

REASONS NOT TO EXIT? A SURVEY OF THE EFFECTIVENESS AND SPILLOVER EFFECTS OF INTERNATIONAL INVESTMENT ARBITRATION

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Reasons not to Exit? A Survey of the Effectiveness and Spillover Effects of International Investment Arbitration

Duy Vu

GREDEG Working Paper No. 2018-35

Abstract: One of the most important characteristics of an investment treaty is that often it grants aggrieved investors access to international arbitration. This arbitration system does not require a foreign investor to petition his home state in order to bring claims against a host state, and provides an alternative to resolving disputes in the host state's local court. Although international investment arbitration is beneficial for countries in terms of foreign direct investment, it has been accused of not being transparent or effective especially in relation to environment or public health cases. Some countries expressed their discomfort with the current international investment law regime by radical exit solutions such as denunciation of the Convention on the settlement of investment disputes between states and nationals of other states, rejection of investor-state dispute settlement provisions and unilateral denunciation of investment treaties. Based on a vast law, economics and political science literature, this paper proposes arguments to examine these criticisms. First, it is argued that investor-state arbitration is currently a concern in both developing and developed countries. Second, although assessing the spillover effects of arbitration outcomes on some dimensions of public interests such as the environment or public health is not straightforward, the uncertainty that leads to arbitrariness and sometimes inconsistencies in arbitral decision-making exists and needs to be properly identified. Finally, this article argues that exit is not efficient at either the national or international levels, and that it is possible for countries to adapt the current regime to new situations without wholesale exit.

Keywords: International investment, investor-state dispute settlement, interdisciplinary studies, public interest.

JEL Classification: K41, F21, F53

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1 Introduction

A century ago, investment disputes between foreign investors and host states would have been "settled" by diplomatic protection of nationals. At that time there was a threat of assets seizing until debts were settled. The surge in bilateral investment treaties (BITs) was associated to the use of international investment arbitration - a third party to the dispute, for the purpose mainly of depoliticizing investment disputes and maintaining efficient investment flows. Since the mid-1990s, nearly all new BITs have allowed private investors to sue the host state before international arbitration, in accordance with, e.g., the Convention on the settlement of investment disputes between states and nationals of other states (the ICSID Convention) or the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules. Although a comprehensive multilateral investment agreement needs time to achieve a common consensus, the ICSID Convention was signed by more than 160 signatory and contracting states, many of which are developing countries. This multilateral treaty is an important milestone in improved transparency in dispute settlement, and in particular if disputes are related to national interests.

However, in 2007 there was a major protest against the international investment law regime, in particular investment arbitration, when Bolivia withdrew from the ICSID Convention, followed in 2009 by Ecuador and in 2012 by Venezuela. These countries also unilaterally denounced their bilateral investment treaties with many partner countries. Perhaps more surprising is that in 2011 and again in 2017, Australia and New Zealand announced they would no longer include investor-state dispute settlement (ISDS) provisions in future trade agreements. There are many explanations for this radical exit solution, but the main one is that some countries no longer consider international investment arbitration to be effect. There are many critiques of it in the literature on international arbitration, such as the claim that developing countries have a higher chance of being targeted by arbitration claims, and the outcomes of international investment arbitration always favor foreign investors. Furthermore, international arbitration has been seen as narrowing the national policy space in certain areas such as the environment and public health, since host countries are liable for millions of dollars of compensation if they lose an arbitration following their regulatory measures.

Although this article refers to a specific aspect of the international investment law, we believe that the above criticisms deserve examination from other disciplines than only the legal literature. Moreover, in relation to research on international arbitration, Professor Thomas Schultz in an editorial to the *Journal of International Dispute Settlement* (Vol. 6, No. 2, 2015) said that:

We are probably still far behind other legal fields, such as international law, which clearly is no longer the intellectual wasteland that it was said to be 20 years ago. My sense is that arbitration is following a similar route, thanks in part, precisely, to the fact that international lawyers, but also political scientists, economists, and even militant NGOs, have joined the fray.

With the aim of supporting interdisciplinary research on international arbitration, this article brings diverse views from neighboring fields such as economics and political science into legal studies, by combining theoretical and empirical research to survey the effectiveness and spillover effects of international investment arbitration.

The issues outlined above are incorporated in the following survey. Section 2 investigates how some aspects of the international investment law regime such as investment treaties and the ICSID Convention can benefit a country in terms of foreign direct investment (FDI). Section 3 reviews some radical solutions chosen by states to express their unease with the current regime. To understand states' decisions and provide the reader with a broader assessment, section 4 reviews all contentious aspects of international investment arbitration, e.g. risk of exposure, outcomes, and spillover effects of arbitration on national interests. After identifying the problems related to the investment arbitration system, section 5 provides a brief discussion of why reformation of the current international investment law is needed but not in the direction of the radical exit solution. This section highlights also how countries can change rules from within. In section 6, we draw some conclusions by referring to some recent developments in international investment law. Our main conclusion is that the actual crisis in the regime is an opportunity for states to learn and to revise their policies, and that the favorable conditions are sufficient to allow improvements to the regime rather than exit from it.

2 International investment law, country credibility and international capitals

This section focuses on the relationship between a country's credibility and international capital, and how countries can benefit from the international investment law regime to build credibility. Theoretically, a country's credibility can be defined in various ways depending on the field being considered. In international finance, national credibility can be revealed by the simple act of government repaying its foreign debts on time (Dreher and Voigt 2011). In international trade, this can be expressed as the state's commitment to avoiding inefficient barriers to trade, or the state's capacity to implement reliable sanitary safety regulation for exported products (see Charlier 2012). In international investment, an important part of the literature refers to the commitments of host states to ensure a secure environment for business and investment, e.g. by avoiding any political risks, in order to define the country's credibility.

2.1 Relationship between International capital and country credibility

When investing outside their home country, firms can face major constraints such as small size of the future market, poor infrastructure, macroeconomic instability, and political risk in the host country. According to a survey conducted by the Multilateral Investment Guarantee Agency in 2013 (MIGA 2013), political risk still ranks second (after macroeconomic instability) among the possible impediments to FDI flows. Political violence (war, civil disturbance, terrorism) is of the most concerns in relation to the Middle East and North African countries. Furthermore, the majority of firms in the MIGA survey continue to identify the increased risks related to adverse regulatory changes and breach of contract in this region. The survey emphasized that risk of adverse regulatory changes is generally not covered by the political risk insurance industry although it can result for investors in cancellations or withdrawals of investment or both.

Political risks usually are characterized by economic conditions (e.g. the occurrence of financial crisis) and by governance conditions (e.g. public corruption, lack of respect of rule of law) (Dupont et al. 2016). The notion of political risk is central to the legal, political, and economic literature on international investment. Like the empirical economic literature on trade (Levchenko 2007), the empirical economic literature on FDI stresses especially the negative impact of political risk not only on companies that have invested abroad but also on the host country's investment environment (see Fig.1). The fact that a host state breaches its contract with investors can instantly "chill" co-national investors, and reduce both the country's credibility and bilateral FDI flows (Wellhausen 2016b). Using a sample of host

developing countries, Busse and Hefeker (2005) and Allee and Peinhardt (2011) show that government stability, absence of internal conflict, and the quality of democracy are important determinants of the investment decisions of multinationals.

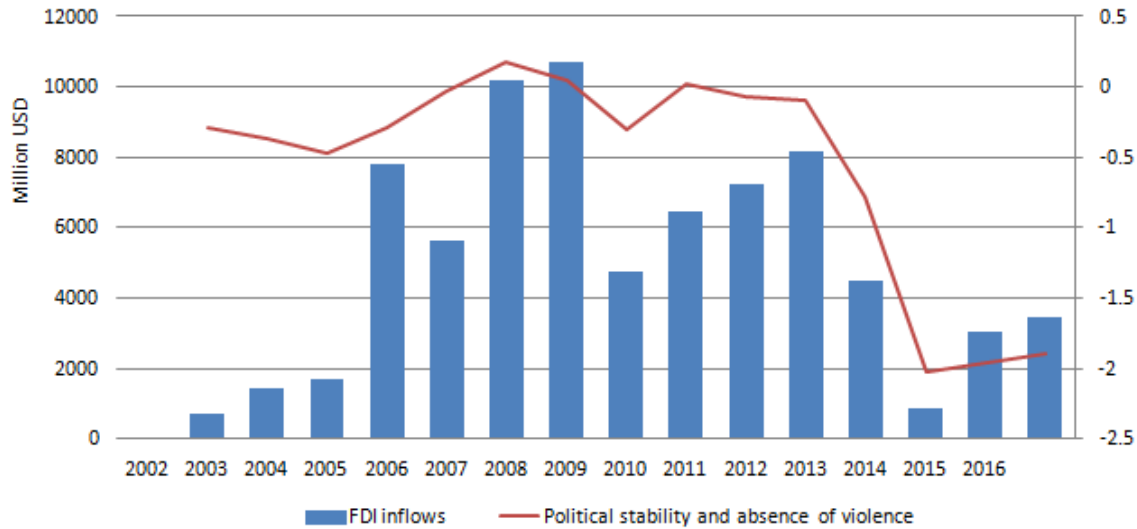


Fig. 1 Relationship between political risks¹ and FDI inflows: the case of Ukraine

Source: Author's calculations based on data from the World Bank

Given the advantages to the host state of FDI inflows such as economic growth, development of infrastructure or employment, countries receiving capital are considering "signaling" their international credibility. Subsection 2.2 discusses two ways identified in a vast economic literature, to build national credibility: signing and ratifying bilateral investment treaties, and accession to international organizations.

