the recent practice of other Western states, by insisting on transparency and a loser-pays-costs principle.

While proponents of investment treaty arbitration argue that a system of standing investment tribunals based on the EU's agreements with Canada and Vietnam would depart too far from the status quo (e.g. Brower and Blanchard 2014; EFILA 2015), some critics argue that it does not go far enough (e.g. Van Harten 2015). The prospects of a multilateral investment court are even more uncertain. Changes in the political context in the United States underway at the time this book went to press raise questions about the US's support for major trade and investment agreements, such as multilateral investment court initiative. In early 2017, the US withdrew its signature to the TPP, stated its intention to re-negotiate NAFTA and froze negotiations of the TTIP. The Trump administration's policies seem to prioritize bilateral negotiations and show an aversion to international dispute settlement (United States 2017). As this book went to press, the EU's ambition for a multilateral investment court also lacked the public support of other key states, like China and India.

Yet, the very existence of this proposal from an actor such as the EU in response to a perceived lack of legitimacy of the status-quo highlights the relevance of ongoing legitimacy debates about investment treaty arbitration as a system of dispute resolution. Although not always articulated, the starting point for this debate is the question of how to conceptualize investment treaty arbitration in the first place. In particular, do arbitrators serve only the disputing parties or do they also have law-making and governance roles? The answer has critical implications and therefore needs to be addressed before turning to more specific criticisms of investment treaty arbitration as a dispute settlement mechanism.

The function of investment treaty arbitration

Arbitration – particularly commercial arbitration – is traditionally conceived as a form of *private* dispute settlement under the control of the disputing parties (see Chapter 3; Ware 1999; Cutler 2003; Lustig and Benvenisti 2014). According to this view, the mandate of party-appointed arbitrators is limited to settling one particular dispute. Some arbitrators continue to see their role in this way also in investment treaty arbitration (e.g. Born 2012, 872). This view implies that tribunals should not consider the governance implications of their decisions (including the interests of third parties) because the outcome of the dispute is only relevant to the disputing parties themselves. Second, for the same reason, transparency in dispute settlement has no particular value. Third, tribunals are limited to applying the law chosen by the disputing parties – i.e. the investment treaty and, possibly, any related investment contract – even if the exclusive application of these sources of law rubs up against other domestic and international legal institutions.

Many of the criticisms against investment treaty arbitration flow from an alternative conception of investment treaty arbitration as being more than a mechanism to settle individual disputes. On this alternative view, foreign investors use investment treaty arbitration to challenge the improper exercise of public power by states. Whereas commercial parties traditionally established arbitral tribunals with only two functions in mind – to find facts and settle commercial disputes by applying the law – investment treaty tribunals have two additional functions: to develop the law and to engage in governance (see generally von Bogdandy and Venzke 2012; Alvarez 2014). Only the first two functions are concerned with the disputing parties. The third, law-making function refers to the role of arbitrators in articulating and clarifying legal principles, which then affect the behavior of the disputing parties and third parties *ex ante* (Kronstein 1944, von Bogdandy and Venzke 2014; Besson 2014; Schill 2015a). The fourth, governance function refers to their role in endorsing or reflecting certain normative values in the course of developing the law (Alvarez 2014).

In our view, investment treaty tribunals play a law-making role in that they articulate and clarify the meaning of core treaty standards such as FET.[15] The frequency with which these tribunals use awards of other investment treaty tribunals when justifying their interpretation of treaty provisions also confirms this role (e.g. Fauchald 2008). Tribunal decisions also play a governance role, in that certain conceptions of the appropriate exercise of public power inform the way they develop and apply international investment law. As Chapter 4 shows, tribunals endorse and reflect certain normative values, for example when they interpret core treaty standards such as FET in light of various understandings of 'arbitrariness' in the exercise of public power.

One implication of this broader conception of investment treaty arbitration is that the mechanism should be evaluated in light of norms of accountability, openness, coherence and independence in adjudication that are central to how other institutions (e.g. domestic courts) review the exercise of public power (Van Harten 2007). Such values may be, but are not necessarily, in tension with other norms that are traditionally associated with the settlement of commercial disputes between private parties – notably norms emphasizing the value of cheap, swift, predictable and final resolution of the dispute in question (Alvarez 2016a). In particular, if investment treaty tribunals contribute to the development of the international law and governance of foreign investment, there are important implications for transparency and consistency – the subject of the following sections.

[15] See Chapter 4.

