

# **ADJUDICATING TRADE AND INVESTMENT DISPUTES: CONVERGENCE OR DIVERGENCE?**

*Edited By*

**SZILÁRD GÁSPÁR-SZILÁGYI**

*University of Oslo, PluriCourts*

**DANIEL BEHN**

*The University of Liverpool*

**MALCOLM LANGFORD**

*University of Oslo*

Cambridge University Press

Studies on International Courts and Tribunals Series

# CONTENTS

*Contributors* ..... Error! Bookmark not defined.

**1 Convergence, Divergence, and International Economic Dispute Settlement – A Framework**  
Error! Bookmark not defined.

SZILÁRD GÁSPÁR-SZILÁGYI, DANIEL BEHN, AND MALCOLM LANGFORD

**PART I Dispute System Design** ..... Error! Bookmark not defined.

**2 Investment Chapters in PTAs and Their Impact on Adjudicative Convergence** . Error! Bookmark not defined.

SZILÁRD GÁSPÁR-SZILÁGYI, MAXIM USYNIN

**3 The EU Investment Court System and its Resemblance to the WTO Appellate Body?** ..... Error! Bookmark not defined.

HANNES LENK

**4 Entry Rights and Investments in Services: Adjudicatory Convergence between Regimes?**  
Error! Bookmark not defined.

MURILO LUBAMBO

**PART II Use of Precedent Across Regimes** ..... Error! Bookmark not defined.

**5 Approaches to External Precedent: The Invocation of International Jurisprudence in Investment Arbitration and WTO Dispute Settlement** ..... Error! Bookmark not defined.

NICCOLÒ RIDI

**6 Engagement between International Trade and Investment Adjudicators** ..... Error! Bookmark not defined.

MICHELLE Q ZANG

**PART III Interpretive Convergence and Adjudicative Behaviour** .... Error! Bookmark not defined.

**7 Inherent Powers of the WTO Appellate Body and ICSID Tribunals. A Tale of Cautious Convergence** ..... Error! Bookmark not defined.

RIDHI KABRA

**8 The Use of Object and Purpose by Trade and Investment Adjudicators: Convergence without Interaction** ..... Error! Bookmark not defined.

GRAHAM COOK

**9 Assessing Convergence between International Investment Law and International Trade Law through Interpretative Commissions/Committees: A Case of Ambivalence?** ..... Error! Bookmark not defined.

YULIYA CHERNYKH

**10 Regime Responsiveness** ..... 3

MALCOLM LANGFORD, COSETTE D. CREAMER AND DANIEL BEHN

**11 Epilogue: ‘Convergence’ is a Many-Splendored Thing** ..... Error! Bookmark not defined.

JOSÉ E. ALVAREZ

## Regime Responsiveness

Malcolm Langford,<sup>\*</sup> Cosette D. Creamer<sup>\*\*</sup> and Daniel Behn<sup>\*\*\*</sup>

### 1 Introduction

State backlash has marked dispute settlement mechanisms in both the international trade and investment treaty regimes. For the former, the transition from the General Agreement on Tariffs and Trade (GATT) dispute panels to the World Trade Organization's (WTO) Dispute Settlement Mechanism (DSM) represented a notable instance of the turn toward international courts within world politics.<sup>1</sup> Yet, the decisions of the WTO Appellate Body and dispute panels (which comprise the DSM) soon engendered critique from both states and other stakeholders, against the backdrop of stalled negotiations over new trade rules. Greenwald encapsulates this disquiet when he wrote in 2003 that 'WTO dispute settlement has been far more an exercise in policy-making, and far less an exercise in even-handed interpretation of carefully negotiated language of WTO agreements'.<sup>2</sup>

As to the latter, the development of the modern investment treaty regime represents an equally remarkable extension of international law. Built on a network of more than 3000 signed bilateral and other investment treaties,<sup>3</sup> foreign investors are granted beneficiary rights primarily aimed at the protection of their investments. While each international investment agreement (IIA) is a stand-alone agreement with considerable diversity,<sup>4</sup> agreements typically include investor-state dispute settlement (ISDS).<sup>5</sup> Mirroring trade, early litigation and initial

---

<sup>\*</sup> Professor, Faculty of Law, University of Oslo and Co-Director, Centre on Law and Social Transformation, University of Bergen and CMI. Email: malcolm.langford@jus.uio.no.

<sup>\*\*</sup> Assistant Professor of Political Science, University of Minnesota. Email: ccreamer@umn.edu

<sup>\*\*\*</sup> Lecturer in Law, Liverpool Law School, University of Liverpool and Associate Professor, PluriCourts Centre of Excellence, Faculty of Law, University of Oslo. Email: d.f.behn@jus.uio.no.

<sup>1</sup> J. Jackson, 'The WTO "Constitution" and Proposed Reforms: Seven "Mantras" Revisited' (2001) 4 *Journal of International Economic Law* 67.

<sup>2</sup> J. Greenwald, 'WTO Dispute Settlement: An Exercise in Trade Law Legislation?' (2003) 6 *Journal of International Economic Law* 113 (2003).

<sup>3</sup> UNCTAD provides an extensive database on IIAs <<http://investmentpolicyhub.unctad.org/IIA>> accessed 1 June 2019. Other types of treaties include regional free trade agreements (FTAs) and a handful of plurilateral investment treaties. Later examples include: *Energy Charter Treaty* (ECT), *North American Free Trade Agreement* (NAFTA), *Association of South-East Asian Nations Comprehensive Investment Agreement*, *Central American-Dominican Republic Free Trade Agreement* (DR-CAFTA), as well as, recently concluded or late-round negotiated treaties: *Trans-Pacific Partnership Agreement* and the *Regional Comprehensive Partnership Agreement*.

<sup>4</sup> IIAs typically include: prohibitions against expropriation without adequate compensation, full protection and security, fair and equitable treatment (FET), most-favored nation (MFN) treatment, and national treatment.

<sup>5</sup> B. Simmons, 'Bargaining over BITS, Arbitrating Awards: The Regime for Protection and Promotion of International Investment' (2014) 66 *World Politics* 12, 42.

awards soon produced a backlash and the so-called legitimacy crisis.<sup>6</sup> Primarily, this phenomenon is not about the expansiveness of the substantive rights granted to foreign investors under IIAs, but rather the combination of such rights with a robust ISDS mechanism. They include claims that ISDS is pro-investor, or anti-developing state; that the jurisprudence is incoherent, riddled with contested interpretations; and that the levels of monetary compensation are too high.<sup>7</sup>

To be sure, many claim that these critiques are misguided and that there is little evidence of ‘judicial empowerment’ or adjudicatory activism. Others are more nuanced and point to the potential for self-correction. Indeed, various studies stress or find that international courts and tribunals purposefully conform their rulings to the expressed preferences of member states, especially politically or economically influential ones, and do not always engage in expansive judicial law-making or assertions of authority.<sup>8</sup> In this vein, the legitimacy crises are merely a – *crise de croissance* – ‘growing pains’<sup>9</sup> and as the systems mature, they will evolve (or have done so) into more legitimate, consistent, and effective forms of international adjudication. However, only a nascent and mostly doctrinal literature has examined the degree of adjudicatory responsiveness in international economic law.<sup>10</sup>

In light of the debate surrounding these legitimacy crises, we ask whether there is (or has been) a reflexive and evolutionary self-correction in each regime. Do adjudicators in international economic law seek to build their normative *and* sociological legitimacy<sup>11</sup> by displaying sensitivity to state signals in their resolution of substantive and procedural questions? Or do we find that their behaviour is largely indifferent to the storm outside?

---

<sup>6</sup> See e.g. P. Eberhardt and C. Olivet, ‘Profiting from Injustice: How Law Firms, Arbitrators, and Financiers are Fueling an Investment Arbitration’, *Corporate Europe Observatory*, November 2012; M. Langford, D. Behn, and O.K. Fauchald, ‘Backlash and State Strategies in International Investment Law’ in Thomas Gammeltoft-Hansen and Tanja Aalberts (eds) *The Changing Practices of International Law: Sovereignty, Law and Politics in a Globalising World* (Cambridge University Press, 2018), ch 4.

<sup>7</sup> See e.g. G. Van Harten, ‘Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration’ (2012) 50 *Osgoode Hall Law Journal* 211, 251; Z. Douglas, ‘The MFN Clause in Investment Arbitration: Treaty Interpretation off the Rails’ (2011) 2 *Journal of International Dispute Settlement* 97; G. Kahale ‘Is Investor-State Arbitration Broken?’ 7 *TDM* (2012) <www.transnational-dispute-management.com> accessed 1 June 2019; ‘The arbitration game: governments are souring on treaties to protect foreign investors’ *Economist*, 11 October 2014.

<sup>8</sup> G. Garrett, D. Kelemen and H. Schulz, ‘The European Court of Justice, National Governments, and Legal Integration in the European Union’ (1998) 52(1) *International Organization* 149; L. Helfer. and K. Alter, ‘Legitimacy and Lawmaking: A Tale of Three International Courts’ (2013) 14(2) *Theoretical Inquiries in Law* 479; O. Larsson and D. Naurin, ‘Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU’ (2016) 70(2) *International Organisation* 377; Ø. Stiansen and E. Voeten, ‘Backlash and Judicial Restraint: Evidence From the European Court of Human Rights’ *SSRN Working Paper*, 17 August 2018.

<sup>9</sup> A. Bjorklund, ‘Report of the Rapporteur Second Columbia International Investment Conference: What’s Next in International Investment Law and Policy?’ in J. Alvarez et al (eds.) *The Evolving International Investment Regime: Expectations, Realities, Options* (Cambridge University Press, 2011) 219.

<sup>10</sup> D. Schneidermann, ‘Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint’ (2011) 2 *Journal of International Dispute Settlement* 471. The empirical exception is: M. Busch and K. Pelc, ‘The Politics of Judicial Economy at the World Trade Organization’ (2010) 64(2) *International Organization* 257.

<sup>11</sup> By normative legitimacy, we mean the extent to which an institution with the right to rule has moral grounds for doing so; and by sociological legitimacy, we mean the extent to which the ruled accept or believe in that exercise of power.

This question of responsiveness is relevant for three reasons. The first is theoretical. A central division in the characterization of international courts and tribunals is the extent to which adjudicators *act* as ‘trustees’ or ‘agents’.<sup>12</sup> Are they trustees that decide according to their own professional judgments; or are they agents, susceptible to the critique and influence of their principals, states?<sup>13</sup> The second reason is policy. Various reform processes are underway such as the current negotiations in UNCITRAL Working Group III on the reform of investor-state dispute settlement (ISDS). Yet, if courts and arbitral panels are responsive, the need for more drastic changes may be obviated. Likewise, if some institutional designs (especially a centralized model of adjudication) makes dispute settlement more responsive, then that may be a preferable model. This belief explains partly the European Union’s drive for a multilateral investment court in UNCITRAL Working Group III.<sup>14</sup> The third is comparative and is central to the core question of this book. An examination of the respective trade and investment regimes provides evidence of whether the systems are converging (or not) with respect to adjudicative posture. Is investor-state arbitration moving closely to what some claim (until recently) is the more responsive regime of the WTO.