2.2 How to build credibility

2.2.1 Signing and ratifying bilateral investment treaties

The fundamental purpose of a bilateral investment treaty (BIT) is to encourage investment flows between two countries. Governments likely were motivated to signal their credibility by signing BITs in order to compete for FDI, and therefore the number of BITs signed and ratified exploded in the 1990s – a difficult time for international bank lending following the crisis in the 1980s. However, debate over "BIT or no BIT" seems not to have been concluded. According to Downs and Jones (2002), if an investor is looking only at a BIT in order to make investment decisions (on the basis that the host country will comply with BIT commitments to preserve its reputation), then some caution is recommended because there are numerous theoretical and empirical reasons for believing that the (host) state can no longer be said to have a single reputational function related to all the problems of treaty compliance. It means that defection

¹ The variable "Political stability and Absence of Violence" uses 4 indicators: government stability, absence of internal conflict, external conflict, and ethnic tension.

from an agreement in an area depends on the "size" of the treaty, or otherwise the relative importance that the state assigns to it. This argument appears to make the effect of BIT on the country's credibility and thus on FDI, somewhat vague. Yackee (2008) is similarly skeptical. He argues that with foreign investors, investment agreements such as BITs cannot be a reliable solution to for credibility problems and that the international investment regime would not and should not collapse in a world without BITs.

Other authors provide empirical evidence confirming the existence of a BIT effect. Leshner and Miroudot (2006) broaden the scope of investment agreements to include regional trade agreements that contain investment provisions. They find that these types of agreements are associated positively not only to trade but also and to a greater extent to investment flows. Kerner (2009) provides interesting evidence that investors not only invest more when they are protected by BITs but also invest more in countries that have ratified more BITs, even though these agreements do not offer the investor additional protection from expropriation. Similar to Buss et al. (2010), Allee and Peinhardt (2011) show that the number of BITs is positively correlated to FDI inflows in the host state, *ceteris paribus*, and that each additional treaty increases FDI inflows by approximately USD 23 million annually.

Why do BITs work? The empirical literature highlights the role of dispute settlement provisions - one of the most important provisions in these treaties - on FDI inflows. Since the mid-1990s, the proportion of international investment agreements that offer pre-consent to international arbitration has grown significantly (Neumayer et al. 2016). The international arbitration system does not require the foreign investor to petition its home state in order to bring a claim against a host state, and provides an alternative to resolution of its disputes in the host state's local court. Furthermore, international investment arbitration clause can give investors "a sense of protection" that can affect their investment decisions (Kerner 2009, Büthe and Milner 2014; Neumayer et al. 2016). However, Yackee (2009) clarified the relationship between BIT and FDI by emphasizing that BITs are statistically significant predictors of FDI only for low-risk countries. The fact that a high-risk country expects to "buy" credibility by signing and ratifying BITs with many countries may not lead to an increase in FDI.

2.2.2 Accession to international organizations

It has been argued that the value of an important government asset such as credibility can be reduced by non-respect of commitments to foreign investors. While the implementation (or at least the announcement) of a commitment can be reversed unilaterally by the host state, a commitment embedded in an international agreement involves higher costs of reversal. E.g. non-respect of commitments could lead to the termination of loans or credit from international financial institutions, or initiation of complaints before the World Trade Organization (WTO) dispute settlement mechanism. Because membership of an international organization can make reneging on promises costly, foreign investors might expect that accession to international organizations (IOs) such as the WTO, or membership in the ICSID Convention would help governments to build international credibility.

The theoretical literature on the effect of IOs is not straightforward. Pevehouse (2003) states that the governments of some newly democratized countries decided to join selected international organizations for domestic political motives rather than international reasons. E.g. the current government might try to an IO shortly before an election in order to demonstrate its policy preference and be voted in for another term. Some authors (Feldstein 1999; Stiglitz 2002) are doubtful about the effectiveness of IOs, and emphasize their side effects on the national policy space. However, these side effects of IOs might be due to the negotiation process which does not understand what will be good for the country (Tang and Wei 2009).

Empirical economic studies on the positive effect of IOs on a country's credibility are well developed in the literature. One example is the case of the WTO. In line with a vast theoretical literature which presupposes the importance of the GATT and WTO for trade and economic growth because they enhance a country's credibility by reducing the governments' discretionary barriers with regard to trade policy (Staiger and Tabellini 1987; Bagwell and Staiger 2002), Tomz et al. (2007) show that the estimated effects of the GATT on the substantial growth during the postwar trade are positive and robust across time and regions. Tang and Wei (2009) find an effect of WTO membership on national credibility, arguing that accession to the WTO is associated to significantly increased growth and investment sustained over about five years. Of more interest is their argument that under the "umbrella" of the WTO, policy changes are less discretionary, and thus, WTO accession is beneficial for countries with weak governance. In the case of membership of the International Bank for Reconstruction and Development, it is important for developing countries to have a presence on the Board of Executive Directors not just for the international prestige it brings, but also in order to increase loan commitments for their home countries (Kaja and Werker 2010). In the context of international investment, what about the case of the ICSID Convention? Dreher et al. (2010) argue that membership in IOs can increase inflows of FDI even if the members are countries with high levels of political risk. Accordingly, ratification of the ICSID Convention in the previous year significantly increases FDI inflows in the current year. Dreher and Voigt (2011) propose a clearer explanation of the previous finding by assessing the effect of membership of IOs on a country's risk rating which is based on the three weightiest indicators: political risk, debt indicators, and economic performance. They suggest that membership of the ICSID Convention (as well as the WTO) significantly reduces country risk because accession encourages countries to reform their policies to conform to international standards.

To sum up, the above studies suggest that countries have many ways to build credibility with foreign investors in order to compete for FDI. In addition to the "traditional custom" of signing and ratifying BITs, accession to the ICSID Convention is also a solution to the problem of credibility, even in high risk countries. Given these effects, we can understand why more than 160 countries had signed the ICSID Convention (as of December 2017) and why the number of BITs has grown rapidly since 1990s. However, the current international investment law regime, and especially the system of investor-state arbitration, is experiencing a backlash from a number of countries that have been sued repeatedly by foreign investors and have been obliged to pay millions of dollars of compensation. As a natural reaction, they search first for ways including extremes ones, to exit the regime.

3 Unease with investor-state dispute settlement and Exit strategies

In recent years, investor-state disputes filed before international investment arbitration have increased greatly. In the case of ICSID alone, the number of disputes filed before this institution at the end of 2017 was 664 cases (against 82 cases at the end of 2000). The rise in the number of disputes is responsible for the unease felt by some countries, mostly from Latin America. Those countries claim that the current arbitration system and investment treaties are means to maximize the protection of developed countries' economic interests while harming developing countries that face economic hardship. Furthermore, this system is seen as narrowing the national policy space in some essential areas such as the environment and public health. International investment arbitration is increasingly widespread and is a hotly debated topic when final awards of millions of dollars of compensation and litigation costs become known² (Kawharu et al. 2018). In this context, a number of countries have chosen

² UNCTAD data on treaty-based disputes show the top 6 cases where more than USD 1 billion of compensation were awarded to foreign investors as of December 2017: *Crystallex v. Venezuela* (USD 1,2 billion), *Mobil and others v. Venezuela* (USD 1,6 billion), *Occidental v. Ecuador* (USD 1,7 billion), *Hulley Enterprises v. Russia* (USD 40 billion),

radical solutions to escape the current international investment law system. This article refers to the drastic measures taken by countries in order to remove the jurisdiction of the arbitration centers where investors can sue states, and remove the investor's right to bring a dispute before international arbitration as set out in international investment treaties.