Transparency

As Chapter 3 described, the degree of transparency in investment treaty arbitration varies somewhat depending on the arbitration rules and the applicable investment treaty. Until recently, however, confidentiality was the norm. This was a remnant of the commercial arbitration paradigm from which investment treaty arbitration borrowed heavily in procedural terms (Roberts 2013). Given the flexibility of investment treaty arbitration, the disputing parties in investment treaty arbitration could in principle agree to a greater degree of transparency than required by the arbitral rules or the investment treaty. ICSID streamed parts of the Vattenfall II case against Germany online . Yet this rarely happens. One of the disputing parties invariably has some individual interest in keeping the proceedings confidential, whether to avoid embarassment or external criticism, or to seek a tactical advantage. Consequently, the content and outcome of investment treaty arbitrations are often hidden from the public – unlike domestic litigation[16] – and even the existence of arbitrations can remain secret in some cases. This precludes scholars and the wider public to debate and critically scrutinize awards and confidentiality in investment treaty arbitration has therefore been a major concern among critics since the early 2000s (DePalma 2001; The Economist 2009; Rowley 2013; Wallach and Beachy 2013; Hamby 2016a).

As a result of these criticisms, the level of transparency in investment treaty arbitrations is set to increase due to the UNCITRAL Transparency Rules and the Mauritius Transparency Convention. Although the application of these initiatives still remain severely limited in practice,[17] they have nevertheless significantly changed public debate about the regime. In contrast to the situation only a decade ago, lack of transparency in investment treaty arbitration is no longer among the main concerns that critics of investment treaties raise (e.g. Alliance for Justice 2015; Schneiderman, Tienhaara and Van Harten 2015).

Despite the waning public attention towards transparency in the investment treaty regime, or perhaps exactly because of it, we need a more-finegrained understanding of how transparency under the main arbitral rules in investment treaty arbitration compares to transparency in civil proceedings across jurisdictions (which, as noted in Chapter 3, is not uniform). Some studies have begun to apply empirical methods to assess under what circumstances tribunals rely on each other's rulings, with transparency being a precondition for such cross-fertilization (e.g. Commission 2007; Fauchard 2008). Others have looked into party preferences for opacity (Hafner-Burton, Steinert-Threkheld, and Victor 2016). Yet important questions remain unanswered.

Two categories of questions arise. The first is about what drives transparency or opacity in investment treaties and arbitral rules. For instance, do states that include greater transparency provisions in their investment treaties have common characteristics? And with respect to

[16] However, as Chapter 3 explained, the degree of transparency of domestic civil proceedings also varies.
[17] See Chapter 3.

arbitral rules, what role did the reputational concerns of arbitrators, law firms and states play in the drafting and adoption of the UNCITRAL Transparency Rules and the Maurtius Transparency Convention? Equally, was outcome of the UNCITRAL initiatives influenced by the appointment of elite investment arbitrators by some states as their representatives in these negotiations?

A second set of questions relates to the impact of transparency on investment treaty arbitration. For instance, does public knowledge of the existence or the content of arbitrations threaten embarassment or pressure for the state and/or the investor, and if so, what are the implications for normative questions of whether transparency is desirable? Also, what is the impact of the recent partial turn towards transparency? Does it increase consistency of arbitral awards and spillovers, and if so how (see below)? Does it affect the cost and length of arbitrations? Relatedly, do arbitrators adopt different (or more extensive) reasoning in their awards or respond otherwise to legitimacy concerns as a result of greater transparency (e.g. Langford and Behn 2016)? Finally, do transparency requirements in investment treaty arbitration result in greater use of ADR, including informal negotiations and settlement? These are all critical questions for future research.

Consistency

A related, and more persistent, criticism of investment treaty arbitration concerns the sometimes inconsistent decisions by tribunals (e.g. Franck 2007). The decentralized nature of the investment treaty regime gives rise to possibilities of forum shopping (Busch 2007; Pauwelyn and Salles 2009), parallel proceedings (McLachlan 2009) and the persistence of different interpretations of common treaty provisions (Dupuy and Viñuales 2014). This can result in inconsistent decisions. Following Reinisch (2010), we can distinguish three different types of inconsistency, which are potentially problematic from a regime perspective:

1. *Inconsistency in interpreting investment treaty provisions*: different tribunals interpret identical or near identical provisions of different treaties in different ways. Examples include divergent decisions on umbrella clauses and MFN provisions (see Chapter 4).
2. *Inconsistency in fact-finding:* tribunals assess the same facts under the same legal standard differently. An example is when tribunals reached different conclusions on whether the response of Argentina to its financial crisis fell within the non-precluded measures clause of the US-Argentina BIT (see again Chapter 4).
3. *Inconsistency in outcomes:* tribunals issue contradictory decisions in essentially the same dispute. This can happen when different entities within a single corporate chain bring arbitrations under different investment treaties containing near identical provisions. An oft-cited example is the two arbitrations against the

> Czech Republic mentioned in Chapter 1, where a Dutch company brought a successful arbitration under the Czech-Netherlands BIT (*CME v. Czech Republic,* 2001), even though the majority shareholder of the company had been unsuccessful in a separate arbitration under the Czech-US BIT in relation to the same facts (*Lauder v. Czech Republic,* 2001).

