The Impact of Investment Arbitration on Investment Treaty Design: Myths versus Reality

Wolfgang Alschner
Assistant Professor, University of Ottawa

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† Ph.D., LL.B., B.A., M.A., J.S.M. (Stanford). Assistant Professor, University of Ottawa. I gratefully acknowledge the funding support from the SNF project “Convergence versus Divergence? Text-as-data and Network Analysis of International Economic Law Treaties and Tribunals” and from NCCR trade regulation. Email: wolfgang.alschner@uottawa.ca.
INTRODUCTION

Investor-state arbitration (ISA) has become the defining feature of international investment law. ISA dominates public discussions and policy debates that accompany the negotiation of new investment agreements; it forms the lens through which investment law is analyzed and taught at universities; and it has grown to be a significant area of practice for lawyers, arbitrators, and legal service providers. Given its prominence, it is high time to ask just how influential ISA has been in shaping the rules that make up international investment law.

International investment law is primarily based on over three thousand international investment agreements (IIAs). Investment law scholars often assert that states change these treaties in response to developments in investment arbitration—although they typically disagree on whether to herald that change as a long overdue “re-balancing” of rights and obligations or as an undesirable

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lowering of investment protection levels. Apart from a few exceptions, however, no serious empirical effort has been made to investigate the effect of investment arbitration on IIA rulemaking. This is problematic. In the absence of empirical knowledge, legal scholars, and investment policy makers are bound to rely on potentially misleading anecdotal evidence to inform their normative evaluations and policy assessments. A few vivid examples of states changing their IIAs in light of investment claims risk dominating the collective thinking, while crucial yet latent trends at the intersection of arbitration and treaty innovation are overlooked.

To place the current investment law and policy discourse on a more solid empirical footing, this Article systematically investigates the impact of investor-state arbitration on treaty-making via three channels. First, both historically and in today’s practice, not all investment treaties contain consent to investment arbitration. So what can the absence or presence of an ISA clause tell us about the design of an investment treaty more generally? Are states, for instance, more willing to agree on tough investment protection in treaties that do not provide consent to ISA because they know that these obligations cannot be effectively enforced? Second, ISA may impact investment treaty design through claims. When a country is subject to an investment claim or learns about investment claims against other countries, it may adjust or “rebalance” its treaty design to make it easier to defend against future investment cases. Third, ISA may influence treaty design through the case law it generates. States may react to awards either by endorsing a specific interpretation by an arbitral tribunal or by explicitly rejecting it in future treaties.

This article assesses the impact of investment arbitration on rulemaking via these three channels by using state-of-the-art information extraction techniques. According to the United Nations Conference on Trade and Development (UNCTAD), the IIA regime has become “too big and complex to handle for governments and investors alike.” Modern technology can help reduce that complexity, opening up unprecedented avenues for large-scale empirical research.


research. Contributing to the emerging computational analysis of the international investment regime, this Article employs machine-coding to investigate close to 1700 bilateral investment treaties (BITs) and free trade agreements (FTAs) with investment chapters across 55 recurring investment treaty clauses. It finds that (1) the inclusion or omission of ISA has no material effect on other treaty design elements, (2) countries do not systematically change their IIAs in the face of investment claims and (3) developments in arbitral case law have traceable repercussions on treaty design. These insights shed light on several normative and policy debates within investment law.

First, recognizing that ISA clauses are mere procedural add-ons whose omission or inclusion has no material effect on treaty design should put us on guard not to overstate the transformative impact of investor-state arbitration. In particular, the empirical finding weighs against viewing the inclusion of ISA as creating substantive investor rights or as turning IIAs into the international equivalent of a contract for the benefit of a third party. The analysis, rather, suggests that ISA clauses merely provide an alternative procedural enforcement right for investors, but otherwise leave the inter-state nature of the treaty's substantive rights and obligations unaltered.

Second, the insight that investment claims have little impact on treaty design should prompt us to view the current IIA landscape in a new light. The "rebalancing" of rights and obligations in IIAs, long held as a product of rising investment claims, actually predates the surge of claims and can be traced back to NAFTA. The subsequent diffusion of NAFTA design elements is due to a multiplicity of factors among which is NAFTA itself. By inspiring the first wave of investment claims, NAFTA became entrenched as a template for future treaty-making in a path dependent IIA universe. Investment claims also played a part in helping to diffuse NAFTA treaty design, but with varying degrees of importance: while the United States learned from NAFTA claims, transposing its design to BITs, other countries like Canada, Germany, or Japan experienced no equivalent effect. As those case studies show, bureaucratic inertia, public awareness of ISA, and the interaction of investment and trade law were often more important than claims in shaping treaty design outcomes. This insight is both good and bad in legal policy terms. It is good because states have not reacted to rising ISA claims by opportunistically altering their treaty design to escape liability. But it is also bad because our findings point to a status quo bias in treaty-making. While states have not overreacted to investment claims, as some commentators feared, they may have actually done too little in response to a changing policy environment, thus entrenching a pre-ISA claims architecture rather than engaging in genuine innovation.

Finally, the finding that states systematically react to arbitral case law points to the type of legal innovation that states do engage in. They fine-tune existing treaty commitments in light of legal developments, investing in the gradual adjustment of the field rather than its reinvention. Hence, as arbitral case

law with quasi-precedential effect spreads, states actively intervene in ongoing normative debates that play out in arbitration by changing their treaty design to endorse or reject a strand of arbitral interpretations.

The study thus reveals that investment arbitration's impact on rulemaking is surprisingly small and that other factors, including status quo bias and path dependency, are more important determinants of (and obstacles to) treaty design innovation and diffusion. The Article proceeds in three stages. The first introduces investment treaties and arbitration and identifies the three channels by which the latter may impact the former, drawing from the existing literature. The second lays out the empirical methodology for measuring the impact of ISA on treaty design. The third then applies that methodology to investment law, tracing the evolution of IIAs generally before isolating the influence of the three impact channels—clauses, claims and cases—on treaty design.

I. INVESTMENT LAW AND ARBITRATION

International investment law has become one of the most dynamic, but also one of the most controversial, fields of international law. This Part briefly traces the development of investment law and its investor-state arbitration component, and then identifies the three channels by which arbitration may impact international investment treaty-making.

A. The Development of Investment Law and Arbitration

Investment law originally developed from the customary international law protection of foreign nationals abroad. In the nineteenth century, European states and the United States argued that aliens were entitled to a minimum standard of protection under international law. This minimum standard was initially hotly contested by newly independent states in South America—in part because it often served as pretense to justify foreign military interventions ("gunboat diplomacy"). By the early twentieth century, however, as inter-state arbitrations began to gradually replace the use of force as primary means to enforce the protection of foreign nationals, including investors, abroad, the minimum standard gained credence and became a part of customary international law.

Contestation over the protection of foreign investors began anew in the second half of the twentieth century. Decolonization and socialism placed emphasis on

8. The most famous decision on the minimum standard of treatment is L.F.H. Neer and Pauline Neer (U.S.A.) v. United Mexican States, 4 R.I.A.A. 60 (Oct. 15, 1926). Neer continues to be widely cited by investment tribunals to describe the scope of the international minimum standard. On the minimum standard, see generally Martins Paparinskis, The International Minimum Standard and Fair and Equitable Treatment (2013).
sovereign control over natural resources, which often conflicted with existing foreign ownership rights. The ensuing waves of expropriation combined with a series of United Nations resolutions on a “New International Economic Order” challenged the customary rules on the protection of aliens, including the level of compensation owed to foreign investors in case of an expropriation. Developed countries responded in two ways. First, they began codifying the protection of foreign investors by signing bilateral investment treaties (BITs) with like-minded developing countries. Second, they promoted the establishment of an international arbitration mechanism that would depoliticize foreign investment relations by allowing private investors to bring their claims directly against host states before international arbitration tribunals. The latter efforts culminated in the conclusion of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) in 1965 under the auspices of the World Bank.

Following the end of the Cold War, contestation gave way to a global acceptance of investment protection and arbitration. Today virtually every country is signatory to at least one of the around 3,000 bilateral investment treaties (BITs) and several hundred free trade agreements (FTAs) with investment chapters that have been signed since the 1960s. Most of these agreements provide consent to investor-state arbitration, be it under ICSID or another forum. Treaty-based ISA, however, lay largely dormant until the mid-1990s. Since then, investors have brought over 600 cases pursuant to investment treaties. If successful, the respondent state is liable to pay damages. Such damage awards benefit from the strong recognition and enforcement
infrastructure of the ICSID Convention (for ICSID awards) and the 1958 New York Convention (for non-ICSID awards) and can thus effectively attach host state assets around the world not protected by sovereign immunity.  

Through its effectiveness, investment arbitration has become a cornerstone of today's investment law architecture and has transformed the way we think about the field. Investment law scholars today spend most of their time making sense of arbitral case law rather than interpreting investment treaties, contracts, or domestic law. Similarly, university courses are taught on "investment arbitration" rather than "investment law" to prepare students for an increasingly litigation-focused area of practice. While ISA makes investment law attractive for scholars and practitioners, it also makes investment law controversial. Some investment arbitration claims have challenged sensitive areas of public policy giving rise to fears that investment treaties and arbitration could compromise the state's ability to regulate in the public interest, leading to "regulatory chill." Furthermore, the ad hoc structure of arbitration modeled on commercial arbitration, its (partial) secrecy, and the relatively small pool of practitioners with revolving roles as negotiators, arbitrators, and counsels have attracted academic and public criticism. ISA has thereby become a publicly debated and contested element of investment law.

Given its prominence among proponents and critics, the question arises: just how much of today's investment law is owed to investor-state arbitration? While it is beyond doubt that ISA has revolutionized the litigation of investment disputes, it is much less clear to what extent it has also changed the substance of IIAs that form the underpinning of today's investment law architecture.

Prominent commentators have argued that investment arbitration has transformed the substantive nature of IIAs. Thomas Wälde, for instance, suggested that the inclusion of ISA "fundamentally changed the character of BITs." Similarly, Michael Reisman stated that ISA turned BITs into "treaties for the benefit of third parties." Joost Pauwelyn argues that ISA "fundamentally

transformed the rules on foreign investment protection"\textsuperscript{25} and introduces a distinction between generations of BITs depending on whether consent to ISA is included.\textsuperscript{26} For Ole Spiermann, the insertion of ISA into modern BITs even "vest[s] rights in private investors as subjects of international law."\textsuperscript{27} More than just creating another enforcement route, ISA, according to them, thus seems to have altered the substance of international investment law.

In addition, there is widespread agreement in the literature that ISA has triggered a major overhaul of IIAs across the globe over the past decade. The proliferation of ISA claims is said to have created a "backlash against investment arbitration"\textsuperscript{28} and, according to UNCTAD, "led to the emergence of ‘new generation’ IIAs."\textsuperscript{29} This "new generation" places greater emphasis on host state policy flexibility and non-investment values than earlier agreements.\textsuperscript{30} The evidence for widespread treaty design reform in response to the proliferation of investment claims is largely anecdotal, however. Commentators routinely invoke the United States’ experience pointing to the stark differences between the pre-arbitration-claims 1994 U.S. model BIT and the post-arbitration-claims 2004 model BIT in making the case for a strong impact of arbitration on rulemaking.\textsuperscript{31} Scholars thereby risk jumping from correlation to causation attributing treaty design innovations that co-occur with the proliferation of investment claims to the latter.\textsuperscript{32} Furthermore, it is unclear how representative the U.S. case is for developments in the wider IIA universe. While a major reform of IIAs seems underway with the EU proposing a new investment court system\textsuperscript{33} and countries

\textsuperscript{27} Ole Spiermann, Twentieth Century Internationalism in Law, 18 EUR. J. INT’L L. 785, 811 (2007).
\textsuperscript{28} Michael Waibel et al., The Backlash Against Investment Arbitration: Perceptions and Reality, in THE BACKLASH AGAINST INVESTMENT ARBITRATION xxxvi (Michael Waibel & Asha Kaushal eds., 2010).
\textsuperscript{29} World Investment Report 2013: Global Value Chains: Investment and Trade for Development, UNCTAD 107 (2013), http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf; see also Peinhardt & Manger, supra note 3, at 3 ("many states have begun to rethink their investment treaty commitments after appearing before international tribunals").
such as India revamping their model BITs, such as India revamping their model BITs, at the time of writing these far-reaching changes remain to be implemented. Widespread talk of reform thus tends to detract from investigations into how much concluded agreements have in fact changed since the rise of investment arbitration. A case in point is the investment chapter of the Trans-Pacific Partnership (TPP) Agreement, which has been advertised as a "new, gold standard," yet over 80 percent of the chapter simply reproduces the language of a prior 2006 U.S. agreement and contains few genuine innovations. In short, ISA is often perceived as transformative of IIAs, but we actually do not know how transformative it has actually been.

B. Three Impact Channels

This Article empirically investigates ISA’s impact on investment treaty-making in order to answer that question. More specifically, it focuses on three channels through which ISA could have affected the design of international investment agreements: (1) investment arbitration clauses, (2) investment arbitration claims, and (3) investment arbitration case law.

1. Investment Arbitration Clauses

The first way by which ISA may have impacted IIA design is through its mere inclusion. Before the late 1960s, the enforcement of international investment law was exclusively an inter-state affair. The law of diplomatic protection as part of customary international law translated injuries against foreign nationals into injuries against their home state, turning investor-state disputes into inter-state disputes. Accordingly, early investment treaties exclusively provided for state-to-state dispute settlement clauses. The situation changed dramatically in the 1960s when the ICSID Convention was signed and IIAs, starting with the Netherlands–Indonesia BIT (1968), began to include consent to its jurisdiction or to alternative investor-state arbitration mechanisms. By allowing private investors to directly sue host states for treaty


37. In the 1960s, Belgium, for instance, brought a diplomatic protection claim on behalf of Belgian investors against Spain before the International Court of Justice, alleging that Spain’s acts vis-à-vis an electricity provider, which was mostly owned by Belgian shareholders, violated international law. Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), Judgment, 1970 I.C.J., ¶¶ 45-46, 54 (Feb. 5). See generally Edwin Montefiore Borchard, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD: OR, THE LAW OF INTERNATIONAL CLAIMS (1915).

38. American Friendship Commerce and Navigation (FCN) Treaties and early European BITs delegated the settlement of investment disputes either to the International Court of Justice or to ad hoc inter-state arbitration.

 violations, ISA stripped away the political and diplomatic considerations that had hitherto prevented many investor-state disputes from rising to the level of inter-state disputes, making the enforcement of treaty violations and the ensuing payment of damages more credible and more likely.

The decision to create treaty-based ISA in the 1960s is nothing short of astonishing. During the 1960s, even in deep integration projects such as the European Community (EC), states were reluctant to provide individuals with a direct means of supranational law enforcement. It took the European Court of Justice’s judgments to find a direct effect of EC law implied in the original EC treaty.\(^{40}\) Indeed, even by today’s standards, investment law’s innovation in the 1960s seems remarkable given that compulsory adjudication of international law, let alone compulsory adjudication initiated by private parties as opposed to states, continues to be the exception rather than the rule. One thus has to wonder whether the quite radical innovation to create such a powerful and innovative enforcement mechanism was accompanied by an equally radical innovation in treaty design more generally.

ISA clauses could have affected treaty design both substantively and procedurally. On the substantive side, ISA clauses could have led to a lowering of investment protection levels: while states may have been ready to tie their hands to tough commitments when they knew that they were unlikely to be enforced—few inter-state investment disputes had ever been brought—they may have been more cautious if they expected to actually be held to these standards. Hence, following this line of thought, one would expect to observe either a decrease in the number of obligations or an increase of the number of exceptions in IIAs with ISA as compared to IIAs without ISA.