In 2007, Bolivia became the first state to withdraw from the ICSID Convention, followed by Ecuador which withdrew from the Convention partially in 2007 (by disallowing international investment arbitration from resolving oil and gas disputes) and totally in 2009. In 2012, after being faced with more than thirty arbitration claims, Venezuela exited from the ICSID Convention. It is not difficult to justify the decisions of those three states: ICSID at the time was the forum cited in most investment agreements, and the ICSID Convention had been signed and ratified by around 147 countries at the end of 2012³. However, these actions represent only the first exit strategy.

The second strategy adopted by states to negate the investor's right to sue was the exclusion of ISDS provisions in investment agreements, or unilateral denunciation of these agreements. At the end of 2017, according to the United Nations Conference on Trade and Development (UNCTAD) data⁴, the list of denounced investment treaties as might be expected involved countries hit by arbitration claims, e.g. Bolivia (10 BITs), Ecuador (11 BITs), South Africa (10 BITs), Indonesia (21 BITs), and India (22 BITs). Perhaps more surprising is the fact that some developed countries which are considered capital-exporting, began to worry about the effects of international investment arbitration, and also took extreme measures to express their discomfort with this system. In 2011, the Australian government announced that it would no longer include investor-state dispute settlement provisions in future Australian trade agreements. In a trade policy statement published by the Gillard Government in April 2011, two main reasons were given to justify this decision: to reduce discrimination against domestic investors since they had no access to investor-state arbitration, and to maintain government's ability to regulate in favor of public health. Given that country's long and committed support of international law, its decision stunned the investment community. Much less affected by its neighbor, New Zealand's newly elected government in order to gain more regulatory space stated in October 2017 that "no further free trade agreements include ISDS clauses"⁵. Surprisingly, New Zealand's policy shift is not explained simply by reference to its home state and host state experience before international investment arbitration⁶. Thus, the new government of New Zealand's approach may add some complexities to negotiation of the investment chapter in the Regional Comprehensive Economic Partnership (ASEAN + 6) – an important free trade agreement between Australia, New Zealand, China, Japan, South Korea, India and the ASEAN countries (Kawharu et al. 2018).

To give readers and policy makers an objective and comprehensive view, the next section reviews all relevant contentious aspects of the investor-state dispute settlement: risk of exposure for the "weak", outcomes that are thought to be beneficial to foreign investors, and the spillover effects of arbitration outcomes on national interests.

4 Investor-state arbitration: review of the risk of exposure to arbitration claims, determinants of the outcomes and spillover effects of arbitration on national interest

Veteran Petroleum v. Russia (USD 8.2 billion), Yukos Universal v. Russia. More information on: <http://investmentpolicyhub.unctad.org/ISDS/FilterByAmounts> (accessed July 1, 2018).

³ More information on: <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx#>. Accessed July 1, 2018.

⁴ More information on <http://investmentpolicyhub.unctad.org/IIA/>. Accessed July 1, 2018.

⁵ Source: https://www.beehive.govt.nz/sites/default/files/2017-11/PM%20Press%20Conference%2031%20October%202017_0.pdf. Accessed July 1, 2018.

⁶ As of December 2017, according to UNCTAD data, New Zealand has not experienced any treaty-based dispute as respondent state or home state of investors. See <http://investmentpolicyhub.unctad.org/ISDS>. Accessed July 1, 2018.

4.1 Risk of exposure to arbitration claim

The first rumor is about potential litigation risks for developing countries: investment arbitration would serve to strengthen the influence and economic interests of developed over developing countries. For this reason, in some cases, local tribunals are preferred over international investment arbitration to settle disputes between states and foreign investors. This subsection examines whether the probability of being sued before international investment arbitration varies and depends on both the characteristics of the parties to the dispute as well as the targeted industries. Before answering the main question, some empirical facts related to the choice of international arbitration forum may be of interest to the reader.

In her publication, Franck (2007) reveals an interesting fact about investment arbitration: there is an apparent preference for institutional arbitration (e.g. cases administered at the Permanent Court of Arbitration (PCA), Stockholm Chamber of Commerce (SCC), or ICSID), among 65/82 cases studied that were institutional and 17/82 cases were ad hoc (e.g. tribunal organized under the UNCITRAL Arbitration Rules). In a research dated 2014, Simmons finds that countries' economic and democratic conditions can affect the choice of arbitration forum. Indeed, the greater the difference in the levels of development of the two BIT partners, the greater the possibility that the particular BIT will choose an international delegation such as ICSID for the settlement of disputes. Likewise, democratic countries tend to negotiate treaties with ICSID dispute settlement provisions, and avoid concluding agreements that contain neither ICSID nor UNCITRAL provisions.

Besides the BIT partners' choice of dispute resolution forum, many authors show that the identity of the parties to the dispute, e.g. the economic and institutional conditions of the host country, contributes to answering the question of who is likely to be sued before international arbitration. In a 2007 statistical work, Franck shows that 88.9% of investors were from OECD countries while only 30.5% of the government respondents were OECD countries. Dupont et al. (2016) confirm Franck's (2007) finding, emphasizing that "being a Latin American country" may be a good indicator of arbitration claims. In addition to economic conditions, Dupont et al. (2016) investigated the impact of some host state institutional indexes such as corruption and rule of law⁷ on the occurrence investment arbitration claims. They find that bad governance (proxied by a high level of corruption or lack of rule of law) significantly increases arbitration claims.

Can we confirm the statement that the *weak* have a higher chance of being targeted by arbitration claims? Schultz and Dupont (2014), using a sample of arbitration claims between 1972 and 2010, reject the *neo-colonial* hypothesis and provide an important finding: claims are not systematically filed against developing countries, and in particular since the mid-to-late 1990s. Wellhausen (2016a) confirms this finding, insisting that none of the top 20 respondents in her research is classified by the World Bank as a low-income country (Fig.2 depicts Schultz and Dupont's (2014) and Wellhausen's (2016a) results for UNCTAD database of treaty arbitrations). Interestingly, Dupont et al. (2016) state that developing countries that received a recent loan from the International Monetary Fund (IMF) to correct their balance of payments problems and restore the conditions for strong economic growth, have a lower probability of facing investment arbitration compared to the conventional wisdom, because such programs tend to severely limit the discretion of governments. As a result, the country's economic conditions should be interpreted with care in order to assess bias in the distribution of filings.

Regarding industry characteristic, according to Franck (2007) and Wellhausen (2016a), the three most targeted industries are energy, water, and waste management. Long established investments in these sectors are vulnerable to regulatory risks since once high investment costs are sunk, it is difficult for investors to pull out of the project. However, Wellhausen (2016a)

⁷ The authors use Worldwide Governance Indicators (WGI) project data.

confirms that services including broadcasting and media, retail, importers/exporters, finance and banking, aviation services, maritime services, tourism (operation of hotels and resorts) - "a set of industries with traditionally more mobile assets " as said by the author - account for almost 24% of investment arbitrations.

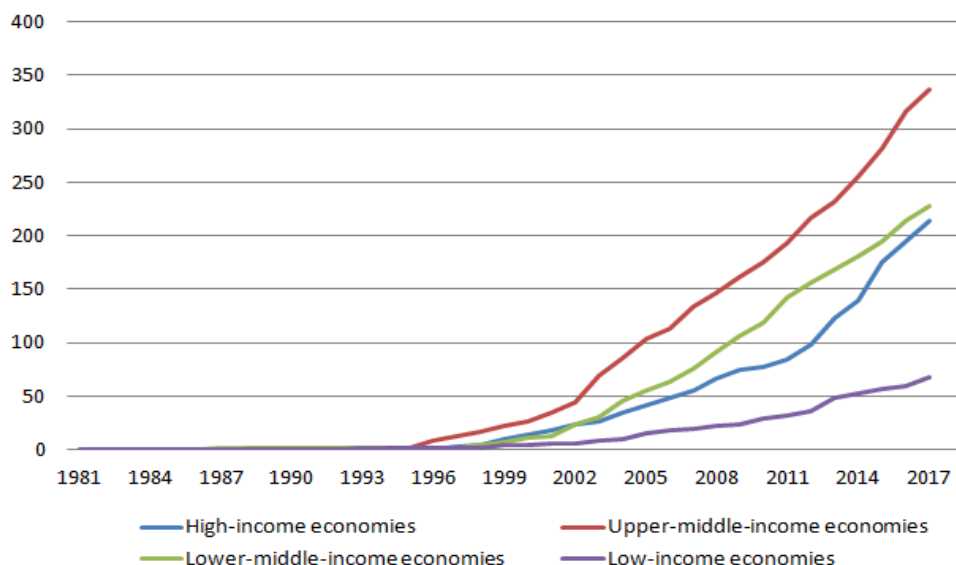


Fig. 2 Number of treaty-based arbitration claims filed per year, by World Bank development status of respondent state (1980-2017)

Source: Author's calculations based on UNCTAD data

Although the empirical results for the impact of a country's economic conditions and type of industry on the probability of facing investment arbitration remain unclear, arbitration in the previous year is a strong predictor of arbitration in any given year (Simmons 2014). Reviewing and improving the institutional and legal frameworks, including regulatory policies, to avoid any abuse of sovereign power that might harm foreign investors would act as a shield against future litigations.