The potential for all three types of inconsistency arises from the lack of an anchor organization or appellate body with the power to resolve inconsistency across disputes under more than 3,000 investment treaties.

Commentators disagree as to how serious the problem of inconsistency is. First, conceptualizations of investment treaty arbitration differ, as we explained above. If investment treaty tribunals are solely charged with settling individual disputes – as some arbitrators argue – none of the three forms of inconsistency would significantly undermine the legitimacy of the regime. However, if tribunals have law-making functions and contribute to governance in the investment treaty regime, as is our view, then inconsistency could be a cause for concern. In particular, the potential for all three types of inconsistency makes it more difficult for states to comply with their investment treaties *ex ante*.

Second, existing research leaves major gaps in our understanding of consistency in investment treaty arbitration. At a basic level, the very notion of consistency has not been subject to sufficient critical examination. More comparisons with domestic legal systems would be useful to understand the extent of the problem. Also helpful would be a clearer understanding of whether and why certain types of inconsistency are more problematic than others. For instance, are inconsistent interpretations more problematic from a normative perspective than inconsistent outcomes? Equally, what is the relationship between inconsistency and regulatory chill? Greater consistency reduces uncertainty about the scope of investment treaties, which could, in turn, reduce regulatory chill if states are risk-averse. But greater consistency could also increase regulatory chill if tribunals' rulings are consistently constraining.

Third, and relatedly, what are the underlying causes of inconsistency? Here, two factors are particularly relevant: the role of arbitrators and the design of investment treaties. With respect to the first, one view is that inconsistency is less of a problem than is often suggested because the interpretation of common treaty provisions will converge over time due to a closely-knit 'community' of investment law arbitrators (Schill 2011; cf. also Commission 2007; Fauchald 2008). We will return to this 'community' in more detail below, but this proposition should be subject to empirical testing. Is it really the case that arbitral tribunals resolve inconsistencies over time, rather than exacerbate them? Or do patterns of convergence/divergence vary across provisions and issues? Another observable implication of this theory would be that tribunals with members within the 'core' of the investment law 'community' are more likely to produce consistent decisions than tribunals consisting of 'outsiders'.

Another view is that inconsistency will characterize the investment treaty regime as long as states include varying provisions in their investment treaties (Kaufmann-Kohler 2008; Banifatemi, 2013; Schreuer, 2013; Vadi 2015, 240). This, again, is an empirical proposition which scholars should scrutinize. The challenge, of course, is to identify arbitrations which are similar in relevant respects except for the design of the underlying treaties. These, too, are critical questions for future research so as to develop a better understanding of the drivers and effects of inconsistency in the investment treaty regime.

Regime Spillovers

In addition to consistency *within* the investment treaty regime, a related – but broader – set of issues concern the impact of investment treaty arbitration on the wider investment regime complex. As Chapter 1 described, this complex of regimes includes various codes of investor conduct, regional institutions, trade agreements, finance and debt agreements, double taxation treaties, international insurance, as well as human rights and environmental agreements, all of which relate to the governance of foreign investment. Arguments for consistency *between* regimes are arguably less compelling than those for consistency within a regime, because different regimes may impose different rules on different actors to achieve different purposes (e.g. Ratner 2008). However, not all regimes are equally effective in achieving their purposes. And because the investment treaty regime contains a powerful international mechanism for binding and enforceable dispute settlement, the regime is more likely to create spillovers to other parts of the investment regime complex.

In general terms, spillovers from one regime to another can be divided into synergies ('positive' spillovers) and conflicts ('negative' spillovers) (see generally Johnson and Urpelainen 2012; Gómez-Mera 2015). Synergies occur when the investment treaty regime promotes the goals of other parts of the investment regime complex (e.g. providing protections that fill some of the 'gaps' in political risk insurance). Conflicts occur when the regime impedes such goals (e.g. protecting tax haven investors may complicate international tax governance).[18] Yet, very little research has been undertaken on the extent of such spillovers from the investment treaty regime. To illustrate why this is a major gap, consider the following three examples.