On the procedural side, one could expect that if states consented to the radical step of being sued by private actors before an international compulsory arbitration mechanism issuing binding monetary awards, they would also add procedural safeguards to mitigate the sovereignty impact of this choice. In the WTO context, for instance, the gradual progression from a diplomatic to a more judicial dispute settlement architecture was accompanied by a simultaneous infusion of more politics into the GATT/WTO machinery. According to Joost Pauwelyn, “more discipline and harder law (less exit) lead to and require more politics and higher levels of participation (more voice).”\(^{41}\) The WTO rules governing amicable settlements are an example of this bidirectional interaction of law and politics. As legalization increased, the references to disputing parties’ freedom to avoid formal dispute settlement and resolve the matter bilaterally also increased to the point that in today’s quasi-automatic and highly judicial WTO

\(^{40}\) In its 1963 seminal judgment *Van Gend en Loos*, the ECJ found that a direct effect of EC law was implied in the European Economic Community (EEC) Treaty. Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 1. As Paul Craig and Gráinne de Búrca explain, “The strong interventions made on behalf of three governments [in *Van Gen den Loos*], half of the existing Member States, indicated that the concept of direct effect, understood as the immediate enforceability by individual applicants of those provisions in national courts, probably did not accord with the understanding of those states of the obligations they assumed when they created the EEC.” *Paul Craig & Gráinne de Búrca, EU Law: Text, Cases, and Materials* 185 (2011).

dispute settlement system, a “solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.”\textsuperscript{42} Applied to the investment law context, we should expect similar procedural safeguards to accompany the inclusion of ISA in order to ensure that the contracting states have some voice and scope for politics in an otherwise highly legalized architecture. Ex ante controls embedding contracting states’ preferences could carefully circumscribe the arbitration procedure. Ex post controls would allow the contracting states or other outside interests to monitor and weigh in on the tribunal’s interpretation or analysis in ongoing disputes. If anything, giving private actors a direct cause of action seems to warrant an even stronger role of such elements than in the inter-state WTO context. Hence, it is reasonable to expect that ISA may have had an impact both on the substantive and the procedural content of investment treaties.

2. Investment Arbitration Claims

A second way by which ISA may have impacted IIA design is through investment claims. ISA clauses lay largely dormant for over 20 years. It was only in 1987 that an investor for the first time relied on state consent given in an investment treaty to initiate an ISA claim in \textit{AAPL v. Sri Lanka}.\textsuperscript{43} It then took another 15 years before ISA became a more frequent means of recourse with more than 25 cases filed per year starting in 2002.\textsuperscript{44} Given this large gap before the law in the books turned into law in action, investment claims could constitute a second impact channel on treaty design separate from investment clauses.

Considering claims as unique impact channels finds support in the literature. Several scholars have argued that states had not fully grasped the liability implications of ISA clauses when they were first introduced and only understood their full potential when ISA claims began to proliferate. Lauge Poulsen’s empirical research on BIT diffusion convincingly shows that developing countries systematically underestimated the costs of IIAs and overestimated their benefits, taking BITs for simple “photo-opportunities” and mere “ink on paper.”\textsuperscript{45} Similarly, Christoph Schreuer stated in an expert opinion that developing countries often “had no idea that [BITs] would have real consequences in the real world.”\textsuperscript{46} In addition, commentators have also

\begin{footnotesize}

\bibitem{43} \textit{Asian Agricultural Products Ltd. v. Republic of Sri Lanka}, ICSID Case No. ARB/87/3, Award (June 27, 1990) [hereinafter \textit{AAPL Award}].

\bibitem{44} See Investment Dispute Settlement Navigator, UNCTAD, \url{http://investmentpolicyhubunctad.org/ISDS} (last visited Aug. 15, 2016).


\bibitem{46} Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, Final Award, ¶ 85 (Dec. 8, 2008) (quoting expert testimony of Professor Christoph Schreuer).
\end{footnotesize}
suggested that prior to the first investment claims, even developed countries could not have understood the full potential of ISA. Pauwelyn has argued that the idea of “arbitration without privity,”47 which today allows an investor to perfect an arbitration agreement with the host state by simply accepting an offer of consent unilaterally given by the host state in the investment treaty, was a largely unanticipated, and initially controversial, legal innovation first accepted by the AAPL tribunal in 1990.48 If both developing and developed countries were surprised by investment claims, we could expect that they altered their treaty design in response to mitigate the impact of ISA on state sovereignty.

There is a rich literature, albeit rarely empirical in nature, which addresses countries’ efforts to “rebalance” investment treaties in response to investment claims—sometimes framed as a “backlash against arbitration.”49 The common theme of this literature is that investment claims exposed a substantive tension between investment protection obligations and states’ regulatory powers, as well as procedural shortcomings in the arbitral process, such as a lack of public participation.50 In response, it is argued, states have included public policy exceptions into their investment treaties and refined the investment arbitration architecture to curb arbitral discretion and to allow for more involvement of outside interests.51 Following this literature, it is reasonable to expect states to have reacted to investment claims by adapting their treaty design, adding policy exceptions and procedural safeguards.

3. Investment Arbitration Case Law

A final way by which ISA may have impacted IIA design is through the case law it generates. As a corollary of their adjudicative functions, investment tribunals have to interpret the often vaguely phrased provisions in investment treaties. Investment tribunals thus exercise a de facto lawmaking role, filling the normative gaps left open by the treaty drafters.52 While delegation of interpretive power to tribunals saves negotiation costs ex ante, it can lead to ex post costs if third-party interpreters wrongly arrive at an interpretation unintended by the contracting parties.53 These costs of delegation are especially great if decisions by third-party adjudicators have de facto lawmaking power. Although there is no formal rule of precedent in investment law, parties and tribunals abundantly refer to prior arbitral interpretations in subsequent cases, including but not limited to

48. Pauwelyn, supra note 25, at 400.
49. See supra note 2; see also Waibel et al., supra note 28.
50. See supra note 2.
51. Id.
52. Instead of investing time and effort at the negotiation stage to anticipate future developments, states are often better off delegating normative gap-filling to third-party adjudicators. This is a basic insight of contract theory applied to treaties. See, e.g., Simon A. B. Schropp, Trade Policy Flexibility and Enforcement in the World Trade Organization: A Law and Economics Analysis 96-97 (2009).
disputes involving the same treaty. This practice has given rise to a sort of “investment common law”—a body of investment case law that is widely used to elucidate the meaning of core IIA provisions across treaties.

The existence of a parallel judge-made rulemaking process may impact how states as primary lawmakers design their treaties. Where they disagree with arbitral interpretations, states can use their normative powers to contract explicitly out of arbitral case law. Although states are unlikely to react to all arbitral pronouncements, they are likely to take sides in controversial debates that arise in case law and that critically affect the reading of their agreements. On rare occasions, for example, states have issued binding interpretations of existing treaties: a well-known example is the parties’ interpretive note on the meaning of NAFTA Article 1105 regarding the minimum standard of treatment. More often, however, arbitral interpretations may be factored in when new agreements are negotiated.

Aside from contracting out of arbitral case law, states can also explicitly endorse an arbitral interpretation. Where arbitrators resolve a difficult issue not anticipated by the drafters, their interpretation may serve as a template in future treaty-making. In a seminal piece, Thomas Schelling showed that “focal points” incentivize players to choose one outcome over another in coordination games involving several possible equilibria. In negotiations over new treaties, prior jurisprudence can constitute such a focal point leading to a convergence of views and corresponding changes in treaty design. Garrett and Weingast, for instance, use Schelling’s framework to explain why the European Community member states chose the European Court of Justice’s jurisprudence as a template for designing their single market rules rather than devising new rules from scratch.

In the same vein, contracting states to investment treaties may opt into solutions

58. For example, the NAFTA Free Trade Commission’s Notes of Interpretation of Certain Chapter 11 Provisions was integrated into subsequent BITs including those by the United States, Canada, and Mexico. See, e.g., 2004 U.S. Model BIT at art. 5 and Annex; Agreement Between the Czech Republic and the United Mexican States on the Promotion and Reciprocal Protection of Investments, Czech-Mex., art. 2, Apr. 4, 2002, 2449 U.N.T.S. 149.
devised in prior arbitral case law to solve problems not explicitly addressed in their earlier treaties. With states endorsing or rejecting arbitral interpretations, investment case law may constitute a third channel by which ISA impacts the design of IIAs.

II. METHODOLOGY

Using state-of-the-art empirical tools, we can trace and measure the impact of investment arbitration on treaty design through these three channels. This Part presents the dataset of treaties investigated, explains the content-analysis tools used to extract legally relevant information from these texts, and introduces the methods for analyzing ISA’s impact on treaty design.

A. The Dataset

To trace change in treaty content, this Article relies on the Alschner/Skougarevskiy (2015) dataset, which is the most comprehensive collection of English language BIT full texts to date. It comprises 1,628 English language BITs collected from the Kluwer Arbitration, Investment Claims, and UNCTAD investment policy hub websites amounting to 51% of the entire universe of signed BITs. The dataset spans from 1959 (Germany–Pakistan BIT) to 2014 and covers 171 countries. In spite of its breadth, the dataset under-samples two groups of signatories. First, it only captures a comparatively small portion of BITs signed by low-income countries, which, in part, is due to the fact that these countries publish their BIT full texts less frequently than higher income countries. Second, the majority of France’s BITs are not included in the dataset, since it comprises English language treaties only.

Even though the sample is not fully representative of the entire population of BITs, there are three reasons why this subset of treaties still allows us to make persuasive inferences on the entire BIT population. First, although it only contains English BITs, many non-English-speaking countries negotiate English language treaties or agree on an equally authentic English text in addition to a version in their native language. Often, the English version even trumps the native language version in case of an inconsistency. Second, BITs are highly homogenous texts, which closely follow common model treaties and multilateral draft conventions such as the OECD Draft Convention on the Protection of Foreign Property. These common roots make it less likely that BITs outside

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62. Id.
63. For instance, the Agreement Between the Government of the Republic of Croatia and the Government of Ukraine for the Promotion and Reciprocal Protection of Investments, Croat.-Ukr., Dec. 15, 1997, UNCTAD INV. POL’Y HUB, provides that “[i]f there is any divergence in interpretation, the English version shall prevail.” Similar formulations can be found, for example, in the Agreement Between the Swiss Confederation and the Hashemite Kingdom of Jordan on the Promotion and Reciprocal Protection of Investments, Jordan-Switz., Feb. 25, 2001, 1128 U.N.T.S. 82; see also Agreement on Reciprocal Promotion and Protection of Investments Between the Government of the Republic of Turkey and the Government of the Republic of Iran, Iran-Turk., Dec. 21, 1996, UNCTAD INV. POL’Y HUB (2003).
our sample are substantially different from those within it. Third, even though there may be a selection bias in reporting with some countries publishing the full texts of all their treaties, while others do not, this bias is mitigated by the bilateral nature of the treaties—BITs from virtually every country are in our dataset. Taken together these three factors make it less likely that the unreported or foreign language texts contain treaty features not also present in our sample.

Supplementing the 1628 BITs, this Article also includes fifty-two free trade agreements (FTAs) with investment chapters, such as NAFTA, identified from the WTO list of regional trade agreements and six multilateral investment agreements such as the ASEAN Comprehensive Investment Agreement identified through UNCTAD’s other IIA list. Not included are agreements that are not substantively equivalent to BITs, for example, FTAs that do not contain both relative (e.g. national treatment) and absolute (e.g. expropriation) investment protection clauses, and subject-specific investment agreements such as the Energy Charter. In total, our dataset thus comprises close to 1,700 IIAs.

Finally, data on treaty-based investment claims is taken from UNCTAD’s investor-state dispute settlement (ISDS) database. At the time of writing, the database comprised 561 cases spanning from 1987 to 2013.

B. Coding of Treaty Features

To track the changing legal content of IIAs in our database, the Article relies on an automated content analysis using machine-coding based on a dictionary of treaty provisions.


International law textbooks emphasize that investment treaties contain a set of core elements. Dolzer and Schreuer refer to common “principles of international investment law.” Montt describes the BIT universe as “a system that contains thousands of investment treaties, all having substantive provisions worded in closely similar terms.” For Salacuse, BITs form a global regime of investment protection characterized by common principles, norms, rules, and
decision-making processes. In short, there is considerable uniformity in the terms of recurring investment protection clauses.

The uniformity across treaties facilitates the creation of a codebook of frequently encountered clauses. For this Article, we devised an original codebook comprising fifty-five core investment treaty features relating to three dimensions of IIAs: (1) investment protection, (2) exceptions, and (3) investor-state arbitration. To identify representative clauses and their variation, we consulted investment law textbooks, reports by international organizations, BIT model agreements and commentaries, as well as concluded IIA texts. The list regroups the fifteen most common investment protection obligations found in IIAs, a range of twenty-three treaty exemptions, carve-outs, and exceptions that limit the scope of these obligations typically vis-à-vis non-investment values, and seventeen investor-state arbitration features that curb arbitral discretion either ex ante or ex post, reserving control for the contracting parties and outside interests. The specific coding features and coding process are detailed in Annex 1.

2. Representation of Treaty Design

The coding results are used in three different ways to represent treaty design. First, in its raw form, the coding allows us to depict the occurrence of specific treaty features and their changing prevalence over time. We can thus trace, for instance, when general public policy exceptions modeled on Article XX of the General Agreement on Tariffs and Trade (GATT) were introduced into the IIA universe and how they proliferated over time. Second, we can aggregate individual treaty features into their larger categories, i.e. protection, exception, and arbitration, to calculate how many treaty features per category occur in a given treaty and compare that figure across agreements. Third, we can calculate the cumulative score either of the total features per treaty or its substantive (protection and exception) and procedural (arbitration) components to get a sense of a treaty’s scope. These three different representations of our coding results thus allow us to produce fine-grained comparisons between agreements.

C. Research Design

We use our representation of treaty design to investigate the effect of investment arbitration on rulemaking using both quantitative and qualitative tools. Part III begins with a descriptive quantitative analysis of treaty design to

set the stage for our causal assessment of clauses, claims, and case law in Parts IV to VI. In Part IV, we present quantitative evidence, including a regression analysis, to trace the effect of investment clauses on other treaty design elements. Statistical tools, however, are less effective when applied to the impact of claims or case law. As will be further elaborated below, the impact of investment claims tends to be obscured by bidirectional causation as well as intervening or supervening variables difficult to control for in statistical analysis. Investment awards, in turn, are not amenable to regression or event studies as they tend to impact investment treaty-making only in the aggregate. Controversial cases spark arbitral disagreement that lead to the creation of different jurisprudential camps, to which states then react through treaty-making. Accordingly, Parts V and VI rely more heavily on contextual, qualitative assessments and case studies to reveal the impact of claims and case law on treaty design.

III. THE EVOLUTION OF INVESTMENT TREATY DESIGN

In this Part we begin by empirically tracing how investment treaty law has changed over time. This analysis creates the basis for our subsequent efforts to attribute treaty design changes to investment clauses, claims, and cases.

A. Evolving Investment Treaty Design

Investment treaties have changed quite drastically since their inception. Figure 1 traces that change using two different proxies: (1) IIA length (in character count) and (2) annual average treaty scores based on fifty-five coded clauses indexed by 2013 values. The figure shows first that the cumulative count of treaty features is highly correlated (0.95) with treaty length. As can be seen in Figure 1, both proxies of treaty design evolve almost identically. This suggests that our coding of treaty design features captures the changing scope of treaties well without omitting material changes. Second, the figure shows that agreements have gradually increased in length and scope at least since the 1980s, with the pace picking up significantly in the last decade.
**Figure 1: Annual average scores of treaty length and coded features between 1959 and 2013 (Index Basis: 2013 values)**

<table>
<thead>
<tr>
<th>Year</th>
<th>Treaty Length</th>
<th>Coded Treaty Features</th>
</tr>
</thead>
<tbody>
<tr>
<td>1960</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1970</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1980</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1990</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2010</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Note: The figure displays annual average scores of 1686 IIAIs concluded between 1959 and 2013. The length of a treaty (or investment chapter) is measured by the number of characters it contains. The number of coded treaty features is the cumulative count of fifty-five coded features per treaty. The annual average is calculated and yearly results are indexed between 0 and 1 as shares of 2013 values. To better understand what lies behind these changes we need to distinguish between two separate processes: the first appearance of a novel treaty feature and its diffusion in the IIA universe.