4.2 Determinants of the outcomes of international investment arbitration

If the first claim about the litigation risk of a weak country cannot easily be justified, might the literature tell us more about the "predictability" of the outcomes of international investment arbitration?

It has been argued that the outcomes of arbitration are decided by many "actors". Arbitrators decide whether an investor or a state wins. They also determine the amount of damages awarded to the injured party. In addition to arbitrators, foreign investor and host state, together with their legal counsel, may also contribute to deciding the outcome of the arbitration. Moreover, the parties can discontinue the proceedings and agree a pre-award settlement which may not be made public.

This subsection identifies the determinants predicting the outcomes of international investment arbitration, what could be called "extra-legal" factors, because they are not related directly to the law (in its strict sense), e.g. the country's developmental status, the appointment

of arbitrators, or the type of industries involved. To simplify, we classify these determinants into three groups: (i) the characteristics of the parties to the dispute, (ii) tribunal-related factors, and (iii) the characteristics of the industries and the investment agreements. For each group, we present the different scholars' arguments around the outcomes of international arbitration.

4.2.1 Characteristics of the parties to the dispute

With respect to the effect of the characteristics of the parties to the dispute on the outcomes of international investment arbitration, findings in the empirical literature differ. Some authors show that the outcomes of investment arbitration are independent of extra-legal factors such as the characteristics of the parties to the dispute. E.g. by focusing on the ultimate outcome (win-lose), Franck (2007) confirms that although investors making claims are predominantly from developed states, the percentage of ultimate winners seems not to be meaningfully different between investors and host states. Similarly, Franck (2009) finds no statistically significant relationship between the OECD status and the World Bank status of the host state, and winning a given investment treaty dispute. According to Franck, these two indicators also need not affect the mean damages awarded by the tribunal.

Others, by focusing on the jurisdictional stage of the proceedings, argue that the decision of investment arbitrators may be a function of the economic and institutional variables related to the parties to the dispute. First, in applying descriptive statistics to a ICSID arbitration database, McArthur and Ormachea (2009) emphasize that weak countries experienced greater success in international investment arbitration because cases against host countries scoring low for institutional quality, or include in the most impoverished quartile, are more likely to be denied jurisdiction at ICSID (and then the host state wins) than cases with high host country institutional quality scores, or countries in the richest quartile. However, in contrast to McArthur and Ormachea (2009), other studies provide opposing findings: it appears that host states with higher development status and investors from capital-exporting states have higher chances of success in international arbitration. In an analysis of the content of arbitration awards, Harten (2012) discovered a clear tendency toward expansive approaches⁸ frequently used by arbitrators in the resolution of jurisdictional issues (e.g. corporate person investor, scope of most favored nation (MFN) treatment), and found also that this tendency was especially strong in disputes concerning claimants from the United States, France, the United Kingdom, and Germany (compared to claimants of other nationalities). Simmons (2014), using data from Harten (2012), concludes that less wealthy respondent states are likely to receive awards in favor of investors at the jurisdictional stage. Schultz and Dupont (2014) agree with Simmons (2014), and stress economic power disparities as a factor of success for the respondent state even at the merits stage of the proceedings.

Other than the relationship between the economic or institutional conditions of countries, and the outcome of arbitration, the literature has benefited from Hafner-Burton and Victor's (2016) research into another special outcome: early settlement. Accordingly, respondent states are more likely to settle cases before final award if they have past publicized experience of losing. Furthermore, Wellhausen (2016a) finds a correlation between investor's national origins and the settlement rate. Among 118 concluded arbitrations in which a US investor was

⁸ The arbitrator adopts expansive or restrictive approaches to respectively increase or reduce the damage awarded to claimants, and the risk of liability for respondents. E.g. with respect to the concept of "corporate person investor", a tribunal adopting a restrictive approach would refuse a claim brought by a foreign company owned and controlled by nationals of the host state whereas an expansive approach would be characterized by allowance of this claim. The author notes also that the coding process considers only resolution of an issue which depends largely on the arbitrator's discretion. This means that if the treaty provides some "guidelines" about how it should be resolved, the resolution is excluded from the database. The database contains 515 individual arbitrator decisions on the resolution of jurisdictional issues for 115 awards. See Harten (2012), appendix two.

a claimant, the respondent state won 36% of the time, and settled 36% of the time. This proportion seems to be no different for British investors. However, in 49 concluded arbitrations in which the claimant was a Dutch entity, the author found that the state won 29% of the time and settled 55% of the time.

4.2.2 Tribunal-related factors

It is recognized that for each dispute brought before international investment arbitration, the number of arbitrators is around three per panel, and most decisions follow the majority of the arbitrators. Interestingly, talking about the investment arbitrator network, Puig (2014) describes it as a small, dense and male-dominated group of European and Anglo-American professionals.

Using data on coded investment treaty arbitration awards, Franck (2007, 2009) demonstrates that there is no statistically significant pattern between the OECD status or the World Bank status of the presiding arbitrator, and winning a given investment treaty dispute and the mean damages awarded. In Franck and Wylie (2015), the authors find even that host states are more likely to obtain a zero-liability award if all the arbitrators on the panel are from high income countries. Kapeliuk (2012) shares Franck's (2007) finding in an investigation of the effect of panel composition, specifically identifying the difference between an experienced arbitrator (appointed to an ICSID panel prior to appointment to the panel in question) and an arbitrator with no prior ICSID arbitration experience, on the outcomes of treaty arbitrations. Kapeliuk shows that there is no statistically significant relationship between panel composition and outcome. More interestingly, party-appointed arbitrators with no prior ICSID experience do not appear to render dissents less often than experienced arbitrators.

Although Franck and Kapeliuk find no reason to take account of either development status or prior experience of the arbitrators, other authors identify the impact of the appointment process of arbitrators on case outcomes, especially when they use legal content analysis of jurisdictional decisions (as opposed to ultimate outcome analysis applied by Franck and Kapeliuk). For instance, if the investors appoint the presiding officer of the arbitration panel, they are more likely to receive expansive decisions to jurisdictional questions (Simmons 2014). The frequency of appointments also matters: Harten (2012) finds that frequently appointed arbitrators are more likely to resolve jurisdictional issues in favor of investors. However, according to Puig (2014), these findings may not be surprising, as firms do not want to take any additional risks when bringing their disputes to international arbitration. As a result, they simply appoint "who may deliver more predictable solutions, even if wrong or imperfect" (Puig 2014, p.423). Harten (2012) confirms also that although his empirical results are less likely to be explained by chance, alternative explanations, in addition to the economic incentives of arbitrators, are always possible.

4.2.3 Industry and investment agreement characteristics

In this subsection, we investigate whether the type of industry and the characteristics of the investment agreement matter for predicting arbitration outcomes.

Regarding industry, Franck (2011) uses treaty-based disputes from 1990 to 2006 to show that there is no statistically meaningful difference between energy sector (representing an immobile industry) disputes and non-energy disputes, and settlement. However, if the scope of "immobile industry" is extended, Hafner-Burton and Victor's (2016) find that the probability of settlement is higher for disputes in the following sectors: roads and rail, mining, hydrocarbon and electricity. Wellhausen (2016a) confirms also Hafner-Burton and Victor's (2016) result.

In relation to the characteristics of investment agreements there seems to be a link to the outcomes of international investment arbitration. First, in the case of the dispute resolution rule, Franck (2011) finds no significant pattern of relations between arbitral decisions (the ultimate winner of a dispute, the amount awarded) and whether disputes were brought under the ICSID or other rules. Although Franck's (2011) research methodology provides the reader with an overall view, Simmons (2014) by switching to a content analysis method gives more details about the relationship between the rules applied and the outcomes. Accordingly, host states are more likely to win at the jurisdictional stage under the ICSID arbitration rules, but not under the UNCITRAL arbitration rules. Second, given that the scope of an ICSID tribunal's jurisdiction depends on the specific provisions of the written instruments in which consent to arbitration is expressed, e.g. a BIT, an investment chapter of a regional trade agreement, or an investment contract, McArthur and Ormachea (2009) show empirically that investors will be more likely to succeed at the jurisdictional stage if trade agreements and BITs form the basis of state consent to ICSID jurisdiction. If the basis depends on a contractual agreement, the host state may prevail and end the case by denials of the tribunal's jurisdiction. Finally, the type of investment agreement also can affect arbitration outcomes. According to Harten (2012), where a claim is brought under a bilateral investment treaty or the Energy Charter Treaty (ECT), jurisdictional issues had a higher probability of being resolved expansively in favor of investors than in cases brought under the North American Free Trade Agreement (NAFTA).

