A GLOBAL PUBLIC GOOD? AN EMPIRICAL PERSPECTIVE ON INTERNATIONAL INVESTMENT LAW AND ARBITRATION

Daniel Behn,[*] *Ole Kristian Fauchald*[**] *and Malcolm Langford*[***]

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1. Introduction

The relationship between the international investment regime and public goods has been investigated from at least two perspectives. The first and most longstanding debate concerns whether and to what extent international investment law *limits or restricts* the provision of (global) public goods such as environmental protection, sustainable use of natural resources, and fundamental rights of individuals, workers, vulnerable groups and indigenous peoples.[1] The second, which will be the main focus of this chapter, is the claim that the international investment regime is itself a global public good that *enhances* collective global welfare.[2] By facilitating increased flows of foreign capital into less developed states – which may contribute to economic development, responding to the unreliability of domestic host state courts, and advancing the rule of law and good governance, it is said that the international investment regime constitutes a global public good.[3] With over 3000 international investment agreements (IIAs) and over 950 known international treaty arbitration (ITA) cases, the regime should be positioned to provide such global benefits.

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[*] Lecturer in Law, Liverpool Law School and Senior Research Fellow, PluriCourts Centre of Excellence, University of Oslo. Email: d.f.behn@jus.uio.no.
[**] Professor of Law, PluriCourts Centre of Excellence, University of Oslo. Email: o.k.fauchald@jus.uio.no.
[***] Professor of Law, 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.
[1] See e.g., D. Kalderimis, 'Investment Treaties and Public Goods,' 7(1) *Transnational Dispute Management* (2010).
[2] See e.g., B. Choudhury, 'International Investment Law as a Global Public Good,' 17(2) *Lewis and Clark Law Review* 481 (2013).
[3] For a critical review of such claims, see G. Van Harten, 'Five Justifications for Investment Treaties: A Critical Discussion,' 2(1) *Trade Law and Development* 19 (2010).

This positive claim faces two principal problems. The first is whether the international investment regime by *design* is a global public good. The number of bilateral and plurilateral treaties and ITA cases might suggest so but it is questionable whether the regime fulfils the formal public good requirements of being non-exclusive and non-rivalrous. Choudhury argues that the regime is highly exclusive[4] and thus it might be preferable to characterize the regime as lop-sided, uneven, and idiosyncratic. The second challenge is whether the regime delivers *benefits* that are public and global in nature. Do the benefits flow to societies and peoples or are they largely sequestered by a particular class of foreign investors? Does the international investment regime promote broadly both increased foreign direct investment (FDI) flows and a promotion of the rule of law or does it largely benefit capital exporting states?

This chapter addresses these two challenges through a largely empirical perspective. Drawing on three datasets, we try to go beyond the current theorizing in the literature on this theme and base our findings on a comprehensive perspective of what has happened to date. The chapter is structured as follows. Section 2 discusses the idea of global public goods, section 3 examines whether the design of international investment regime fits the global public good definition, and section 4 examines whether the regime in fact provides global and public benefits. Section 5 concludes.

2. Global Public Goods: The Analytical Framework

Following the tradition of Anglo-American economics, we define public goods as those which are both non-exclusive and non-rivalrous. *Non-exclusive* means that everybody can access the good. *Non-rivalrous* refers to the fact that one person's consumption of the good does not deprive another of it. A frequently given example of a pure public good is moonlight – all can enjoy it and one person's enjoyment does not deplete the good. However, Samuelson's seminal 1954 essay on public goods[5] attempted to push economists past such naturalistic definitions.[6] Public goods are not only those naturally occurring phenomena such as clean air but also those goods desired by all individuals that the market cannot provide and which therefore in various degrees are provided by the public.[7] Thus legislation regulating the speed of motor vehicles can be enjoyed by all persons and enjoying the protection of this law does not deplete its effectiveness. On the contrary, private goods are characterized by both rivalry and exclusiveness. A manufacturing facility producing consumer goods can exemplify a pure private good, being both rivalrous and exclusive.

In between we find two mixed or 'impure' goods. First, where a good is *exclusive* but still *non-rivalrous* among those that benefit or use the good, it is commonly referred to as a 'club good,' indicating that it is only available to a limited group. An example could be private education. Secondly, there is the situation where there is *rivalry* but *no exclusion*. Such goods are

[4] Choudhury contends that it could formally be a "pure public good by failing to exclude states from at least some of its benefits" and producing a "framework that efficiently facilitates the transfer of capital between states." Choudhury (n 2) 504.

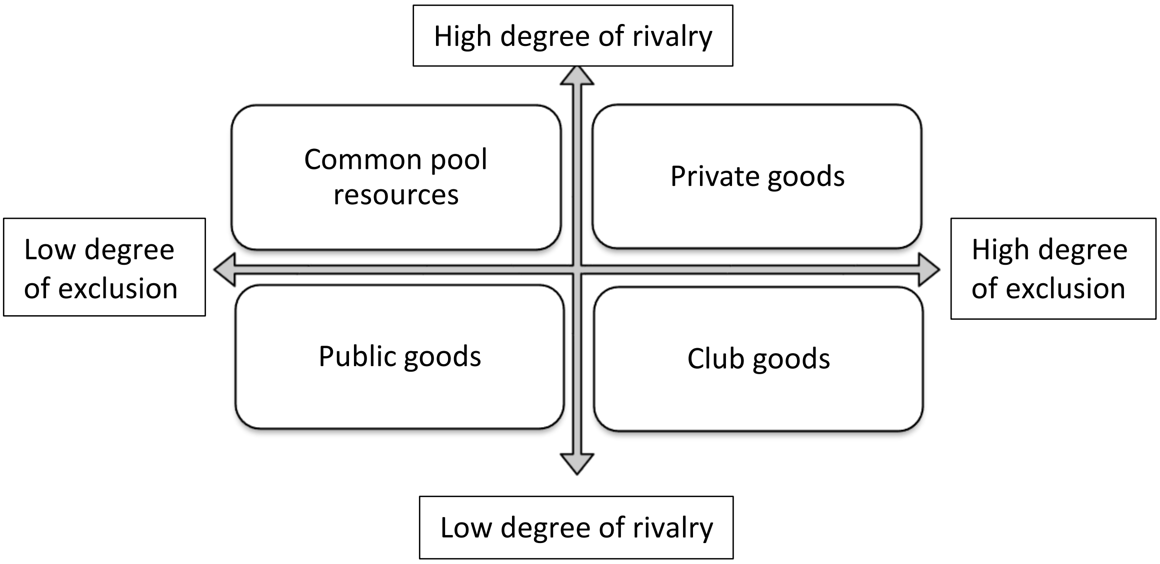
[5] P. Samuelson, 'The Pure Theory of Public Expenditure,' 36 *Review of Economics and Statistics* 387 (1954).

[6] O. Morrissey, D. Velde, and A. Hewitt, 'Defining International Public Goods: Conceptual Issues,' in M. Ferroni and A. Mody (eds.), *International Public Goods: Incentives, Measurement and Financin*g (Kluwer, 2002).

[7] I. Kaul and R. Mendoza, 'Advancing the Concept of Global Public Goods,' in I. Kaul *et al*, *Providing Global Public Goods: Managing Globalization* (OUP, 2003).

commonly referred to as 'common pool resources.' This category of goods includes many environmental resources such as water. In reality, many or most goods are 'impure' and found somewhere on a spectrum. We can therefore place goods on the two scales of rivalry and exclusiveness, as illustrated in Figure 1. The key question in order to determine the extent to which the international investment regime can be categorized as a public good is to what extent the regime is both non-rivalrous and non-exclusive.

Figure 1. Analytical framework for classification of the international investment regime



Global public goods are those goods, as defined by Kaul, "whose benefits extend to all countries, peoples and generations."[8] The typical list of such goods tends to include relatively naturally-occurring phenomena such as environmental resources but also human constructions such as peace and security, multilateral trade and investment, and international human rights.[9] However, whether a good is or should be *global* and *public* is not always clear. The almost ubiquitous claim in global public goods literature is that 'peace' is a public good,[10] but becomes contested once the discussion moves to the details – does it include military humanitarian intervention or the nuclear stalemate?[11] The same is valid for the international investment regime – whether and the extent to which it is a global public good gets controversial once one looks closer at the design and effects of the regime.