The first is the human rights regime. If a foreign investor brings a successful investment treaty arbitration arising from interference with its human rights – for example, if the host state interfered with a foreign media company's right of free expression – there is a synergy between the investment treaty regime and the human rights regime. At the time of writing, Al Jazeera was pursuing such an arbitration against Egypt under the Egypt-Qatar BIT (Bollinger and Sauvant 2016). However, in mapping the spillovers between the investment treaty regime

[18] Whether the goals are normatively desirable is irrelevant from this perspective; the focus is on the effectiveness of institutions which is understood as their ability to reduce or solve the problems they were created to address. See generally, Levy, Young, and Zürn (1995).

and the human rights regime, recall that investment treaties provide limited protection to the human rights of only one particular, and often powerful, group of actors – namely, foreign investors (Alvarez 1997). And when foreign investors use investment treaties to oppose or challenge host state measures intended to protect or promote the human rights of other actors, negative spillovers from the investment treaty to the human rights regime can result. For example, foreign utility firms have relied on investment treaties to oppose universal access requirements designed to ensure the adequate supply of drinking water to poor or remote communities (Meshel 2015).

Second, the investment treaty regime partially supports the WTO's goal of establishing an international economic order underpinned by principles of non-discrimination. But it also conflicts with this goal by providing foreign investors with enforceable protections that go well beyond prohibitions on discrimination and that potentially limit the ability of states to impose non-discriminatory regulations on foreign investment (see Chapter 4 on FET and indirect expropriation; see generally Kurtz 2015; Puig 2015).

Third, arbitral tribunals have held that sovereign debt owed to foreign creditors qualifies as an 'investment' under investment treaties. Such protection of debt instruments could complement the international sovereign debt regime if increased creditor rights facilitates the ability of debtor states to raise money in international capital markets. Negative spillovers could also arise, however, if investment treaty arbitration allows foreign hold-out creditors to obtain full repayment of sovereign debt following a restructuring facilitated by the IMF and the Paris Club and agreed by a supermajority of creditors (Waibel 2007a).

The impact of investment treaty arbitration on the investment regime complex varies not only with treaty texts but potentially also with how arbitrators understand their own function. Arbitrators who see themselves as solely involved in settling disputes may be discouraged from considering other bodies of law that specify the rights and obligation of both investors and host states vis-à-vis third parties (recall that only investors have standing to bring arbitrations, rather than also host states). For example, in *Micula v. Romania* (2013), Romania's suspension of subsidies to a Swedish foreign investor breached an investment treaty, even though the EU Commission had required Romania to terminate the subsidies on the grounds that they constituted illegal state aid under EU law. This could be characterized as a negative spillover effect from the investment treaty regime to the EU. By contrast, arbitrators attuned to their law-making and governance functions may be more inclined to consider their impact on the broader investment regime complex. Determining whether, and under what circumstances, investment treaty arbitrators should consider these impacts in their decisions raise a series of thorny and intertwined legal and normative issues (see e.g. Alvarez 2016a).[19]

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[19] A normative implication that follows from the law-making and governance functions of investment treaty arbitration is that arbitrators should consider the impact of their rulings on states, persons, or entities not directly represented in the case before them (Alvarez 2005, 528-9). Consistently with this view, investment treaties have begun to confer the power on arbitral tribunals to accept *amicus curiae* submissions from individuals or entities

In short, the relationships between the investment treaty regime and the broader investment regime complex are important but understudied. Future research should consider not just (i) where and how legal institutions within the investment regime complex create synergies and conflicts with investment treaty texts and arbitral awards; but also (ii) why and how states and other actors facilitate spillovers from the investment treaty regime in the first place (see generally Benvenisti and Downs 2007; Helfer 2009; Gehring and Faude 2014; Ranganathan 2014); and (iii) how spillovers affect the distribution of benefits and impact different actors, institutions, and processes in domestic and international arenas across the investment regime complex (see generally Meunier and Alter 2009; Jinnah 2011b).

Arbitrator Selection

In addition to questions of transparency, consistency, and regime spillovers, normative debates about the legitimacy of the investment regime have in recent years focused on the background and the beliefs of arbitrators themselves (Pauwelyn 2015; Venzke 2016). These debates are rooted in an underlying assumption that third-party adjudicators are not necessarily neutral and disinterested parties. And indeed, a large literature shows that the personal motives and charactistics of adjudicators can shape outcomes of legal disputes across a wide range of fields (e.g. Farhang and Wawro 2004; Sunstein et al. 2007; Voeten 2008).