In sum, the literature review shows that arbitration outcomes do not always favor foreign investors. Sometimes, a dispute has been terminated early by a secret settlement and the public does not know exactly which side actually "won". The literature suggests also that foreign investors' success may be predicted by some extra-legal determinants such as the development status of the parties, appointment of arbitrators, and the characteristics of investment agreements and of arbitration rules. After reviewing the risk of being attacked by arbitration claims and the outcomes of the cases, the next subsection analyzes the spillover effects of these outcomes on important aspects of national interests: national credibility (again), environment, and public health. This is a topical issue highlighted also in the recent negotiation of several economic agreements such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the Comprehensive Economic and Trade Agreement (CETA) (Henckels 2016).

4.3 Spillover effects of international investment arbitration on national interests.

4.3.1 *International investment arbitration and contingent credibility*

In the previous section, the literature clarified how some aspects of the current international investment law regime can help countries to signal their credibility to potential investors, and thus to compete for FDI. However, Allee and Peinhardt (2011) contend that this is contingent in the sense that the increase in FDI flows depends on states' compliance with the law, and particularly the treaty provisions.

The effect of BITs on FDI flows depends largely on the subsequent behavior of the governments who sign them. This idea is nevertheless not highlighted in the literature because most studies focus on the *ex-ante* informational role of BIT (or the promotion effect mentioned in Section 2). Accordingly, appearing before the ICSID sends a negative signal about the host state's behavior towards foreign investors. The appearance of a government at an arbitration venue could make potential investors hesitate about future investment in that country. More importantly, losing an arbitral panel ruling provides more precise information (not a noisy signal) to investors about the definitive illegality of the host state's actions. Using a sample of non-OECD countries, Allee and Peinhardt (2011) show empirically that a single ICSID dispute filed against a host state, on average offsets the FDI gains associated to signing two additional

BITs, and that each pending case reduces FDI by about USD 55 million annually. In particular, losing an ICSID ruling reduces the gains produced by a dozen or sometimes more BITs. In Wellhausen (2016b), Allee and Peinhardt's (2011) empirical results are confirmed by adding a nationality effect. Wellhausen finds about a 2% annual decrease in average bilateral FDI flows when a co-national investor brings a public international arbitration against the host state. Allee and Peinhardt's (2011) and Wellhausen's (2016b) results demonstrate that with the monitoring and punishment effect, international investment law, via investor-state arbitration, can make a state's treaty violation more costly than the financial penalties found in arbitral awards. The main question is whether and when the promotion effect of BITs or the ICSID Convention might be outweighed by their monitoring and punishment one?

4.3.2 *Arbitration and Environmental protection: regulatory chill and chilling arbitrary regulations.*

a. *Regulatory chill effect of international investment arbitration.*

International law has long recognized a certain *bona fide* (in good faith, without deception or fraud) regulation which can be categorized as the exercise of police power such as non-discriminatory measures enacted and implemented in accordance with due process to protect the environment or public health, need not be compensable⁹. Examples from high-profile NAFTA and CAFTA disputes introduce the discussion on government's right to regulate in the context of international investment arbitration.

In 1997, Ethyl, a large US chemical corporation, submitted a claim against Canada following a ban on imports of the gasoline additive methylcyclopentadienyl manganese tricarbonyl (MMT) for use in unleaded gasoline, which is considered as dangerous toxin. Only one year after the Ethyl dispute, the Canadian government faced a challenge to its attempt to ban exports of polychlorinated biphenyl (PCB) wastes from Canada. While this regulation caused alleged economic harm to a US investor (S.D. Myers), the government found that the ban was in line with the Basel Convention on the management of toxic waste. In 2002, Chemtura Corporation, another US-based chemical company, added to this wave of litigation by filing a claim against Canada's measures to restrict production of goods containing lindane, a hazardous persistent organic pollutant. Like Canada, the United States also was challenged by foreign investors following its environmental regulation. In 1999, the state of California issued an executive order banning methyl tertbutyl ether (MTBE), a gasoline additive that was polluting drinking water supplies and the air. This regulation was challenged in the same year by a Canadian investor (Methanex Corporation). The results of all these arbitrations were made public: all claimants' claims were dismissed at the merits stage in the case of Chemtura and Methanex, the state lost in the case of S.D Myers, and settled with the investor Ethyl.

Other CAFTA cases involving developing countries are cited in the legal literature as examples of governments' rights to regulate. E.g. the case of El Salvador when the country put a stop to several "financially lucrative, but environmentally destructive" mining projects in

⁹ See cases: Emmanuel Too v. Greater Modesto Insurance Associates and USA (award dated December 29, 1989), administered by the Iran-United States Claims Tribunal; Methanex v. USA (award dated August 3, 2005), administered by ICSID under the UNCITRAL arbitration rules; Saluka v. Czech Republic (partial Award dated March 17, 2006), administered by the Permanent Court of Arbitration under the UNCITRAL arbitration rules. In the case of Tecmed v. Mexico, the ICSID tribunal said in the final award dated May 29, 2003 that "the principle that the state's exercise of its sovereign power within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable". However, while most international investment treaties provide protection against indirect expropriation or measures tantamount to expropriation, they do not highlight the treatment of the non-compensable governmental regulation. Moreover, the line between indirect expropriation and non-compensable regulatory measures has not been systematically clarified in arbitral jurisprudence, and depends on the facts of each case. See OECD (2004) for more information.

2009¹⁰, to prevent severe deforestation and pollution of its major river, the Lempa (Broad and Cavanagh 2015). In 2015, the government of Costa Rica revoked environmental viability permits for a hotel project in order to protect wetlands and forests¹¹. Investors in these projects decided to bring their disputes with these two governments before international investment arbitration. In December 2017, El Salvador's environmental dispute ruling was in favor of the state at the jurisdictional stage; the Costa Rica ruling is pending.

Although the outcomes of these arbitrations are mixed, and even controversial in the view of environmentalists, they can suggest that the right of governments to regulate, despite an environmental protection purpose, may be challenged before international arbitration if the regulation harms investors' rights. Hence, the true effect of legitimate environmental policies is somewhat contingent on the adjudication of arbitrators. A criticism of the spillover effects of arbitration in this context is related to the claim that international arbitration "chills" national regulation, and that governments may refrain from or alter even legitimate regulation and legislation in order to protect the environment, for fear of costly arbitration: losing a panel ruling can render the host state liable not only for arbitration fees and monetary damages but also millions of dollars of lost FDI due to damage to the state's credibility.

To illustrate the so-called "regulatory chill", Tietje et al. (2014) identify two effects of international investment arbitration which can prevent governments from exercising their sovereignty in certain areas such as environment, health and human rights: an anticipatory effect occurs when government takes into account potential disputes with investors before it begins to draft regulation, and a precedential effect occurs when government stops or changes a regulatory measure already taken, especially after losing an arbitration involving the same kind of regulation, in order to prevent another "bad" precedent. According to Choudhury (2008), the "regulatory chill" effect, or equivalently, the fact that the arbitrators can review national public policies, while limiting public participation in this kind of dispute can imply a democratic deficit. The core of this criticism is deemed to be uncertainty in the arbitration ruling (Mann 2013), which can perhaps be explained in three ways. First, the current regime of investor-state arbitration is not based on the system of precedents (Mercurio 2014). Second, the text of investment treaties is heterogeneous, e.g. in terms of definition of investment and investor, and exceptions for environmental regulations (Henckels 2016). Third, several authors such as Reiner and Schreuer (2009); Brabandere (2011) have expressed doubt about whether the arbitral panel, as currently constituted, is well suited to adjudicate disputes concerning social and environmental matters.

However, Tietje et al. (2014) also add that assessing the "regulatory chill" effect of international investment arbitration in practice is not straightforward for three reasons. First, it is necessary to distinguish a *bona fide* measure to protect the environment and public health, from a discriminatory one. Second, it will be difficult to prove that the tribunal's decisions challenge the legislative acts of government because in reality, the vast majority of regulatory measures are administrative in nature (pre-existing contract, license, permit). Third, to date, there is no statistical research to studying the effect of arbitral decisions on national public policy choice. While information on arbitral proceedings and ultimate outcomes (liability or amount of damages awarded), in general, are available to the public, we cannot systematically know more about the *ex-post* effect of arbitral awards, or the exact decision to maintain the initial regulatory measures of the respondent state after losing an arbitration. Additionally, evaluating the "regulatory chill" in the case that the parties agreed to a settlement before the final award is also not evident, especially when details of the settlement are not made public. While international arbitration is often "required" to protect the host country's legitimate interests in debate on the "regulatory chill" effect, from a different perspective, adequate protection of investors' interests from arbitrary regulations is also a way to mitigate the effects of climate change, especially investors in low-carbon projects.