We begin the chapter by theorizing how, why, and when adjudicators in the two regimes might be sensitive to state signals (section 2). We then review the evidence in the WTO DSM (section 3) and ISDS (section 4) before concluding on whether there is convergence between the two regimes and what it says for debates on adjudicator behaviour and policy reform.

## 2 Theorizing Adjudicative Responsiveness

It is beyond doubt that international courts and arbitral bodies possess legal techniques to manage their legitimacy and *respond* to the concerns of states.<sup>15</sup> Such techniques include the ability to tighten jurisdictional criteria, exhibit greater deference to respondent states on the merits, reduce the number of claims upon which a claimant state or investor wins, minimize the extent of the remedy, shift legal costs, or a combination of all of these. In the context of investor-state arbitration, the formal space to deploy these techniques may be greater than in

---

<sup>12</sup> See e.g. K. Alter, ‘Agents or Trustees? International Courts in their Political Context’ (2008) 14(1) *European Journal of International Relations* 33. Delegation is a fairly open framework such that principal-agent approaches are more a ‘highly flexible family of models, rather than an overarching set of assumptions and results.’ S. Gailmard, ‘Accountability and Principal-Agent Models’, in M. Bovens, T. Schillemans, and R. Goodin (eds), *Oxford Handbook of Public Accountability* (Oxford University Press, 2014). In this respect, see the response of M. Pollack, ‘Principal-Agent Analysis and International Delegation: Red Herrings, Theoretical Clarifications, and Empirical Disputes’ (2007) *Bruges Political Research Papers, No. 2* to claims that the fiduciary model of beneficiary-trustee is an alternative to the principal-agent model.

<sup>13</sup> Alter, *ibid.*

<sup>14</sup> *Multilateral investment court: Council gives mandate to the Commission to open negotiations*, 20 March 2018 <[www.consilium.europa.eu/en/press/press-releases/2018/03/20/multilateral-investment-court-council-gives-mandate-to-the-commission-to-open-negotiations](http://www.consilium.europa.eu/en/press/press-releases/2018/03/20/multilateral-investment-court-council-gives-mandate-to-the-commission-to-open-negotiations)> last accessed 1 June 2019.

<sup>15</sup> See e.g. M. Madsen, ‘The Legitimization Strategies of International Courts: The Case of the European Court of Human Rights’ in M. Bobek (ed.) *Selecting Europe’s Judges* (Oxford University Press, 2015); J.H.H. Weiler, ‘Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration’ (1993) 31(4) *Journal of Common Market Studies* 417; S. Dothan, ‘Why Granting States a Margin of Appreciation Supports the Formation of a Genuine European Consensus’ *iCourts Working Paper Series No. 22* (2015).

the WTO given that the latter operates under a centralized Appellate Body, while investor-state arbitration is completely *ad hoc* in organization.

But why would international adjudicators turn to such techniques? Why would they sacrifice their cherished legal positivism to manage, consciously or unconsciously, the legitimacy of their respective regimes when resolving disputes? A useful way of distinguishing two competing sets of arguments is to employ the analytical framework or heuristic of delegation theory. The extent to which investment treaty arbitrators are reflexive arguably comes down to the extent to which they *act* as ‘trustees’ or ‘agents.’<sup>16</sup>

## 2.1 *Trustee Null Hypothesis*

Some scholars argue that adjudicators on international courts and arbitral bodies are best characterized as ‘trustees.’ They adjudicate through delegated authority and according to their own professional judgments on behalf of states and other beneficiaries<sup>17</sup> and are relatively insulated from the signals of states as they ‘serve publics with diverse and often conflicting preferences.’<sup>18</sup> This conception suggests that an external legitimacy crisis would exert little influence on adjudicative decision-making.

On its face, *investor-state arbitration* might lie at the trustee end of the delegation continuum. Besides partial party-appointment, many of the typical characteristics of an agency relationship are not present as arbitrators wield significant discretionary powers with minimal accountability. Arbitral jurisdiction is made compulsory in most IIAs; arbitral appointments in a particular case are largely beyond challenge; awards can only be overridden on very narrow technical and procedural grounds;<sup>19</sup> it is difficult for states to amend treaty provisions in order to avoid any precedential effects that an award may have on future cases with a similarly-placed investor;<sup>20</sup> and there is no formal channel by which states can express their discontent with arbitral awards rendered against them. Moreover, arbitrators are usually selected on the basis of their ‘personal and professional reputation’.<sup>21</sup>

If the trustee model captures the space in which investor-state arbitrators operate, we would therefore expect the underlying values of the regime and/or arbitrators to largely guide decision-making. As Alter puts it, the result will be a ‘rhetorical politics’ in which the appointing actors will appeal to the trustee’s ‘mandate’ and ‘philosophies.’ This might be *legal positivism*. Arbitrators, according to their professional judgment, seek to apply IIA provisions in good faith to the specific facts of the case. Indeed, the fact that arbitrators regularly find for

---

<sup>16</sup> See (n 12).

<sup>17</sup> Alter (n 12).

<sup>18</sup> Y. Lupu, ‘International Judicial Legitimacy: Lessons from National Courts’ (2013) 14(2) *Theoretical Inquiries in Law* 437, 438. Some scholars claim that the problem even extends to domestic courts. National judges will only have ‘vague notions,’ for example, about parliamentary preferences and the risk of legislative override. See J. Segal, ‘Separation-of-Powers Games in the Positive Theory of Congress and Courts’ (1997) 91 *The American Political Science Review* 1, 31.

<sup>19</sup> There are very limited grounds for appeal – either through annulment procedures (under the ICSID Convention) or domestic court set-aside proceedings (non-ICSID cases),

<sup>20</sup> K. Gordon and J. Pohl, ‘Investment Treaties over Time: Treaty Practice and Interpretation in a Changing World’ *OECD Working Papers on International Investment* (OECD Publishing, 2015).

<sup>21</sup> Y. Dezalay and B. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press, 1998).

respondent states as much as claimant-investors may suggest a certain even-handedness.<sup>22</sup> Accordingly, any change in arbitral behaviour could only be explained by legal shifts in the regime's substantive rules or a significant shift in the average set of factual circumstances. Yet, it is hard to say that there has been a change in either.<sup>23</sup>

Paradoxically perhaps, an *attitudinalist* perspective of adjudicative behaviour would suggest also trustee-like behaviour. Arbitrators make decisions according to their sincere ideological attitudes and values (according to their 'personal judgment')<sup>24</sup> because they are relatively unconstrained by other actors, including states.<sup>25</sup> Some claim that investor-state arbitrators are on average more partial to investors, representing an elitist and largely Western-based epistemic community with a commitment to promoting and protecting foreign investment. Arbitrators from Western Europe and North America make up a total of 70 percent of all appointees to investment treaty arbitrations.<sup>26</sup> Such differences can matter given Posner and Figueredo's finding on the International Court of Justice (ICJ): permanent judges were significantly more likely to vote for a disputing state that shares a similar level of economic development and democracy with their home state.<sup>27</sup> In the context of investor-state arbitration, there has been a slight uptick in the appointment of arbitrators hailing from lesser developed states but many of them tend to come from a similar 'epistemic community' and South America in particular<sup>28</sup> and may need to adhere to the 'rules of the club' in order to gain appointments.<sup>29</sup>

Turning to the WTO, given compulsory jurisdiction and that Appellate Body adjudicators act as authoritative and ultimate interpreters of WTO law, many assert that the WTO DSM operates virtually free from direct state control.<sup>30</sup> Commentators largely agree that states find

---

<sup>22</sup> See D. Behn, 'Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-the-Art' (2015) 46(2) *Georgetown Journal of International Law* 363; Franck, 'Conflating Politics and Development: Examining Investment Treaty Outcomes' (2014) 55 *Virginia Journal of International Law* 1.

<sup>23</sup> Some recent and revised IIAs include general but vague clauses concerning the right to regulate or greater exceptions for domestic environmental and labour policies, but their significance is not yet clear. See T. Broude et al, 'Who Cares About Regulatory Space in BITs? A Comparative International Approach,' in A. Roberts et al (eds.) *Comparative International Law* (Cambridge University Press, 2017); W. Alschner and K. Hui, 'Missing in Action: General Public Policy Exceptions in Investment Treaties', L Sachs, J. Coleman and L. Johnson (eds.), *Yearbook on International Investment Law and Policy* (Oxford University Press, 2018). An empirical study based on computational text analysis suggests that renegotiations of IIAs tend to result in less room for state regulatory powers and more investor-protective ISDS provisions: W. Alschner, 'The Impact of Investment Arbitration on Investment Treaty Design: Myth versus Reality', (2017) 42(1) *Yale Journal of International Law*, 1.

<sup>24</sup> See generally J. Segal and H. Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge University Press, 1993).

<sup>25</sup> *Ibid.*, p. 28.

<sup>26</sup> PITAD through 1 August 2017. M. Langford, D. Behn, and R. Lie, 'The Revolving Door in International Investment Arbitration' (2017) 20(2) *Journal of International Economic Law* 301.

<sup>27</sup> E. Posner and M. de Figueiredo, 'Is the International Court of Justice Biased?' 34 *Legal Studies* (2005) 599. Together, these correlations explained a remarkable 60 percent to 70 percent of variance amongst individual judicial votes.

<sup>28</sup> Langford, Behn and Lie (n 26).

<sup>29</sup> M. Langford, D. Behn and M. Usynin, Does Nationality Matter? Arbitrator Background and Arbitral Outcomes, in D. Behn, O.K. Fauchald and M. Langford (eds.), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (Cambridge University Press, forthcoming 2020).