3. Design: Exclusion and Rivalry in the International Investment Regime

When determining the extent to which the international investment regime is rivalrous and exclusive we will distinguish between international investment agreements (IIAs) and investment treaty arbitrations (ITAs). IIAs are obviously a core element of the regime as they set out the substantive rules and define the associated institutional and procedural frameworks.

[8] Ibid.

[9] Ibid, 98.

[10] Ibid; R. Mendez, 'Peace as a Global Public Good,' in I. Kaul *et al.*, *Providing Global Public Goods: Managing Globalization* (n 7).

[11] B. Mueller, 'Peace,' in E.A. Andersen and B. Lindsnaes (eds.), *Towards New Global Strategies: Public Goods and Human Rights* (Brill, 2007).

In addition, one should take into account some of the rules relating to international dispute settlement set out in three multilateral international conventions:[12] the ICSID Convention,[13] the New York Convention[14] and the Mauritius Convention.[15] Clearly though, ITA must also be considered as it provides 'teeth' to the regime – the threat and actuality of compulsory dispute resolution with associated enforcement mechanisms.

3.1 Exclusion

In which ways and to what extent is the international investment regime designed to either promote or prevent exclusion? Drawing a sharp distinction between the regime's clear 'club good' characteristics and only possible 'pure public good' characteristics, Choudhury claims that the regime is clearly exclusive.[16] However, we have adopted a more fine-grained perspective finding that a more graduated examination of 'global publicness' is warranted for *de jure* design exclusion but that the *de facto* operation of the regime suggests high exclusiveness.

3.1.1 De Jure Exclusion

Starting with *de jure* exclusion, we focus on three main elements in IIAs that determine the constituency that can benefit (and enforce) the rights provided by states in these treaties through ITA. These rules concern the definition of 'investors,' the definition of 'investment' and the rights and participation of stakeholders other than the directly affected foreign investor and host state in the context of ITA. All three aspects determine *who* can participate in the international investment regime and therefore become important benchmarks for assessing who can benefit from the regime.

At first glance, the definition of 'investor' in IIAs is narrow and exclusive – protecting a particular class of investor. While all IIAs are standalone treaties with considerable diversity, we can confidently state that in all known IIAs with access to ITA, the substantive protections apply to the treatment of *foreign* investors and the enforcement of those obligations are only accessible by foreign investors. Since all domestic investors are excluded (in contrast to protections under regional human rights treaties), a high degree of exclusion is already evident.

However, it can be argued that the role of the international investment regime is not to provide privileges to foreign investors but rather to level the playing field between foreign and domestic investors. Consequently, in light of this object and purpose, the exclusion of domestic investors is not necessarily a sign of strong exclusiveness. The claim faces a formal challenge in that the

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[12] Other rules might also be of relevance – notably the UNCITRAL rules on arbitration and transparency, the ICSID arbitration rules, and those of relevant arbitral houses – but these tend to be applied on a case-by-case basis.
[13] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (ICSID Convention), 17 UST 1270, TIAS 6090, 575 UNTS 159 (1965).
[14] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York Convention), 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968).
[15] *Convention on Transparency in Treaty-based Investor-State Arbitration* (Mauritius Convention), 54 ILM (2015).
[16] Choudhury contends that it could formally be a "pure public good by failing to exclude states from at least some of its benefits" and producing a "framework that efficiently facilitates the transfer of capital between states." Choudhury (n 2) 504.

core protection standard in IIAs is not limited to non-discrimination between foreign and domestic investors ('national treatment'). Both IIAs and ITA practice demonstrate the primary importance of other standards of protection, such as – in particular – fair and equitable treatment and protection against direct and indirect expropriation. Such standards combined with robust investor-state dispute settlement (ISDS) provisions provide foreign investors with levels of protection that often exceed the level that domestic investors enjoy.

However, recent IIA practice appears to be trending towards the curtailment of the elevated levels of protection that foreign investors enjoy under these treaties. Based on a relatively crude coding of bilateral investment treaties (BITs),[17] Berge and Fauchald have measured the extent to which BITs provide investor and investment protection beyond national treatment and most-favored nation treatment.[18] Classifying strength across seven categories, a score of six or more is indicative of a higher level of protection in a particular BIT.

Figure 2. Degree of investor and investment protection in BITs (by year of signature)

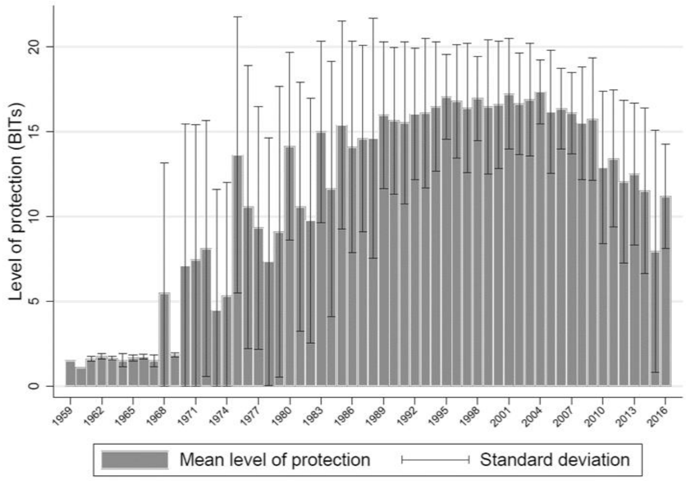

Figure 2 shows the results of this measurement. It indicates that levels of protection beyond non-discrimination and most-favored nation treatment in BITs increased significantly from around the mid-1970s and remained comparatively high through to the mid-2000s, and the level of the variation decreased from the 1980s. However, in about 2010, the levels of protection in BITs started to decrease and at the same time the variability among treaties increased. This suggests a fall in the exclusiveness of the regime. Although, the overall the levels of protection in BITs still remain significantly higher than merely that of non-discrimination protection. Furthermore, it is important to note that the number of BITs in force around the world (especially those signed in the late 1980s through the late 1990s) remain in

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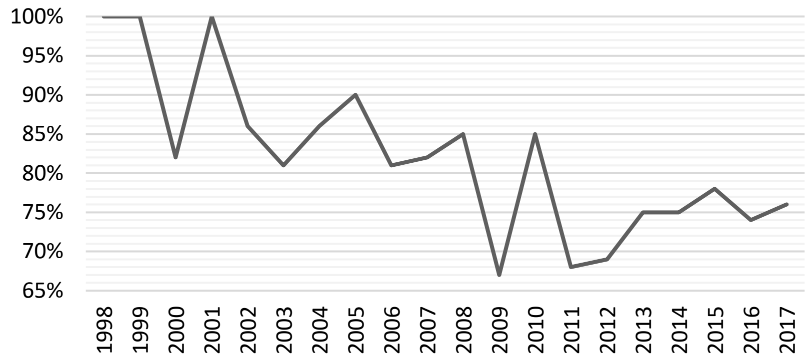
[17] This is slightly smaller than the broader category of IIAs.

[18] See D. Behn, T.L. Berge, O.K. Fauchald and M. Langford, *International Investment Regime as a Global Public Good*, PluriCourts Working Paper, Spring 2018. We have taken into account seven categories of protection clauses with weighted positive values, three flexibility clauses with weighted negative values, and adjusted the results depending on availability of dispute settlement (details available upon request). The findings are based on data from UNCTAD's IIA Mapping Project <http://investmentpolicyhub.unctad.org/IIA/mappedContent#iiaInner Menu> accessed 25 June 2018. The data cover BITs in force and coded in the UNCTAD IIA Mapping Project up through mid-2017 (N=2385, BLEU treaties are counted twice as they are trilateral treaties). The BITs are allocated to year of signature.

force and are being infrequently terminated or renegotiated. This means that in the aggregate the vast majority of BITs in force around the world offer significant levels of protection to foreign investors and this will not change in the foreseeable future.

Turning to the definition of 'investment', we find that it is generally defined broadly in IIAs as 'asset-based' including all kinds of assets unless explicitly exempted. While there is great variation among IIAs, the vast majority in force include broader rather than narrower definitions of what constitutes a protected investment. Hence, there is a low level of exclusion in this regard. However, there appears to be a trend in IIA practice to include broader exemptions from asset-based definitions[19] and some treaties now contain 'positive lists' that define covered investments.[20] In addition, many IIAs include requirements that investments be made – and in some cases also conducted – in accordance with national legislation in order to qualify for protection.[21] All these elements could potentially increase the level of exclusion.