¹⁰ Case Pac Rim v. El Salvador, case Commerce Group v. El Salvador.

¹¹ Case Aven and others v. Costa Rica.

b. *Low-carbon investment and chilling arbitrary regulations*

Low-carbon investment is one of the best ways to introduce private capital and technology to promote sustainable development. Unlike other forms of investment, low-carbon investments such as renewable energy projects, energy efficiency improvements, and carbon capture and storage depend very much and fundamentally on public support schemes and other regulatory structures of host states (e.g. by creating green certification systems, feed-in-tariffs mechanisms), given the lack of internalization of carbon externalities. Without such supports, the investments could not survive economically. As a consequence, a low-carbon investment is particularly vulnerable to regulatory risk. If these risks are anticipated and perceived by investors, the cost of climate policies will increase compared to expectations when the low-carbon investment was introduced.

The European Union (EU)'s development of renewable energy is an interesting case study in our discussion. Since promoting the production and consumption of green energy has become a high priority for the EU, a series of related binding Directives have been published since 2009 to achieve the relevant targets. These conditions combined with a degree of flexibility related to member states' implementation (including initial over-incentivizing), have led to significant growth of renewable energy projects in Europe (Behn et al. 2017). Sadly, recent reports show that member states have changed their policy frameworks fundamentally to respond to the rapid and unsustainable growth of renewable energy, especially during the financial crisis (Marata et al. 2010; Behn et al. 2017).

While many scholars of international arbitration focus on the issue of a "regulatory chill" when talking about the environmental protection, Boute (2009, 2012) suggests that the time has come to switch to the role of investment arbitration in restricting arbitrary regulatory changes harming low-carbon projects, and thus, in reinforcing climate change mitigation policies. However, Boute and also Mann (2013), Mercurio (2014) and Behn et al. (2017) find several reasons to justify that in the current context, investors cannot be confident that arbitral tribunals will sufficiently protect their green investments.

First, for low-carbon investors, their right to benefit from support schemes cannot be qualified as an "investment" within the scope of investment treaties, although in some previous cases, the arbitral tribunal accepted that the specific right associated to the principal investment can be seen as an individual "investment"¹². Second, some arbitrators are reluctant to consider measures that destroy the specific rights associated to renewable energy projects as expropriation, given that these measures did not destroy the economic value of the "basic" investment, nor did they deprive investors of full ownership and control of their assets¹³. Moreover, Boute explains that even if these rights can be considered a key element of an investment, "without which it appears that there would have been no investment at all" according to the *Eureko* Tribunal¹⁴, the characteristic that some of them cannot be exploited separately from the rest of the investment (e.g. feed-in-tariffs and premium schemes) might limit investors' benefits from the full protection under the expropriation provision¹⁵. Third, in the case especially of projects in Europe, an additional complication that makes the resolution of investor-state disputes more intricate is the European Commission's jurisdictional objection

¹² Case *Compañía de Aguas del Aconquija v. Argentina*, case *Eureko v. Poland*, case *CME v. Czech Republic*.

¹³ Case *CMS v. Argentina*, case *Occidental v. Ecuador*.

¹⁴ Case *Eureko v. Poland*, partial award dated August 19, 2005, paragraph 145.

¹⁵ According to Boute (2012), among green certificates, feed-in-tariffs, and premium schemes, only green certificates qualify as individual investments that could be subject to partial expropriation, because they are usually and independently tradable in a secondary market. Tariff-based mechanisms such as feed-in tariffs or premium schemes usually entitle the operators of renewable energy installations to fixed prices. Since this fixed support may not be traded independently from the main electricity transaction, it may not easily qualify as an independent investment when the tribunal examines a state interference.

to ECT and BIT disputes brought by an investor from an EU member state against another member state (intra-EU disputes) before international investment arbitration, because of the incompatibility of these legal instruments with the EU law¹⁶.

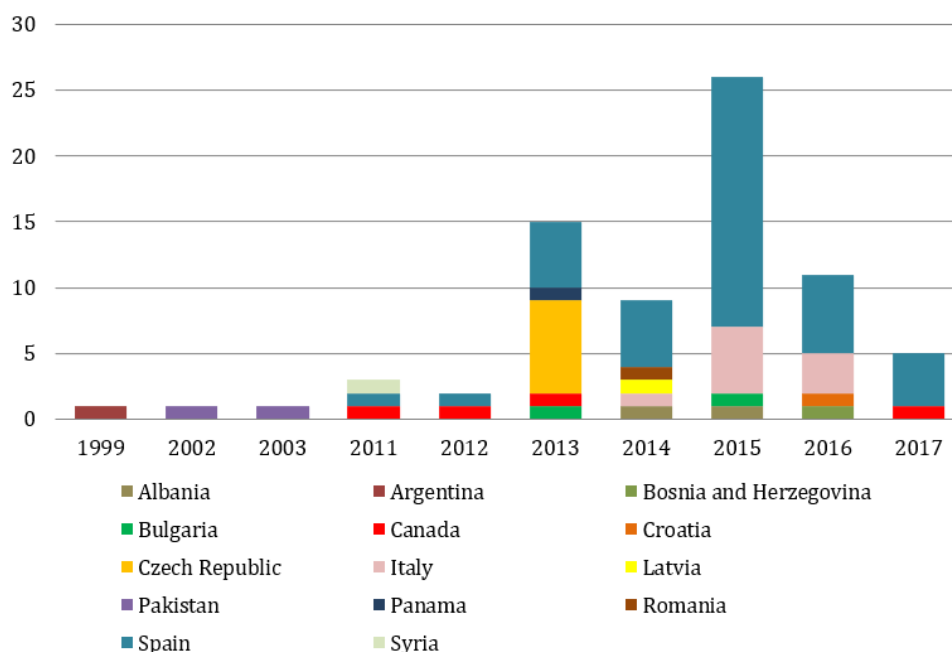


Fig. 3 Number of treaty-based renewable energy arbitration as of December 2017

Source: Author's calculations based on UNCTAD data

To illustrate the difficulty involved in developing low-carbon projects, as of December 2017, there were 74 treaty-based arbitrations in the field of renewable energy (see Fig.3) in which the majority of claims were initiated by investors under the ECT. The earliest treaty arbitration was in 1999 against Argentina, and was discontinued in 2001¹⁷. Among respondent states, it seems that Spain, Czech Republic, and Italy are the most targeted by investor claims following changes to their legal and regulatory frameworks such as taxes on power generators' revenues, and sudden changes to or reductions in subsidies for renewable energy producers. Apart from five known arbitrations against Italy (in 2014¹⁸), Spain (in 2012¹⁹ and 2013²⁰) and Czech Republic (2013²¹) in which the investor obtained some form of recovery in only one case²², all other disputes against these three countries in the renewable energy sector are pending to date. Furthermore, recent developments concerning the EU Court of Justice's

¹⁶ More information on: https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-3735364_en. Accessed July 1, 2018. See also case *Blusun v. Italy*, award dated December 27, 2016; case *Charanne and Construction Investments v. Spain*, award dated January 21, 2016.

¹⁷ Case *Empresa Nacional de Electricidad v. Argentina*.

¹⁸ Case *Blusun v. Italy*.

¹⁹ Case *Charanne and Construction Investments v. Spain*.

²⁰ Case *Eiser and Energía Solar v. Spain*, case *Isolux v. Spain*.

²¹ Case *JSW Solar and Wirtgen v. Czech Republic*.

²² In *Eiser and Energía Solar v. Spain*, the investors successfully recovered over USD 139 million from Spain. All the claimants' claims were dismissed at the merits stage in the other four cases.

rejection of the validity of the arbitration clause contained in the Netherlands-Slovakia BIT²³ have a significant impact on low-carbon investors who are and will be bringing their disputes before international investment arbitration. At the time of writing, while intra-EU BITs have not yet been completely terminated, and claims invoking the ECT's protection are still filed against these three EU countries, the question of the legitimate rights of investors in green projects is not adequately answered yet.