<sup>30</sup> K. Alter, 'Agents or Trustees? International Courts in their Political Context' (2008) 14(1) *European Journal of International Relations* 33; D. Cass, 'The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade' (2001) 12(1) *European Journal of International Law* 39–75. A. C. Sweet, 'The New GATT: Dispute Resolution and the Judicialization of the Trade Regime', in M. L. Volcansek (ed.), *Law above Nations: Supranational Courts and the Legalization of*



it difficult if not impossible to engage in formal legislative response to rulings of the organization's quasi-adjudicative bodies.<sup>31</sup> As with the investment regime, then, few of the typical characteristics of an agency relationship are found within the WTO regime. While *ad hoc* panellists may be appointed by the disputing parties, the vast majority have been selected by the WTO Director General.<sup>32</sup> Given, however, that many panellists have served as government delegates to the WTO, we might expect panellists to act less like trustees than members of the Appellate Body, who enjoy a longer tenure on the bench. Indeed, trade scholars generally concur that the jurisprudence of the WTO Appellate Body has exhibited legalistic traits more akin to either a legal positivist or attitudinalist perspective of adjudicative behaviour in comparison to the WTO trade dispute panels.<sup>33</sup>

## 2.2 Agent Responsiveness Hypothesis

The alternative to these predictions of stable adjudicator behaviour is to suggest that international courts and tribunals follow the mood shifts of states as agents rather than trustees. This claim is relatively under-theorized within the literature, even though many recognize that states frequently employ such horizontal pressure. In our view, the principal prism through which to understand and model such behaviour is *rational choice*. Adjudicators: (1) may hold diverse preferences that extend beyond political ideology or good lawyering; (2) 'take into account the preferences and likely actions of other relevant actors, including their colleagues, elected officials, and the public;' and (3) operate in a 'complex institutional environment' that structures this interaction.<sup>34</sup>

Indeed, evidence from various domestic jurisdictions suggests that judges are strategically sensitive to signals from the executive and legislature,<sup>35</sup> although the scholarship is divided on the extent of this shift.<sup>36</sup> As to public opinion, there is consensus that it has an *indirect* influence on judgments through judicial appointments but is divided over whether it exerts a *direct* influence on judges.<sup>37</sup> At the international level, empirical and doctrinal scholarship suggests

---

*Politics* (University of Florida Press, 1997); A.C. Sweet and T.L. Brunell, 'Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism' (2013) 1(1) *Journal of Law and Courts*, 61–88, 62.

<sup>31</sup> C.D. Ehlermann and L. Ehring, 'The Authoritative Interpretation Under Article IX:2 of the Agreement Establishing the World Trade Organization: Current Law, Practice and Possible Improvements' (2005) 8 *Journal of International Economic Law* 803 (2005).

<sup>32</sup> C.D. Creamer, *Judicial Responsiveness in the World Trade Organization* (unpublished manuscript).

<sup>33</sup> R. Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary' (2016) 27 *European Journal of International Law* 9.

<sup>34</sup> L. Epstein and J. Knight, 'Reconsidering Judicial Preferences' (2013) 16 *Annual Review of Political Science* 11, 11. On diverse goals, see in particular L. Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton University Press, 2008).

<sup>35</sup> See e.g. J.C. Rodriguez-Rada, 'Strategic Deference in the Colombian Constitutional Court, 1992-2006' in G. Helmke and J. Rios-Figueroa (eds.) *Courts in Latin America* (Cambridge University Press, 2011) pp. 81-98; Epstein and Knight, *ibid*; D. Kapiszewski, 'Tactical Balancing: High Court Decision Making on Politically Crucial Cases' (2011) 45 *Law and Society Review* 471.

<sup>36</sup> Compare e.g. M. Bergara, B. Richman, and P. Spiller, 'Modeling Supreme Court Strategic Decision Making: The Congressional Constraint' (2003) 28(2) *Legislative Studies Quarterly* 247 with Segal (n 24).

<sup>37</sup> R. Flemming and D. Wood, 'The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods' (1997) 41 *American Journal of Political Science* (1997) 468, 480. See also B. Friedman, *The*

that the Court of Justice of the EU (CJEU)<sup>38</sup> is sensitive to the balance and composition of member state opinion within institutional constraints.

For investor-state arbitrators, a strategic account would imply that a behavioural correction in response to legitimacy critiques could forestall certain material and reputational ‘costs.’ In practice, arbitrators may lack trusteeship freedoms and are reduced to agents engaged in ‘contractual politics’ with their principals. There might be two grounds for thinking so. First, arbitrators may be concerned *collectively* about backlash by principals as it may increase the risk of non-compliance by respondent states, encourage greater exits from the regime, reduce the rate of new treaties being entered into, or, those with strong investor protection proclivities, result in weaker future and/or revised IIAs. Such state behaviour would inhibit the ability of arbitrators to impose their political preferences (comparable to the concern with ‘overrides’ in the judicial context)<sup>39</sup> and maintain their general reputational standing. Second, investor-state arbitrators may be concerned about their own *individual* reputation and material chances of future appointment.<sup>40</sup> If they experience reversal through annulment procedures,<sup>41</sup> set-asides in domestic courts, or criticism by their colleagues or scholars, behaviour may adjust. Arbitrators interested in the role of chair or respondent wing arbitrator may be particularly sensitive – given the common role of states in these appointments.

Could arbitrators be so strategic and consequentialist? Well, arbitrators themselves have acknowledged that the notion is not so far-fetched. In a recent survey, 262 international arbitrators, which included a subset of 67 with experience in investor-state arbitration,<sup>42</sup> were asked whether they considered future re-appointment when deciding cases.<sup>43</sup> A remarkable 42 percent agreed or were ambivalent. Given the sensitive nature of the question, it is arguable that this figure is understated.<sup>44</sup>

These strategic predictions may be also enhanced by sociological forces.<sup>45</sup> The theory of *discursive institutionalism* proposes that discourse (such as the legitimacy crisis) is not simply a static, internalistic, and slow-moving phenomenon but also an independent, dynamic, and

---

*Will of the People: How Public Opinion has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (Farrar, Straus and Giroux, 2009); L. Epstein and A. Martin, ‘Does Public Opinion Influence the Supreme Court? Possibly Yes (But We’re Not Sure Why)’ (2010) 13 *University of Pennsylvania Journal of Constitutional Law* 263, 270; I. Unah et al, ‘U.S. Supreme Court Justices and Public Mood’ (2015) 30 *Journal of Law and Politics* 293.

<sup>38</sup> Olof Larsson and Daniel Naurin, ‘Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU’ (2016) 70(2) *International Organisation* 377-408; M. Pollack, *The Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU* (Oxford University Press, 2003).

<sup>39</sup> Larsson and Naurin (n 38).

<sup>40</sup> Studies of domestic judges that are subject to reappointment processes reveal higher levels of strategic behavior amongst this group. See I. Lifshitz and S.A. Lindquist, ‘The Judicial Behavior of State Supreme Court Judges’ (2011) *APSA 2011 Annual Meeting Paper*.

<sup>41</sup> A. Van Aaken, ‘Control Mechanisms in International Investment Law’ in Z. Douglas et al (eds.) *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press, 2014) 409.

<sup>42</sup> S. Franck et al, ‘International Arbitration: Demographics, Precision and Justice’ (2015) *ICCA Congress Series No 18, Legitimacy: Myths, Realities, Challenges*, 33.

<sup>43</sup> *Ibid.*, 91.

<sup>44</sup> *Ibid.*

<sup>45</sup> On this empirical conundrum, see A. Gilles, ‘Reputational Concerns and the Emergence of Oil Sector Transparency as an International Norm’ (2010) 54 *International Studies Quarterly* 103.

liminal phenomenon. Shifts to stakeholder discourse may shape the ‘background ideational abilities’ of judicial agents.<sup>46</sup> Or as Cardozo put it, ‘the great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.’<sup>47</sup> Arbitrators may shift their background preferences as they become acquainted or engaged in the legitimacy debate. The crisis may also affect their ‘foreground discursive abilities’ and the space in which they ‘communicate critically about those institutions, to change (or maintain) them.’<sup>48</sup> Arbitrators may simply adapt to a different palette of legitimate reasons that can be foregrounded in their decision-making. Thus, changes in arbitrator behaviour may not only be strategic. It may also be a process of rapid adjustment to a new social norm that affects arbitrator preferences and speech acts.

How might we expect WTO adjudicators to respond to a legitimacy crisis or other changes in stakeholder discourse? From a strategic point of view, professional role orientations and self-interest may motivate WTO adjudicators to promote political support for the dispute settlement system and increase its legitimacy, as these factors critically influence their own personal salary potential, professional prestige, and occupational ambition.<sup>49</sup> As strategic actors, then, WTO adjudicators may well adjust their behaviour to pre-empt further pushback or backlash. If sociological forces increase this sensitivity, then trade adjudicators should pay close attention to discursive shifts in WTO member government views. Given the difficulty of employing unilateral sanctioning within the WTO, we would expect them to have an interest in cultivating it among the wider membership, and not solely in relation to the largest economies or most ‘powerful’ states within the regime.

Notably, the extent to which agent or trustee motivations drive adjudicator behaviour likely varies across the two levels of WTO adjudication – the dispute panels and the Appellate Body. Appointed individuals serve as panellists on a part-time basis, in addition to their usual job.<sup>50</sup> As with investor-state arbitrators, WTO panellists have shorter time horizons than elected adjudicators, as they are appointed *ad hoc* for a given dispute and only have this ‘one shot’ to achieve their individual goals or motivations for agreeing to serve on a panel. Due to these shorter time horizons, we might expect panellists to be *more* sensitive to legitimacy crises or fluctuations in political support than members of the Appellate Body, who enjoy relatively longer tenures (renewable once) and thus act more as trustees of the trade rule of law.

Two connected rationalist reasons suggest that strategic motivations may shape panellist behaviour. First, for reasons of professional self-interest, a number of panellists are likely motivated by re-appointment. A little over half appointed since 1995 have sat on more than one panel, with a few sitting on as many as ten or eleven separate panels. Repeat panellists are likely more integrated in the organizational life of the WTO, and some even go on to become Secretariat officials or Appellate Body members. For this reason, they seek to maintain a

---

<sup>46</sup> V. Schmidt, ‘Discursive Institutionalism: The Explanatory Power of Ideas and Discourse’ (2008) 11 *Annual Review of Political Science* 303, 304.

<sup>47</sup> B. Cardozo, *The Nature of the Judicial Process* (1921) 168.

<sup>48</sup> Schmidt (n 46), 304.

<sup>49</sup> F. Schauer, ‘Lecture: Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior’ (2000) 68 *University of Cincinnati Law Review* 615.