Before reviewing criticisms of the status quo, let us first consider some of the arguments from supporters of the current system of party-appointed arbitrators. As in previous sections, many of these arguments follow from a particular conception of investment treaty arbitration. Defenders of party appointments often rely on the traditional conception of arbitration as a form of *private* dispute settlement in which the mandate of a tribunal is limited to settling a *particular* dispute. As Veeder (2013, 401) puts it, 'the right of each party to appoint an arbitrator makes the arbitration the *parties'* arbitration, deciding *their* dispute with *their* tribunal.' Defenders of party-appointments also contend that each party's ability to appoint its 'own' arbitrator gives each party confidence that its arguments have had a fair hearing within the tribunal and, thus, increases the likelihood that the losing party complies with the tribunal's award (e.g. Posner and Yoo, 2005; Shany 2008). This latter proposition is an empirical question, which has yet to be subject to rigorous scrutiny.[20]

A different argument in favor of party-appointments is that it prevents all arbitrators from being dependent on states for their appointment. As alluded to above, this argument has become particularly pertinent after the European Commission (2015a) suggested a standing

that are not parties to the dispute; e.g. CAFTA 2004, Article 10.20(3). This is not the same, however, as suggesting that arbitrators should consider the impact of their rulings on other regimes.

[20] Moreover, this argument does not provide a reason for allowing an investor to appoint an arbitrator. Because only investors can initiate investment treaty arbitration, questions of compliance with adverse awards arise mostly in relation to states. That said, tribunals sometimes order investors to pay costs.

international investment court, where investors have no role in appointing tribunal members. According to supporters of the existing party-appointment model, such alternative arrangements 'may undermine the very foundations of arbitration (and of justice): the equality of arms between the parties' (EFILA 2015, 23). This normative argument has some uncomfortable implications however. If one accepts that 'justice' and 'the equality of arms' require that states have no greater influence than plaintiffs over the choice of tenured judges, it seems to follow that courts such as the German Bundesverfassungsgericht and the US Supreme Court are not legitimate fora to resolve claims against states. Such views have little resonance outside debates about investment treaties, and are inconsistent with the ordinary role of courts in reviewing state conduct in democratic societies. Even if domestic courts lack independence, it does not follow that foreign investors themselves – as opposed to the home state of the investor – should be able to influence the composition of investment treaty tribunals.

That said, important arguments have been made in favor of the existing system of party-appointments in investment treaty arbitration – notably, those that draw attention to its simplicity and flexibility (American Bar Association, 2016). It is therefore important to carefully scrutinize criticisms against the status quo. Here, we briefly address three criticisms relating to: (i) the dependence of arbitrators on the disputing party that appoints them; (ii) the career and financial incentives of arbitrators; and (iii) the link between arbitrator background and arbitration outcomes, including the exclusive 'community' of elite arbitrators. All are critical for legitimacy discussions about investment treaty arbitration.

The first line of criticism concerns arbitrator moral hazard – the idea that party-appointments for individual cases encourages each party to identify and appoint individuals who are, at least perceived to be sympathetic to their position (Paulsson 2010). For instance, parties may favor arbitrators who share a similar legal or cultural background (Bishop and Reed 1998, 395; Blackaby and Partasides 2015, para 4.76). Accordingly, the interests of party-appointed arbitrators may be closely aligned with their appointing party, as was the case in inter-state arbitrations in the 19th century when arbitrators often assumed the mantle of advocates for their appointing-parties (Alter 2008; Shany 2008).

Concerns with moral hazard run somewhat contrary to a second criticism, which focuses on the financial and career incentives of arbitrators considered as a group (Van Harten 2007, 152-53; Sornarajah 2008, 218; see generally Blanes i Vidal, Draca and Fons-Rosen 2012). When interpreting and applying investment treaty provisions, full-time arbitrators who earn fees for each arbitration may have an incentive to expand the scope of the regime so as to facilitate more arbitrations and thus potential appointments for themselves (Drahozal 2004). Part-time arbitrators could have similar incentives as expansive interpretations not only means future appointments but also an overall expansion of the field from which they derive income as lawyers and experts. A particular concern may arise when arbitrators wear 'multiple hats' in investment treaty arbitration by also representing investors. An analogous situation in domestic legal systems would be if a judge could also represent claimants against the state - or the state against claimants – in which case the neutrality of the judge may be in doubt.