Figure 3. Percentage of investor success on jurisdiction in ITA disputes (by year)



ITA practice seems to confirm that limitations on the scope of IIAs are leading to increased levels of exclusion. Figure 3 shows the degree to which jurisdictional challenges to IIA application (which largely turn on the applicable definitions of 'investor' and 'investment' in the relevant IIA) are being accepted by ITA tribunals against foreign investors.[22] The clear downward trend shows that claimant-investors in ITA cases are increasingly finding it challenging to move beyond the jurisdictional phase in ITA. In previous work, we have explored some of the reasons for this downward trend,[23] but for the purpose of this chapter we note that while the number of ITA cases filed each year is on an upward trajectory, there has

[19] According to UNCTAD's IIA Mapping Project (ibid), 16 IIAs (0.6 per cent) were identified as excluding "portfolio investments" and 109 IIAs (4.3 per cent) as excluding "certain specified assets." In addition, 59 IIAs (2.3 per cent) were identified as setting out "certain characteristics that an asset/transaction must meet to be considered an investment covered by the treaty." The total number of mapped IIAs up through mid-2017 is 2511.

[20] According to UNCTAD's IIA Mapping Project (ibid), 41 IIAs (1.6 per cent) were identified as containing 'an exhaustive, or closed, list of investments covered.' The total number of mapped IIAs up through mid-2017 is 2511.

[21] According to UNCTAD's IIA Mapping Project (ibid), 1604 IIAs (63.9 per cent) were identified as containing a requirement that an "investment must be made in accordance with domestic/local/national laws of the host State." The total number of mapped IIAs up through mid-2017 is 2511.

[22] PluriCourts Investment Treaty Arbitration Database (PITAD) <https://jus-pitad01.uio.no/index#welcome> accessed 25 June 2018.

[23] M. Langford and D. Behn, 'Managing Backlash: The Evolving Investment Arbitrator?' 28(2) *European Journal of International Law* (2018). There is also a discussion here as to whether there has been an increase in speculative or frivolous cases.

been a decline in the proportion of cases in which foreign investors can satisfy the definitional requirements that they are ‘investors’ and that they have made a protected ‘investment’ in the host state.

Another area that highlights the level of *de jure* exclusion is that stakeholders other than the state parties to the relevant IIA and the third-party beneficiary (the foreign investor) have traditionally had no substantive or procedural rights under IIAs. This indicates a high level of exclusion. However, rules adopted under the ICSID Convention have modified this starting point by providing other stakeholders with some procedural rights (mostly in the context of transparency and participation by non-disputing parties in ITA).[24] The same applies to the Mauritius Convention, although despite its entry into force in October 2017, the Convention had at this point only been ratified by three states and signed by another 19.[25] Finally, a handful of recent IIAs include rules to promote transparency and participation of third parties.[26] Thus, there does seem to be a modest trend towards lower exclusion due to the increasing procedural rights of other stakeholders in IIAs. There are also some signs that IIAs increasingly include substantive provisions to safeguard the interests of other stakeholders, in particular to protect the environment, labor rights and human rights.[27]

Against this background, we conclude that the level of foreign investor protection beyond non-discrimination indicates a high level of exclusion of domestic investment and investors as well as for foreign investors and investments being made in states where no IIA protections are available.[28] Limited transparency and opportunities for participation also indicate a high level of exclusion in terms of third party interests. However, the broad definition of ‘investment’ in IIAs and its formulation according to the ICSID Convention (Article 25) suggest a low level of exclusion within the particular class of foreign investors making investments in host states. Moreover, recent trends in IIA practice indicate that the level of exclusion associated with non-discrimination and third-party interests has a downward trend. Thus, it is difficult to characterize the regime as highly exclusive although we note that the level of exclusion associated with investments protected is increasing.

[24] See ICSID Arbitration Rules 32, 34, 37, and 48; ICSID Administrative and Financial Regulation 21, 22, and 23.

[25] Mauritius Convention (n 15), ‘Status’ <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html> accessed 25 June 2018.

[26] According to UNCTAD’s IIA Mapping Project (n 18), 38 IIAs (1.5 per cent) were identified as containing requirements “that certain ISDS related documents are made available to the public,” 30 IIAs (1.2 per cent) as requiring “ISDS hearings to be open to the public” and 31 IIAs (1.2 per cent) as laying down “rules regarding submissions from third parties not involved in the dispute (amicus curiae), including the right of the tribunal to accept and consider such submissions.” The total number of mapped IIAs up through mid-2017 is 2511.

[27] According to UNCTAD’s IIA Mapping Project (ibid), 274 IIAs (10.9 per cent) were identified as using “the terms ‘health’ or ‘environment’ and/or related terms ‘ecological,’ ‘animal’ or ‘plant’ in any of its provisions,” 91 IIAs (3.6 per cent) as using “the term ‘labour standards’ in any of its provisions” and 24 IIAs (1.0 per cent) as using “the term ‘corporate social responsibility’ in any of its provisions (except the preamble), as well as other similar terms.” The total number of mapped IIAs up through mid-2017 is 2511.

[28] As shown in section 3.1.2 below, the largely bilateral basis for IIAs indicates a patchy network of treaties that is far from global coverage of all foreign investors and all states hosting FDI.

3.1.2 De Facto Exclusion

When considering *de facto* exclusion, we consider the most important element to be the geographical pattern of IIAs: Are there many states that do not participate in the regime or participate only sparingly? Do important groups of states participate significantly less than others? Such features may enhance the moderate to high level of *de jure* exclusion.

We have used the World Bank income groups (WBIGs) and the UNCTAD IIA database[29] to determine which type of states participate in the regime. We focus on the subset of IIAs classified as BITs as most other IIAs contain no or weak protections of foreign investor rights. Furthermore, UNCTAD has mapped very few of these other IIAs in their coding of IIAs.[30] This sample mean that we may slightly overestimate the level of *de facto* exclusion, as there are some additional treaties (e.g., EU regional trade treaties) that provide for extensive protection to foreign investors.[31] However, we have also analyzed whether the inclusion of all types of IIAs in the analysis would lead to significantly different results. As we show in relevant footnotes, we find that inclusion of such treaties would probably not significantly change our findings.

Limiting our study to states that are members of the United Nations (UN), we firstly find that there are 21 UN member states that have no BITs in force, five have only one, and 16 have two. Hence, 42 UN members (21.8 per cent) are bound by two or fewer BITs. Even if many of these are bound by other IIAs, the low participation of a significant number of UN member states suggests a relatively high level of *de facto* exclusion.

Secondly, the total number of BITs in force constitutes only a small percentage of the number of possible bilateral agreements that could be signed between state pairs. If we take the 193 members of the UN as our starting point, then there would need to be approximately 17,500 BITs in force in order to guarantee universal coverage. Given that the number of BITs in force currently stands at 2,317, this constitutes only approximately 15 per cent of what would be required for global coverage. Moreover, not all treaties provide for high levels of investment protection. As shown in Figure 2, the degree of investment protection has varied significantly over time. Moreover, Figure 4 shows the variation in our estimated level of investment protection among BITs in force in terms of number of treaties.[32] We mapped all BITs for levels of investor and investment protection, giving each BIT as score between (1) and (21) depending on the number and type of investment protection provisions included in these treaties. While most treaties provide for a relatively high level of investment protection, the analysis reveals

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[29] Data on treaties are collected from UNCTAD's IIA Navigator <http://invest mentpolicyhub.unctad.org/IIA> accessed 25 June 2018.