**B. Mind the Gap: The Crucial Difference Between Treaty Innovation and Diffusion**

Treaty design innovation and treaty design diffusion are two separate processes. They need not co-occur in time, nor are they necessarily determined by the same causal factors. That is why it is crucial to investigate them separately.

Beginning with the inclusion of new features, Figure 2 identifies when the fifty-five treaty features for which we code first appeared in the investment treaty universe and displays them as cumulative count per year and by treaty dimension. It shows that the evolution of IIA treaty design proceeded in several phases. The first period corresponds to the origins and early days of the IIA universe. The second coincides with the United States’ entry into the BIT universe in the early 1980s.  

The two latest periods of concentrated innovation—one in the early 1990s and one in the early 2000s—consist primarily of the introduction of new exceptions and investment arbitration control mechanisms. Table 1 lists the individual elements introduced in periods three and four. With respect to the features appearing in the early 1990s, on the exceptions side, we see efforts being made to harmonize normative conflicts between investment protection and non-investment values, from environmental protection to macro-economic policy. On the arbitration side, we see that states include procedural ex ante and ex post controls in their treaties. From the notice of intent that marks the beginning of the arbitration to the limitation of remedies at its end, we see that states define the arbitration process ex ante. In addition, contracting states begin to reserve control mechanisms ex post through authoritative interpretations, the return of certain questions of law and fact to the state parties, and the possibility of intervening in the arbitration process as a non-disputing state party.

Table 1: Exception and arbitration features appearing in the latest two periods of innovation depicted in Figure 2 above

<table>
<thead>
<tr>
<th>Third Period of Innovation: Early 1990s</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Exceptions</strong></td>
</tr>
<tr>
<td>Compulsory License Carve-out</td>
</tr>
<tr>
<td>Creditor Protection</td>
</tr>
<tr>
<td>Culture</td>
</tr>
<tr>
<td><strong>Arbitration</strong></td>
</tr>
<tr>
<td>Notice of Intent</td>
</tr>
<tr>
<td>Loss or Damage</td>
</tr>
<tr>
<td>Limitation Periods for Claims</td>
</tr>
</tbody>
</table>
Environmental Measures Clause
GATT XX
Exchange Rate Measures Carve-out
Prudential Measures Carve-out
Subsidies Carve-out

Waiver of Other Proceedings
Consolidation
Closed List of Remedies
Authoritative Interpretation
Renvoi to State Parties
State-party Participation

Fourth Period of Innovation: Early 2000s

Exceptions
Indirect FET Breach Carve-out
MFN Non-application to ISA
Bona Fide Taking Carve-out
Indirect Expropriation Definition
Investment Characteristics
FET linked to CIL

Arbitration
Transparency of Proceedings
Amicus Curiae
Preliminary Objections
Comment Procedure on Draft Award
Appellate Mechanism Proposal

In comparison to these extensive and quite radical changes, the elements that prevailed during the fourth period constitute targeted refinements. On the exception side, we see efforts to clarify key treaty provisions, from the definition of investment to the scope and content of fair and equitable treatment (FET), most-favored-nation (MFN) clauses, or expropriation. On the arbitration side, we see an integration of outside interests into the arbitration process through transparent proceedings and amicus curiae submissions, in addition to an increase in state control mechanisms such as comment procedures for draft awards and appellate review proposals.

Shifting from the first inclusion of these treaty design features to their proliferation, we see important differences, but also common trends. Figure 3 traces the evolution of the coded treaty design dimensions—protection, exception, and arbitration—over time. All three dimensions display a small but gradual growth over time. Protection scores increased particularly in the 1970s and 80s, as well as over the past five years. In contrast, exception and arbitration scores only began to surge during the past decade. The data thus suggests that, both in their first inception and their proliferation, protective obligations tend to predate exceptions and arbitration control mechanisms.
An important difference, however, lies in the timing of the first appearance of treaty features and their diffusion. The features first introduced in Period 3 spread only marginally in the IIA universe in the 1990s and early 2000s. Only after Period 4 innovations had already occurred, did the features of these two periods of innovation diffuse more broadly in the IIA universe. By 2013, on average, every second treaty signed contained Period 3 features and every third treaty had Period 4 elements. Accounting for this gap between treaty innovation and diffusion is thus likely to be key in isolating and understanding the impact of investment arbitration.

C. Developments in Investment Arbitration

Shifting from the effects we want to explain, i.e. treaty design changes, to their potential causes, Figure 4 traces the evolution of the three investment arbitration impact channels identified above: (1) the inclusion of investment clauses, (2) the yearly count of investment claims, and (3) the yearly count of investment awards rendered.
Figure 4: Evolution of the three investment arbitration impact channels (Index Basis: 2013 values)

Note: The figure displays the development of the three ISA impact channels between 1959 and 2013. The existence of ISA clauses is represented as the share of IIAs concluded per year that contain consent to ISA, normalized by 2013 values. (All treaties concluded that year in our database contain consent to ISA). Investment claims are measured as number of claims filed per year and normalized by 2013 values; fifty-one claims were submitted in 2013. Finally, investment awards data comes from italaw.com and includes all awards and decisions of treaty-based investment tribunals rendered per year, normalized by 2013 values. Eighty-one awards and decisions were rendered in 2013.

We see a steady increase in all three variables over time. First, investor-state arbitration clauses began to appear in the IIA universe shortly after the conclusion of the ICSID Convention and became virtually ubiquitous in the 1990s, with a small dip in recent years as countries like Australia stopped including them in their treaties. Second, investment claims began to increase sharply in the late 1990s and have continued to increase, with more than fifty claims being filed in 2013. Third, with a three- to five-year delay from the commencement of arbitration claims, we also observe a steady growth in investment case law from 2000 onward.

The remainder of this Article will bring together the different pieces of data linking developments in investment arbitration to changes in treaty design. A cursory comparison of the figures presented in this Part already suggests that the interplay between investment arbitration and investment treaty design is a complex one. Few if any significant treaty design changes seem to coincide in time with major changes in investment arbitration. Numerous treaty design innovations, like those in the early 1990s, either post-date (compared to investment clauses) or predate (compared to the surge of investment claims)

74. For a discussion of the Australian policy change, see infra, Part IV.
developments in investment arbitration, and stark changes in treaty design seem to have occurred well after the first proliferation of investment disputes and awards. Hence, we must engage in a nuanced investigation that distinguishes between treaty design changes that can be attributed convincingly to investment arbitration clauses, claims or cases and those that may be due to other factors.

IV. THE IMPACT OF ARBITRATION CLAUSES ON RULEMAKING

The first impact channel we identified was investment clauses. How does the inclusion or omission of an ISA clause affect treaty design? Do states, for instance, lower the degree of investment protection offered by their treaties or include specific procedural safeguards when they choose to let an IIA be enforced through investor-state arbitration? As this Part will show, investment clauses do not have a material impact on the other treaty design elements we coded for. This non-finding, however, has important normative implications.

A. No Material Impact on Treaty Design

In Part I, we hypothesized that treaties with ISA would display certain procedural ex ante and ex post controls over the arbitration process and would possess fewer investment protection features than treaties without it. Surprisingly, however, we find that ISA’s inclusion has not been accompanied by a meaningful increase in other systematic treaty design changes.

1. ISA Clauses and Procedural Safeguards

On the procedural side, contrary to the expectation derived from the WTO experience that more law (e.g. stronger enforcement) requires more politics (e.g. extra-judicial flexibility), states did not accompany ISA clauses with control mechanisms when they first decided to let investors enforce their IIAs. Prior to 1990, almost none of the BITs with ISA included additional procedural safeguards. At most, agreements contained one out of the sixteen ex ante and ex post arbitration controls for which we coded. These treaties may, for instance, establish committees of state representatives charged with monitoring the agreement’s application.

In other words, in most of the early BITs with ISA signed prior to 1990, no inter-state interaction is foreseen short of formal state-to-state dispute settlement. Accordingly, the home state is excluded from taking any part in the ISA process. The ISA procedure itself is sketched out in little detail, leaving it not to the contracting parties but to the disputing parties, or—if they cannot agree—to the arbitrators to mold the proceedings. With little procedural guidance ex ante and

75. At the same time, not all of these early BITs contained comprehensive ISA clauses. For the typology and prevalence of different ISA clauses, see Yackee, supra note 17.


77. See, e.g., Treaty Between the Federal Republic of Germany and the Kingdom of Nepal Concerning the Encouragement and Reciprocal Protection of Investments, Ger.-Nepal, art. 10(2), Oct. 20,
no means of intervening in the ISA dispute settlement process ex post, the contracting states did not accompany the inclusion of ISA clauses in early BITs with a set of procedural control mechanisms.

2. ISA Clauses and Substantive Treaty Design Differences

While ISA clauses were not accompanied by more widespread procedural changes in treaty design, did they trigger changes in the substantive content of IIAs: for example, prompting a reduction in protective clauses or an increase in exception provisions? A comparison of the protection and exception dimensions in IIAs with and without ISA suggests that ISA clauses do not lead to material differences in substantive treaty content.

Figure 5 compares the summary statistics of IIAs with and without ISA as boxplots. We see that both types of agreements display similar exception and protection scores. The majority of treaties in either category have only zero to two exceptions. When it comes to protection features, most treaties without ISA range between five and seven clauses, while IIAs with ISA range between six and eight protection clauses. Hence, apart from a slight difference in protection features, treaties with and without ISA are strikingly similar.

Figure 5: Comparing the substantive scope of IIAs with and without ISA between 1959 and 2013

Note: The figure compares IIAs with and without ISA between 1959 and 2013 as boxplots. The central box marks the 50% of observations around the median (black line). The median is six and seven for protection clauses without and with ISA respectively and one for exceptions in both groups. The "whiskers" show upper and lower quartiles representing the range of observations with dots being outliers.

In spite of this general similarity, did ISA clauses perhaps trigger treaty design changes when they were first introduced? To answer that question we

1986, 1554 U.N.T.S. 306. Article 10(2) merely refers disputes to ICSID arbitration without specifying the arbitration procedure or reserving a right for non-disputing parties to take part or to intervene.
focus on the initial twenty years of the IIA universe between 1959 and 1979, which marked the gradual transition from BITs without ISA to BITs with ISA. We run a Poisson regression with the existence of an ISA clause as an independent variable and the coded treaty scores of protection and exception levels as dependent variables respectively. We control for differences stemming from the richer treaty partner, as prior research found that developed countries differ in the treaty templates they employ and that these templates have a strong impact on treaty design outcomes. The results are reported in summary form in Table 2.

Table 2: Results of a Poisson regression of BITs between 1959 and 1979 investigating the link between the inclusion of ISA clauses and substantive treaty design

<table>
<thead>
<tr>
<th>Controls</th>
<th>Protection Scores</th>
<th>Exception Scores</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(1)</td>
<td>(2)</td>
</tr>
<tr>
<td>Existence of ISA</td>
<td>0.158** (0.073)</td>
<td>(0.163)</td>
</tr>
<tr>
<td>CHE</td>
<td>-0.030 (0.189)</td>
<td>2.101** (1.010)</td>
</tr>
<tr>
<td>DEU</td>
<td>0.257** (0.128)</td>
<td>2.683*** (0.995)</td>
</tr>
<tr>
<td>DNK</td>
<td>-0.148 (0.127)</td>
<td>-18.425*** (1.498)</td>
</tr>
<tr>
<td>FRA</td>
<td>0.075 (0.127)</td>
<td>-18.425*** (1.498)</td>
</tr>
<tr>
<td>GBR</td>
<td>0.275* (0.143)</td>
<td>1.614 (1.040)</td>
</tr>
<tr>
<td>ITA</td>
<td>-0.148 (0.127)</td>
<td>1.877* (0.991)</td>
</tr>
<tr>
<td>JPN</td>
<td>0.100 (0.119)</td>
<td>-18.551*** (1.525)</td>
</tr>
<tr>
<td>LBY</td>
<td>-0.841*** (0.127)</td>
<td>-18.425*** (1.498)</td>
</tr>
</tbody>
</table>

78. Alschner & Skougarevskiy, supra note 5.
79. I am grateful to Dmitriy Skougarevskiy for his guidance on this regression design.
The regression results show a statistically significant positive effect of ISA clauses on protection clauses, albeit with a very small magnitude. About every sixth BIT with an ISA clause will have one protective clause more than a BIT without an ISA clause. ISA clauses do not, however, have any statistically significant effect on a BIT’s propensity to include exception clauses. Therefore, contrary to our expectation, the inclusion of ISA clauses did not lead to a material redesigning of IIAs. On the one hand, it increased rather than decreased the protective dimension of a treaty—albeit only very slightly. On the other hand, states did not increase exceptions in their BITs to mitigate the impact of ISA clauses on policy issues. This absence of a larger effect of ISA clauses on the substantive scope of BITs suggests that, when they first introduced ISA clauses, states did not consider them to warrant a transformation of treaty design more generally. They merely saw ISA clauses as self-standing procedural add-ons.

When we look at more modern IIAs with and without ISA this assessment does not change. In April 2011, the Australian government announced that it would refrain from including ISA clauses in future IIAs. Comparing the substantive protection and exception dimension of the treaties signed immediately prior to this shift in policy (e.g. Australia-Chile FTA (2008) and ASEAN-Australia-New Zealand FTA (2009)) with those treaties signed after it with New Zealand (2011), Malaysia (2012) and Japan (2014), we do not find any systematic variation in treaty design between ISA and non-ISA treaties. Eleven out of the fifteen protection clauses and sixteen out of the twenty-three exception clauses do not vary across the five agreements. More importantly, of the remaining eleven features that do vary, not one of them clusters in groups of ISA versus non-ISA treaties. Hence, Australia considered ISA clauses as something it could include or omit in its treaties without having to adjust the agreements’ substantive scope.

Finally, recent investment treaty practice provides an even more striking illustration of the non-impact of ISA clauses on other substantive treaty design elements. The TPP concluded in October 2015 contains an investment chapter

\[
\begin{array}{lcc}
& NLD & SWE \\
& -0.049 & -0.306^* \\
& (0.125) & (0.119) \\
\text{Constant} & 1.534^{***} & -1.877^* \\
& (0.127) & (0.991) \\
\end{array}
\]

\[p<0.1; \quad ^*p<0.05; \quad ^{***}p<0.01\]

1 Richer signatory country dummies (ISO-3 country code)
with an ISA mechanism.  

Australia and New Zealand, however, agreed in a letter exchange to preclude its investors from having recourse to ISA against the other party respectively.  

That means that identical TPP investment obligations and exceptions are enforceable by investors and their home states in some bilateral relationships and exclusively by the home states in others. The choice of enforcement mechanism is thus independent from the substantive content of an IIA.

B. Implications for Normative Debates

The empirical analysis revealed that the introduction of ISA clauses has not been accompanied by material treaty design alterations. From this analysis, we can draw two key lessons.