4.3.3 *Tension between public health and intellectual property*

The literature on the "regulatory chill" effect states that a *bona fide* regulatory measure targeting foreign investors' assets may be changed or halted for fear of costly arbitrations. These assets may be tangible or intangible, e.g. exploitation license or environmental permit. This subsection focuses on a special kind of intangible asset that recently has been regulated by the host government to protect public health, that is, intellectual property. The emerging literature on the causal link between intellectual property and public health demonstrates the difficulties for host states as well as for adjudicators involved in re-balancing the interests of investors with those of the state, because this type of asset in itself is not harmful.

Protecting intellectual property such as a foreign trademark will encourage multinational corporations to invest in developing countries. As a result, many investment agreements protect this as a form of "investment" against unlawful expropriation, and also give trademark owners the right to bring their disputes with host states directly before international investment arbitration (e.g. Korea-US FTA (2007), Japan-Indonesia FTA (2007)). Since intellectual property rights are included in many treaties, these provisions could affect the sovereignty of governments in promoting and regulating public health. In this context, the most common potential claim is expropriation when it applies to the protection of foreign investors from a broad range of regulatory measures such as issuance of a compulsory license for a life-saving pharmaceutical, or invalidation of a patent or restriction on tobacco advertising and packaging (Mercurio 2012). The cases of Philip Morris and Eli Lilly are worth discussing in this context.

Philip Morris, an American global tobacco manufacturer, challenged restrictions applied to tobacco advertising and packaging in Uruguay (2010) and Australia (2011) before international arbitration, while both governments argued that strong tobacco control policies are consistent with a substantial body of scientific literature, and more importantly with the World Health Organization's Framework Convention on Tobacco Control. In another sector, Eli Lilly, a US global pharmaceutical company incorporated in Indiana, in 2013 filed arbitration claims against Canada for the invalidation of the patents for *Strattera* and *Zyprexa*²⁴. According to the Canadian courts, these patents were canceled because the drug companies had failed to sufficiently prove that their products would be useful (i.e., the promise of utility doctrine which is to "prevent the grant of speculative patents that over promise and under deliver - both of which are harmful to society and stagnating to innovation" (see Billingsley 2015, p.31). As of the end of 2017, the ruling in all the above cases was in favor of the state, and in two cases (Eli Lilly v. Canada and Philip Morris v. Uruguay), all the claimants' claims were dismissed at the merits stage. The fact that international arbitrators ruled in the two tobacco cases in favor of the state is, as the Public Health Association of Australia put it, "the best Christmas present for public health nationally and internationally".

The literature shows that balancing intellectual property and public health is not straightforward and can be a dilemma in the current international investment law regime. To

²³ More information on: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=199968&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=404057>. Accessed July 1, 2018.

²⁴ Drugs are commonly used to treat attention deficit disorders such as hyperactivity disorder, schizophrenia and bipolar disorder.

some extent, strong trademark protection usually is associated to positive effects on consumer protection, especially in medicine if it prevents the public from purchasing inferior goods (Vadi 2009). Thus the negative effect of trademark protection on public health would seem illogical but it exists. The three cases cited above suggest an emerging tension between intellectual property rights protection and regulations in favor of public health. The debate on the spillover effects of international arbitration persists with the question of the public participation in cases concerning public interest (Kurtz 2012; Mercurio 2012). However, considering that intellectual property disputes brought before international investment arbitrations so far are relatively rare²⁵, it is difficult to assess the arbitrators' legal reasoning and to draw conclusions about the existence of a "regulatory chill" effect of arbitration in this area. Fortunately, the negotiation of new economic agreements such as CPTPP and CETA demonstrates that this issue has been recognized by states and that measures to harmonize private and public interests have also been considered in their texts (Henckels 2016).

To summarize, the survey shows that arbitration outcomes could potentially affect the national interest. E.g. being sued before international tribunals and losing a ruling become signals of the non-commitment of host states, and can affect investors' decisions in the future. Although investor-state arbitration is not always bad for the environment or public health, the main worry is that a *bona fide* regulation in favor of public interests may be challenged by investors and changed to avoid costly arbitral awards. While this concern has yet to be verified empirically, countries, through particular case studies or based on anecdotal evidence, may express doubt about the effectiveness of the current arbitration system, especially if they link observed trends which are significant in the empirical literature (e.g. the investor's likelihood of winning a dispute) to the rationales for systemic bias in international investment arbitration (Harten 2012; Schultz 2015)²⁶. The next section provides a short discussion on the root of the crisis faced by international investment arbitration given that it is a system of application of the law. We acknowledge the need for some adequate reforms to address this crisis but not the radical exit solution.

5 Discussion: Reasons not to exit from the international investment law regime?

5.1 Why exit is not efficient at either the national or international level?

The literature suggests that it does not matter whether judges or arbitrators maximize "the same thing everybody else does" (Posner 1993), because there is an environment which facilitates arbitrary and inconsistent judgments and economic incentives. Identifying "the uncertainties that give rise to reasonably perceived bias", according to Harten (2011, p.9), is more important than proving or disproving an actual bias.

In fact, some authors argue that the current network of international investment agreements is dense but its contents heterogeneous. E.g. there are agreements that allow foreign investors to bring disputes with the host country before international arbitration, and others that do not, or allow it with many limitations (Neumayer et al. 2016). While some agreements have broadened the scope to cover regulation on environmental protection and other public interests, others have relaxed these requirements (Gordon and Pohl 2011). While

²⁵ There is also an intellectual property dispute concerning public health regulations between Shell and Nicaragua. However, this ICSID arbitration was discontinued by a pre-award settlement. The details of the settlement deed were not made public.

²⁶ The law and economics approaches to judicial behavior try to discover how the interaction between the law and non-legal factors influences arbitrators' decision-making. The starting point of this economic analysis is that, like everyone else, arbitrators as well as both parties to the dispute are maximizers of their own utility (financial and non-financial interests including but not limited to arbitral (re)appointments, reputation of the host state, or future investment opportunities for investors).

some agreements define in detail the concepts of investment and foreign investors in order to exclude shell companies from protection by the treaties, others define those concepts broadly “as a standard” of BIT (Wellhausen 2016b). The differences in treaty contents are understandable, especially when countries negotiate and sign these agreements in the context of incomplete information and analysis (Poulsen and Aisbett 2013). However, the consequences of incomplete investment treaties - an important source of law- are not only treaty shopping on the part of investors but also inconsistencies in arbitrators’ interpretations and uncertainty of international investment law (Mercurio 2014; Henckels 2016). In this view, international investment arbitration is not at the root of all the criticisms highlighted in the literature. Moreover, researchers remain in some doubt about whether radical exit solutions are achieving their objectives at the national level (Peinhardt and Wellhausen 2016).

At the country level, the departure from the system to fend off future arbitration claims can sometimes be counterproductive, for four reasons. First, the alternative forums, such as ad hoc tribunals under the UNCITRAL arbitration rules, are now commonly listed in many investment treaties. Second, it is too early and unclear to confirm that a host state which is no longer a member of the ICSID Convention will not be bound to future ICSID arbitrations, because a state’s denunciation, as set out in Article 72 of the ICSID Convention, “shall not affect the rights or obligations under this Convention of that state or of any of its constituent subdivisions or agencies or of any national of that state arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary”, as explained by Tietje et al. (2008) and Lavopa et al. (2013)²⁷. UNCTAD and ICSID data show that after the withdrawal from the ICSID Convention, while Ecuador faces arbitrations using the UNCITRAL arbitration rules, Venezuela and Bolivia still face ICSID claims. Third, given the redundancy in investment agreements, multinational firms may structure their investments through countries that have favorable treaties with the host state (e.g. ones provide investors the right to bring investment disputes before ICSID) to bypass the unfavorable treaty (Peinhardt and Wellhausen 2016). Finally, a significant number of BITs include sunset clauses which extend treaty protection beyond its unilateral termination date (e.g. it can continue to protect investments made before the date of termination, for up to 5 to 20 years). This system of immunity of BITs evidently delays the immediate effects of an unilateral denunciation (Lavopa et al. 2013; Gordon and Pohl, 2015).

At the international level, while it will take some time to reach a consensus among countries in a future comprehensive multilateral investment agreement or a future multilateral investment court model devoted to resolve investor-state disputes, the wholesale exit of a number of countries could trigger a “wave” that other countries will follow, and the ultimate outcomes behind this domino effect could be the forum and treaty shopping, the panic of investors and finally the systemic collapse of the international investment regime. Reforms are needed to address countries’ concerns but not to include wholesale exit. The next subsection demonstrates that the current international investment law is not a closed system. In fact, it has allowed and still does allow changes to better adapt to modern issues such as climate change and unsustainable development. More importantly, if some countries choose to stay in the current international law regime to improve it, our survey shows that they will not be alone.