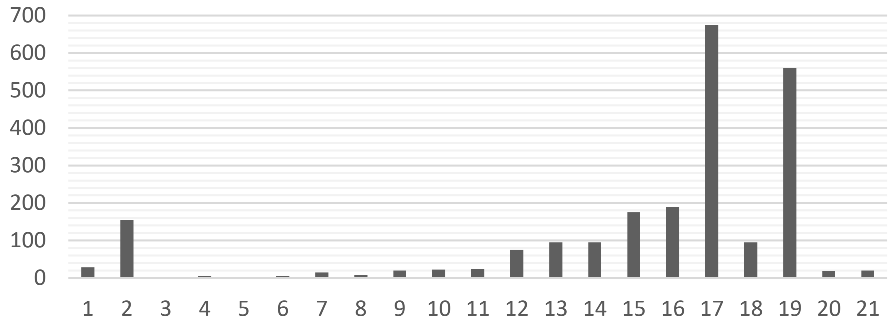
[30] Up through mid-2017, UNCTAD had mapped only 27 of 342 treaties with investment protections (TIPs). See UNCTAD's IIA Mapping Project (n 18).

[31] The main treaties of importance in this context include: *Energy Charter Treaty* (ECT) 2080 UNTS 95 (1994); *North American Free Trade Agreement* (NAFTA) 1992, 32 ILM 289, 605 (1993); *Association of South-East Asian Nations* (ASEAN) *Comprehensive Investment Agreement*, 26 February 2009 <www.asean.org/documents/ FINALSIGNED-ACIA.pdf> accessed 25 June 2018; *Central American-Dominican Republic Free Trade Agreement* (DR-CAFTA), 43 ILM 514 (2004) (draft).

[32] From Behn, Berge, Fauchald and Langford (n 18).

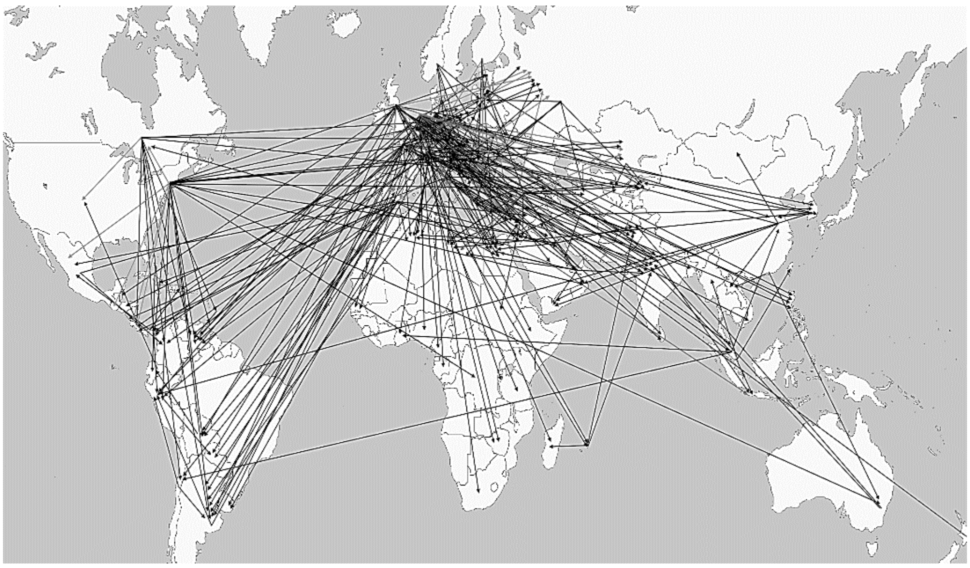
that approximately 200 treaties provide for insignificant levels of protection. This further reduces the extent of global coverage of investment protection through BITs.

Figure 4. Distribution of estimated level of investment protection in BITs[33]



Turning to the practice of ITA, we find that foreign investors have used few treaties and the distribution of these IIAs in arbitration suggests a high level of regional concentration. Of the BITs currently in force around the world and the handful of plurilateral treaties that foreign investors frequently invoke,[34] we find that the universe of IIAs that forms the basis of actual disputes currently stands at 375 unique IIAs. In Figure 5, we map the bilateral state pairs for actual ITA disputes that have been registered up to August 2017 (874). Most significantly, we find that there is a high concentration of intra-European ITA cases that have been registered, along with a significant number of ITA disputes initiated by investors from Western Europe against Latin American states. South and East Asia and Sub-Saharan Africa are largely excluded as either investor-claimants or respondent states in ITA.

Figure 5. Number of unique IIAs invoked in registered ITA cases (375 IIAs)[35]



[33] The data cover BITs in force and coded in UNCTAD's IIA Mapping Project up through mid-2017 (N=2385, BLEU treaties are counted twice as they are trilateral treaties).

[34] See (n 32).

[35] Based on PITAD data (n 22). Up to August 2017, 874 individual ITA cases have been registered. These ITA cases are based on 375 unique IIAs.

In Figure 6, we show the six most frequently invoked IIAs in ITA cases. Approximately one quarter of all ITA disputes up to August 2017 have been based on these six IIAs.[36] Furthermore, the 375 unique IIAs that have been used in ITA cases, account for only 16 per cent of all IIAs in force up to August 2017. Overall, we can see that foreign investor use of IIAs to enforce their rights through ISDS provisions is in practice highly exclusionary.

Figure 6. Most frequently invoked IIAs

The distribution of ITA claims can also be broken down by WBIGs. Table 1 shows the distribution of ITA claims by the income group of the investors' home state and the respondent host state. We find a very high degree of *de facto* exclusion from the international investment regime by low income and lower middle income states, with virtually no representation by low income states as *either* investor-claimants or respondent states in ITA.

Table 1. Distribution of ITA claims by World Bank income groups[37]

		Claimant-investor home state				
		High income	Upper middle income	Lower middle income	Low income	Sum (874 cases)
Respondent state	High income	227 *26.0%*	21 *2.4%*	5 *0.6%*	0 *0.0%*	253 *28.9%*
	Upper middle income	334 *38.2%*	43 *4.9%*	5 *0.6%*	0 *0.0%*	382 *43.7%*
	Lower middle income	174 *19.9%*	40 *4.6%*	2 *0.2%*	0 *0.0%*	216 *24.7%*
	Low income	21 *2.4%*	2 *0.2%*	0 *0.0%*	0 *0.0%*	23 *2.6%*
Sum (874 cases)		756 *86.5%*	106 *12.1%*	12 *1.4%*	0 *0.0%*	874 *100.0%*

[36] ECT (103 ITA cases); NAFTA (60 ITA cases); US-Argentina BIT (23 ITA cases); Netherlands-Venezuela BIT (12 ITA cases); US-Ecuador BIT (11 ITA cases); DR-CAFTA (10 ITA cases). Based on PITAD data (ibid). Up to August 2017, 874 individual ITA cases have been registered.

[37] Total number of registered ITA claims as recorded in PITAD (n 22) up to August 2017 and using the WBIGs as of August 2017.

Figure 7 provides a map of the six states from which foreign investors have launched most ITA cases. Investors from these six states alone account for over one half of all the ITA cases and they are all from either North America or Western Europe.[38]

Figure 7. Most frequent home state investors in ITA cases

In conclusion, we find that *de facto* exclusion of states in the international investment regime significantly increases the relatively high level of *de jure* exclusion in this field of international law. However, while the *de jure* exclusion mainly concerns foreign investors and their investments from protections in IIA, *de facto* exclusion mainly concerns the diffusion of IIAs in force and the patterns of actual use of IIAs by foreign investors from a limited number of home states against a limited number of host states.

3.2 Rivalry

In terms of rivalry, Choudhury states: "international investment law is non-rival in the sense that the use of the system by one foreign investor or one state does not detract from the system's utility for other users."[39] One state signing a BIT with another state does not formally prevent another state from signing a BIT with the same state. Moreover, the system of international dispute settlement used to enforce rights under IIAs appears relatively effective. Compared to other international adjudicatory institutions, it is largely able to accommodate the increasing caseload of litigation.[40] The average length of an ITA case is a mere 3.74 years and there continues to be a buyer's market for arbitral services.[41] However, this initial perspective on the relative non-rivalry of the international investment regime might be open to challenge, principally on two fronts.

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[38] US investors (155 cases under 33 IIAs); Netherlands investors (88 ITA cases under 34 IIAs); UK investors (77 ITA cases under 26 IIAs); German investors (57 ITA cases under 24 IIAs); Canadian investors (47 ITA cases under 15 IIAs); Spanish investors (44 ITA cases under 17 IIAs). Based on PITAD data (n 22). Up to August 2017, 874 individual ITA cases have been registered.

[39] Choudhury (n 2) 503.