<sup>50</sup> To date, the majority of appointed panellists were current or previous government delegates to the WTO. Some were capital-based trade officials, with a few having served previously as WTO Secretariat officials or Appellate Body members. Even fewer have come from private practice or academia. See Creamer (n 32).

respected professional reputation and strive to issue reports that will not provoke widespread political backlash and sanctioning.<sup>51</sup> Second, even if a panellist is not motivated by re-appointment, she both: (a) possesses imperfect information on how the panel report will impact her long-term professional ambitions; and (b) must reach a collective agreement on the report's findings with two other panellists, who may themselves be motivated by re-appointment.<sup>52</sup>

In sum, first, for both the investment and trade regimes, we might expect states to exert influence on investor-state and WTO adjudicators and can hypothesize that:

*Hypothesis 1 – State Signals: Adjudicators will respond strongly to the signals of states.*

However, and more narrowly, we might expect that investor-state and WTO adjudicators are particularly responsive to the views of certain audiences, namely large, powerful, or particularly influential states.<sup>53</sup> Displaying such sensitivity may be strategic for reputational and survival reasons. In the case of investor-state arbitration, it may also enhance the prospect of more arbitrations entering into the pipeline (particularly due to the large capital exports of these states' foreign investors). Thus, we could state:

*Hypothesis 2 – Influential State Signals: Adjudicators will respond even more strongly to the signals of large, powerful, or particularly influential states.*

Still, it is not clear that strategic incentives and discursive influences apply equally to all adjudicators. Repeat investor-state arbitrators (especially repeat tribunal chairs) are likely to be more sensitive to systemic threats and opportunities in comparison to one-shot arbitrators. They might constitute 'the guardians of the regime,' engaged in wider discussions over investment treaty law practice, development, and legitimacy. Within the WTO regime, panellists integrated into the organizational life of the WTO likely are more sensitive to vacillations in political support for the dispute settlement system and more wary about judicial overreaching into sovereign authority. Those who are concurrently WTO representatives must regularly interact with the individuals representing the complainant or respondent, within meetings of committees and other political bodies. In addition, WTO delegates likely are more attuned to the need to provide home state governments with some sort of political cover to implement adverse judgments. Tellingly, no WTO panels have been composed with all three panellists lacking any prior experience within or interaction with the WTO.<sup>54</sup> We thus propose that:

---

<sup>51</sup> Repeat panellists have an interest in cultivating support among the *wider membership*—and not always or necessarily with particular governments—because the majority of panellist appointments are made by the WTO Director General, and not by the disputing parties.

<sup>52</sup> The organizational norm of consensus decision-making also operates within the DSM, and there is considerable pressure for panel reports to reflect consensus among the three panelists, although individual panelists may—but very rarely do—anonously include a separate or dissenting view.

<sup>53</sup> By large and powerful, we specifically include influential states actors participating actively in the regime: the US, the EU (including its Member States), and China. We note that Larsson and Naurin (n 38) found that influential states had a greater influence on the CJEU, although they theorized that this occurred through greater voting weights in potential overrides of judgments in the Council of Ministers.

<sup>54</sup> Between 1995 and 2013, only seven panels (less than 5 percent) were composed with the majority of panellists having no prior experience within the WTO, while 62.5 percent of panels were composed entirely of individuals with some prior experience within or interaction with the WTO.

*Hypothesis 3 – Prominent Adjudicators: Repeat investor-state tribunal chairs and integrated WTO panelists will respond to signals from states and/or other stakeholders.*

### 2.3 Decentralized versus Centralized Adjudication

So far have we have pointed to largely similar trustee and agent factors in both investor-state and WTO adjudication, with only a nod to potential differences. However, there are some important structural differences concerning the degree of centralization which may significantly affect the degree of responsiveness.

First, investor-state arbitration faces major coordination problems compared to the trade system.<sup>55</sup> While repeat investment arbitrators may provide some semblance of an epistemic and/or strategic community, they only account for half the cases. They are thus quite limited in their ability to communicate and act in a collective fashion. The polycentric and *ad hoc* nature of investor-state arbitration may prevent arbitrators from acting in a *systemic* manner, even if they wish to do so. Unlike a centralized court, an individual arbitral tribunal may feel it can make little contribution to signalling a systemic shift – it is one of many. The incentive to take extra *inter partes* action is thus minimal.<sup>56</sup> Moreover, arbitrators may be doctrinally constrained in considering general concerns and one line of investor-state arbitral jurisprudence suggests that individual arbitrators should not systemically reflect and act as they are constituted as specialist adjudicative bodies.<sup>57</sup>

Second, on the side of trade, the institutional structure of the WTO helps adjudicators and WTO officials in the Secretariat overcome potential coordination problems and act in a more systemic manner. Of note, regular meetings of the DSB facilitates collection and assimilation of discursive shifts and criticism among member state governments. Secretariat officials effectively provide a low-cost way of transmitting these rhetorical signals to WTO adjudicators, who are thereby able to pay attention to fluctuations in their political support among the wider membership and deliberate amongst themselves about whether they should behave in a responsive manner. Secretariat officials are incentivized to push adjudicators to do so because they have relatively longer time horizons than individual panellists. Moreover, these officials seem to hold strongly internalized role perceptions, in that they subscribe to the WTO's self-identification as a member-driven organization and view the Secretariat's role as serving the interests and needs of the member states. In the context of the dispute settlement system, this entails fulfilling its stated purpose: facilitating the settlement of disputes by drafting rulings in a way that will secure compliance.

The upshot is that even indifferent or lazy adjudicators can hedge their bets and engage in low-cost risk-averse decisional behaviour. They do not need to conduct extensive and

---

<sup>55</sup> On this point, see also Michelle Zang, [Chapter 6](#) and Graham Cook, [Chapter 8](#).

<sup>56</sup> On this challenge at the domestic level in civil law courts, see K. Young and J. Lemaitre, 'The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa' (2013) 26 *Harvard Human Rights Journal* 179.

<sup>57</sup> M. Reisman, 'Case Specific Mandates versus Systemic Implications: How Should Investment Tribunals Decide? The Freshfields Arbitration Lecture' (2013) 29 *Arbitration International* 131.

time-consuming research to obtain information on government views because these preferences are pre-assimilated by the WTO Secretariat, who are tasked with assisting the dispute panels and the Appellate Body. Moreover, there is a differential in the jurisdictional powers granted in the constitutive documents that may further exacerbate reflexivity. WTO adjudicators have more curtailed powers than investment arbitrators. The former should never ‘add to or diminish’ the rights of the contracting parties, increasing their potential sensitivity of WTO adjudicators to state preferences.

Thus, we can articulate a final hypothesis concerning the respective reflexivity of the two regimes:

*Hypothesis 4 – Structural Differences: WTO adjudicators will respond more strongly than investor-state arbitrators to the signals of states.*

### **3 WTO Dispute Settlement Mechanism**

#### *3.1 Responsiveness of the Trade Regime*

The WTO relies on a decentralized form of enforcement, with governments challenging other members’ laws and policies as being in violation of WTO rules. Although governments are the ones who formally ‘adopt’ dispute rulings under the reverse-consensus rule, the primary responsibility for clarifying WTO rules and interpreting the scope of international trade authority rests with panels and the Appellate Body (together comprising the DSM). Governments are bound by these decisions and face retaliatory concessions if they do not comply with their rulings, with the result that most governments eventually do make costly changes to domestic laws and regulations to bring them into compliance.

Still, the institutional relationship between member governments and the WTO’s adjudicative bodies reflects a pervasive tension between judicial independence and government control. Countries have hesitated to lash back at every instance of ostensible judicial lawmaking, but they do often engage in public expressions of dissatisfaction with the DSM’s exercise of authority (and more recently blocking of appointment of AB members). That is, in terms of *who* communicates ‘signals’ of crisis to trade adjudicators, member states represent the primary stakeholders for the trade regime and thus are the most likely constituents to influence adjudicator behaviour. In terms of *what* sort of signals are communicated to adjudicators, governments regularly – either individually or collectively – criticize or praise legal interpretations and judicial practices through public statements made in meetings of the political body tasked with overseeing the dispute settlement system (the Dispute Settlement Body (DSB)). Not only do governments use these communicative acts on a regular basis, they do so with the explicit intention of signalling to the WTO’s adjudicative bodies their (dis)satisfaction with its exercise of authority.<sup>58</sup> In fact, these rhetorical signals constitute the

---

<sup>58</sup> C.D. Creamer and Z. Godzimirska, ‘(De)Legitimation at the WTO Dispute Settlement Mechanism’ (2016) 49 *Vanderbilt Journal of Transnational Law* 275.

primary – and for many members the exclusive – means by which governments seek to shape the development of WTO jurisprudence.

Importantly, the majority of these statements do not represent cheap talk by states. Government officials engage in considerable research, analysis, and drafting of the content of these statements. They place on the formal, public record of a political body their government's 'official' view on a given issue. Because these views may impact a country's bargaining position or diplomatic relationships within other political fora, governments carefully and intentionally decide when and what views to express. While a few statements may simply represent a losing party complaining about or a winning party approving of a ruling, many governments without a direct stake in a case often express views on the broader, systemic implications of the WTO's exercise of judicial authority. These exercises of voice cover procedural and systemic concerns that now threaten the system's legitimacy and perhaps even its institutional survival.<sup>59</sup> Similar to the investment regime, while there are other actors that may also signal dissatisfaction with the trade regime, this section focuses on the relationship between trade rulings and government expressions of dissatisfaction.

As discussed above, there are strong reasons to expect trade adjudicators to respond to increases in collective dissatisfaction with the system. And until recently, the organization's adjudicative bodies have responded to spikes in collective criticism by seeking to build up their political support among member governments in distinct ways.<sup>60</sup> The WTO's Secretariat – both the Legal Affairs and Rules Divisions that assist panels and the separate Appellate Body Secretariat – has been absolutely central to monitoring systemic concerns and helping to identify practices to cultivate that political capital. These lawyers pay attention to government statements within the DSB and flag issues of concern for the adjudicators. Thus, we will examine whether this leads the WTO adjudicative bodies to slightly adjust rulings to account for these collective concerns or to signal their recognition of the issue through the language they use within decisions. Indeed, it can be argued that the growing legitimacy of the dispute settlement system during its first two decades largely stemmed from such sensitivity and subtle responsiveness to changing government preferences.<sup>61</sup>

In sum, we have strong reasons to expect that a primary goal of panellists and Appellate Body members is to increase political support for and the institutional legitimacy of the DSM. If this is the case, we should see these bodies responding to spikes in collective criticism by signalling greater judicial restraint. The following section outlines an empirical strategy to evaluate this expectation.

### 3.2 *Empirical Strategy: Data and Results*

In order to capture signals of concern or dissatisfaction communicated by WTO member governments to trade adjudicators, we rely on automated and manual content analysis of

---

<sup>59</sup> C.D. Creamer, 'From the WTO's Crown Jewel to its Crown of Thorns' (2019) 113 *AJIL Unbound* 51.

<sup>60</sup> Ibid; A. Stone Sweet and TL Brunell, 'Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism' (2013) 1 *Journal of Law and Courts* 61, 63-4.