Finally, a third, and broader, strand of criticism centers on the backgrounds and homogeneity of arbitrators. At the time of writing, 66 percent of ICSID arbitrators have been OECD nationals (Waibel and Wu 2012), 63 percent were practising lawyers and 26 percent academics (Puig 2014, 405; Franck et al. 2015, 446). Other common traits of investment arbitrators include a high incidence of elite education, particularly for arbitrators from developing or transition countries.[21] The gender gap is wide: 93 percent of arbitral appointments went to men, and two women account for three quarters of all female appointments (Puig 2014, 405; see generally Grossman 2016). Arbitrators of Asian or African nationality are under-represented, despite significant investment flows to and from Asia in particular, and associated investment treaty disputes. This homogeneity of investment arbitrators is all the more striking when compared with WTO panelists (Costa 2011; Pauwelyn 2015). Moreover, many arbitrators share a similar professional background (Tienhaara 2009, 206; Sornarajah 2006, 341). Of the 536 individuals appointed to ICSID tribunals at the time of writing, only 25 percent have been public international lawyers; 11 percent have been public lawyers, whereas the remaining arbitrators have mostly specialized in commercial law (Waibel and Wu 2012).[22]

These characteristics could matter when arbitrators look for answers to difficult and new questions, particularly when interpreting and applying open-ended standards of treatment such as indirect expropriation or FET. For instance, a background in commercial law might render some arbitrators less sympathetic to interests outside their traditional domain, such as human rights law, or less willing to consider the impact of their awards on other parts of the investment regime complex. More broadly, critics contend that the homogeneity among arbitrators could create – in appearance or in reality – a pro-investor bias in investment treaty arbitration and undermine the objective of a neutral forum for dispute resolution (Franck et al. 2015).

In addition to shared professional backgrounds, many arbitrators are arguably part of a closely-knit network characterized by shared values and frequent and over-lapping personal connections (Borgen 2007; Puig 2014). This is particularly important when considering the remarkably high re-appointment rate within the investment treaty regime, where a small group of individuals decide a very large share of all investment treaty arbitrations (see Table 1.4).[23] That states have delegated law-making and governance functions to such a small

[21] More than one third of all ICSID arbitrators have degrees from only five universities (Cambridge, Harvard, Oxford, Stanford and Yale) (Waibel and Wu 2012).

[22] The percentage of public international lawyers has not increased over time. Of the 50 arbitrators appointed to ICSID tribunals for the first time over the period 2008-2016, only 18 percent have been specialists in international law, and 6 percent have been public lawyers. Yet of the 21 elite arbitrators in Table 1.4, 38 percent are specialists in public international law, and 70 percent have been in full-time private practice before becoming – for the most part – full-time arbitrators (Waibel and Wu 2012).

[23] Between 1972 and 2011, 372 individuals sat as ICSID arbitrators, yet only 37 of these arbitrators accounted for 50 percent of all appointments (Puig 2014, 407).

group of lawyers, most of which are in commercial practice, is an on-going source of controversy.

Some of the arguments by proponents and critics of the system of party-appointments have begun to be subject to empirical testing (e.g. Franck 2007; Franck 2009; Kapeliuk 2010; Kapeliuk 2012; Van Harten 2012; Puig and Strezchnev 2016a; Puig and Strezchnev 2016b; Tucker 2016). Yet, we still know very little about three core questions. First, the track record of appointments and awards suggest that at least some arbitrators position themselves as pro-investor or pro-host state arbitrators, whereas others position themselves as 'neutrals' (Puig 2014; Dupuy and Maupin 2015; Abi-Saab 2015; Waibel and Wu 2012).[24] However, we know little at present about the role of financial and career incentives for arbitrators, and how they relate to outcomes. Recent experimental research lends some initial weight to the hypothesis that arbitrators are influenced by who appointed them (Puig and Strezhnev 2016a). Yet, any explanatory theory of the balance of career and professional incentives facing the tribunal as a whole needs to also understand the incentives of arbitrators marketing themselves as 'neutral' – particularly those who are regularly appointed as presiding arbitrators. (Recall that tribunals decide by majority. In the event of disagreement between the arbitrator appointed by the investor and the arbitrator appointed by the host state, the views of the presiding arbitrator views are likely to be decisive.) In a recent empirical contribution, Donabauer, Neumayer and Nunnenkamp (2017) suggest that the previous experience and 'bias' of the presiding arbitrator have a significant impact on the outcome of investment treaty arbitrations. Future studies could also consider the relevance of the policies and practices of the default appointing authority which appoints the presiding arbitrator when the disputing parties cannot reach agreement (see Chapter 3).