[40] See e.g., the caseload of the European Court of Human Rights (ECtHR) has experienced a significant backlog in recent years.

[41] See M. Langford, D. Behn and R. Lie, 'The Ethics and Empirics of Double Hatting,' 6(7) *ESIL Reflection* 1 (2017).

Table 2. BIT relationships between World Bank income groups[42]

	High income	Upper middle income	Lower middle income	Low income
High income	379 *15.2%*	715 *30%*	592 *24.8%*	131 *5.5%*
Upper middle income		179 *7.5%*	238 *10%*	39 *1.6%*
Lower middle income			90 *3.8%*	19 *0.8%*
Low income				3 *0.1%*
Number and % of parties[43]	2196 *(46%)*	1350 *(28%)*	1029 *(22%)*	195 *(4%)*
BITs per state	39.2	24.5	20.2	6.3

First, in regard to the signing and entry into force of IIAs, there may actually be some rivalry at play. States have limited resources and political ability and willingness to negotiate, sign and ratify IIAs. Hence, we may expect significant rivalry in this regard. Table 2 shows how the BIT relationships between states look when assessed in terms of their WBIG categories. Clearly, the most dominant treaty relationships are between high income states and upper middle and lower middle income states, amounting to almost 55 per cent of all BITs in force around the world. This may indicate that the states with the most resources to negotiate BITs would prioritize signing BITs with states that have the most significant potential economic relationship. States generally seem to sign and ratify a lower number of BITs within their own WBIG category than with states from other WBIG categories. Finally, there is a striking absence of low income states from participation in the international investment regime. These states account for a mere 4 per cent of the treaty relationships between states participating in the international investment regime. These findings support the conclusion that there is some rivalry regarding the negotiation and signing of IIAs.

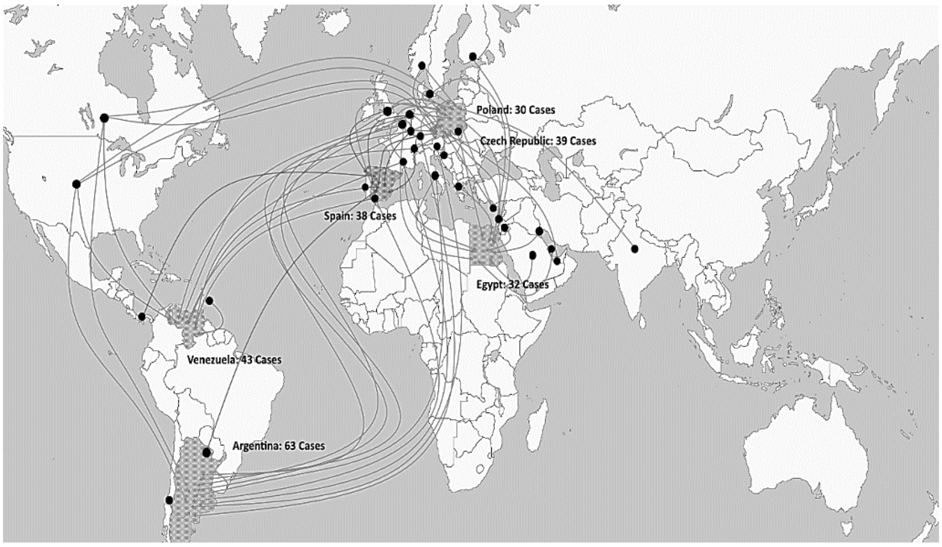
Second, we find that ITA is likely to affect the utility of the international investment regime for other investors – such that we can speak of *diachronic* rivalry. As ITA cases have exploded in number in the past 20 years, a significant number of states have reassessed the extent to which foreign investors ought to have unbridled access to ITA. In the aggregate, early ITA users may foreclose future users from accessing the international investment regime. While IIA practice peaked in the mid-1990s with an average of 200 new treaties signed each year, this enthusiasm for IIAs has evaporated in recent years. As shown in Figure 2, new or revised IIAs continue to be signed, but often with lower levels of protections and the total number of new IIAs being signed per year has remained low in recent years.

Moreover, some states have exited partially or fully from the international investment regime. The only state to date that has indicated a full exit is Ecuador but additional states have – or are currently – renegotiating or terminating some of their IIAs. These include: Bolivia, the

[42] The data are gathered from UNCTAD's IIA Navigator (n 29), covering BITs in force up through mid-2017 (N=2385, BLEU treaties counted twice as they are trilateral treaties) and using the WBIGs as of August 2017.
[43] The total number of BIT relationships is 4770.

Czech Republic, India, Indonesia, Italy, Poland, South Africa, and Venezuela.[44] Three of these states are among the six most frequent respondent states in ITA cases (Figure 8).[45] Thus, frequent ITA cases against certain states can generate diachronic rivalry in that they create a crisis for the regime followed by initiatives to restrict later use of ITA by other aggrieved foreign investors. Moreover, even if later users of ITA against particular states are able to access ITA, an additional rivalry issue can arise. The likelihood of a host state's compliance with a later award is reduced because resources are limited or there is significant domestic opposition.

Figure 8. Most frequent respondent states in ITA cases



Overall, we find that there is some but a limited degree of rivalry regarding participation in and use of the international investment regime. This degree of rivalry seems to be slightly higher than in most multilateral regimes where the entry requirements are generally low, with a few possible exceptions such as the international trade regime and some regional economic integration agreements. The main reason is the ability of states to take measures that limit the benefits of ITA to foreign investors.

3.3 Concluding Remarks

As a whole, we consider that the international investment regime has a high level of exclusion for domestic investors and investments, for foreign investors and investments not protected under IIAs, and for third party interests and participation in the regime. In these contexts, there is a trend towards reduced levels of exclusion. There is a low level of exclusion among foreign investors and investment covered by IIAs. However, there is a trend towards increased levels of exclusion in this context.

[44] M. Langford, D. Behn and O.K. Fauchald, 'Backlash and State Strategies in International Investment Law,' in T. Aalberts and T. Gammeltoft-Hansen (eds.), *The Changing Practices of International Law* (CUP, 2018) 70-102.

[45] Argentina (63 ITA cases); Venezuela (43 ITA cases); Czech Republic (39 ITA cases); Spain (38 ITA cases); Egypt (32 ITA cases); Poland (30 ITA cases). Based on PITAD data (n 22). Up to August 2017, 874 individual ITA cases have been registered.

Despite assumptions in the literature to the contrary, we find indications of some rivalry in regard to the international investment regime. However, the degree of rivalry seems to be low; and there is a need for more research to determine more precisely its level and trend.

We have not been able to compare systematically the levels of exclusion and rivalry in international investment law and arbitration with other fields of international law. Nevertheless, we consider it likely that comparable global multilateral regimes (i.e., regimes including independent and mandatory dispute settlement mechanisms) would generally score lower in terms of exclusion due to their multilateral character and relatively low thresholds for new entrants. Moreover, it seems likely that there would be higher levels of rivalry in such regimes due to resource constraints in the associated international institutions.

Against this background, we tentatively conclude that the international investment regime should rather be characterized as a club good rather than as a public good. We also suggest that international investment law and arbitration would more clearly fulfil the characteristics of a club good than would other comparable fields of international law and adjudication.

4. Benefits: Outputs of the International Investment Regime

Regardless of the exact classification of the international investment regime in terms of being a club good or a public good, it may still produce significant *global and public benefits* such that its characteristics as a club good become less important. Indeed, to constitute a global public good, the international investment regime must also be capable of producing benefits – whether intended or unintended. Two potential benefits stand out: (1) the international investment regime facilitates economic development benefits for states and their populations; and (2) the international investment regime contributes to the global rule of law (international and national).

However, these two claims meet positivist and constructivist skepticism as to the degree and distribution of global benefits and their public nature. The *positivist* approach to global public goods is principally concerned with strictly defining the 'global' in global public goods. In this school of thought, communicable disease control is a global public good since everyone in the world benefits even if the benefit from eradicating polio in Nigeria is of almost negligible benefit to the Canadian population.[46] This essentially technical and residual approach is defended on the basis that the concept of global public goods will be deprived of any practical utility if they were required to extend to cover the tackling of every public evil manifested on the globe. However, a question arises as to whether the international investment regime can achieve these *global* effects.