<sup>61</sup> J. Pauwelyn, 'The WTO 20 Years On: 'Global Governance by Judiciary' or, Rather, Member-driven Settlement of (Some) Trade Disputes between (Some) WTO Members?' (2016) 27 *European Journal of International Law* 1119, 1120.

statements made within the DSB. A coding scheme was developed and applied to all statements made in DSB meetings since the WTO's inception (12,168 statements in total), sorting these statements into four categories: statements expressing a supportive or critical view on the DSM ('Supportive' and 'Critical'), those that relate to the DSM, but do not express an evaluation of its exercise of authority ('Neutral'), and those that do not relate directly to the DSM ('Other'). Following manual coding of a training set of statements and validation tests, methods of automated content analysis were employed to estimate the percentage of all statements falling within each of these four categories.<sup>62</sup>

A subset of these statements is particularly central to signalling legitimacy concerns within the WTO regime: statements made prior to report (the trade 'ruling') adoption. These report statements typically comment legal interpretations or procedural decisions, and are thus more likely to reflect governments' views on the DSM's legitimacy than other types of statements. This chapter focuses on supportive and critical report statements, as those most directly capture political support for the DSM as expressed by its core constituents – member governments – in a public forum within which we would expect governments to signal their views on the WTO's exercise of judicial authority. Drawing on the automated and manual classification of report statements discussed above, **Figure 10.1** displays changes in the sentiment of report views of the collective WTO membership over time.

Since the first reports were adopted in 1996, member state governments have consistently – with the exceptions of 1999, 2002 and 2011 – voiced more support than criticism. The exceptions to this pattern are largely driven by third and non-parties to a dispute, as disputing parties have consistently been more supportive than critical within their report statements. This in and of itself is telling, as we might have expected the 'losing' party to always criticize adverse decisions and the 'winning' party to similarly express support for findings on which it prevailed. But that is not what we observe. Instead, parties – *including* many 'losing' parties – on average express diffuse support for the DSM's judicial authority in spite of or in addition to expressing disappointment with adverse findings related to their specific trade interests.

#### **Figure 10.1: Yearly Estimates for Proportion of DSB Report Statements<sup>63</sup>**

*[Insert Figure 10.1 here]*

How might trade adjudicators respond to spikes in criticism? Each case that comes before the WTO's adjudicative bodies raises a number of distinct issues and claims that must be resolved. A single dispute ruling often finds some aspects of a trade measure in breach of WTO rules while simultaneously upholding other aspects of that trade measure. In fact, only ten of the 188 panel reports issued between 1995 and 2013 found *no* violation of WTO rules across all claims raised (5.3 percent).<sup>64</sup> Binary measures of dispute outcomes thus provide very little variation

<sup>62</sup> For a description of this data and methods, see Creamer & Godzimirska 2016 (n 58).

<sup>63</sup> Categorized by DSB statement sentiment (Critical and Supportive). Total report statements classified (includes compliance proceeding reports) = 1161.

<sup>64</sup> Some studies of WTO disputes code case outcomes along three values: win, loss and 'mixed.' See, e.g., M.L. Busch and E. Reinhardt, 'Three's a Crowd: Third Parties and WTO Dispute Settlement' (2006) 58 *World*



and moreover do not adequately capture the underlying extent to which panels and the AB signal to governments judicial restraint within a given ruling. Instead, a measure is developed under the assumption that panels and the Appellate Body are able to signal responsiveness when they make fewer breach (violation) findings within each dispute. Doing so allows panels and Appellate Body members to afford governments greater political cover to implement adverse rulings – by validating more elements of trade regulations within those rulings.

To construct this measure of adjudicative responsiveness, each dispute panel report issued between 1995 and 2014 was first assigned a score that represents the proportion of discrete findings made by the panel for which it upheld an element or aspect of the trade policy challenged. This score is a continuous variable that ranges from zero to one. Reports receiving a score of one found no instances of breach, signalling complete validation of the trade policy under review, while those receiving a score of zero contain only breach findings across claims, signalling complete invalidation. To construct a measure of judicial responsiveness for disputes that have been (partly) appealed, the score further takes into account the Appellate Body's decision to uphold or reverse the panel finding. A report's total responsiveness score thus represents the ultimate ruling on the dispute - by how much or how little a defendant government 'lost' the case.

Dispute panellists initially provided very little validation of government's trade policy choices, but then began to signal increasingly greater judicial restraint over the first six years of the DSM's operation. Following this initial sharp increase, however, average panel responsiveness has fluctuated around the 0.5 mark, though with relatively constant variance over those years. With the exception of the early years of the WTO, the Appellate Bodies rarely shifts considerably the proportion of panel findings in favour of the respondent. At least until 2015, the average total restraint afforded respondent governments does not differ significantly from that afforded by the panel alone.

Are WTO dispute panels responsive to diffuse political pressures? Do they tend to exercise greater restraint or to signal greater accommodation of trade policy choices when the DSM's political capital declines? And does the Appellate Body tend to shift significantly the degree of judicial restraint signalled within panel reports? To evaluate the *State Signals* hypothesis (Hypothesis 1), we can turn to research on the relationship between the judicial *Responsiveness Score* described above and signals of support for and criticism of the DSM's exercise of authority.<sup>65</sup> We proxy these government signals with half-year estimates of the proportion of DSB statements made by members that were critical or supportive, as described previously. The focus is first on panel reports, as these set the stage for the issues that the AB can subsequently decide and because total judicial responsiveness scores have not differed significantly from those for panel reports alone. If panels are responsive to collective political pressures, as the *State Signals* hypothesis suggests, we would expect a positive association between the proportion of critical statements and judicial responsiveness. Conversely, panels will likely exercise less restraint as political support for the DSM increases.

---

*Politics* 446. Nearly 58 percent of the panel reports issued between 1995 and 2013 are mixed, but there is considerable variance in the mixed category in terms of the number and type of violation findings.

<sup>65</sup> For the full study, see C.D. Creamer, *Judicial Responsiveness in the World Trade Organization* (unpublished manuscript).

We further account for a range of alternative determinants of judicial restraint or responsiveness. To capture party characteristics and thus Hypothesis 2, we control for disputes in which either the United States or the European Union were the respondent (*US/EU Respondent*). We additionally capture the power of the complainant state, by including its logged GDP per capita (*Complainant GDP*). While these two measures do not directly test the *Influential States Signals* hypothesis, they do provide some insight into the extent to which the DSM might defer to powerful countries.

The degree of restraint exhibited by panels may also vary with the type of trade policy or measure(s) challenged within a dispute. To account for the variable nature of review across types of measures, we include a factor variable (*Measure Type*) with three categories: legislation; executive/administrative regulation; executive/administrative investigation(s). To control for politically sensitive disputes, we include a binary variable (*Politically Sensitive Agreements*) for reports that made findings under the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), the Agreement on Agriculture (AoA), or the Agreement on Textiles and Clothing (ATC). In addition, we control for disputes that involve trade remedies (claims falling under the ADA, the Safeguards Agreement (SA), and the Subsidies and Countervailing Measures Agreement (SCM)) (*Trade Remedies*). We take into account panellists' experience with and integration into the life of the WTO (*Hypothesis 3—Prominent Adjudicators*) by including two binary variables for panels with a majority of *Repeat Panelists* and majority *WTO Delegates*. Finally, we include a cubic year trend variable to control for time trends.

**Figure 10.2: Estimated Effects on WTO Adjudicative Responsiveness<sup>66</sup>**

[Insert Figure 10.2 here]

Figure 10.2 reports the estimated relationship between the DSMs political capital - both critical and supportive statements - and judicial responsiveness employing an ordinary least squares regression with robust standard errors. Criticism of the DSM is positively correlated with a report's judicial responsiveness score, supporting the *State Signals Hypothesis* and this chapter's primary expectation. Panels do indeed appear to signal greater restraint when members have been relatively more critical. The influence of criticism is also substantively significant. Even when controlling for the level of political support, a ten percent increase in criticism increases the average panel responsiveness score by seventeen percent.

Similarly, in line with this chapter's argument, support for the DSM is negatively correlated with panel responsiveness, although not significantly. The substantive relationship is also less than that of criticism, with a ten percent increase in support associated with around a nine percent decrease in average responsiveness, even when taking into account the relative degree

---

<sup>66</sup> The circles are estimates of the expected change in panel responsiveness as the indicated variable changes from 0 to 1 (for binary variables) or from their 25th to 75th percentile values (for continuous variables), and all other variables are held constant at their means. The lines are 95 percent confidence intervals. The circles and lines are solid when there is at least 95 percent confidence of a positive or negative effect on judicial responsiveness validation. Otherwise, circles are open and lines are dotted. Estimates obtained from simulated bootstrap parameters of ordinary least squares regression. N=182.

of member dissatisfaction with the DSM. These findings provide support for the argument that panels are not only paying attention to members' collective views on the WTO's adjudicative bodies, but also tend to rule more in favour of the defendant when challenges to their institutional legitimacy increase.

As for responsiveness to influential states, the wealth of the complainant state does not seem to make a difference for decisional outcomes. However, panels signal much greater judicial restraint when either the USA or the EU is the defending party, even when controlling for spikes in collective criticism within the WTO. This provides partial support for the *Influential States Signals Hypothesis* (Hypothesis 2), although further research is needed to assess the extent to which the DSM responds to direct *signals* by these states. Finally, no support is found for the *Prominent Adjudicators Hypothesis* (Hypothesis 3). While not reaching conventional levels of significance, more integrated panels (those with a majority of WTO delegates) are actually slightly less responsive than those with fewer WTO delegates. This should be interpreted with caution, however, given the fact that the Secretariat plays a large role in shaping panel judgments, which must be decided by consensus.

In sum, we find that WTO panels, under certain conditions, are responsive to fluctuations in the level of political support enjoyed by the DSM. The political capital of the DSM is not necessarily or always determined by the extent to which it has engaged in expansionist or activist judicial law making, as courts can 'spark controversy due to the domestic political consequences of their rulings, whether or not those rulings are expansionist.'<sup>67</sup> Yet, the way panels respond to these diffuse political pressures is to signalling greater reflexivity by providing government authorities with slightly more domestic political cover for adverse decisions.

Appellate Body members are similarly concerned with establishing and maintaining the authority and credibility of the DSM. Even though they also take seriously their role as 'insulated' and independent adjudicators, the Appellate Body has signalled a similar degree of judicial restraint as that provided within panel reports. Until recently, the WTO's adjudicative bodies tended to exercise greater judicial restraint – thereby signalling to the membership that they are sensitive to concerns about domestic policy autonomy and regulatory space – when the DSM's institutional legitimacy declined. Put differently, when governments began to voice – through statements made within the DSB – greater criticism and dissatisfaction with how dispute panels and the Appellate Body are exercising their authority, these bodies responded by providing government agencies with slightly more domestic accommodation for adverse decisions.

---

<sup>67</sup> L.R. Helfer and K.J. Alter, 'Legitimacy and Lawmaking: A Tale of Three International Courts' (2013) 14 *Theoretical Inquiries in Law* 479, 502.