1. Procedural Controls and the Depoliticization of Investment Disputes

Considered in light of the historical context, the decision not to add further procedural safeguards when ISA clauses were first introduced seems to have been a conscious design choice rather than an oversight by the treaty drafters. Depoliticizing investment disputes and pacifying international relations was a major impetus for the development of investor-state arbitration in the 1960s; it was thought that enabling private investors to sue host states would prevent investment disputes from becoming inter-state disputes. Accordingly, BITs with ISA involved a basic bargain for both home and host states: home states would refrain from vindicating the rights of their nationals abroad as long as host states agreed to settle disputes with these foreign investors via international arbitration. The exclusion of inter-state or home state control mechanisms over investor-state arbitration was thus an intentional design feature to depoliticize investment disputes.

Whether the same rationale of depoliticization still justifies the exclusion of procedural state controls today, however, is doubtful. The risk of investment disputes spiraling into inter-state conflict is lower today than it was at the advent

81. For an in-depth discussion, see Alschner & Skougarevskiy, supra note 35.
83. BROCHES, supra note 13, at 163; Shihtata, supra note 13, at 2. See generally PARRA, supra note 13. In addition, the ICSID Convention provided in Article 27 that home states are precluded from exercising diplomatic protection vis-à-vis investors while an investor-state arbitration is ongoing. ICSID Convention, supra note 14, art. 27.
84. Pauwelyn, supra note 25, at 402-04.
85. As Figure 3 reveals, starting in the 1990s and gaining traction in the 2000s, we see a partial reversal of that policy and a "return of the state" as more procedural ex ante and ex post controls are inserted into IIAs to accompany ISA clauses. See Alschner, supra note 36; Alvarez, supra note 2. We will further discuss this policy change in the next Part as it coincided with the spread of investment claims rather than investment clauses.
of ICSID. Ideological divides have given way to embedded liberalism; international organizations ensure constant inter-state dialogue and provide mechanisms for the peaceful settlement of disputes. Indeed, empirical research shows that high-level political pressure over investment issues has become extremely rare. At the same time, investor-state dispute settlement today is a driver of politicization rather than a vehicle of depoliticization given the controversies surrounding it. It now divides states into ISA supporters (e.g. United States), opponents (e.g. Venezuela) and reformers (e.g. European Union). As a result, justifications prominent in the 1960s should not stand in the way of a more important role of procedural safeguards today. Recalling the mutually beneficial interaction of law and politics at the WTO discussed above, the infusion of more inter-state politics into investment law may be the best recipe to attenuate the increasingly controversial perception of ISA. Recent treaty practice suggests that such developments are well underway.

2. Substantive Investor Rights? ISA Clauses as Mere Procedural Add-ons

Turning to the substantive treaty dimension, the empirical analysis revealed that ISA clauses are procedural add-ons whose inclusion or omission does not materially alter the substantive content of an IIA. Apart from a slight propensity to be more protective, IIAs do not systematically vary depending on whether they contain ISA or not. This finding should thus add a qualification to assertions that ISA clauses are to be viewed as transformative of IIAs. While the inclusion of ISA clauses in IIAs has undoubtedly impacted the practice of investment law, their inclusion or omission had a much weaker effect on treaty design. Negotiators do not design their agreements differently depending on whether they draft an IIA with or without ISA.

This insight has important normative implications. First, it helps us reevaluate claims that ISA changed the “nature” of investment treaties. The nature of IIAs, and the nature of their substantive obligations in particular, are a hotly debated issue in international investment law. One camp posits that the substantive obligations contained in IIAs are only owed towards the other state party and that investor rights are procedural, but not substantive, in nature. Another camp asserts that the protective obligations in IIAs are owed to the other

88. On ISA controversies, see supra notes 21 and 22.
89. See, e.g., Alschner, supra note 36; Roberts, supra note 56; UNCTAD, supra note 53.
90. See the United Mexican States, ICSID Case No. ARB (AF)/04/5, Award, ¶ 173 (Nov. 21, 2007); ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 35 (2009) (Substantive obligations are merely “applicable adjudicative standards for the claimant’s cause of action rather than binding obligations owed directly to the investor.”).
contracting states and their investors directly. Some go even further, arguing that IIAs are like “contracts for the benefit of third parties” and are to be enforced primarily by investors and only secondarily by states. Deciding which camp is right has significant implications for a myriad of practical legal questions on how inter-state affairs affect investor-state relations and vice versa. If substantive investment treaty rights are owed to states alone, a host state can, for instance, rightfully suspend them as countermeasures without paying compensation in response to a lawful act by the home state. By contrast, if treaty rights are owed to the investor, such an international-law-compliant retaliation does not absolve the host from the obligation to pay compensation to the home state’s investors aggrieved thereby. Similarly, if substantive treaty rights are vested in states, home governments can settle investment disputes over the heads of their investors; yet if these rights actually belong to individuals, investors could veto any such settlements or re-litigate disputes already settled between the contracting parties. Finally, substantive investor rights would also mean that investors could waive treaty protection in investment contracts; if, however, the rights were those of the home state, then it would not be in the investor’s power to forego them. Our analysis sheds new light on these and related legal debates by revealing that ISA’s impact is purely procedural: through an ISA clause a second enforcement route is added next to the state-to-state dispute settlement procedure; no material and systematic impact on investment treaty substance was detected. This empirical insight thus suggests that the more convincing view is that ISA clauses create procedural, but not substantive, investor rights.

Second, the independence of enforcement and substance may also affect how an investment treaty is to be interpreted. The existence of investor-state arbitration has given rise to an individualized conception of key protective provisions. Tribunals assess compliance with fair and equitable treatment based on whether the investor’s individual legitimate expectations, rather than those of its home state, were violated. Similarly, when determining whether a more favorable clause from a third treaty should be incorporated by reference into the


96. While this does not disprove the point that the inclusion of ISA may have implicitly affected the nature of IIAs’ substantive obligations, it places a higher burden of persuasion on proponents of the substantive investor rights view to show why the original inter-state nature of IIA obligations has been altered even though no explicit change in substantive treaty content is empirically apparent.

base treaty through MFN, more favorable treatment is measured vis-à-vis the particular claiming investor and not in relation to an abstract class of home state investors or vis-à-vis the home state itself.\footnote{Tony Cole, The Boundaries of Most Favoured Nation Treatment in International Investment Law, 33 Mich. J. Int'l L. 537, 571-72 (2012).} Finally, with respect to national treatment, tribunals and scholars have argued for differing interpretations between trade and investment regimes on the basis that the former is about competitive opportunities between states, while the latter is about protecting individual rights.\footnote{Nicholas DiMascio & Joost Pauwelyn, Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?, 102 Am. J. Int'l L. 48 (2008).}

The interpretation of IIA provisions, which are typically phrased as inter-state promises, in such an individualized light draws its justification from ISA’s enforcement procedure. The conceptual separation of procedure and substance in IIAs may thus prompt us to reconsider the merits of a more state-centric rather than investor-centric interpretation of IIAs’ protection clauses.

Finally, the insight that ISA clauses are procedural add-ons that leave substantive IIA obligations unaffected gives flexibility to investment treaty drafters to tweak the system’s enforcement architecture. Whether negotiators want to reform ISA, replace it with an investment court system as suggested by the EU, or omit it entirely, opting for a WTO-like state-to-state dispute settlement system instead, they can do so independently of any concurrent reform of the treaties’ substance. Similarly, the independence of substance and procedure also means that multilateralization efforts can selectively target only the latter. Negotiators can thus replace agreement-specific ad hoc tribunals with a standing multilateral body while leaving bilateral treaties dealing with substantive investment protection in place. In short, the insight that ISA is a mere procedural add-on helps negotiators to reform investment law.

V. THE IMPACT OF ARBITRATION CLAIMS ON RULEMAKING

The puzzle remains why states did not react to the inclusion of ISA clauses by changing the design of IIAs, given ISA’s potentially more severe impact on sovereignty as compared to inter-state arbitration. Did they specifically intend to leave treaty design otherwise unchanged? Or did they perhaps misunderstand the true potential of ISA enforcement and were surprised when, thirty years after ISA’s first inclusion, investment claims suddenly began to proliferate? When states then learned about the implications of ISA, did they respond by lowering investment protection and by adding defensive elements to their treaties to mitigate the adverse impact of ISA on their policy space? To find answers to these questions we turn to the second impact channel—the effect of investment claims on treaty design.

A. Learning From Claims?

To measure the impact of investment claims, we first have to understand the causal mechanisms by which they affect treaty design. Scholars investigating
the effect of investment claims typically start from the premise that states may have underestimated or misunderstood the full potential of ISA. From that premise onwards, however, opinions diverge on how best to explain the way states learn from investment claims and alter their treaty design. One theory posits that states may be Bayesian learners, updating their treaty design preferences when new information becomes available. Under a second theory, states are assumed not to act perfect-rationally, but bounded-rationally, only changing their treaties when they themselves become subject to an investment claim and immediately feel its adverse impact. As we will show, regardless of which theory is investigated, scholars need to account for bidirectional causal effects and unobserved intervening or supervening variables; moreover, they need to clearly distinguish between what treaty design change is measured—innovation or diffusion—to unveil the causal mechanisms connecting claims and treaty design.

1. Bayesian Learners

If states were Bayesian learners, then the first information that they could have used to update their knowledge about ISA’s true implications would have been the first treaty-based investment claim, AAPL, which was admitted in a 1990 decision. As discussed above, AAPL was the first tribunal to recognize the initially controversial position that an ISA clause in an IIA provides the investor with a direct means of recourse to enforce treaty violations before international arbitration. We would then expect to observe treaty design changes being introduced widely in the early 1990s in the wake of that decision.

2. Bounded Rational Learners

The alternative theory posits that states only reacted to investment claims when they felt the detrimental consequences of ISA themselves and not by learning about claims against others. Investigating the impact of investment claims on treaty signing patterns, Poulsen and Aisbett, for instance, find that developing countries tended to sign fewer investment treaties only when they

100. See supra Part I.

101. A Bayesian learner theory, supposing that states learn generally from investment disputes around the world, arguably underlies most legal scholarship on the subject. See, e.g., UNCTAD, supra note 3, at 71 (“It is evident that the significant increase in the number of ISDS claims over the last decade has had an impact on the process of investment rulemaking. ISDS practice has led numerous countries to realize that the specific wording of IIA provisions does matter, and that it can make a significant difference to the outcome of an investment dispute. Thus, it is no coincidence that several countries in the Asia-Pacific region recently revised their model IIAs and updated their wording, content, and structure to incorporate the lessons learned from investment-related litigation experience.”).


103. AAPL Award, supra note 43.
were hit by investment claims themselves rather than in response to investment claims generally. 104

The underlying idea derived from behavioral sciences is that decision makers tend to “rely excessively on information that is vivid and easily available.” 105 Information about claims against other states is both emotionally remote due to optimism bias (“this will never happen to us”) as well as costly to obtain. In contrast, being hit by a claim is an immediate and vivid experience. This then results in a bias in information processing as states fail to react to readily available information until they themselves become a target for investment claims.

Which theory better corresponds to reality is a matter of empirical analysis. Yet, in order to empirically verify one theory or the other, researchers have to isolate the causal impact of investment claims from other factors that may influence investment treaty design.

3. Limitations of Existing Econometric Evidence and the Need for Context

Econometric studies are used in deductive empirics to find causal relationships. In the context of investment claims’ impact on treaty design, these studies have yielded mixed results. Manger and Peinhardt found that learning from both claims against others (Bayesian updating) as well as claims against the home state (bounded rationality) lead to treaty design change. 106 They conclude that states add “precision” to their treaties, modeled alternatively as an aggregate count of coded clauses or treaty length, in response to investment claims.

Opting for a different research design, Dmitriy Skougarevskiy and I concluded that being hit by a claim does not cause treaty design innovation. 107 We focus on textual innovation rather than changes in coded clauses or treaty length and account for a potential endogeneity of claims and treaty design by including an instrumental variable. Even if we allow for a lagged impact, we do not find any statistically significant effect of investment claims on treaty design innovation. We did not test the Bayesian updating theory.

In order to properly understand the impact of investment claims, we need to move beyond existing studies. First, as we saw in Part III, there is a gap between treaty innovation in the early 1990s and 2000s and their diffusion starting in the second half of the 2000s. Earlier work focuses either on innovation or diffusion, yet only if we investigate both dimensions and understand the gap between them, can we accurately describe the impact of investment claims. Second, econometric studies investigating the impact of investment claims struggle with omitted variable bias, making alternative, more contextual,
research strategies more viable. On the one hand, we need contextual knowledge to understand whether bidirectional causation is at work: investment claims may lead to treaty design variations, but vice versa, treaty design variations may also lead to investment claims. On the other hand, contextual knowledge is also required to identify alternative causal factors diluting, enhancing, or impeding any impact of investment claims on treaty design. In particular, we need to investigate whether, how, and why responses to investment claims may vary across countries. Although sophisticated econometric studies employing instrumental variables, better control variables, and/or fixed effects may be able to overcome these difficulties, a precondition to any such exercise is a thorough contextual understanding of the interaction between different variables. In the remainder of this Part we therefore provide such a contextual account using case studies, and distinguish between innovation and diffusion as variables to be explained.

B. Treaty Design Innovation and Investment Claims

We begin by analyzing the causal impact of claims on treaty design innovation looking at the two periods of innovation that coincide with the surge of investment claims—Period 3 innovations from the early 1990s and Period 4 innovations from the early 2000s.

1. Innovation in the Early 1990s: Anticipating Rather than Reacting to Investment Claims

What caused the inclusion of new treaty design features in the early 1990s? Almost all the elements we coded for (apart from GATT XX type exceptions) that were introduced in this period can be linked to one agreement: the North American Free Trade Agreement (NAFTA). In NAFTA, Canada, Mexico, and the United States radically expanded the then-existing treaty design, adding sixteen new features (out of the fifty-five coded) to the repertoire of IIAs. What motivated Canada, Mexico, and the United States to introduce a radically different treaty design consisting of new exceptions and novel control mechanisms in arbitration?

When NAFTA was concluded in 1992, none of the NAFTA parties had been subject to investment claims. Hence, bounded rationality fails to explain the shift in policy. Were Canada, Mexico, and the United States then perhaps negotiating under the shadow of the AAPL claim accepted previously in 1990 as a landmark event? Probably not. First, although AAPL has in hindsight been labeled a landmark event, it was much less well known at the time it was decided, even in academic circles. Strikingly, although the 1992 American Society of International Law Annual Meeting (coinciding with NAFTA negotiations) covered the issue of investment law and even invited a judge from Sri Lanka (the country targeted by the first investment claim), none of the speakers even

108. Appropriately, Pauwelyn calls it a "silent revolution." Pauwelyn, supra note 25, at 397.
mentioned the case. The claim was only popularized and placed in its wider context through Jan Paulsson’s seminal article “Arbitration without Privity” five years later. Second, the AAPL decision was legally controversial at the time it was rendered, producing a dissenting opinion. Hence, it was far from clear that the position adopted by the tribunal’s majority would be considered mainstream by the end of the decade. Third, even if the NAFTA negotiators had known about AAPL, a legally controversial majority opinion against a developing country on the other side of the Pacific concerning a shrimp farm is unlikely to have triggered a major policy review in the United States and Canada. Fourth, while the United States agreed to significant treaty design innovations in NAFTA, it did not subsequently alter its BIT model until a later 2004 reform. Had the NAFTA policy change been prompted by a sudden realization of ISA’s true nature, these changes would then have arguably also been integrated into U.S. BITs. The reason for the treaty design shift must thus be found in NAFTA itself and not in AAPL.

NAFTA marked the first time in modern investment law that two developed countries with large mutual foreign direct investment (FDI) stocks agreed between themselves on extensive investment protection provisions enforced through investor-state arbitration. Including an investment chapter in an FTA was not strictly new. The Canada-USA Free Trade Agreement signed in 1988 already had an investment chapter, albeit without investor-state arbitration. Thus, the novelty in NAFTA was the integration of an ISA clause, which, even though it was presumably targeted primarily at the newcomer Mexico, could also be used against Canada or the United States.