The *constructivist* approach emphasizes the 'public' in global public goods. One of Kaul's key conceptual contributions to the debate was to go beyond Samuelson's point that 'human-made' public goods are necessary to maximize utility, and emphasize that both the present availability and distribution of public goods is a matter of social construction and social contestation.[47] Whether a forest is public good is the result of a choice by the authorities which is likely to

[46] See R. Smith and L. MacKellar, 'Global Public Goods and the Global Health Agenda: Problems, Priorities and Potential,' 3 *Globalization and Health* (2007).

[47] Kaul and Mendoza (n 7).

have been heavily influenced by struggles between different perspectives and groups within society. This leads such authorities to evaluate the current state of public goods from a triangular perspective of the 'publicness' of the consumption, decision-making and distribution of a public good. Again, question arise as to whether the international investment regime produces goods a sufficiently *public* nature

4.1 Global Economic Development Benefits

Looking at both the 'globalness' and 'publicness' of the goods produced by the international investment regime, the first question to ask is whether this regime delivers on its *explicit* promise to increase flows of FDI. The development of the international investment regime has always been formally premised on a so-called grand bargain in which states pledge to protect foreign investors and their investments in return for the possibility of increased flows of FDI into the state hosting that investment – and ultimately to contribute to the economic development of that state.[48] Yet, the extent to which the international investment regime is concerned with increased FDI flows is questionable.

First, in terms of actual ITA practice over the past 20 years, this grand bargain tends to be partly forgotten. In determining whether there is a protected 'investment,' the quality and quantity of monetary flows generally receives little attention. For example, the fourth part of the *Salini* criteria[49] – that an investment must clearly contribute to a host state's economic development – has only been applied fully in a minority of ITA cases.[50] Protection of foreign investors is the primary interest considered and scant regard is given to the effect that the investment has or will have on the host state. However, this may be changing. We can observe an increasing focus in IIAs on contribution to sustainable development and thus promotion of FDI flows that enhance (sustainable) economic development in host states.[51] Approximately 10 per cent of IIAs include statements in their preambles to this effect.[52] Even more IIAs, approximately 13 per cent, include substantive provisions on issues of relevance to sustainable development.[53]

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[48] For e.g., the preamble of IIAs frequently state this bargain as: "[…] desiring to promote greater economic cooperation between them, with respect to investment by nationals and companies of one Party in the territory of the other Party; Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties […]." US-Argentina BIT, 14 November 1991.

[49] See *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 21 July 2001, paras. 52, 57.

[50] O. García-Bolívar, 'Economic Development at the Core of the International Investment Regime,' in J. Alvarez (ed.), *Evolution in Investment Treaty Law and Arbitration* (CUP, 2011).

[51] See M. Gehring, S. Stephenson and M-C. Cordonier Segger, 'Sustainability Impact Assessments as Inputs and as Interpretative Aids in International Investment Law,' 18(1) *Journal of World Investment and Trade* 163 (2017); see also A. Keene, 'The Incorporation and Interpretation of WTO-Style Environmental Exceptions in International Investment Agreements,' 18(1) *Journal of World Investment and Trade* 62 (2017).

[52] According to UNCTAD's IIA Mapping Project (n 18), 56 IIA preambles refer to sustainable development, 126 IIA preambles refer to the environment, and 202 IIA preambles refer to social investment aspects such as human rights, labour, health, corporate social responsibility and poverty reduction. The total number of mapped IIAs up through mid-2017 is 2511.

[53] According to UNCTAD's IIA Mapping Project (n 18), 336 IIAs included substantive provisions on one or more of the following subjects: 273 IIAs referred to environment and health, 90 IIAs referred to labour standards, 116 IIAs referred to the right to regulate, 23 IIAs referred to corporate social responsibility, 33 IIAs referred to

In general, these provisions are exceptions, recommendations and political commitments, and as such they do not introduce legally binding obligations on states or investors to contribute to sustainable development – although they do provide states with incentives and greater flexibility to design policies to promote sustainable FDI and prevent unsustainable FDI.

Second, it is not clear to what extent the international investment regime has facilitated increased FDI flows. Early econometric studies were positive[54] but later studies have been generally conditional and occasionally negative in their findings.[55] One increasingly common finding is that enhanced FDI flows are dependent on later state behavior. For example, if a host state is challenged in ITA by a foreign investor, the positive FDI flow effect disappears or can even turn negative.[56] This suggests that IIAs might be more a Faustian than grand bargain. For a significant number of states (of all degrees of economic development), the long-term result may be costly litigation through ITA cases and modest or negative effects on FDI flows. However, some other studies show that IIAs do increase FDI flows but that these benefits are conditional on sector (those with higher sunk costs)[57] or the existence liberal foreign investment admission rules.[58]

Nonetheless and regardless of whether the international investment regime can be seen to increase FDI flows into host states in the aggregate, it is relatively clear that the current structure of IIAs is unlikely to provide significant incentives to increase FDI into countries classified as low income states by the World Bank.[59] More than half of the treaty relationships are between high and upper middle income countries, which presumably are countries with a low need for incentives to attract FDI.[60] Low income states, frequently categorized as least

corruption and 96 IIAs referred to not lowering standards. The total number of mapped IIAs up through mid-2017 is 2511.

[54] E. Neumayer and L. Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?' 33(10) *World Development* 1567 (2005); P. Egger and M. Pfaffermayer, 'The Impact of Bilateral Investment Treaties on Foreign Direct Investment,' 32 *Journal of Comparative Economics* 787 (2004). Although see M. Hallward-Driemeier, *Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit . . . and They Could Bite* (World Bank, 2003).

[55] For systemic reviews, see UNCTAD, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries* 2 (2009); S. Armstrong and L. Nottage, 'Mixing Methodologies in Empirically Investigating Investor-State Arbitration,' in D. Behn, O.K. Fauchald and M. Langford (eds.), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (CUP, forthcoming). See also J. Tobin and S. Rose-Ackerman, 'When BITs Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties,' 6 *Review of International Organizations* 1 (2010).

[56] T. Allee and C. Peinhardt, 'Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment,' 65(3) *International Organization* 401 (2011). See also E. Aisbett, M. Busse and P. Nunnenkamp, 'Bilateral Investment Treaties Do Work; Until They Don't,' *Kiel Working Paper No. 2021* (2016).

[57] L. Colen, D. Persyn and A. Guariso, 'Bilateral Investment Treaties and FDI: Does the Sector Matter?' 83 *World Development* 193 (2016).

[58] A. Berger, M. Busse and P. Nunnenkamp, 'Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions Inside the Black Box,' 32(4) *Journal of Comparative Economics* 788 (2014).

[59] This is because low income states do not actively participate in the international investment regime. Low income states have an average of 6.3 BITs per state, while high income states average 39.2 per state. See Table 2.

[60] Ibid.

developed countries (LDCs) and which are presumably states with a high need for FDI, are largely excluded from the regime and any benefits that might be derived in this regard.[61]

To this picture, we might also add the monetary flows that are generated by ITA cases themselves.[62] In principle, the recovery of damaged foreign investments through compensation should mean the profitable use of this finance elsewhere in the world. Some ITA cases involve awards in the billions of US dollars,[63] and so the contribution of ITA to the facilitation of new FDI flows elsewhere should not be underestimated. The problem with this argument is that many of the benefits of ITA litigation – both compensation[64] and legal fees – are captured by a small group of individuals, firms and companies in a select set of high income, developed states.[65]

Furthermore, it is clear that investor-claimants only succeed in 17 per cent of ITA cases against high income states but are 49 to 62 per cent successful in ITA cases against the three other WBIG categories of states.[66] This means that high income states sustain a double benefit: they are less likely to pay out compensation but it is their foreign investors which are more likely to be successful in ITA cases. The opposite scenario holds true for the remainder of states in the three other WBIG categories. Some authors have tried to justify this differential by reference to lower levels of democratic governance,[67] but our research shows that this claim is only partly correct and only supported by one set of indicators.[68] As to lucrative legal roles, it is notable that developed state actors (those from high income states) completely dominate the lists of arbitrators, expert witnesses, legal counsel, and law firms.[69] It is only amongst tribunal secretaries that we find any sizeable representation in terms of global geographical representation.[70] When we examine the top 25 'power brokers' in the practice of ITA – the most present and connected individuals – there is almost a complete absence of representation from the Global South: see Table 3 below.[71]

[61] Ibid.