## 4 Investor-State Dispute Settlement

### 1.1 Legitimacy Crisis Periods

In order to understand the potential reaction of arbitrators to the legitimacy crisis in ISDS, we need to chart the crisis' trajectory. We are particularly interested in *who* communicates 'signals' of crisis, *what* sort of signals might be communicated to arbitrators, and *when*. As to *who*, states are of particular interest: they constitute the primary principals in the international investment treaty regime and may be thus particularly influential in affecting arbitrator behavior, intentionally or otherwise.<sup>68</sup> As to *what*, state signals might include: *exit* actions such as the denouncement of the ICSID Convention<sup>69</sup> and the termination of IIAs; *voice* actions such as the adoption of more sovereignty-sensitive model IIAs; or *mixed* actions such as moratoriums on the signing of new IIAs, demands for renegotiations of IIAs, or increasingly aggressive litigation tactics in defending ISDS claims.

Initially, investor-state arbitration was an obscure and largely unknown specialization that attracted little attention. While the first modern BIT was signed in 1959,<sup>70</sup> it was not until 1968 that the first BIT providing for ISDS was signed,<sup>71</sup> and it took a further nineteen years until the first treaty-based arbitration was submitted.<sup>72</sup> After the first award in 1990,<sup>73</sup> there was only a slight trickle of cases throughout the 1990s, which we can describe as *pre-crisis*, and the field was largely overshadowed by contract-based investment and commercial arbitrations.

It was not until the early 2000s that the first high-profile investor-state arbitration cases occurred and a crisis began to build. These cases were raised under NAFTA against developed states, the most prominent being the *Loewen* case. Although dismissed on jurisdiction, the *Loewen* case revealed that the justice system of the United States had embarrassing shortcomings that might be challenged under international law, and that arbitrators might face significant political pressure when tasked with resolving these types of disputes.<sup>74</sup> Together with other NAFTA cases against the USA, Canada, and Mexico, this early investor litigation highlighted a perceived threat to sovereignty and the regulatory autonomy of states. Significantly, they catalysed the production of a corrective interpretive note by the NAFTA Free Trade Commission in 2001 (with a more minimalist approach to the FET standard; see **Chapter 9 by Chernykh**)<sup>75</sup> and a new model BIT in 2004 (that was more deferential to state

---

<sup>68</sup> Langford, Behn, and Fauchald (n 6).

<sup>69</sup> *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (ICSID Convention), 18 March 1965, 5 ILM 532.

<sup>70</sup> *Pakistan-Germany BIT* (1959).

<sup>71</sup> *Indonesia-Netherlands BIT* (1968).

<sup>72</sup> The first case under the ICSID Convention was filed in 1972 but this was a claim for a contractual breach: *Holiday Inn and Others v Morocco*, ICSID Case No ARB/72/1, settled.

<sup>73</sup> *Asian Agricultural Products v Sri Lanka*, ICSID Case No ARB/87/3, Award (27 June 1990).

<sup>74</sup> *Loewen Group and Raymond Loewen v United States*, ICSID Case No ARB(AF)/98/3, Award (26 June 2003). See also A. DePalma, 'NAFTA's Powerful Little Secret; Obscure Tribunals Settle Disputes, But Go Too Far, Critics Say' *New York Times* (11 March 2001).

<sup>75</sup> *Notes of Interpretation of Certain Chapter 11 Provisions*, NAFTA Free Trade Commission (20 July 2001), see G. Kaufmann-Kohler, 'Interpretive Powers of the Free Trade Commission and the Rule of Law' in F. Bachand (ed.) *Fifteen Years of NAFTA Chapter 11 Arbitration* (Juris, 2011) 175, 181-185.

interests) from the dominant norm-setter in investment law, the United States.<sup>76</sup>

Beyond NAFTA, several other cases in the early 2000s raised significant and specific concerns regarding the relationship between IIA standards and environmental or human rights-based policy measures.<sup>77</sup> This included the *Aguas del Tunari* case against Bolivia, which grew out of the infamous ‘water wars of Cochabamba,’ resulting in the first-ever submission of an *amicus curiae* brief in an investor-state arbitration case;<sup>78</sup> some controversial examples of inconsistent case law;<sup>79</sup> and the *Lauder* and *CME* cases – in which two tribunals issued two different awards on essentially the same subject matter.<sup>80</sup>

In 2004 and 2005, the phrase ‘legitimacy crisis’ emerged in the academic scholarship for the first time, and the crisis discourse extended clearly beyond its NAFTA origins. The numerous investor-state arbitration awards rendered as a result of the Argentinian economic crisis of 2001-2002 were important in this regard,<sup>81</sup> as were the large number of cases filed against Venezuela, Bolivia, and Ecuador following the passage of various nationalization laws; and the *Foresti* case against South Africa.<sup>82</sup> The result was not only expressions of displeasure but high-profile announcements of exit strategies. Bolivia (2007), Venezuela (2009), and Ecuador (2012) denounced the ICSID Convention; Ecuador and Bolivia terminated many of their BITs; and South Africa placed a moratorium on the signing of new IIAs pending an extensive policy review.<sup>83</sup> By the end of the first decade of the new millennium, the legitimacy crisis discourse and the practice of investor-state arbitration began to reach maturity.<sup>84</sup>

In the last six to seven years, the narrative of crisis became entrenched amongst a broader set of stakeholders but countervailing narratives also emerged. On the one hand, the Phillip Morris tobacco regulation cases against Australia<sup>85</sup> and Uruguay,<sup>86</sup> the energy utility Vattenfall cases against Germany,<sup>87</sup> and Chevron’s 18 billion US dollar (USD) denial of justice case

---

<sup>76</sup> See *Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment*, US Department of State (2004), and particularly the qualifications of the expropriation standard. See J. Alvarez, ‘The Return of the State’ (2011) 20 *Minnesota Journal of International Law* 223, 235.

<sup>77</sup> See O.K. Fauchald, ‘International Investment Law and Environmental Protection’ in O.K. Fauchald and D. Hunter (eds.) *Yearbook of International Environmental Law*, Vol. 17 (Oxford University Press, 2006) 3, 11-25.

<sup>78</sup> *Aguas del Tunari v Bolivia*, ICSID Case No ARB/02/3, settled.

<sup>79</sup> *SGS v Pakistan*, ICSID Case No ARB/01/13, Award (6 August 2003); *SGS v Philippines*, ICSID Case No ARB/02/6, Award (29 January 2004).

<sup>80</sup> *Lauder v Czech Republic*, UNCITRAL, Award (3 September 2001); *CME v Czech Republic*, UNCITRAL, Final Award (14 March 2003).

<sup>81</sup> See eg J. Alvarez and K. Khamisi, ‘The Argentine Crisis and Foreign Investors. A Glimpse into the Heart of the Investment Regime’ in K. Sauvant (ed.) *Yearbook on International Investment Law and Policy 2008-2009* (Oxford University Press, 2009) 379.

<sup>82</sup> *Piero Foresti and Others v South Africa*, ICSID Case No ARB(AF)/07/01, discontinued.

<sup>83</sup> *Bilateral Investment Treaty Policy Framework Review*, Republic of South Africa, Department of Trade and Industry (June 2009).

<sup>84</sup> See the title of M. Waibel et al (eds.) *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer, 2010).

<sup>85</sup> *Philip Morris Asia v Australia*, PCA Case No 2012-12, Jurisdiction Award (27 December 2015).

<sup>86</sup> *Philip Morris Brands v Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016).

<sup>87</sup> *Vattenfall and Others v Germany (Vattenfall I)*, ICSID Case No ARB/09/6, settled; *Vattenfall and Others v Germany (Vattenfall II)*, ICSID Case No ARB/12/12, pending.

against Ecuador fueled the critique<sup>88</sup> and triggered new partial exit strategies – by Australia<sup>89</sup> and the Czech Republic<sup>90</sup> for example. The discourse on the legitimacy of investor-state arbitration moved into the public sphere for the first time<sup>91</sup> and the number of new cases grew and stabilized at an average of approximately 50 cases per annum.<sup>92</sup> Certain states continue to terminate and/or renegotiate their IIAs as a response to defending against treaty-based arbitration, including Romania, Indonesia, India, and Poland.<sup>93</sup>

On the other hand, in the same period there was also a push by certain states to produce new agreements, indicating contradictory shifts in sovereign state policy, reflecting a possible countervailing mood or tendencies. Negotiations on new regional mega-agreements including ISDS provisions burst into life: the USA and the other NAFTA states formally joined (and largely took over) the negotiations for the *Trans-Pacific Partnership* (TPP). Moreover, negotiations for the *Regional Comprehensive Economic Partnership* (RCEP) amongst almost all South and East Asian states were launched and efforts to develop a *Transatlantic Trade and Investment Partnership* (TTIP) between the EU and USA were making progress.<sup>94</sup> In terms of bilateral treaties, the EU emerged as an IIA negotiator with third states following the entry into force of the *Lisbon Treaty*<sup>95</sup> and has sought to negotiate and sign new FTAs (including with Brazil, Canada, India, Indonesia, Japan, Singapore, and Vietnam). Brazil started signing new IIAs after famously refusing to ratify any of their previously signed agreements from the 1990s,<sup>96</sup> and Australia reversed their anti-ISDS policy and signed the TPP in February 2016.

To be sure, this mood change should not be over-emphasized. In January 2017, the incoming US president Trump abruptly cancelled participation in the TPP and TTIP. The EU has sought to develop a multilateral investment court and UNCTRAL Working Group III was given a mandate in 2017 to work specifically on the reform of ISDS. Ecuador became the first state to completely exit from the international investment regime and most recently the Dutch government released a new model BIT that rolls back many investor protections.

---

<sup>88</sup> *Chevron Corp and Texaco Petroleum Corp v Ecuador (Chevron II)*, PCA Case No 2009-23, pending.

<sup>89</sup> *Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity*, Australian Government, Department of Foreign Affairs and Trade (November 2011). This policy was reversed in 2013. See [Chapter 2](#) by Gáspár-Szilágyi and Usynin.

<sup>90</sup> K. Gordon and J. Pohl, 'Investment Treaties over Time: Treaty Practice and Interpretation in a Changing World' *OECD Working Papers on International Investment* (2015).

<sup>91</sup> Partly as a result of TTIP. See eg *Economist* (n 10); 'Trade Agreement Troubles,' *New Yorker* (22 June 2015); 'TTIP Will Not be Approved unless ISDS is Dropped' *Financial Times* (27 October 2014).

<sup>92</sup> See D. Behn and O.K. Fauchald, 'Governments under Cross-Fire: Renewable Energy and International Economic Tribunals' (2015) 12(2) *Manchester Journal of International Economic Law* 117.