Most investment relations underlying IIAs were marked by decidedly asymmetric capital flows from a (developed) source to a (developing) destination country. In contrast, investment relations in NAFTA were characterized by

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110. Paulsson, supra note 47.
112. See Section V.C.2 for United States case study.
113. See Mark Clodfelter, U.S. State Department Participation in International Economic Dispute Resolution, 42 S. TEX. L. REV. 1273, 1283 (2001) ("The United States, and for that matter Canada and Mexico, took a very big step into the unknown when they signed on to Chapter 11 . . . . Even though the United States has been party to a fair number of BITs, which have arrangements resembling Chapter 11, we have never done so with states that have so much investment in our territory."); Daniel M. Price, An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement, 27 Int'l L. 727, 736 (1993); J. Anthony VanDuzer, Investor-State Dispute Settlement Under NAFTA Chapter 11: The Shape of Things to Come, 35 CAN. Y.B. INT'L L. 263, 266 (1997). Canada and the U.S. had already concluded an FTA with an investment chapter in 1988. However, that earlier agreement only contained a rudimentary set of provisions and no ISA. See Jean Raby, The Investment Provisions of the Canada-United States Free Trade Agreement: A Canadian Perspective, 84 AM. J. INT'L L. 394, 395 (1990) ("Canada is the big winner on investment . . . . Canada’s ability to regulate and control American direct investment has not been drastically reduced by the FTA.").
114. See Raby, supra note 113, at 418.
115. See Jeswald W. Salacuse & Nicholas P. Sullivan, Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain, 46 HARV. INT'L L.J. 67, 77 (2005) ("[A] BIT between a developed and a developing country is founded on a grand bargain: a promise of protection of capital in return for the prospect of more capital in the future."); see also Jeswald W. Salacuse, BIT by
considerable bidirectional investment flows and mutual FDI stock. This novel symmetry in investment relations had an impact on treaty design. Negotiators could no longer ignore the possibility that Canada or the United States would become targets for investment claims. Then, an exception structure and enforcement architecture emerged that mitigated the impact of investment arbitration claims. The NAFTA treaty design revolution was thus about *anticipating* rather than *reacting* to investment claims.

If that assessment of the policy shift underlying NAFTA is correct, then an important corollary follows. While empirical research shows that developing countries may have long underestimated the liability risks of ISA enforcement, at least some developed states were arguably aware of them. However, until NAFTA these states considered the likelihood of ISA enforcement too remote. Empirical research suggests that developed countries are chiefly responsible for treaty design outcomes by furnishing and insisting on their treaty template as basis for negotiations. Put differently, developed countries are the system’s rule-makers while developing countries are its rule-takers. As long as investment flows were asymmetrical, the likelihood for a developed state to be sued by a developing country investor was extremely remote. Hence, developed countries could comfortably live with a strong ISA enforcement without simultaneously lowering protection or adding voice to the arbitration procedure because they were not likely to be the target of the more intrusive law enforcement. NAFTA changed this arrangement. As symmetry entered investment relations so did the safeguards to mitigate the anticipated effect of investment arbitration through additional exceptions and arbitration control mechanisms that we identified in Table 1. Hence, while the Mexico, United States and Canada may not have fully foreseen all implications of ISA, they, in contrast to (most) developing countries, did not need to learn from investment claims, but had already understood the broad liability implications of ISA.

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117. See POULSEN, supra note 45.
118. See Alischner & Skougarevskiy, supra note 5.
120. In that vein, former U.S. BIT negotiator Alvarez explains: “The United States did not need to worry very much about adapting its laws or practices, … because, given the one-way flow of capital between the relevant parties, it was extremely unlikely that investors from any of those countries would emerge in any significant presence in the United States, much less be in a position to file a complaint against the United States for a breach of the BIT.” Josè E. Alvarez, *The Evolving BIT*, 7 TRANSNAT’L DISP. MGMT. 3 (2010), www.transnational-dispute-management.com/article.asp?key=1542.
2. *Innovation in the Early 2000s: Refinements Based on Case Law Developments Rather Than Learning From Claims*

While NAFTA innovations may not have been caused by then-existing investment claims, can the Period 4 innovations from the early 2000s be explained as reactions to investment claims? Poulsen highlights that "it wasn't until around 2002 that developing countries had clear information available that BITs' ability to expose host states to liabilities was very real and concrete, rather than merely vague and abstract."\(^{121}\) Also, by that time, developed countries had become the targets of investment claims. The late 1990s had seen a wave of NAFTA claims launched against the United States and Canada, and the first set of awards, such as *Mondev v. United States* and *S.D. Myers v. Canada*, was handed down in 2002.\(^{122}\) In short, while states may not have taken notice of the AAPL claim, they could be expected to react to the wave of claims that had materialized by the early 2000s as Bayesian learners. Alternatively, they might have become targets of investment claims themselves, potentially triggering a bounded rational response. Although the timing of Period 4 innovations coinciding with the rise of claims could suggest as much, the substance of the innovations paints a different picture.

If states had been surprised by an unexpected surge of investment claims and sought to correct their earlier mistakes by reining in the treaties' propensity to unduly restrict policy space, we would expect states to react with Period 3 features as we have seen them in the early 1990s: new exceptions, means of interstate intervention into the arbitral process, and limitations on the access and compensation arbitration can provide to investors. These changes gave birth to a veritably new type of investment treaty design and arbitration.

Period 4 innovations, in contrast, constitute targeted refinements. Some of these refinements, such as new provisions on preliminary objections, also make it easier for states to defend against investment claims. Yet, the bulk of innovation is not targeted at correcting the architecture of investment treaties as such, but is rather aimed at guiding its use and preventing its abuse. As we will show in Part VI, these novel inclusions (such as a clarification that MFN does not apply to dispute settlement clauses) would hardly make sense as tools to limit the impact of investment claims devoid of the context supplied by arbitral practice and jurisprudence. Part VI, *infra*, argues that these innovations are to be understood not as reactions to unanticipated investment claims, but to unanticipated investment case law.

C. *Treaty Design Diffusion and Investment Claims*

While investment claims cannot convincingly be said to have caused most of the treaty innovation from the 1990s onwards, did they play a significant role in their diffusion? As this Section will show, the impact of investment claims on

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\(^{121}\) Poulsen, *supra* note 102, at 203-04.

\(^{122}\) *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002) [hereinafter Mondev Award]; *S.D. Myers, Inc. v. Canada*, UNCITRAL, Second Partial Award (Oct. 21, 2002) [hereinafter S.D. Myers Second Partial Award].
the diffusion of treaty design changes is actually much smaller than the vivid, well-known example of the United States changing its BIT design in the wake of claims suggests. Two other processes have instead decisively shaped the diffusion of treaty design change: (1) bidirectional causation and (2) the domestic policy environment, which determines whether path dependency and bureaucratic inertia are heeded or overcome.

1. Bidirectional Causation

In part, econometric models face difficulty in isolating the impact of investment claims on treaty design because causality can work both ways, a phenomenon also known as reverse or bidirectional causality: investment claims can cause treaty design changes, and treaty design changes can cause investment claims.

NAFTA is a case in point. Quite counter-intuitively, NAFTA—a treaty designed to fend off investment claims through more exceptions and procedural controls—has been instrumental in facilitating the surge of investment claims. In the decade between AAPL in 1987 and 1997, only eleven investment cases were filed. All but two of them were brought under different BITs, involved different parties, and were defended and heard by different counsels and arbitrators. Moreover, half of these early cases were settled without resulting in awards. Put differently, by 1997, investment arbitration hardly existed as a field. Then, between 1997 and 1999, a total of thirty-one claims were submitted, ten of which were brought under NAFTA.

NAFTA by itself did not cause these claims. Yet, it provided a necessary, if not sufficient, environment to enable their proliferation. First of all, in the late 1990s a group of inventive and entrepreneurial North American lawyers “discovered” NAFTA’s potential for opening a new avenue of litigation. One of these NAFTA pioneers was Canadian lawyer Barry Appleton. In June 1994, Appleton published “Navigating NAFTA: A Concise User’s Guide to the North American Free Trade Agreement.” In 1997, he filed one of the first NAFTA cases: Ethyl Corporation v. Canada. In the following three consecutive years, Appleton represented claimants in S.D. Myers (1998), Pope & Talbot (1999) and UPS (2000) against Canada. NAFTA thus enabled industrious lawyers like Barry Appleton to establish a new area of litigation practice.

Second, the development of Chapter 11 into an area of litigation triggered a migration of prestigious practitioners attracted by new professional opportunities, as well as a need for competent NAFTA arbitrators. High-level adjudicators from other international tribunals, including Stephen Schwebel, former judge and president of the International Court of Justice (ICJ), joined the

123. This number is based on UNCTAD’s database on investor-state disputes, Investment Dispute Settlement Navigator, UNCTAD, http://investmentpolicyhubunctad.org/ISDS (last visited Aug. 15, 2016).
The surge of NAFTA Chapter 11 claims from the 1990s onwards was also a key factor in establishing investment arbitration as a field of study. Early NAFTA cases sparked vivid academic debates drawing scholars and their students to this new field of law. A search for academic journal articles on HeinOnline using “NAFTA Chapter 11” and “investment arbitration” as key words between 1992 and 2012 illustrates this: NAFTA Chapter 11 initially received more academic attention than investment arbitration, yet starting in the mid-2000s investment arbitration eclipsed the former in academic publications.128

Finally, NAFTA made investment arbitration known to the North American general public. Inspired by controversies surrounding Chapter 11’s implications for environmental or health policy, non-governmental interest groups took positions on (and often against) elements of Chapter 11 contributing to public awareness on investment arbitration.129 Furthermore, media coverage on investment arbitration increased as programs like the 2002 PBS documentary “Trading Democracy” critically reviewed early NAFTA cases.130

At a time when few non-experts knew about investment arbitration in Europe, the issue had already triggered public debates in North America. In short, NAFTA was the best promotion campaign investment arbitration could have gotten and was therefore instrumental in setting the stage for the ensuing proliferation of investment claims.

NAFTA’s role in shaping the early days of investment arbitration had an impact on the subsequent diffusion of its treaty design elements, which surged from the mid-2000s onwards. Of the ten NAFTA claims submitted between 1997

126. Stephen Schwebel was a judge at the ICJ between 1981 and 2000 and its president between 1997 and 2000. He was first appointed as NAFTA arbitrator by the respondent in Mondev Award, ICSID Case No. ARB(AF)/99/2. He has since served on a number of investment arbitration tribunals. See Stephen M. Schwebel, INT’L ARB. INST., http://www.iaiparis.com/profile/stephen.schwebel (last visited Oct. 13, 2016).


128. In 1992, more articles were published on investment arbitration than on NAFTA Chapter 11. However, NAFTA scholarship overtook general investment arbitration writing in 1999; the volume of NAFTA Chapter 11 scholarship peaked in 2005. After 2005, the trends reversed and by 2012, six times as many articles were published on investment arbitration than on NAFTA Chapter 11. These figures were retrieved based on a key word search for “investment arbitration” and “NAFTA Chapter 11” on HeinOnline in December 2015.


and 1999, nine resulted in awards. NAFTA decisions were thus among the first rendered by arbitral tribunals shaping the foundation of this early field of law. The Metalclad,\textsuperscript{131} Loewen\textsuperscript{132} or Methanex\textsuperscript{133} awards have become “classics” in today’s investment arbitration. Moreover, until 2013 NAFTA was the most litigated treaty with over fifty disputes filed.\textsuperscript{134} As a result, NAFTA provisions are among the most interpreted and commented treaty elements in the IIA universe, adding to their predictability. It is thus easy to see why NAFTA innovations spread as investment claims rose: if countries wanted to change their treaty design to mitigate the often unforeseen impact of investment claims, they could turn to NAFTA as an off-the-shelf alternative to their existing practice that had been tried and tested in actual cases. The use of NAFTA in early claims thus created a path dependency as countries opted into language tested and clarified through arbitration.

In conclusion, we are confronted with a causality loop between investment claims and the diffusion of NAFTA design elements: NAFTA provided an enabling environment that led to investment claims, and these investment claims, in turn, entrenched NAFTA’s position as a trusted treaty design alternative for countries anticipating or reacting to investment claims.

2. Stories of Non-diffusion: United States, Canada, Germany and Japan

Yet, what exactly triggers a country’s decision to engage in innovation by opting into the NAFTA treaty design elements? Is it, as the above-presented theories suggest, a response to being hit by an investment claim or learning from others’ experiences with arbitration? Or are there other elements at play? To answer that question, we investigated the changing BIT practice of the United States, Canada, Germany and Japan.\textsuperscript{135} These four countries share similar characteristics—they are wealthy, developed democracies with large stocks of outward and inward investments. Yet, their experience with investment claims and treaty design changes differs starkly, making them interesting case studies. The United States and Canada were subject to investment claims early on, yet while the United States changed the design of its treaties only after becoming a respondent to investment claims, Canada had integrated many NAFTA features into its BITs prior to its first investment claim. Germany was also hit by investment claims early on, but did not alter its treaties subsequently. Finally,

\textsuperscript{131} Metalclad Corp. v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, ¶ 73 (Aug. 30, 2000) [hereinafter Metalclad Award].

\textsuperscript{132} Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3, Award, ¶ 1 (Jun. 26, 2003) [hereinafter Loewen Award].

\textsuperscript{133} Methanex Corp. v. United States, UNCITRAL, Partial Award, ¶ 8 (Aug. 7, 2002) [hereinafter Methanex Partial Award]; Methanex Corp. v. United States of America, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, ¶2 (Aug. 3, 2005) [hereinafter Methanex Final Award].

\textsuperscript{134} After 2013, the Energy Charter Treaty overtook NAFTA, attracting double-digit numbers of new cases per year. Investment Dispute Settlement Navigator, supra note 44.

\textsuperscript{135} We focus exclusively on BITs (rather than IIAs generally) to ensure comparability between the four different cases; Germany has not signed any FTAs with investment chapters on its own.
although Japan was never a respondent in an investment dispute, it remodeled its treaties significantly after 2002.

We purposefully focus on developed countries rather than developing countries in these case studies. Although investment claims may also change the policy preferences of developing countries, these changes are less likely to lead to actual treaty design adjustments given the asymmetric rule-taker-versus-rule-maker dynamics prevalent in the IIA universe. While developed countries have the bargaining power to translate changes of their policy preferences into changes in the design of the treaties they negotiate, developing countries are less able to affect negotiation outcomes. Thus, developing countries are more likely to respond to changing preferences through unilateral acts halting their investment treaty programs (e.g., Argentina), denouncing selected BITs (e.g., South Africa or Indonesia), or exiting the system altogether (e.g., Bolivia or Ecuador).

The review of these developed-country case studies will show that it takes more than investment claims to diffuse treaty design elements. Day-to-day investment policy comes from bureaucratic structures prone to inertia and a status quo bias. Policy makers can break with path dependency and engage in innovation. However, whether or not they break with path dependency depends on factors other than investment claims, including, but not limited to, the streamlining of foreign investment policy, changing national or international economic policy agendas, or changes in how information on investor-state arbitration is disseminated and processed in a country.

a. United States — Treaty Design Change After Investment Claims

The experience of the United States is the primary showcase for a strong impact of investment arbitration on rulemaking. In 1999, soon after it faced its first investment claim under NAFTA in Loewen, the United States halted the negotiation of new investment treaties and initiated a policy review. The outcome

136. See Alschner & Skougarevskiy, supra note 5.
137. Some developing states, such as India, have also revised their model agreements in anticipation of future investment treaty negotiations and renegotiations. At the time of this writing, however, no investment treaty has been negotiated on that template. Developed countries’ BIT practice thus constitutes the most reliable source for tracing the impact of claims on the design of concluded BITs.
138. Argentina signed its last BIT in March 2001 with the Dominican Republic (but never ratified it) shortly after the first investment claim was decided against Argentina in November 2000. See Compañía de Aguas del Aconcagua S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award (Nov. 21, 2000).
142. Loewen Award, supra note 132.
of that review was the 2004 Model BIT, which integrated NAFTA Period 3 innovations into U.S. BITs and reacted to early arbitral case law by including targeted Period 4 innovations. This radical change in U.S. policy following investment claims can be traced in Figure 6.