[62] See G. van Harten and P. Malysheuski, 'Who Has Benefited Financially from Investment Treaty Arbitration? An Evaluation of the Size and Wealth of Claimants,' in Behn, Fauchald and Langford (n 54).

[63] See e.g., ITA cases such as: *Hulley Enterprises v. Russia*, PCA, UNCITRAL, Award, 18 July 2014 (40 billion USD); *Veteran Petroleum v. Russia*, PCA, UNCITRAL, Award, 18 July 2014 (8.2 billion USD); *Yukos Universal v. Russia*, PCA, UNCITRAL, Award, 18 July 2014 (1.8 billion USD); *Occidental II v. Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012 (1.8 billion USD); *Venezuela Holdings v. Venezuela*, ICSID Case No. ARB/07/27) Award, 9 October 2014 (1.6 billion USD); *Crystallex v. Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (1.4 billion USD).

[64] See Figure 7 above.

[65] M. Langford, D. Behn and R. Lie, 'The Revolving Door in International Investment Arbitration,' 20(2) *Journal of International Economic Law* 301 (2017).

[66] D. Behn, T.L. Berge and M. Langford, 'Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration,' 37 *Northwestern Journal of International Law and Business* 3 (2017).

[67] S. Franck, 'Conflating Politics and Development: Examining Investment Treaty Outcomes,' 55 *Virginia Journal of International Law* 1 (2014).

[68] Behn, Berge and Langford (n 66). The one indicator that appears to be most relevant in this context is the extent to which a host state maintains robust property rights institutions.

[69] Langford, Behn and Lie (n 65).

[70] Ibid.

[71] Ibid.

Table 3. Network rankings of all actors in ITA cases[72]

Rank	Name	Nationality	Arb.	Cnsl.	Exp.	Sec.	HITS Hub
1	G. Kaufmann-Kohler	Switzerland	56	0	0	0	1.00000
2	L.Y. Fortier	Canada	53	0	0	0	0.87664
3	B. Stern	France	88	0	0	0	0.87278
4	V.V. Veeder	UK	37	2	0	0	0.55004
5	F. Orrego Vicuña	Chile	49	0	0	0	0.54280
6	S. Alexandrov	Bulgaria	32	31	0	0	0.52113
7	C. Brower	US	52	0	0	0	0.48111
8	J. Crawford	Australia	27	14	5	0	0.48067
9	D. Price	US	18	13	0	0	0.48031
10	E. Gaillard	France	23	21	0	0	0.47015
11	B. Hanotiau	Belgium	40	3	0	0	0.44905
12	J. Paulsson	France	28	18	4	0	0.44540
13	A.J. van den Berg	Netherlands	44	0	0	0	0.44069
14	J. C. Thomas	Canada	43	3	0	0	0.42114
15	K-H. Böckstiegel	Germany	40	0	0	0	0.41590
16	M. Lalonde	Canada	35	0	0	0	0.39232
17	S. Schwebel	US	18	9	0	0	0.38389
18	B. Cremades	Spain	37	2	0	0	0.37650
19	P. Bernardini	Italy	36	1	0	0	0.37495
20	G. Flores	Chile	0	0	0	38	0.34236
21	W.M. Reisman	US	19	1	16	0	0.33781
22	J. Fernández-Armesto	Spain	29	0	0	0	0.32955
23	F. Berman	UK	24	0	0	0	0.32912
24	V. Lowe	UK	24	1	1	0	0.32573
25	G. Álvarez-Avila	Mexico	0	18	0	19	0.32565

Overall, we might conclude that participation in the international investment regime may be capable of providing economic development benefits to states, but as the regime currently operates, the economic benefits of the regime – in the aggregate – appear to provide no or few benefits to low income states and significant economic benefits to private actors from high income states (in the form of investor-claimants using the ITA system and the actors – arbitrators, counsel experts, secretaries – engaged in the litigation of ITA cases).

4.2 Global Rule of Law Benefits

A second potential global benefit is the advancement of various aspects of the rule of law. These rule of law aspects take on a variety of forms; but have entered the discourse in recent years largely as ancillary benefits to the 'grand bargain' described above.[73] However, there are

[72] Ibid.

[73] B. Kingsbury and S.W. Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law,' *NYU Law School Working Paper 2009/6* (2009) 8. For an alternative view on the good governance narrative, see M. Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* (CUP, 2018). See also B. Guthrie, 'Beyond Investment Protection: An Examination of the Potential Influence of Investment Treaties on Domestic Rule of Law,' 45 *New York University Journal of International Law and Politics* 1151 (2012-2013); R. Echandi, 'What Do Developing Countries Expect from the International Investment Regime?' in J. Alvarez and K. Sauvant (eds.), *The Evolving*

of course limitations to this set-up in terms of global benefits because the grand bargain is implemented through scattered and fragmented global coverage that is largely based on bilateral treaty promises (IIAs) that are then enforced through *ad hoc* one-off dispute settlement (ITA) that (technically speaking) is not supposed to have binding effect beyond the parties to a particular dispute. One would thus expect very little collective, multilateral, and global effect or benefit to the rule of law through the international investment regime.[74]

However, there are equally strong arguments that despite these limitations, the international investment regime is producing *de facto* global rule of law benefits that were neither intended (never an explicit purpose of the regime) nor expected (bilateral versus multilateral set-up with *ad hoc* tribunals for enforcement of the legal norms).[75] According to this claim, what has developed over the last 20 years is a system of global adjudication based on what has emerged as a *de facto* multilateral international legal order.[76] There are two ways in which the international investment regime can be seen to provide global rule of law benefits that potentially belie its status a global public good. These global rule of law benefits can be categorized as *international* rule of law benefits and *national* rule of law benefits.

First, it is relative undisputed that the use of ITA is one of the most frequently invoked dispute settlement mechanisms in international law and that these tribunals have produced a significant amount of jurisprudence on particular international legal standards. While each IIA is a standalone agreement, the investor protection guarantees provided in these IIAs tend to be similar and have allowed tribunals to multilateralize the jurisprudence to a certain or significant degree.[77] Coupled with fact that the majority of ITA awards become publicly available, the amount of jurisprudence on particular international legal rules and standards is profound. The development of IIA case law through the practice of ITA tribunals over the past two decades – at a minimum – has significantly stabilized expectations about international legal standards

International Investment Regime: Expectations, Realities, Options (OUP, 2011) 13; S. Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Hart, 2009); R. Dolzer, 'The Impact of International Investment Treaties on Domestic Administrative Law,' 37 *New York University Journal of International Law and Policy* 972 (2004); J. Crawford, 'International Law and the Rule of Law,' 24 *Adelaide Law Review* 4 (2003); J. Hewko, 'Foreign Direct Investment in Transitional Economies: Does the Rule of Law Matter?' 11 *European Constitutional Review* 71 (2002).

[74] T. Schultz and C. Dupont, 'Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study,' 25(4) *European Journal of International Law* 1160 (2015); J. Yackee, Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?' 42(4) *Law and Society Review* 805 (2008); S. Franck, 'Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law,' 19(2) *Pacific McGeorge Global Business and Development Law Journal* 337 (2007).

[75] A. Bjorklund, 'The Emerging Civilization of Investment Arbitration,' 113(4) *Penn State Law Review* 1269 (2009).

[76] S.W. Schill, *The Multilateralization of International Investment Law* (CUP, 2010).

[77] On discussion about this discourse about the development and stabilization of legal standards in international investment law through the practice of ITA, see S.W. Schill, 'W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law,' 22(3) *European Journal of International Law* 875 (2011); W.M. Reisman, '"Case Specific Mandates" versus "Systemic Implications:" How Should Investment Tribunals Decide? The 2012 Freshfields Arbitration Lecture,' 29(2) *Arbitration International* 131 (2012); G. Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse – The 2006 Freshfields Arbitration Lecture,' 23(3) *Arbitration International* 357 (2007).

such as fair and equitable treatment, full protection and security, expropriation and non-discrimination in the context of international investment law.[78]

To be sure, ITA awards, through the one-off nature of arbitration and the generally vague legal treaty standards that tribunals must interpret, have produced – at times – an inconsistent jurisprudence.[79] However, it can be asked whether the level of inconsistency significantly diverges from that of domestic judiciaries and the high level of consistency in international investment arbitration is quite surprising given the *ad hoc* and fragmented nature of the regime overall.[80] Unlike Choudhury, we would argue that through the practice of ITA, the development of international investment law, the advancement of the procedural sophistication of ITA itself, and the relatively firm stabilization of legal expectations does lend itself to the claim that the international investment regime is producing significant international rule of law benefits even if vague and contradictory at times.