<sup>93</sup> See overview in Langford, Behn, and Fauchald (n 6); T. Jones, 'Poland Threatens to Cancel BITs' *Global Arbitration Review* (26 February 2016).

<sup>94</sup> Mention of the TTIP was included in the US president's state of the union address on the next day, and an announcement of new talks by the European Commission president came the day after that.

<sup>95</sup> The *Lisbon Treaty* conferred competence to the EU in the area of foreign direct investment for the first time: *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007, 2007/C 306/01. See [Chapter 2](#) by Gáspár-Szilágyi and Usynin.

<sup>96</sup> P. Martini, 'Brazil's New Investment Treaties: Outside Looking ... Out?' *Kluwer Arbitration Blog* (15 June 2015).

## 1.2 Empirical Strategy: Data and Results

How can we determine if investor-state arbitrators adjust their behavior in response to the legitimacy crisis without asking arbitrators to disclose their approaches?

The first approach is doctrinal. Recent jurisprudential scholarship in investor-state arbitration suggests a potential reflex on a number of critical areas, whether it is an investor-state arbitration case involving an environmental component<sup>97</sup> or how investor-state arbitral tribunals analyze particular IIA standards such as the criteria for a breach of the (indirect) expropriation standard,<sup>98</sup> the FET standard,<sup>99</sup> the FPS standard,<sup>100</sup> MFN provisions,<sup>101</sup> or the jurisdictional requirements relating to the definition of a ‘foreign investor.’<sup>102</sup> The advantage of such a doctrinal approach is that it provides a fine-grained perspective on the legal mechanics of change and permits a swift focus on those areas which have attracted the most criticism. However, the disadvantage of a doctrinal lens is that one may be tracking unwittingly a subterfuge of verbiage: arbitrators may simply craft and tweak their foregrounded discourse without visiting any material consequences upon the actual decision-making.

Tracking the ongoing interaction between doctrine and factual and political contexts therefore requires also a broader aggregative perspective. An alternative approach is therefore quantitative. Our approach is therefore outcome-based and analyses patterns in arbitral tribunal decision-making over time. Its prime advantage is its focus on the concrete nature of decisions and remedies, which cannot be obscured by written reasoning or oral speech.

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

The data is obtained from a new and first-of-its-kind database (PITAD) that codes all investor-state arbitration cases since their inception.<sup>103</sup> As at 1 August 2017, the dataset included 389 *finally resolved* cases, based on a treaty, where the claimant-investor wins on the merits or loses on jurisdiction or the merits. These cases also include 748 *discrete decisions*,

---

<sup>97</sup> D. Behn and M. Langford, ‘Trumping the Environment? An Empirical Perspective on the Legitimacy of Investment Treaty Arbitration’ (2017) 18 *Journal of World Investment and Trade*; J. Viñuales, ‘Foreign Investment and the Environment in International Law: The Current State of Play’ in K. Miles (ed.) *Research Handbook on Environment and Investment Law* (Edward Elgar, 2018), ch. 2.

<sup>98</sup> C. Henckels, ‘Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration’ (2012) 15(1) *Journal of International Economic Law* 223.

<sup>99</sup> R. Dolzer, ‘Fair and Equitable Treatment: Today’s Contours’ (2014) 12 *Santa Clara Journal of International Law* 7.

<sup>100</sup> S. Alexandrov, ‘The Evolution of the Full Protection and Security Standard’ in M. Kinnear et al (eds.) *Building International Investment Law: The First 50 Years of ICSID* (Kluwer, 2015) 319.

<sup>101</sup> J. Maupin, ‘MFN-Based Jurisdiction in Investor-State Arbitration: Is There Any Hope for a Consistent Approach’ (2011) 14(1) *Journal of International Economic Law* 157.

<sup>102</sup> Van Harten (n 10) 251.

<sup>103</sup> PluriCourts Investment Treaty Arbitration Databas, <<https://www.jus.uio.no/pluricourts/english/topics/investment/research-projects/database.html>> accessed 26 June 2019.

453 on jurisdiction decisions<sup>104</sup> and 291 on liability/merits.<sup>105</sup> Both types of cases are useful in analyzing responsiveness. ‘Finally resolved’ cases may capture diachronic strategic planning across a case, whereby arbitrators may allow a claimant-investor to win at the jurisdiction stage but not the liability/merits stage. ‘Discrete decisions’ may better capture synchronic signals from actors at a particular point in time.

The PITAD database also makes a distinction between full wins and partial wins. **Figure 10.3** shows the *Any Win* success ratios across time for the claimant-investor at the jurisdiction stage and the liability/merits stage of the investor-state arbitration dispute. It also tracks the *Any Win* success ratios for finally resolved cases. Eye-balling the trends, it is relatively clear that claimant-investors did well in the first decade of litigation. In the period 1990 to 2001, investors rarely lost at the jurisdiction stage (94 percent success rate in 32 decisions) and they won in approximately 72 percent of finally resolved cases (25 cases) and 78 percent of liability/merits awards (23 decisions). From 2002, an observable drop in claimant-investor success occurs in finally resolved cases and liability/merits awards. The trend downwards appears to begin in 2002 and bottoms out a few years later. For the period 2002 through 1 August 2017, success rates in finally resolved case drops to 44 percent for claimant-investors – not unlike the 50/50 ratio for trade decisions discussed in **Section 3**.

For liability/merits awards, the trends are slightly different. The success rates drop to 59 percent for this period (2002 through 1 August 2017) overall, but there is a drift upwards in claimant-investor liability/merits awards successes from 2012, followed by a downward correction from about 2015. Jurisdictional decisions reveal a partially inverse pattern. There is a shift downwards to an average of 82 percent success for investors in the period 2002 to 2010, but a further drop downwards to about 69 percent from 2011 onwards. These divergent patterns in recent years help explain why the success ratio for claimant-investors in finally resolved cases remains fairly steady at about 44 percent throughout the period of 2002 through 1 August 2017 as jurisdiction and merits trends cancel each other out.

#### **Figure 10.3 Claimant-Investor Success Ratios (by year)**

*[Insert Figure 10.3.a and Figure 10.3.b here]*

In addition, we created a compensation ratio in cases in which the claimant-investor won on the merits and was awarded compensation. The ratio is the amount awarded divided by the amount claimed. However, it could only be calculated for a subset of 148 cases (out of 178 cases where the investor won on the merits), since information on both the amount of compensation claimed *and* awarded was not always known. The ratio has a large amount of annual variation but a surprising amount of stability over time. Between 1990 and 2004, the ratio was 44 percent; and fell to 36 percent for the period 2005 onwards.

---

<sup>104</sup> The jurisdiction decisions include bifurcated and non-bifurcated cases. For a non-bifurcated case, a decision where the claimant-investor ultimately loses on the merits will be coded as two decisions: one jurisdiction decision counted as a win for the claimant-investor and one merits decisions counted as a loss.

<sup>105</sup> These liability/merits decisions do not count quantum awards. In other words, a liability award in favour of a claimant-investor is counted in the same way as a merits award where damages are included.



In seeking to test the reflexivity expectations, we have operationalized the first hypothesis (*State Signals*) into different models. Each model tests the effects of a mood indicator with a lag of one year.

First, the *State Signals* hypothesis is operationalized by two separate indicators. The *State Mood I* indicator for treaty exits records a unilateral withdrawal by one state party to an IIA, including the ICSID Convention. As **Figure 10.4** shows, this phenomenon begins in 2007, peaks in 2008 (with 19 treaty exits) and has remained at a steady annual average of about six treaty exits. An alternative version of this indicator weights the three ICSID Convention withdrawals by Latin American states by a factor of ten on the basis that they received tremendous media and academic coverage.

**Figure 10.4. State Mood I – Number of Unilateral Treaty Exits (by year)**

[Insert Figure 10.4 here]

The *State Mood II* indicators operationalize a positive state signal and records the number of new treaties (IIAs) signed by year. This indicator is weighted for remaining available treaties that could be signed. As **Figure 10.5** shows, the number trends steadily downwards throughout the 2000s.

**Figure 10.5 State Mood II – Number of New Treaties Signed (by year)**

[Insert Figure 10.5 here]

In order to avoid potentially misleading bivariate results for the correlation between these three indicators and investor-state arbitration outcomes, we include a set of controls for each model. The basic attributes are summarized in **Annex 1** alongside the independent variables. First, we include a dummy variable for treaty-based arbitration, specifically *NAFTA-based Cases* and *ICSID-administered Cases*.<sup>106</sup> Second, we apply an *Extractive Industry Cases* dummy measuring whether the investment leading to a claim is in the extractive industries economic sector. These cases often involve varying degrees of nationalization with the dispute centering on levels of compensation not liability (and thus claimant-investors will be more likely to win). Third, we add a measure of *Law Firm Advantage* to control for the effect of the quality (or at least the expense) of legal counsel as measured by whether claimant-investors and respondent

---

<sup>106</sup> We include this dummy because NAFTA-based arbitrations matured earlier, while ICSID-administered arbitrations are based on a specific treaty (the ICSID Convention) with some specific structural features. ICSID-administered cases constitute 59% (523 of 878 ITA cases) of all known treaty-based arbitrations registered through 1 August 2017.

states retained counsel from a Global 100 law firm.<sup>107</sup> Fourth, we include a dummy variable for *State Learning* to control for the effect of previous exposure to investor-state arbitration.<sup>108</sup> Fifth, to control for situations where specific events or circumstances create an artificially large caseload against a respondent state in a short space of time, we use a *Case Cluster* dummy.<sup>109</sup> Sixth, we include a *GDP Per Capita (Logged)* for respondent states as a control, particularly since states with lower GDP per capita are more likely to lose.<sup>110</sup> Finally, we have included a cubic year trend variable in all models.

However, this explanatory model has limits. It does not capture all potential reasons for claimant-investor success rates. First, states may adopt strategies that *directly* affect the underlying legal framework (ie the IIAs themselves) in which investor-state arbitrators operate. Although we doubt that the legal framework governing foreign investment is particularly important as almost all of the decisions under analysis in this article are based on IIAs that were drafted before the emergence of the legitimacy crisis. Moreover, even where there is an arbitration based on a newer generation IIA, expected outcomes are not always generated.<sup>111</sup> Second, the relationship between claimant-investor success and future litigation may be partly endogenous. The growing awareness of the open legal opportunity structure<sup>112</sup> of investor-state arbitration may have prompted foreign investors to bring more dubious cases. However, the likelihood of claimant-investor success dropped quite early – well before the possibility of a wave of dubious cases entering the system. In the case of jurisdiction decisions, this endogeneity argument may have more explanatory power given the more recent decrease in claimant-investor success at this stage of the proceedings. Yet, even this might be explained by reflexivity – with arbitrators tightening jurisdictional criteria as a response to the legitimacy crisis. In any case, separating out these effects is a clear task for a future research agenda.