At the same time, the conventional narrative focusing on the differences between pre- and post-2004 BITs misses the mark. More accurately, investment claims challenged the wisdom of having separate treaty design preferences for BITs and FTAs. After the innovations of NAFTA, the United States continued to use its prior model to negotiate BITs, leading to a disconnect between its FTA investment policy and its BIT policy. Investment claims revealed this disconnect to be untenable.

Figure 6: U.S. BIT practice and its investment claims experience

![Graph showing U.S. BIT practice and investment claims](image)

Note: The figure displays U.S. BITs based on their year of signature and total score of coded features from the categories of protection, exception, and arbitration. Each treaty is color-coded based on whether it was signed before or during the year of the first investment claim (grey) or after that date (black).

First of all, the investment claims led the United States as a Bayesian learner to reevaluate the likelihood of being a target in investment arbitration. As we explained above, investment flows and stocks were symmetric under NAFTA. NAFTA may have induced the United States to consider claims more likely, warranting policy safeguards. Yet no equivalent symmetry existed in the relations between the United States and its developing country BIT partners in the 1990s. In light of asymmetric investment flows, investment claims against the United States seemed remote under BITs and policy safeguards were


144. See, e.g., Vandevelde, *supra* note 2.
unnecessary from a U.S. perspective.\textsuperscript{145} Since the late 1990s, however, the risk of being sued arguably has increased even in asymmetric investment relations. Expansive interpretations of investment treaties, including notions of investor and investment, combined with a fungible notion of capital, strategic corporate restructuring, and more awareness of investment arbitration, have made investment claims under any treaty more likely.\textsuperscript{146} As the United States feared becoming the target of investment claims, the differentiated approach in BITs and NAFTA was abandoned in favor of a one-size-fits-all policy that contained the greater policy safeguards initially developed for NAFTA.

Second, the United States may have also reacted as bounded rational learner. The long-held belief that the United States' political and legal structures were immune to challenge under investment treaties and that ISA would primarily be used against developing countries with a poor rule-of-law record was shattered by the late 1990s, as the United States itself became a target of investment claims.\textsuperscript{147} Although the United States did not lose any of its early investment cases, the use of ISA to challenge U.S. legislation corrected its optimism bias, creating a heightened awareness that any country—irrespective of the quality of its domestic legal system—could become a target for ISA claims.

Third, and perhaps most important, the critical domestic debate triggered by NAFTA claims put pressure on U.S. policy makers to "do something."\textsuperscript{148} The subsequent bipartisan 2002 Trade Promotion Authority legislation marked a turning point in U.S. investment policymaking, stating that "United States investors in the United States are not [to be] accorded lesser rights than foreign investors in the United States" and listing several ways in which investor-state arbitration was to be improved.\textsuperscript{149} Congress thereby mandated a realignment of U.S. BIT practice with NAFTA treaty design and its lessons learned.

In conclusion, in the case of the United States, investment claims prompted a change in the country's investment policy. Yet this change was not one from the 1994 U.S. Model BIT to the 2004 Model. Instead, it was an alignment of FTA and BIT practice. Increasing investment claims thus resulted in an integration of

\textsuperscript{145} Alvarez, supra note 120, at 3.

\textsuperscript{146} Several authors have pointed out that today more than one investment treaty may govern a single investment transaction. See STEPHAN SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 197-240 (2009); Barton Legum, Defining Investment and Investor: Who Is Entitled to Claim?, 22 ARB. INT'L 521, 526 (2006).

\textsuperscript{147} Alvarez, supra note 120, at 3 ("The United States could afford to assume that its laws and practices were already consistent with the minimal standards contained in its BITs."). Prior to the rise of investment claims against Canada and the U.S., it was a widely held assumption that investment claims would only be raised against developing countries, since developed countries already offered adequate protection to foreign investors. For example, Jürgen Voss stated that "an active investment protection and promotion policy exists only in relations with Third World countries. In all the industrial countries there is a comparable and sufficiently stable protection framework so that investments flow freely to their optimal economic use." The Protection and Promotion of Foreign Direct Investment in Developing Countries: Interests, Interdependencies, Intricacies, 31 INT'L & COMP. L.Q. 686, 688 (1982).

\textsuperscript{148} Kinnear & Hansen, supra note 129, at 106-09.

\textsuperscript{149} Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C. § 3801 (2012); see also Gagné & Morin, supra note 143, at 358-59.
NAFTA design elements into BITs rather than a complete reinvention of U.S. practice, as a comparison of pre- and post-arbitration BITs would suggest.

b. Canada – Innovation Following NAFTA

The Canadian case is somewhat different. Canada had already incorporated the lessons learned from NAFTA into its BITs, reducing the later impact of investment claims on its treaty design. The evolution of Canadian practice can be traced in Figure 7. Canada entered the BIT universe relatively late, signing its first BIT in 1989 with Russia. At that time, Canada followed a BIT model heavily influenced by the 1967 OECD Draft Convention on the Protection of Foreign Property. Early Canadian BITs were thus short and simple treaties similar in design to BITs of European countries that had equally adopted templates modeled on the OECD draft. Following the conclusion of NAFTA in 1992, however, the treaty design of Canadian BITs changed drastically as innovations from NAFTA’s Investment Chapter 11 were introduced into its new BITs (Period 3 innovation). Why Canada chose to alter its BIT design is unclear. Bounded rational learning from investment claims can be excluded as cause, since those claims only hit Canada later. Nor is symmetry of investment flows a credible explanation, as the design template was applied irrespective of the investment flows or stock of Canada’s negotiation partner. The most persuasive explanation is probably that decision makers considered NAFTA to constitute an update of Canada’s investment policy and asked the relevant ministry to streamline future Canadian IIAs with NAFTA. Innovation and diffusion of NAFTA elements thus occurred at the same time in Canadian treaty practice.

150. Kinnear & Hansen, supra note 129, at 103.
151. SCRILL, supra note 64, at 35-36.
154. Canada’s negotiating partners included a range of small countries with low levels of FDI in Canada and minute risks of ISA claims.
The later impact of claims on investment treaty design in Canadian BIT practice was therefore less significant. The first claim against Canada was launched in 1997. Canada continued to sign new BITs until 1999, before it halted its program for five years. Canada then concentrated its efforts on defending existing claims, not concluding any new IIAs. After evaluating how Chapter 11 had performed in “real life,” Canada did not abandon NAFTA treaty design. Instead, its 2004 Model BIT, as commentators agree, closely follows NAFTA practice. In addition, it included Period 4 innovations in its model BIT, which enshrines refinements and lessons learned from NAFTA litigation. Figure 7 allows us to put these changes into perspective: the gap between early Canadian treaties modeled on OECD practice is much wider than the gap between its BITs signed in the mid-1990s and those concluded in the 2000s. Hence, while case law helped to refine NAFTA design architecture, the real innovation in Canada’s practice took place ten years earlier.

The case thus not only shows that innovation in BITs can take place prior to claims, with Canada updating its BIT template following NAFTA, but also that claims can further entrench a country in its pre-claims architecture rather than producing radical innovation, since Canada deepened its commitment to a NAFTA design architecture (albeit refined through clarifications induced by case law).

c. Germany – Business as Usual in Spite of Investment Claims

In stark contrast to these North American reactions to investment claims, Germany’s BITs were unaffected by the rise of investment cases. Germany is credited with having invented the BIT, signing the first of these agreements with Pakistan in 1959. While the terms of its treaties have been slightly reformulated over time, the structure of German treaties has remained remarkably constant. Figure 8 traces this consistency over time.

**Figure 8: The German BIT practice and its investment claims experience**

Note: The figure displays German BITs based on their year of signature and total score of coded features from the categories of protection, exception and arbitration. Each treaty is color-coded based on whether it was signed before or during the year of the first investment claim (grey) or after that date (black).

At the same time, Germany, like the United States, has been the target of investment claims. In 2000, Indian investor Ashok Sancheti initiated arbitration pursuant to the Germany-India BIT. Eight years later, the Swedish company Vattenfall filed an arbitration claim pursuant to the Energy Charter Treaty challenging environmental permit delays and, ultimately, denials by the city of Hamburg that impeded the construction of a coal-fired power plant. Both cases

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156. The structure of its treaties is so similar that a 2013 commentary on the 2009 German model BIT cross-references every provision to the corresponding clause in the 1959 Germany-Pakistan BIT. See Rudolf Dolzer & Yun-I Kim, *Commentary on Germany’s Model BIT* (2009), in *COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES* 289, 301 (Chester Brown & Devashish Krishan eds., 2013).


158. For a listing of German cases, see *GERMAN INVESTMENT TREATY DISPUTES*, http://www.german-investment-treaty-disputes.de/Home/Index/de.
were settled. A third investment claim also brought by Vattenfall relating to Germany's withdrawal from nuclear energy is still pending.  

How can we explain the difference between investment claims' impact on the United States as opposed to Germany? The key difference between them lies in the way information relating to investment claims was handled. German cases have been dealt with under a veil of secrecy, while in the United States a culture of transparency emerged early on.

Until recently, arbitration rules did not mandate the publication of awards and sometimes did not even require the disclosure of claims. The extent to which investment claims' information entered the public domain therefore depended on the attitudes of respondent governments. In NAFTA, the United States provided for the possibility to make awards public (Annex 1137.4) and, in subsequent decisions in 2001 and 2003, institutionalized public access to dispute settlement information. This transparency introduced investment arbitration claims into the public sphere and thereby fueled the political debate, which led to the treaty design changes of the 2004 U.S. Model BIT. In Germany, by contrast, investment arbitration was kept below the public or political radar. German BITs did not mandate the publication of dispute settlement information and the German Ministry of Economics, in charge of negotiating BITs and defending BIT claims, kept such information private. The Ashok Sancheti v. Germany claim of 2000, for instance, was only revealed in 2008 through the investor and upon an inquiry by IAREporter, an investment arbitration news provider. The terms of its settlement still remain unknown. Similarly, the first Vattenfall case was handled in secrecy until the terms of the settlement were disclosed in August 2010. Indeed, even on the inter-agency level, other ministries were scarcely involved in BIT matters. The paradox result was that in Germany, the country that had invented the BIT, ISA claims were almost completely unknown outside of the Ministry of Economics, while in the United States, a latecomer to BITs, ISA claims were hotly debated by politicians and civil society alike.

The situation in Germany changed drastically in the early 2010s. First, in 2009, competency for the conclusion of investment treaties shifted from the

160. See infra Section VI.B.2.b.
162. Nathalie Bernasconi, Background Paper on Vattenfall v. Germany Arbitration, INT’L INST. FOR SUSTAINABLE DEV., 2 (2009), https://international-arbitration-attorney.com/wp-content/uploads/arbitrationlawbackground_vattenfall_vs_germany.pdf (“Vattenfall and Germany have refused to comment publicly about the arbitration, so that most aspects of the case are unknown. . . . The German Federal Ministry of Economics and Technology, which is responsible for handling the case, has remained resolutely silent on the matter”). For the terms of the settlement, see Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany, ICSID Case No. ARB/09/06, Award (Mar. 11, 2011).
163. See MAHINAZ MALIK, TIME FOR A CHANGE: GERMANY’S BILATERAL INVESTMENT TREATY PROGRAMME AND DEVELOPMENT POLICY 10 (2006) (inferring a “lack of coordination between the efforts of the German Federal Ministry of Economics and Labour and the German Federal Ministry of Economic Cooperation and Development with respect to investment”).
164. See Ralph Alexander Lorz, Germany, the Transatlantic Trade and Investment Partnership and Investment-Dispute Settlement: Observations on a Paradox, 132 COLUM. FDI PERSP. (2014).
EU member states to the EU Commission with the entry into force of the Lisbon Treaty. Taking the BIT dossier away from the handful of German Ministry of Economics bureaucrats and passing it on to EU officials who were tasked to create a new EU investment policy from scratch under the scrutiny of the EU Parliament shifted the issue from the backroom into the forefront of political attention. Second, negotiations began on the Transatlantic Trade and Investment Partnership (TTIP) in 2013. The TTIP was to include an investment chapter. Anti-globalization interest groups opposing both the deal and investor-state arbitration seized the occasion and successfully mobilized societal forces against the TTIP to the extent that senior German politicians vowed to veto any deal negotiated by “Brussels” that included investor-state arbitration. Finally, the second Vattenfall claim challenging the German withdrawal from nuclear energy provided a focal point for ISA critics. The majority of Germans has been critical of the use of nuclear power and enthusiastically supported the government’s decision to phase out nuclear power plants. The widely publicized claim then fueled public awareness of and opposition to ISA. In the course of a few years, ISA had turned from an issue virtually unknown to one emotionally debated in German politics and civil society.

The fact that Germans really only began in 2014 to read about those “secret tribunals” that had been known to American audiences since 2002 helps to explain the difference between Germany’s and the United States’ reaction to investment claims. Absent such knowledge that could have fostered public and political debate, officials in the German Ministry of Economics could proceed with “business as usual” in bureaucratic inertia even after the country was exposed to investment claims in the early 2000s. Therefore, the German case shows that the impact of investment arbitration on rulemaking depends at least in part on public awareness about investment arbitration and the extent to which this awareness translates into political pressure that prompts decision makers to overcome bureaucratic inertia.

d. Japan – Innovation Without Investment Claims

Japan presents an altogether different narrative. Japan has never been a respondent in an investment case, nor has Japan experienced significant public protest and debate over investment arbitration. Nevertheless, Japan is almost on par with the United States and Canada in the conclusion of long and elaborate treaties with widespread exceptions and arbitration safeguards (see Figure 9).

166. See Hans-Edzard Busemann et al., Germany to Reject EU-Canada Trade Deal: Sueddeutsche Newspaper, REUTERS (July 26, 2014), http://www.reuters.com/article/2014/07/26/germany-canada-trade-idUSL6NOQIOCS20140726; see also Lorz, supra note 164.
Japan began its investment treaty practice in 1977 when it signed its first BIT with Egypt using a short and simple OECD treaty model. On the basis of that template, eight more agreements were concluded over the next 25 years. Then suddenly, in 2002, Japan’s treaty practice changed fundamentally and the country started to conclude what Hamamoto and Nottage call a “new generation” of Japanese agreements.

Hamamoto advances two explanations for this shift in treaty design. First, earnings from Japanese foreign investment had become a more important item on Japan’s commercial policy agenda. While the country had been a lukewarm supporter of BITs before, occasionally accepting offers for the negotiations of BITs from other states, it began to formulate a more activist investment policy agenda in order to become a “mature creditor nation,” as a later White Paper of Ministry of Economy, Industry and Trade put it. Second, prior to 2002, Japan had hoped for a multilateral agreement on investment. As negotiations under the auspices of the OECD failed in the late 1990s and the issue was scrapped from the WTO agenda in the early 2000s, Japan decided to launch its investment program in earnest in order to build a web of bilateral treaties similar to those of the United States or Europe.