Moreover, it could be argued that IIAs ensure global transparency of the protections that foreign investors get, at least to the extent that investors are not given additional protections through contracts or secret decisions of public authorities. ITA is significantly more transparent than international commercial arbitration even if some challenges remain and there is lack of transparency in the context of settlements.[81] However, challenges also remain regarding the public availability of IIAs (403 of all BITs and 167 of those in force in UNCTAD database have no texts available).[82] Thus, the overall transparency of the international investment regime does provide the opportunity for greater public scrutiny of both investments and investor-state relationships and conflicts. The fact that the regime is for the most part public provides the possibility for positive rule of law effects.

Second, the international investment regime has the potential to contribute to national rule of law.[83] The argument for national rule of law benefits goes something like this: IIAs bind states with lower rule of law development to supra-national oversight that creates credible

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[78] For e.g., in relation to the fair and equitable treatment standard, see R. Dolzer, 'Fair and Equitable Treatment: Today's Contours,' 12(1) *Santa Clara Journal of International Law* 7 (2013); K. Yannaca-Small, 'Fair and Equitable Treatment: Recent Developments,' in A. Reinisch (ed.), *Standards of Investment Protection* (OUP, 2008) 111. In relation to the full protection and security standard, see G. Cordero-Moss, 'Full Protection and Security,' in Reinisch (ibid) 131; 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); C. Schreuer, 'Full Protection and Security,' 1(2) *Journal of International Dispute Settlement* 353 (2010).

[79] See e.g., Z. Douglas, 'The MFN Clause in Investment Arbitration: Treaty Interpretation off the Rails,' 2 *Journal of International Dispute Settlement* 97 (2011); M. Waibel *et al.* (eds.), *The Backlash Against Investment Arbitration: Perceptions and Reality* (CUP, 2010); A. Bjorklund, 'Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals is Not Working,' 59 *Hastings Law Journal* 241 (2007-2008).

[80] O.K. Fauchald, 'The Legal Reasoning of ICSID Tribunals: An Empirical Analysis,' 19 *European Journal of International Law* 301 (2008).

[81] ITA cases that settle tend to be kept confidential. However, approximately 75 per cent of known ITA cases that go through to a final award are publically available. See D. Behn, 'The Performance of Investment Treaty Arbitration,' in T. Squatrito *et al.* (eds.), *The Performance of International Courts and Tribunals* (CUP, 2018).

[82] See UNCTAD's IIA Navigator (n 29).

[83] C. Drahozal and C. Rogers, 'Investment Arbitration and the Rule of Law,' in Behn, Fauchald and Langford (n 55).

commitments to foreign investors that they will be treated according to international legal standards of non-discrimination, fairness, and non-arbitrariness. These credible commitments ensure (or at least create an enforcement mechanism if they fail) that these states will grant rights to a particular class of foreigners *vis-à-vis* their investments. One might expect that, if the international investment regime was global enough in scope, it would assist in the progressive strengthening of rule of law standards within a wide-array of states struggling to develop their own domestic governance institutions. In other words, IIA commitments and the threat of suit through ITA may compel poorly governed states to reform their legal systems in a manner that both advances domestic rule of law and mitigates against the possibility of being sued in ITA.[84]

However, this domestic rule of law theory suffers from a number of flaws. Primarily, there are three arguments as to why 'global' national rule of law benefits may be difficult for the international investment regime to secure: (1) IIAs are so fragmented and spotty in coverage that it would be virtually impossible to envision states needing higher rule of law performance modifying domestic governance structures to ensure that national policies and regulations are consistent with particular IIA obligations;[85] (2) the enforcement of IIA rules through international arbitration removes the adjudication of foreign investments disputes from the domestic context, which in turn limits the development of the rule of law on these issues in domestic judiciaries;[86] and (3) there is the possibility that by granting strong and enforceable rights to foreign investors at the international level – and no one else – the international investment regime facilitates a negative form of 'regulatory chill' that freezes a state's ability to pursue policies that are consistent with the rule of law but that run afoul of the promises made to a narrow class of foreign investors.[87] Collectively, it is possible that the international investment might actually be detrimental to the advancement of the rule of law at the national level.

5. Reforming the International Investment Regime?

Is the international investment law regime a global public good? Maybe, maybe not. Unlike other comparable international regimes, it is grounded in fragmented membership and high asymmetry in the patterns of treaty ratification and litigation. This suggests high levels of exclusion and its characterization as a club good rather than public good. However, the efficiency of the ITA system in speedily processing complaints – as compared to almost any other international tribunal – indicates high level of non-rivalry. Use of the dispute settlement

[84] For a more in depth discussion of this theory, see generally Sattorova (n 73).

[85] See Section 3.1.2 above.

[86] T. Ginsburg, 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance,' 25(1) *International Review of Law and Economics* 107 (2005).

[87] On the issue of whether ITA has the potential to have a chilling effect on domestic law and regulation, see K. Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (CUP, 2009); D. Behn and M. Langford, 'Trumping the Environment? An Empirical Perspective on the Legitimacy of Investment Treaty Arbitration,' 18(1) *Journal of World Investment and Trade* 14 (2017); D. Rosert, 'The Stakes Are High: A Review of the Financial Costs of Investment Treaty Arbitration,' *International Institute for Sustainable Development* (2014). For a case study of South Africa, see L.N.S. Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (CUP, 2015) Ch. 7.

system (ITA) does not mean depletion and delay. However, rivalry concerns kick in for states subject to high levels of litigation by foreign investors as they struggle to cope with an avalanche of cases – and which has led some of these states to reassess their participation in the international investment regime.[88]

The design limitations might be overcome through the provision of benefits. The jury is out however on the extent to which the international investment regime delivers enhanced FDI flows and rule of law at the international and national levels. It is correct that some states and actors have financially benefitted but the underrepresentation of low income states as beneficiaries of increased FDI flows due to marginal participation in the regime raises important questions over the global nature of the regime and its levels of (in)equity. The argument that the international investment regime can provide rule of law benefits may be partly stronger as the regime has taken on a more judicial-like character – seeking to provide (with varying degrees of success) more legal certainty through ITA – which may have pressured some states to improve their administrative and judicial procedures domestically as a mechanism for avoiding future ITA disputes.

The weakness of the claim that the international investment regime is actually a global public good suggests why the ongoing legitimacy crisis in international investment law and arbitration appears perpetual and more acute than the equivalent crisis that belied the international trade regime in the late 1990s and early 2000s. Concerns over the democratic legitimacy of international and regional trade regimes – and their interference with other global public goods like the environment and human rights – are often met with the claim that trade agreements deliver material benefits for all. Output legitimacy saves the day.[89] However, the asymmetric nature of the design and outcomes in international investment law and arbitration may make it harder to defend when faced with concerns over its legitimacy – from procedural concerns through to its impact on human rights and the environment.[90]

The question thus becomes whether the global public good characteristics of the regime should be enhanced. Is there a need to reduce *de jure* or *de facto* exclusion from the regime? Is there a need to ensure that the regime, its users and its adjudicators evince more concern with the promised benefits? We would argue yes. If the international investment regime is not simply meant to provide benefits for a wealthy minority of states, companies and lawyers and ensure its own sociological legitimacy, the flaws in the claims that it is a global public good should be taken seriously. One area that should attract attention in both design and implementation is ensuring that the benefits of the regime are more evenly spread – that the rights of investors ratchet up pressure for better rule of law and economic growth for all rather than for a few.

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[88] See L.N.S. Poulsen and E. Aisbett, 'When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning,' 65(2) *World Politics* 273 (2013).

[89] A. Buchanen and R. Keohane, 'The Legitimacy of Global Governance Institutions,' in R. Wolfrum and V. Röben (eds.), *Legitimacy in International Law* (Springer, 2008) 25.

[90] Although one needs to take a nuanced approach to such concerns. See Behn and Langford (n 87).