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

---

<sup>107</sup> See *American Lawyer* <[www.law.com/americanlawyer/sites/americanlawyer/2017/09/25/the-2017-global-100/](http://www.law.com/americanlawyer/sites/americanlawyer/2017/09/25/the-2017-global-100/)> accessed 1 June 2019. The dummy takes the value of (1) if only the claimant-investor counsel is from a Global 100 law firm; (-1) if only the respondent state retains a Global 100 law firm; or (0) if both the claimant-investor and the respondent state both have the same type of law firm representing them.

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

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

<sup>110</sup> See D. Behn, T. Berge, and M. Langford, 'Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration (2018) 38(3) *Northwestern Journal of International & Business Law* 333.

<sup>111</sup> See Behn and Langford (n 97); Alschner and Hui (n 23).

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

**Table 1: Logit Regression Results for State Mood**

	<i>Controls</i>	<i>Treaty Exits</i>	<i>New Treaties</i>	<i>All</i>
	Model 0	Model 1	Model 2	Model 3
<b>Independent Variables</b>				
<i>State Mood I (Treaty Exits)</i>		-0.03		-0.03
<i>State Mood II (New Treaties)</i>			0.01	0.01*
<b>Controls</b>				
<i>NAFTA-based Case</i>	-0.44	-0.50	-0.48	-0.53
<i>ICSID-administered Case</i>	-0.14	-0.15	-0.16	-0.17
<i>Extractive Industry Case</i>	0.58**	0.60**	0.58**	0.59**
<i>Law Firm Advantage</i>	0.38*	0.34*	0.35*	0.31
<i>State Learning</i>	0.06	0.07*	0.06*	0.07*
<i>Case Cluster</i>	0.70	0.63	0.70*	0.62
<i>GDP Per Capita (Logged)</i>	-0.33**	-0.34**	-0.33***	-0.35***
<i>Cubic Year Trend</i>	-0.00004**	-0.00004**	0.00008	-0.00005
<i>Chi<sup>2</sup></i>	33.80	39.40	36.13	40.03
<i>Observations (Number of Cases)</i>	388	388	388	388

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

Turning to the *State Mood I* indicator, the coefficient is negative as expected. An increase in unilateral IIA exits corresponds with a decrease in claimant-investor success. While this indicator is not significant in Model 1 and the full Model 3, it is so for the subset of liability/merits decisions.<sup>113</sup> The *State Mood II* indicator is positive, also as expected, but only significant in Model 4. A rise in the number of IIAs signed correlates with investor success.

We now look at the magnitude of the measured shift. In other words, how much work do these factors (which have been significant in some or many models) potentially do in explaining variation in outcomes? This can be graphically observed in **Figure 10.6**. It shows the predicted probabilities for 5-unit differences in the treaty exits (*State Mood I*) indicator. Holding all other variables constant at their means, the probability of a claimant-investor win is 56 percent when the treaty exit indicator is at zero. Yet, it falls to 38 percent when the number of annual IIA exits rises to 25 (which occurred in 2009). These differences are noticeable but not enormous.

**Figure 10.6: Predicted Outcomes for State Mood I (Treaty Exits)**

[Insert Figure 10.6 here]

In the case of the new treaties (*State Mood II*) indicator, the differences across the indicators' range are even more dramatic. Holding all other variables constant, claimant-investors achieved 80 percent success rates in lagged years where there were close to 200 IIAs that were

<sup>113</sup> See extra Tables at <[www.jus.uio.no/pluricourts/english/topics/investment/research-projects/database.html](http://www.jus.uio.no/pluricourts/english/topics/investment/research-projects/database.html)> accessed 1 June 2019

signed annually. But this drops to 30 percent in lagged years where the number of annual IIAs signed bottoms out at 30 per year (see [Figure 10.7](#)). However, it is important to note that the confidence intervals at the ends of ranges for both *State Mood* indicators are large.

#### **Figure 10.7 Predicted Outcomes for State Mood II (New Treaties)**

*[Insert Figure 10.7 here]*

Overall, the tests on these *yearly* indicators suggest a weak or modest relationship between stakeholder mood and arbitral outcomes. The significance of the correlations is sensitive to changes in the model and sample period. Variables such as development and case-type (eg the extractives sector) explain significantly more of variance in outcomes.

The next stakeholder hypothesis, *Influential States*, is measured differently. We break up outcomes according to five three-yearly crisis periods that follow 2001 and correspond to our analysis in [Section 4.1](#). This disaggregation allows us to examine possible structural breaks after interventions by a small number of large influential states (primarily the USA but also the EU) that we believe may have disproportionate signaling power. It is a crude approach but may better reflect the nature of legal adjudication with periodic rather than frequent paradigm shifts – i.e. ‘doctrinal time’.<sup>114</sup> The key structural breaks relating to influential states are the pro-state signals sent by the NAFTA state parties after the issuance of the FTC Interpretive Note in 2001 and the release of the new US model BIT in 2004; and the pro-investor signals sent by the ramping up of negotiations<sup>115</sup> by the USA, EU, and China for large-scale bilateral and plurilateral trade and investment treaties (that include ISDS), particularly after February 2013.

#### **Figure 10.8 Influential State Signals and Structural Breaks**

*[Insert Figure 10.8 here]*

Controlling for the same factors as above, [Figure 10.8](#) shows the predicted probabilities in each period for claimant-investor success. It is notable that the probability of success does fall after the first break (after 2001) and the second break (after 2004) but the decrease in claimant-investor success is only statistically significant after the second break.<sup>116</sup> Turning to the last structural break (after 2013), the average success rate for claimant-investors is comparable to all the preceding periods. However, it is notable that claimant-investor success rates are not different (no statistical significance) from the period 1990 to 2001. While the p-scores hover close to the 10 percent level, the large confidence interval for 2014 to 1 August 2017 reveals the fact that many claimant-investors are enjoying success that is almost comparable to the period 1990 to 2001. While the measure is crude, the recent pattern may

---

<sup>114</sup> P. Rueda, 'Legal Language and Social Change during Colombia's Economic Crisis', in J. Couso, A. Huneeus, and R. Sieder (eds.), *Cultures of Legality: Judicialization and Political Activism in Latin America* (Cambridge: Cambridge University Press, 2010), 25-50.

<sup>115</sup> A number of these large bilateral and plurilateral negotiations were officially launched prior to 2012, but we use 2012 as the year when these negotiations ramped up significantly.

<sup>116</sup> See (n 114).

suggest that influential states are exercising a renewed subtle influence on investor-state arbitrators.

Finally, we look at the Prominent Adjudicator hypothesis, which codes for the presence of an investor-state arbitration tribunal chair who has rendered five or more decisions (as a tribunal chair). Using an interaction term, we test whether the presence of a prominent tribunal president decreased the chances of claimant-investor success in the different periods after 2001 relative to other investor-state arbitration cases. Yet, the results are almost identical to those for trade. Investor-state arbitrations with a prominent tribunal chair were slightly more likely to award claimant-investors any success from 2005 onwards – the reverse of what was expected. However, the differences are not statistically significant.

## 5

## 6 Conclusion

Since the mid-2000s, the international investment regime has been subject to a ‘legitimacy crisis.’ And earlier, the trade regime has faced its own legitimacy crisis, particularly in the realm of dispute settlement. While both regimes have their ardent supporters, the mood of various stakeholders - from a diverse group of states, scholars, and global social movements - has tilted towards viewing each regime as biased and/or flawed. We have not tried to solve this normative debate in this chapter but instead focused on effects. We have asked whether trade adjudicators and investor-state arbitrators are reflexively evolving and have helped the system adapt to more legitimate and effective forms of international adjudication (by becoming more deferential to respondent states).

The chapter set out various rational choice and discursive-based reasons for thinking that trade adjudicators and investor-state arbitrators would be sensitive and adaptive. We countered these reasons with a competing set of legalistic (and attitudinal) reasons that may inhibit adjudicators from acting in such a fashion. Drawing from two new sets of data and research, we demonstrated that the WTO’s adjudicative bodies tended to exercise greater judicial restraint when their institutional legitimacy declined. When governments voice greater criticism and dissatisfaction with how dispute panels and the AB are exercising their authority, these bodies respond by providing government agencies with slightly more domestic accommodation for adverse decisions. Turning to investment, we then demonstrated that there has been a significant drop in claimant-investor success across time and found suggestive evidence that investor-state arbitrators have moderately shifted their behavior on some types of outcomes. Moreover, in both fields, we found modest evidence that powerful states (especially USA, EU) exert influence while more integrated and/or repeat adjudicators tend not to diverge from other adjudicators.

Overall, our main finding on reflexivity in the investment regime is that states matter. However, the empirical evidence suggests that the effect is much greater in the trade regime. The magnitude of the effects is greater in the DSM trade panels than investment arbitration and statistical significance is very uneven across different models in the latter. Notably these results

resonate with the general doctrinal developments. Scholars point to strong corrections in trade jurisprudence and outcomes but investment jurisprudence tends to be characterized by fragmentation. Responsive doctrines emerge in some cases but approaches are not consistent.<sup>117</sup> These differences suggest that institutional design also matters. The investment arbitration regime may be less responsive to state signals because it lacks a centralized communication mechanism like the WTO. Signals ripple out diffusely in the sea of cases.

---

<sup>117</sup> See W. Alschner, 'Correctness of Investment Awards: Why Wrong Decisions Don't Die', Special Issue of The Law and Practice of International Courts and Tribunals (forthcoming, 2020).

*Annex 1: Summary Statistics – Fully Resolved Investor-State Arbitration Cases*

	<i>Mean</i>	<i>Std. Dev.</i>	<i>Min</i>	<i>Max</i>	<i>Obs.</i>
<b><i>Outcome Variable</i></b>					
<i>Any Win</i>	0.45	0.50	0	1	389
<b><i>Independent Variables</i></b>					
<i>State Mood I (Treaty Exits)</i>	13.01	6.01	2	26	389
<i>State Mood (New Treaties)</i>	74.89	43.80	33	198	389
<b><i>Controls</i></b>					
<i>NAFTA-based Case</i>	0.09	0.29	0	1	389
<i>ICSID-administered Case</i>	0.62	0.48	0	1	389
<i>Extractive Industry Case</i>	0.17	0.38	0	1	389
<i>Law Firm Advantage</i>	-0.10	0.56	-1	1	389
<i>State Learning</i>	5.84	4.09	1	10	389
<i>Case Cluster</i>	0.11	0.31	0	1	389
<i>GDP Per Capita (Logged)</i>	8.71	1.09	5.37	11.01	388