172. Id. at 54.

173. Id. at 54-55.
Figure 9: The Japanese BIT practice

<table>
<thead>
<tr>
<th>Year</th>
<th># of Features per Treaty</th>
</tr>
</thead>
<tbody>
<tr>
<td>1960</td>
<td></td>
</tr>
<tr>
<td>1970</td>
<td></td>
</tr>
<tr>
<td>1980</td>
<td></td>
</tr>
<tr>
<td>1990</td>
<td></td>
</tr>
<tr>
<td>2000</td>
<td></td>
</tr>
<tr>
<td>2010</td>
<td></td>
</tr>
</tbody>
</table>

Note: The figure displays Japanese BITs based on their years of signatures and total score of coded features from the categories of protection, exception, and arbitration. Each treaty is color-coded based on whether it was signed before or during the year of the first investment claim (grey) or after that date (black). Since Japan has not yet been respondent in an investment dispute, all its treaties are color-coded grey.

Although Hamamoto finds evidence that later Japanese BITs were adjusted in response to developments in investment case law (see Part VI, infra), his research suggests that investment claims had no impact on the decision to revise Japanese BITs from 2002 onwards. First, Hamamoto points out that foreign investment stock in Japan has been triflingly small, making claims against Japan from foreign investors unlikely. Second, post-2002 Japanese BITs became more rather than less protective of foreign investors than their pre-2002 counterparts. Instead of limiting Japan's exposure to claims, post-2002 BITs expanded exposure by adding pre-establishment national and MFN treatments and the prohibition of performance requirements. Third, together with concluding new BITs, Japan also began signing FTAs with investment chapters. In an effort to catch up with its North American competitors, Japan followed their lead and incorporated NAFTA treaty design elements. Drawing closely from North American treaty language, Japan incorporated the aforementioned pre-establishment features coupled with other Period 3 clauses and Period 4 innovations into its IIAs.

In conclusion, although the radical treaty design shift in 2002 coincided with proliferating investment claims, the claims themselves had little to do with

174. Id. at 60.
175. Id. at 53-54.
176. See Hamamoto & Nottage, supra note 170, at 22-23.
177. Id. at 9-10.
178. See Alschner, supra note 73 (discussing the Americanization of investment policy, including with respect to Japan).
Japan's decision to revise its treaty template. Instead, the country sought to update its treaty practice in light of a changing commercial policy agenda and in response to a transition from multilateral to bilateral international economic diplomacy.

D. Conclusion: Status Quo Bias Rather than Backlash Against Arbitration

Our empirical findings suggest that the impact of investment claims is considerably smaller than expected. The vivid and well-known example of the United States updating its BIT design following investment claims seems to be the exception rather than the rule, and even there, claims merely prompted an alignment between FTA and BIT practice rather than reinvention of investment policy from scratch. The case of Canada and Japan suggests that investment claims sometimes play hardly any role in the diffusion of treaty design innovation. In Canada, claims further entrenched a pre-arbitration design refined through case law-induced clarifications. In Japan, domestic and international economic policy developments were more important drivers for a change in BIT design than claims. Finally, the distinction between the experience of the United States and that of Germany shows that being hit by an investment claim may not be enough to trigger treaty changes: transparency, public awareness, and political momentum are needed to translate investment claims into policy responses. Absent such an impact, the tendency of investment negotiators is to continue with "business as usual."

The findings of this Part have three major implications for the current legal debate on how states have responded and how they should respond to the growth of investment claims.

1. No Backlash Against Investment Arbitration

First, our findings suggest that the idea that countries react to investment claims by rebalancing their treaties is only partially accurate. The most significant act of rebalancing in the history of investment treaties so far actually predates investment claims: in NAFTA, the contracting states anticipated rather than reacted to investment claims by designing a new investment treaty architecture, which subsequently spread widely within the IIA universe. NAFTA itself was instrumental to its own diffusion, because it gave rise to the first wave of investment claims and awards. These claims and awards entrenched NAFTA's treaty design as tested and tried language that could be taken up by subsequent treaty-makers across the globe. While investment claims did play a part in this diffusion, other factors—such as public knowledge, symmetric FDI flows, changing commercial policies, and the interaction of trade and investment disciplines in FTAs—have proven at least as decisive in shaping treaty design outcomes.

The relatively weak impact of investment claims can be viewed as a positive sign: we have not seen an opportunistic reaction from states in the face of rising investment claims. Developed countries did not overhaul their treaty
design to escape liability once investment claims spread or once they became subject to them. Instead, we see that states faced with investment claims stood their ground and implemented fine-grained adjustments in the 2000s. Rather than an opportunistic backlash against arbitration, states showcased a strategic long-term commitment to the investment arbitration architecture first devised in NAFTA and refined thereafter.

2. Status Quo Bias and Anchoring in a Pre-ISA Architecture

The insight that today’s treaty design is still shaped by an architecture that predates the surge of investment claims may also be a source of concern. Resisting temptation to make self-serving change is one thing; sticking to your guns when change is needed is quite another. As this Section has highlighted, investment law suffers from status quo bias; path dependency dominates over prolific innovation. Treaty design evolution, where it takes place, consists of states opting into and refining tried and tested language rather than trying out something new. This path dependency prevents more radical change, even where this change may be on balance beneficial.\(^{179}\)

Investment claims have exposed some of the IIA system’s weaknesses. Mass claims by investors and bondholders in the wake of economic crises, treaty and forum shopping, and strategic corporate restructuring and litigation were all issues scarcely contemplated when the pre-ISA claim architecture was designed.\(^{180}\) Additionally, concerns about inconsistent decisions by tribunals and conflicts of interests among arbitrators are now widespread.\(^{181}\) Seen in this light, it seems disconcerting that investment claims have led to an entrenchment and refinement of the original NAFTA architecture rather than triggering more fundamental reforms.

Such reforms may now be under way. For instance, the mentioned proposal by the EU to replace investment arbitration with an investment court may be a viable design alternative that breaks with path dependency. However, IIA reformers should start by identifying what is wrong with the current system before endorsing ways to fix it. What would the investment regime look like if we could rid ourselves of its path-dependent baggage and redesign it from scratch today? What are investment treaties supposed to achieve in our twenty-first-century world? What purpose do they serve? We must answer these questions before we can determine where we can build on and where we need to depart from path dependency.


\(^{181}\) See, e.g., UNCTAD, *supra* note 30, at 88.
3. Transparency as Precondition for Policy Change

Finally, transparency and access to information concerning ISA is a crucial ingredient for any such policy change. In light of bureaucratic inertia, pressure for change is unlikely to come from within responsible ministries. Therefore, broad access to investment claim related information is necessary to raise public awareness, trigger public debates, and guide public choices. Current developments from broad transparency clauses in newly negotiated treaties—such as the TPP—to parallel efforts to enhance transparency in arbitration under already existing IIAs through the Mauritius Convention are encouraging. If ratified and widely accepted, these trends towards more transparency promise to be an effective antidote against status quo bias, path dependency, and bureaucratic inertia by enhancing the impact of investment claims on the domestic policy discourse.

VI. The Impact of Arbitration Awards on Rulemaking

While investment claims have had only a limited impact on treaty design, the influence of case law developments on treaty-making is more pronounced. As we hypothesized in Part I, the parallel judge-made law in arbitration may cause states to make changes in their investment treaties. In this Part, we briefly describe how we can identify the causal influence of ISA awards and then proceed to investigate the impact of case law on procedural and substantive treaty design innovations through several case studies. Importantly, the ambition of this Part is not to comprehensively map the interaction between case law and treaty-making—which would require many volumes—but rather to show that investment awards, in contrast to clauses or claims, play a systematic role in shaping investment treaty design.

A. Identifying the Impact of Arbitral Case Law

Investment arbitrators exercise an implied interpretive power as part of their adjudicatory function. In exercising that power, tribunals can impact future treaty design in two major ways. First, arbitrators may fill gaps left open by the drafters, providing a solution or “focal point” to a normative void that is later codified in subsequent investment treaties. Second, arbitrators may interpret existing provisions in a way unintended by the contracting parties, prompting states to correct the perceived misinterpretation in future treaties.

How can we causally attribute a change in treaty design to a development in investment case law? Investment awards only began to spread in the early 2000s. That means that only Period 4 innovations could have been caused by arbitral decisions. In Table 1 in Section III.B, we identified both substantive and procedural changes introduced in that period. By looking at these treaty design

183. Roberts, supra note 56, at 180.
changes in their legal context, we can investigate whether they are related to parallel developments in investment case law.\textsuperscript{184}

In considering the legal context of treaty innovations, we do not need to limit our analysis to cases rendered against the country that first introduced a treaty design innovation. We instead assume that countries learn from awards rendered generally. There are several reasons for the merit of this assumption. First of all, as we discussed above, tribunals cite previous awards that are not limited to cases involving the same IIA.\textsuperscript{185} Hence, awards rendered against any state A, B, or C can affect outcomes in a case against state D in similar ways as a prior unrelated award against state D. Second, states are unlikely to react to a single unwanted arbitral decision by changing their future treaties, but rather react to lines of jurisprudence. Due to the ad hoc nature of investment arbitration with its changing pools of arbitrators, decisions can vary in quality, interpretation, and outcome.\textsuperscript{186} When a particular arbitral decision falls short on any of these fronts (from the contracting states’ perspectives), the host country may file for the annulment or setting aside of the award, and the home state may openly criticize the arbitral tribunal, as has happened on occasion.\textsuperscript{187} Only if a controversial decision develops into a line of jurisprudence, which might affect the outcome of future cases, are contracting states likely to respond by taking sides in interpretive debates through their treaty-making. Therefore, we believe it is justified to look at developments in the entire body of arbitral decisions to find an impact on specific treaty design innovations.\textsuperscript{188}

Thus, if we expect that states take sides in major debates about how prominent treaty norms are to be interpreted or practical procedural questions are to be resolved, how can we tell whether a given treaty design change is caused by a development in case law and not the result of another factor? A treaty design change is caused by a development in case law when it cannot be explained outside of its legal context. For example, preventing MFN from applying to dispute settlement provisions presupposes a legal controversy on the scope of MFN. Similarly, the clarification that the minimum standard of treatment refers to customary international law would be unnecessary but for the interpretive disagreement on the content of that provision. As we shall see through several

\textsuperscript{184} Indeed, this seems to be the methodology adopted in an UNCTAD study, although UNCTAD’s treatment of contextual arbitral disagreement and treaty design changes is somewhat disjointed. See UNCTAD, supra note 4.

\textsuperscript{185} See supra Section I.B.3.

\textsuperscript{186} This built-in inconsistency is the primary reason why some scholars are skeptical about the feasibility and desirability of an investment appeal mechanism. See generally APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES (Karl P. Sauvant & Michael Chiswick-Patterson eds., 2008).

\textsuperscript{187} In 2003, for instance, Switzerland sent a letter to the ICSID Secretariat complaining about the SGS v. Pakistan tribunal, criticizing the narrow meaning it gave to the umbrella clause in the Switzerland–Pakistan BIT which “runs counter to the intention of Switzerland.” The letter is reprinted in its relevant parts in ANDREW NEWCOMBE & LLUIS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 466–467 (2009); see also Gabrielle Kaufmann-Kohler, Non-Disputing State Submissions in Investment Arbitration: Resurgence of Diplomatic Protection?, in DIPLOMATIC AND JUDICIAL MEANS OF DISPUTE SETTLEMENT 307, 315 (Marcelo Kohen et al. eds., 2012).

\textsuperscript{188} Future research may investigate whether this assumption holds true as an empirical matter. Involvement in a case that includes a controversial interpretation may affect the propensity of a state to react to this same interpretation in future treaty practice. Such research would shed light on whether states are Bayesian or bounded rational learners when it comes to digesting case law.
case studies, substantive innovations can only be meaningfully explained through their case law context, while procedural changes may have been caused by other factors as well.

B. Case Studies of Investment Treaty Changes Induced by Case Law

To assess the degree to which case law shapes treaty design, we link substantive and procedural innovations to developments in investment arbitration through several case studies. We do not, however, systematically investigate what factors drive the subsequent diffusion of these innovations, merely noting that such diffusion does take place.

1. Substantive Refinements

With respect to the substantive innovations of Period 4, a strong link exists between arbitral decisions and treaty design changes. In Table 1, we identified several treaty design changes that relate to the clarification of four core elements: (1) the notion of investment, (2) the scope of indirect expropriation, (3) the content of FET, and (4) the reach of the MFN principle. These four elements have spread across the IIA universe, with investment, expropriation, and FET definition innovations existing in almost every second, newly concluded IIA in 2014. Through a set of case studies, we show that each of these Period 4 innovations can be linked to debates in arbitral case law. Each debate began with a controversial case and later inspired awards that adamantly followed or rejected the interpretation advanced therein. These lines of jurisprudence then triggered a reaction by states, which manifested as treaty design adjustments in newly concluded agreements.

a. Salini – Defining the Notion of Investment

The definition of investment has generated much interpretive quarrel. An asset must qualify as an “investment” under an IIA to benefit from the treaty’s protection. For investment arbitration, the existence of an investment is a threshold requirement that must be met in order to establish a tribunal’s jurisdiction ratione materiae. The concept of investment is thus central to the treaty architecture. The ICSID Convention, which provides the framework for most investment arbitrations, simply states in Article 25(1) that the “jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment” without clarifying the term.\textsuperscript{189} IIA\textsubscript{s}, in turn, predominantly defined investment as “every type of asset” including, but not limited to, an illustrative list of specifically mentioned assets such as movable and immovable property, shares, and intellectual property rights, but also claims to money or performance. Hence, the notion of investment remained vaguely defined.

As a result, divergent interpretations developed in case law to give meaning to the term and its outer limits. On one extreme, a line of cases emerged following \textit{Fedex v. Venezuela} (1997) and \textit{Salini v. Morocco} (2001) according to which a

\textsuperscript{189} ICSID Convention, \textit{supra} note 14, at art. 25(1).
transaction has to satisfy four cumulative requirements to qualify as an investment ("Salini criteria"): (1) commitment of capital, (2) certain duration, (3) assumption of risk, and (4) a contribution to the host state’s development. At its high point, the annulment committee in Mitchell v. Congo (2006) struck down an award for assuming jurisdiction when the underlying investment—an American law firm in the Democratic Republic of Congo—did not contribute to the host state’s development, thus failing to meet the Salini criteria. On the other extreme, the annulment committee in Malaysian Salvors v. Malaysia (2009) denied the existence of such investment criteria and annulled an award that had applied them. It instead held that the term “investment” excludes simple sale contracts, but does not have any intrinsic meaning absent a definition by the contracting or disputing parties.

To counteract the uncertainty and divergence characterizing the case law, states began to clarify the notion of investment in their treaties. The U.S.-Uruguay BIT (2005) was the first BIT to explicitly stipulate in Article 1 that “an investment means every asset . . . that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.” The U.S.-Uruguay BIT formulation includes some of the Salini criteria, but notably does not mention the contribution to host state development. At the same time, it is more restrictive than what the Malaysian Salvors annulment committee deemed to be the ICSID default rule. Hence, the clarifying language, which has since been diffused to other treaties, occupies a middle ground between the extreme positions taken in case law.
b. *Ethyl/Methanex – Drawing a Line Between Indirect Expropriation and General Regulations*

Early NAFTA cases gave rise to an intense legal and public debate as to whether a state has to compensate foreign investors if, by virtue of general regulatory measures, part of the investor’s business becomes practically worthless. The issue first arose in the case *Ethyl Corp. v. Canada* and was fully litigated in the *Methanex v. United States* dispute.¹⁹⁵ In both instances, a province or state had passed legislation that effectively banned the use of certain gasoline additives due to health reasons and in both cases parts of the businesses of the producers of these substances suffered losses that were claimed to be tantamount to an outright expropriation. Most investment treaties, including NAFTA, protect investors against indirect expropriation, i.e., those measures that involve no formal taking of assets but effectively deprive an investor of the value associated with its assets.