Second, there is little systematic evidence on whether, and to what extent, arbitrator backgrounds and social interactions have an impact on investment treaty arbitration. Assessing these questions will be riddled with methodological challenges. What is bias, and how do we measure it? For instance, does statistical analysis of only those cases that result in final awards allow us to meaningfully assess bias, given that parties that expect to lose are more likely to settle (Strezhnev 2016)? Also, what are the relevant arbitrator characteristics to consider? Is it really relevant where an arbitrator was born (as tested by Franck 2009), or may their education, socio-economic backgrounds, and social interactions be more important? How can researchers account for dynamics between tribunal members, and to what extent can outsiders assess bias from awards when many of the deciding facts of the case may not be made public. These are but some of the thorny questions about the role of arbitrator backgrounds and interactions that a combination of qualitative, quantitative, and experimental research has yet to address.

[24] Neutral here is used in a very narrow sense as between the disputing parties in relation to a particular dispute at the time of appointment. It does not imply neutrality in a wider sense – e.g. neutral as between the interests of the disputing parties and the interests of those who are not parties to the dispute.

Finally, even in the absence of actual bias, critics argue that party-appointed arbitrators risk being *perceived* as biased, thereby undermining perceptions that the investment treaty regime as a whole is neutral and legitimate, which in turn may risk compliance (Van Harten 2007; Paulsson 2010; Smit 2010; van den Berg 2011). Just like the opposite proposition by defenders of party-appointments – namely that legitimacy and compliance is promoted through party appointments – this has yet to be subjected to empirical testing. Here, the EU's standing investment court could provide a counter-factual if it materializes.

Investor obligations

Finally, we turn to another influential criticism of the investment treaty regime: that it lacks binding investor obligations. In some limited circumstances, host states can raise investor misconduct as a bar to a tribunal hearing a case – for example, if the investor acquired the investment corruptly or, possibly, in breach of domestic law. The investment treaty regime thereby complements efforts to promote responsible investment in the minimal sense that investors who wish to ensure they retain their option to initiate investment treaty arbitration must avoid such forms of misconduct. However, investor treaties do not create investor obligations that can be enforced by host states acting on their own initiative.[25] Almost since their inception in the mid-20th century, critics have contended that this exclusive focus on investor rights in investment treaties makes them 'unbalanced' instruments (e.g. UNCTC 1984, 8; Stiglitz 2007, 536-540; Miles 2013, 348-372). As with the criticisms described above, this raises important questions that have yet to be assessed in detail.

First, is it in fact necessary to give states the right to file arbitrations under investment treaties to achieve 'balance'? As Chapter 3 notes, host states are generally able to bring proceedings in their own courts against foreign investors present in their territory.[26] Critics are sometimes unclear why this avenue is inadequate. One possible answer is that if the foreign investor lacks assets in the territory of the host state,[27] the host government may need to enforce any decision against the foreign investor outside its own jurisdiction. In these circumstances, it may be easier for a host state to enforce abroad the ruling of a 'neutral' international tribunal than one of a 'politicized' domestic court (Toral and Schultz 2010).

Even if a normative case can be made for including investor obligations in investment treaties, such proposals raise legal difficulties. The ICSID Convention does not rule out state claims against investors, for instance, but they are only possible if both parties have

[25] Host states can formulate so-called counterclaims in limited circumstances in investment treaty arbitrations initiated by investors.

[26] Moreover, in some very narrowly defined situations investors may also be subject to proceedings initiated by non-state plaintiffs in home state courts for their extraterritorial activities – examples include claims under the US Alien Torts Claims Act and tort claims in a range of common law jurisdictions alleging liability for extraterritorial harm resulting from decisions made by business executives within the territory of the home state.

[27] A related issue is that the investor may be a limited liability company incorporated in a jurisdiction different from its ultimate parent.

consented to the arbitration of such claims. As Chapter 3 describes, investors consent to states' 'standing offer' to investment treaty arbitration by initiating the arbitration. For states to be able initiate claims against investors, the consent of investors to such arbitration claims would need be obtained by other means. Although this is possible in principle – for instance, by drafting investment treaties in a way that requires foreign investors to give advance consent to arbitration at the point of admission of their investment in order to be covered by the protection of the investment treaty – such a system would create additional administrative burdens for host states.