5.2 How states can change rules without exiting from the international investment law regime.

²⁷ The authors state that under certain conditions, including interpretation of article 72 of the ICSID Convention on the validity of consent to the jurisdiction of the Centre, the wording used in the dispute settlement provisions of investment treaties or the period of 6 months before date of entry into effect of the denunciation, the country’s decision to withdraw from the ICSID Convention may have no impact on the binding consent granted by the host state in its treaties to refer disputes to ICSID arbitration.

The literature identifies three major factors which show that it is possible to change the rules of the current system rather than leaving it altogether. The first is willingness. Broude et al. (2016) and Haftel et al. (2018) show that states are willing to renegotiate existing agreements even when involved in treaty violation disputes. Renegotiation as opposed to withdrawal from investment treaties or institutions, allows home and host states actively to adjust and clarify their commitments over time by mutual and constructive agreement. Furthermore, such renegotiation could produce immediately desirable effects given the in-built immune system in BITs and the ICSID Convention (Lavopa et al. 2013). The renegotiation of existing treaties is occurring at a rapid rate across the world because both developing and developed countries (e.g. the United States, Australia, and New Zealand) are very concerned about the impact of liberalization and globalization on sustainable development (Meyer et al. 2018). These arguments could explain why only a few countries are choosing radical means of escaping from the current international investment law regime.

The second factor is possibility. Renegotiation is a feasible solution to calibrate states' long-term commitment under international law because many investment treaties especially new generation ones, include provisions that allow future amendments (UNCTAD 2017). Even if these agreements do not regulate amendment, article 11²⁸ and article 39²⁹ of the Vienna Convention on the Law of Treaties (1969) will usually apply (Lavopa et al. 2013).

The third factor is international support. States and especially developing and least developed ones, are not alone because they can profit from the international organization's support to develop their own investment treaty reform roadmaps. As part of the World Investment Forum, UNCTAD's extensive investment and development programs, e.g. Annual High-level International Investment Agreement Conference, Investment Promotion Conference, are becoming reference points for policymakers for formulating national investment policies. For the purposes of placing "inclusive growth and sustainable development at the heart of efforts to attract and benefit from investment" (UNCTAD 2012), reform *à la* UNCTAD focuses not only on negotiating new sustainable development friendly treaties but also on modernizing old generation treaties that still "bite" and which are divergent in their treaty clauses via the many options including renegotiation (UNCTAD 2017)³⁰.

Renegotiation often takes two forms: countries can focus on a small number of specific issues which require amendment through a new protocol³¹, or replacement of an old treaty by a new one and addition of a clause to terminate the prior treaty³². Many suggestions proposed by UNCTAD to introduce the right to regulate and to ensure responsible investment are generally supported in the literature, e.g. reference to the right to regulate in preambles or introductory provisions of treaties, clarification of the scope of standards of protection (e.g. what does and does not constitute indirect expropriation)³³, calibration of the definition of

²⁸ Article 11 of the Vienna Convention on the Law of Treaties (1969): Means of expressing consent to be bound by a treaty.

²⁹ Article 39 of the Vienna Convention on the Law of Treaties (1969): General rule regarding the amendment of treaties.

³⁰ Among the options, UNCTAD proposes also termination of old investment agreements. However, UNCTAD and Peinhardt and Wellhausen (2016) recommend that this option should apply only when the country's treaty network is too dense and overlapping, and is causing inconsistencies in the application of international law (e.g. regional FTAs overlap with bilateral agreements in the region).

³¹ This solution can reduce transaction costs significantly and does not alter the overall design and philosophy of the old agreement (UNCTAD 2017).

³² This means also that a BIT can be replaced by a FTA with an investment chapter. E.g. Panama-Mexico BIT (2005) is replaced by Mexico-Panama FTA (2014), Nicaragua-Taiwan BIT (1992) is replaced by Nicaragua-Taiwan FTA (2006), EU-Viet Nam FTA will replace 22 BITs between Vietnam and EU member states.

³³ As an illustration, to ease the tension between public health and intellectual property, Vadi (2009) and Mercurio (2012) suggest borrowing the TRIPS agreement language (compulsory license, article 31 of the TRIPS agreement) to allow a government to authorize a third party to "use" intellectual property rights in the public interest and without discrimination, without the consent of the rights holder. See examples in Korea-United States FTA (2007), Australia-Chile FTA (2009), New Zealand-China FTA (2008).

investment, especially low carbon investment³⁴, and right to invoke international arbitration conditioned on investors' responsibility³⁵, among others.

At the end of 2017, 242 investment agreements had been terminated and more than half replaced by new ones³⁶. This suggests that many countries want to remain in the current international investment law regime and are looking for ways to reform it from within. Although there are no comprehensive statistics on the amendment of investment treaties, the evidence in the literature suggests that this form of renegotiation has not been widely exploited by states (Gordon and Pohl 2015; Broude et al. 2016). An example of renegotiation that took place before 2010 (before the crisis in the international investment law regime had peaked) is provided by Broude et al. (2016) which shows that the revised versions of the bilateral investment treaties have changed little in terms of investor-state arbitration provisions. Despite this general trend, the authors recognize that a small but significant number of agreements including those where Canada and the United States are partners, were changed to create more state regulatory space in ISDS provisions, e.g. exclusion of some policy areas from investor-state dispute settlement or allowing public intervention in the form of *amicus curiae* submission.

6 Conclusion

At the national level, the decision of some countries to exit from the current international investment law regime is understandable because it could reduce the risk of being sued by foreign investors and having to pay millions of dollars of compensation. Sometimes being hit by arbitration claims gives countries an opportunity to learn and to reassess their current policies.

International investment arbitration is an important part of the current international investment law regime. It is suffering public criticism as a biased system that overpowers the interests of foreign investors while not considering the national interests. Although showing that countries may benefit from international investment arbitration in terms of international capital, the literature points out that these criticisms are not irrelevant, especially in the context of the new challenges brought by globalization. Changes to adapt the current system to the new situation are required but where should these changes begin?

There are several ideas for reforming the existing system of arbitration, including the Investment Court model, an entity proposed by the EU in its FTAs with Canada and Vietnam. This model is expected to improve some weaknesses of the ad hoc arbitration, e.g. the appointment of standing judges or an appellate tribunal. However, it is in the testing process, and its success depends largely on the support of other non-EU countries³⁷ (Vajda 2018; Robert 2018). Since the current investor-state arbitration system or any other international

³⁴ According to Boute (2012), an expansive concept of "investment" in the treaty should cover low-carbon investors' rights associated to public support schemes, given the vulnerability of this kind of investment.

³⁵ Peterson and Gray (2003) propose another solution to inject private responsibilities into an investment treaty. Accordingly, a treaty may require investors' compliance with minimum human rights or environmental protection responsibilities, as well as other rights set out in domestic law (e.g. contribution to the host state's economic development) as a condition for invoking international arbitration. See examples in Burundi-Turkey BIT (2017), Ukraine-Turkey BIT (2017), Turkey-Mozambique BIT (2017).

³⁶ As of end 2017, 138 terminated investment agreements had been replaced by new ones, 81 agreements had been denounced unilaterally, 20 agreements had been terminated by mutual consent, 3 agreements had expired. More information on: <http://investmentpolicyhub.unctad.org/IIA>. Accessed July 1, 2018.

³⁷ FTAs between the EU and Japan were signed in July 2018. However, this instrument does not include the investment chapter or the mechanism for resolving investment disputes between investors and host states, given the divergence between the EU and Japan on the initiative to create a permanent multilateral court. See Robert (2018). This divergence is found also in the cases of Canada and Mexico. In the new CPTPP agreement, Canada and Mexico agree to maintain the traditional approach to ISDS. By contrast, in their respective agreements with the EU, they favor establishing a permanent investment court (UNCTAD 2018).

court model is a system of application of the law, this paper aimed at providing a fundamental solution which seeks to change the content of international investment agreements - an indispensable source of the law used by both arbitrators and judges to resolve investment disputes.

In early 2018, the international community received a promising sign when Ecuador following its wholesale exit in 2007, announced that it was ready to return to the negotiating table for future investment treaties, including treaties unilaterally denounced, on the basis of its new BIT model (which is considered to better protect host state's rights to regulate)³⁸. Together with strong efforts by the Asia Pacific region in recent years to achieve international economic integration, there is evidence that many countries still see potential gains from international capital. While important conditions are being met to improve the current international investment law regime such as strong support from international forums, self-improvement efforts from arbitral institutions such as the next amendment to ICSID Arbitration rules and the consensus of states on the need for reform, remaining in it and changing the rules seem to be the best option.

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³⁸ <https://www.cancilleria.gob.ec/en/ecuador-proposes-new-investment-agreements-that-protect-the-country-and-defend-human-rights/>. Accessed July 1, 2018.

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