In its 2005 award, the *Methanex* tribunal resolved the case by distinguishing between expropriatory measures mandating compensation and general bona fide regulations not giving rise to compensation. The tribunal stated that “as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable . . ..”¹⁹⁶ The tribunal thereby effectively adopted the legal standard advanced in the United States’s written submissions.¹⁹⁷ Yet, absent a clear textual carve-out in the treaty, there was a risk that another arbitral tribunal would disagree with the *Methanex* award and not read a BIT’s clause on expropriation in light of the underlying customary international rules. In response, the United States began inserting a clarifying annex to its newly concluded treaties, and other countries followed suit. The U.S.-Uruguay BIT (2005), for instance, states in Annex B that the treaty’s expropriation clause “is intended to reflect customary international law concerning the obligation of States with respect to expropriation” and that “[e]xcept in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.”¹⁹⁸

¹⁹⁵. *Ethyl Corp. v. Government of Canada*, UNCITRAL, Award on Jurisdiction (June 24, 1998); Methanex Partial Award and Methanex Final Award, *supra* note 133.


¹⁹⁸. U.S.-Uruguay BIT, *supra* note 193, at annex B.
All early NAFTA tribunals struggled with giving meaning to NAFTA Article 1105, entitled “Minimum Standard of Treatment,” which states in paragraph one that “[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.” The Metalclad v. Mexico tribunal read the provision as mandating a general duty of transparency toward foreign investors. Considering this interpretation as an excess of power, the Supreme Court of British Columbia partially annulled the award a year later. The S.D. Myers v. Canada tribunal found that a tribunal should assess compliance of a state with international law generally under NAFTA Article 1105, and that a finding of violation of another international norm would weigh heavily toward finding a breach of Article 1105. Most disturbing for NAFTA parties, however, seems to have been the Pope & Talbot v. Canada award. Openly disagreeing with the position advanced by the United States through a NAFTA non-disputing party submission, the tribunal adopted what it called an “additive” interpretation that ascribed a protective scope to the FET clause beyond the customary international law minimum standard of treatment. In July 2001, the NAFTA parties reacted. Representatives of the three NAFTA states issued an authoritative interpretation through the NAFTA Free Trade Commission (FTC), pursuant to Article 1131(2), clarifying that NAFTA Article 1105 does not require treatment above or beyond the customary international law minimum standard of treatment. According to Todd Weiler, the NAFTA parties thereby sought to remedy the “‘mistakes’ which their lawyers told them were being made by the tribunals.” Whether or not the statement merely clarified or effectively amended NAFTA is subject to an unresolved debate. What is clear, however, is that NAFTA parties were so convinced that this reading of fair and equitable treatment is the proper one that they integrated the explicit customary international law minimum standard references also in their subsequent treaties. Since 2002, over 40 newly concluded BITs contain explicit references linking FET to the customary international law minimum standard.
d. Maffezini – Guarding Against the Application of MFN Clauses to Dispute Settlement

One of the most controversial cases in investment law’s history, *Maffezini v. Spain*, also triggered changes in treaty practice. In *Maffezini*, the tribunal allowed an investor to circumvent an obligatory pre-arbitration waiting period in the Spain-Argentina BIT by using MFN to claim the more favorable treatment granted in the BIT between Spain and Chile, where such a requirement was absent.  

Subsequent investors have followed the *Maffezini* strategy of invoking MFN to overcome similarly unfavorable admissibility requirements in their base treaty or to outright ground a tribunal’s jurisdiction in MFN where the original treaty’s consent to arbitration is too narrow.

The *Maffezini* legacy produced a divide in case law and scholarship. While some tribunals have allowed investors’ requests to access more favorable admissibility or even jurisdictional conditions for arbitration claims, others have rejected it. One of the central issues in this debate has been where the presumption lies. Do states have to explicitly limit the scope of MFN to prevent circumvention of the dispute settlement architecture set up in a treaty? Or are MFN clauses subject to inherent limitations that prevent investors from accessing more favorable dispute settlement terms in third treaties? To remedy this uncertainty, several BITs have specifically circumscribed the scope of MFN clauses. The Belgium-Colombia BIT (2009), for instance, provides in Article V(3): “The most favourable treatment does not encompass mechanisms for the settlement of investment disputes, such as those contained in Articles XII and XIII of this Agreement, which are provided for in treaties or international investment agreements.” Several states have followed suit. Most recently, such a clarification has also been introduced in the Trans-Pacific Partnership Agreement at Article 9.5(3).


208. Emilio Agustin Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction ¶¶ 38-98 (Jan. 25, 2000).


2. Procedural Innovations

What these substantive innovations have in common is that they cannot be convincingly explained devoid of their case law context. As a result, we can infer that they have been caused by debates in investment case law. The case of procedural changes introduced in Period 4 is more ambiguous. On the one hand, we do see changes being driven by the same desire to correct arbitral misinterpretations that prompted the substantive innovations observed. In addition, we can also trace how arbitral decisions may have inspired the normative solutions later adopted by the treaty makers. On the other hand, the emergence and diffusion of these procedural elements are also likely to have been shaped by causal factors outside of the courtroom.

a. Pope & Talbot – Enhancing Control Mechanisms

The foregoing substantive controversies arguably not only impacted substantive treaty design changes, but also highlighted procedural issues involving the allocation of power between arbitral tribunals and state parties.

The above-mentioned FTC interpretive note and the Pope & Talbot tribunal is a case in point. Following the NAFTA FTC interpretation, Canada argued in Pope & Talbot v. Canada that a tribunal must accept such a statement by the FTC at face value and abide by it as binding pursuant to NAFTA Article 1131(2).214 The Pope & Talbot tribunal disagreed and proceeded to review whether the statement was indeed an interpretation or, rather, an amendment of NAFTA.215 Although it ultimately accepted the interpretation as binding, it voiced concern about the contracting parties changing the law retroactively in an ongoing proceeding and leaned towards characterizing the statement as an amendment of NAFTA.216 The case thus raised a fundamental question of delegation; how much control do contracting states still have over arbitral tribunals after bestowing them with adjudicatory and interpretive authority within their treaties?

Some of the procedural innovations of Period 4 can be viewed as reactions to this debate. An explicit provision on preliminary objections is a form of ex ante control, as it specifies the procedure in the treaty itself rather than leaving it to the disputants and the discretion of arbitral tribunals. A comment procedure on draft awards and the possibility to create an appeal mechanism are forms of ex post controls, which allow contracting states to seek a correction of an arbitral misinterpretation.

At the same time, the causal connection between specific awards or debates in arbitration and procedural treaty design changes is much less clear and direct, as was the case for the aforementioned substantive changes. The inclusion of preliminary measures can also be explained by states’ desires to more easily

215. Id. at ¶¶ 24-47.
216. Id. at ¶¶ 47-51.
defend against investment claims by being able to address frivolous claims early on in a proceeding. Similarly, commenting on draft awards and creating an appeal mechanism may not be so much about keeping a single tribunal in check, but more about achieving consistency and predictability in arbitration on a systemic level. Hence, while arbitral caselaw, either through specific awards or in their totality, seem to have contributed to influencing the outcomes of procedural innovations, the causal link is more tenuous; other considerations are at play that could have equally caused or contributed to such innovation.

b. Metalclad and Methanex – Transparency in Arbitration

A second way that arbitral decisions may have made an impact on procedural innovations is by serving as focal points for subsequent treaty-making. In contrast to the substantive Period 4 refinements, which relate to vague but existing clauses, some of the issues covered by procedural Period 4 innovations were simply not contained in previous treaties. Consider the issue of transparency in arbitration, which regroups the Period 4 innovations of amicus curiae submissions, the confidentiality of arbitral documents and the possibility of open hearings. The text of Chapter 11 provides no clear guidance on these three procedural points.\(^\text{217}\) Consequently, early NAFTA tribunals, when first confronted with these issues, had to find solutions on their own. These NAFTA tribunals send a message in favor of greater transparency in investment arbitration: the Metalclad tribunal allowed the publication of dispute-related information,\(^\text{218}\) and the Methanex tribunal accepted amicus curiae submissions and conducted open hearings for the first time.\(^\text{219}\)

Subsequent treaty practice closely followed these early arbitral decisions. In two successive statements in 2001 and 2003, the NAFTA Free Trade Commission committed the NAFTA states to making all documents relating to ISA cases public, subject to redaction of confidential information,\(^\text{220}\) and clarified that a tribunal is allowed to accept amicus curiae submissions.\(^\text{221}\) In post-2004 treaties, Canada and the United States then regulated the admission of third-party interventions, publication of documents, and open hearings explicitly, incorporating the lessons learned from NAFTA.\(^\text{222}\)

It is tempting to view these earlier NAFTA decisions as creating “focal points” that caused subsequent treaty makers to endorse the tribunals’ view in

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\(^{218}\) Metalclad Corp. v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Decision on a Request by the Respondent for an Order Prohibiting the Claimant from Revealing Information (Oct. 27, 1997) [hereinafter Metalclad Decision on Revealing Information].

\(^{219}\) Methanex Corp. v. United States of America, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as “amicus curiae” (Jan. 15, 2001). The hearings were opened through live broadcasts.

\(^{220}\) See NAFTA Free Trade Comm’n, *supra* note 57, § A(2)(b).


\(^{222}\) Lévesque, *supra* note 155, at 268.
their subsequent practice. Yet a range of causal factors seems to have been at play, making it difficult to evaluate the impact of these early arbitral decisions. First, discussions inside the courtroom were accompanied by external debates as public interest groups and critics of Chapter 11 campaigned against the “secrecy” of NAFTA tribunals, thus putting pressure on NAFTA states to ensure greater transparency in adjudication.223

Second, disagreement among the NAFTA parties was also a major impediment to innovation. During NAFTA negotiations, Mexico had already resisted a clause allowing the publication of awards, while Canada and the United States agreed to it in Annex 1137.4 of NAFTA. Mexico also fought against the publication of arbitration-related information in Metalclad224 and intervened in Methanex as non-disputing parties arguing against a tribunals’ capacity to receive amicus submissions,225 while both Canada and the United States favored greater transparency. Mexico then changed its position step-by-step. Mexico first agreed to the publications of documents and amicus submissions in the two FTC notes mentioned above, and in 2004 joined an earlier statement by the United States and Canada to open hearings in arbitration disputes.226 Whether this change of heart was induced by the transparency-favoring arbitral decisions or by pressure from its NAFTA partners or domestic constituencies is unclear.

Hence, the causal impact of early arbitral decision on transparency innovations is uncertain. On the one hand, they are likely to have facilitated the transition towards more transparency in arbitration and may even have furnished “focal points” for the states to deal with the issue in subsequent treaties. On the other hand, factors outside of the courtroom shaped the countries’ position on the issue as well, which makes it difficult to ascertain the effect induced by arbitral decisions alone.

This Section has shown that investment case law has a systematic impact on investment treaty design. The innovation and diffusion of substantive treaty design features can be linked to specific normative debates in case law. What these substantive changes have in common is that they strive to refine treaty standards rather than reinventing them. They often take the guise of explanatory footnotes or annexes to avoid the impression that they deviate from prior treaty practice. Their tenor is thus that the original treaty content has not been altered, but merely clarified by correcting arbitral misinterpretation. Similarly,


224. See Metalclad Decision on Revealing Information, supra note 218.


procedural innovations can often be associated with developments in case law, although a causal connection is more difficult to establish since a number of factors may be responsible for the procedural changes observed. Nevertheless, of the three factors—clauses, claims and cases—considered, investment case law seems to have the most significant effect on treaty design.

CONCLUSION

Contributing to the burgeoning computational analysis of international investment law, this Article has used state-of-the-art information extraction techniques to empirically investigate the effects of investor-state arbitration on treaty design. It has shown that the impact of arbitration on investment rulemaking is surprisingly small. Both investment clauses and investment claims do not systematically trigger material changes in IIA design. In contrast, arbitral case law does exert a traceable influence on investment treaties. States thus behave somewhat counter-intuitively: they do not adjust their agreements in light of major legal events like the inclusion of investment clauses starting in the 1960s or their widespread use in practice from the late 1990s onwards, yet they are shaken by small and technical developments in investment arbitration to which they feel compelled to respond.

There is logic to this apparent paradox. This logic has less to do with the magnitude of extraneous changes in investment arbitration and more with the lawyers observing, digesting, and reacting to them in national ministries. As this research suggests, investment lawyers cherish the path-dependent predictability of tried and tested legal language. Such predictability is more at risk of being unhinged by a growth of conflicting interpretations in arbitral case law, than by a new enforcement route of investment obligations or the fact that investment claims have been launched pursuant to a treaty. Thus, we observe countries like Germany continuing business as usual in the face of investment claims, and countries like the United States, Canada, and Japan entrenching and refining their treaty design based on pre-arbitration templates rather than rethinking their agreements from scratch.

This means that in order to explain treaty design changes, researchers must take account of the variety of cognitive, social, and political factors impacting investment treaty-making on the national and international level. This Article has highlighted that bureaucratic inertia, symmetry in underlying investment relations, or public awareness are often more decisive for the absence or presence of legal innovation and diffusion than the raw developments in investment arbitration. The Article has also shown that a mixed method approach combining computational, quantitative and qualitative analyses is particularly suitable to disentangle these different factors empirically.

For investment arbitrators, this study suggests that a state-centric rather than an investor-centric reading of substantive investment provisions is warranted. Empirically, investor-state arbitration is a mere procedural add-on that leaves the treaties’ protective obligations untouched. IIAs are thus not like contracts for the benefits of third parties and should not be read as such. Instead, they are inter-state promises that sometimes can and sometimes cannot be
enforced through ISA. Since their enforcement route exists independently of the
rest of the treaty, we should not let it overshadow the reading of substantive treaty
standards and should instead treat IIAs more like other public international
treaties.

For other investment stakeholders, this research suggests that they should
be more concerned about states not changing their treaties when change is needed
than about investment lawyers overreacting to developments in arbitration.
While more radical change may be on the horizon, thus far we have primarily
seen a reproduction and entrenchment of what is essentially a pre-ISA
architecture. We thus need more rather than less reaction to investment
arbitration. At the same time, careful reflection on what investment treaties are
to achieve in today’s world has to precede any change in treaty design so to guide
our judgment as to where we need to depart from and where we need to continue
with established practice.
Annex

A. Coding Procedure

Using international investment law textbooks and treaties, we identified 55 treaty features relating to (1) investment protection, (2) public policy exceptions and clarifications, and (3) ex ante and ex post controls of contracting states over the arbitration process. The list of features is detailed in the table below. For each of these 55 treaty features selected, we identified key words uniquely associated with each feature (e.g. key word “expropriat” denoting the concept of “expropriation”), carefully accounting for variation in a clause’s wording.

For example, one of the most important clauses in investment treaties is the “fair and equitable treatment” standard. Some treaties, however, refer to “equitable and reasonable treatment” instead. The Parkerings v. Lithuania tribunal held that both terms are to be understood synonymously. Since similar variations can be observed for virtually all features investigated, we compiled a list of possible variations per treaty feature. To verify the quality of the keyword approach, we went through rounds of coding and verification of results to gradually improve precision (accounting for false positives) and recall (accounting for false negatives). The considerable uniformity of investment treaty language helped significantly to keep the list of keywords per feature low. In total, our dictionary comprises over 200 keywords and phrases for the 55 treaty features investigated.

This dictionary of key terms is subsequently automatically run through the dataset of IIAs using the programming language Python. If a given element from the dictionary of terms appears in a treaty, it is coded as 1. If the element does not appear, it is coded as a 0. For FTAs, only investment chapters are analyzed. Where a detailed comparison of two FTAs was required, such as in Part III comparing Australian FTAs before and after the policy decision to exclude ISA, we also manually checked the financial service and exception chapters to ensure accuracy.

227. Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, ¶¶ 198, 278 (Sept. 11, 2007).
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