Even if a system were established to secure investors' advance consent to arbitration, further questions arise as to the types of investor obligations that should be included. A first option could be a 'reverse umbrella clause', where an investor's alleged breach of contract, and possibly even an investor's alleged breach of obligations under national law, could be the basis for a treaty claim (Laborde 2010). Yet this route would be fraught with difficulties, particularly in light of the concerns about 'ordinary' umbrella clauses that Chapter 4 reviewed. A second option is to include binding investor obligations in investment treaties that are derived from other parts of the investment regime complex, for instance obligations defined by reference to the UN Guiding Principles on Business and Human Rights or the OECD's Guidelines for Multinational Enterprises (see e.g. IISD 2005).[28] A third possibility is for investment treaties to endorse such instruments in investment treaties, without attempting to render them enforceable through arbitration. Although significantly less ambitious, such an approach might still be useful in establishing a focal point in investment treaties for social expectations about responsible business conduct, which in theory could strengthen non-legal forms of accountability for coporate misconduct.

Future research could usefully inform debate about these questions. First, it would be helpful to investigate why hardly any of the over 3,000 existing investment treaties include binding investor obligations.[29] Second, is it possible to assess the impact of those few investment treaties that do include investor obligations?[30] Even without formal treaty claims brought against investors, we know from the human rights regime that non-legal channels of accountability can be important to ensure treaty compliance (Simmons 2009). Third, in line with the observations about arbitrator charactistics above, is it possible to identify systematic differences in the extent to which arbitrators conside instruments from other parts of the investment regime complex pertaining to investor obligations? Fourth and finally, does the exclusive focus of investment treaties on the rights of foreign investors have implications for efforts to promote international standards of responsible investor conduct through initiatives?

[28] The Guiding Principles cover only human rights while the OECD Guidelines cover a wide range of corporate misconduct. In addition, in July 2014, the Human Rights Council established a working group to come up with a binding instrument on TNCs and human rights. The outcome of this initiative is difficult to predict, but there has been some discussion of whether human rights should have 'primacy' over international investment treaties.

[29] For instance, India scrapped plans to include binding investor obligations in the 2015 Indian model BIT after a critical review by the Indian Law Commission (Law Commission of India 2015).

[30] E.g. the plurilateral investment treaty among member states of the Islamic Conference (Article 9), and particularly the South African Development Community (SADC) Model BIT (Articles 10, 15, and 17).

In other words, does the 'unbalanced' nature of investment treaties have negative spillovers to initiatives such as the UN Guiding Principles on Business and Human Rights and the UN Global Compact?

All in all, debates about investment treaty arbitration as a dispute settlement mechanism are as heated as they are complex. Some criticisms may be misguided, whereas others warrant serious attention. As with discussions about the impact of investment treaties on national governance, it is therefore critical that further research is conducted into the normative, legal, and empirical effects of this potent but controversial dispute settlement mechanism.

Conclusion

Competing forces are pulling in the investment treaty regime. On the one hand, the intensifying criticism of the regime even in Europe, where the regime was created, reminds us that it is a fragile construct. There may be thousands of treaties in place, but many of them are coming due for renewal in the coming years. The 'modern' investment treaty regime is also young; it was only from the 1980s that investment treaties began to commonly include investor-state arbitration provisions and the number of investment treaty arbitrations has grown rapidly only since the early 2000s. If controversy intensifies, the regime could unravel just as quickly as it was established.

On the other hand, recent European proposals reminds us that, despite the heated debates about the regime, most reforms have remained partial and incremental to date. Hardly any country has begun to revisit whether foreign investors should in fact have substantive treaty protections that go beyond guarantees of non-discrimination. The majority of states continue to favor a dispute settlement system that gives foreign investors direct standing to bring arbitrations against host states. Equally, states have not, on the whole, attempted to 'rebalance' the regime to focus more on legally binding investor obligations. Only very few states have begun to terminate their agreements outright. Whether such path-dependency is a boon or a threat to the governance of the investment treaty regime remains to be seen, but outside observers could be forgiven for considering on-going reforms as little more than tinkering at the margins.

Whatever the future holds for the investment treaty regime, any assessment of the status-quo and its alternatives requires scholars and stakeholders to appreciate both the law and the political economy of the regime. Lawyers need to understand the economics and politics of both foreign investment and investment treaties, and those without a legal background need to be familiar with the basic legal features of the regime. Our aim in this book has been to fill some of the gaps in understanding among members of both groups. In addition, our mapping and synthesis of the existing academic literature shows that many important questions about the regime remain unanswered, particularly those relating to its political and economic implications. In doing so, we hope to have contributed to a more informed debate about the past, present, and future of this crucial regime underwriting economic globalization.

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