

# Managing Backlash: The Evolving Investment Treaty Arbitrator

*Malcolm Langford\* and Daniel Behn\*\**

**Abstract.** The international investment regime provides an exemplary illustration of the legitimacy dilemmas of the expansion of international adjudicative power. Investment treaty arbitration is said to have been in a ‘legitimacy crisis’ for over a decade now; and the discourse to date suggests ongoing discontent with the status quo by particular stakeholder groups, including a range of vocal states. At the same time, the regime has its apologists, who claim that that the regime is neither incoherent nor biased as imagined. Between the critics and the apologists, one finds an alternative and evolutionary position: the crisis in investment treaty arbitration is real but fleeting. As the system matures, arbitrators will reflexively evolve and help the system adapt to more legitimate and effective forms of international adjudication.

This paper asks whether arbitrators have in fact responded to changes in the ‘stakeholder mood’ by moderating their behaviour. There are strong rational choice and discursive-based reasons for thinking that arbitrators would be sensitive and adaptive. However, a competing set of structural, legalistic and attitudinal reasons may prevent arbitrators from bending towards the arc of enhanced sociological legitimation. After commenting on certain doctrinal developments, this paper draws upon a newly created arbitration database to analyse whether there is an aggregative shift in arbitration outcomes across certain crisis periods. We find that regime may be going through a shift, particularly in the merits phase and possibly in compensation awards. We conclude by suggesting a research agenda that could shed further light on the topic, which would also move the scholarship towards a more general theory of arbitrator behaviour.

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\* Postdoctoral Researcher, Norwegian Centre of Human Rights and PluriCourts Centre of Excellence, Faculty of Law, University of Oslo. He is also the Co-Director, Centre on Law and Social Transformation, University of Bergen and CMI. Email: [malcolm.langford@cmi.no](mailto:malcolm.langford@cmi.no)

\*\* Postdoctoral Researcher, PluriCourts Centre of Excellence, Faculty of Law, University of Oslo. Email: [d.f.behn@jus.uio.no](mailto:d.f.behn@jus.uio.no).