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## **Towards a New Heuristic Model: Investment Arbitration as a Political System**

Cédric Dupont\* and Thomas Schultz\*\*

*Abstract: In this introduction to the Special Issue "Empirical Studies on Investment Disputes", we offer a new heuristic model to structure the thinking about investment arbitration. Investment arbitration is presented here as a political system in a sense inspired by David Easton's landmark theory: it transforms the input of key actors (namely states, investors, arbitrators, and arbitration institutions) into output (namely arbitral awards taken in the aggregate), with feedback loops from output to input, leading to or calling for adjustments or other reactions from these actors. We use this model to review some of the leading existing research and bring together key insights offered by the contributions to the issue.*

Investment arbitration is usually viewed as an international legal dispute resolution mechanism. This means not only that it is a mechanism in which law is applied, when arbitrators render decisions applying law to facts, and to which law is applied, when questions are entertained regarding the conditions under which arbitrators can render such decisions, the limits of such decision-making, and its effects. The idea that investment arbitration is viewed as a legal dispute resolution mechanism also means that, when we try to understand it, we concentrate on legal rules and principles. We examine the relevant law, in its different aspects and manifestations, in order to form our understanding of investment arbitration.

At other times, which are also fairly habitual, investment arbitration is viewed as a business instrument. This may mean that it does or should serve the interests of business or, alternatively, that individual arbitrations should be conducted in some form of business-like fashion, and ultimately, that there is a business of investment arbitration. At a different level, the idea that investment arbitration is viewed as a business instrument also means that, when we try to understand it, we concentrate on business reflexes, on the interests of its different stakeholders, on their utility functions and how these functions reveal preferences, perceived or conscious, rational or not, and how these preferences translate into, precisely, business strategies.<sup>1</sup> The resulting image we obtain from such an approach is already quite different from the picture produced by the legal approach sketched in the preceding paragraph.

Less frequently, investment arbitration is viewed as a legal system of its own, just like other types of international arbitration or precisely in opposition to them. This may mean that the label of law was successfully affixed to this legal phenomenon, thus supplying an additional illustration of legal systems that are neither national law nor international law. Another meaning may be that it

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<sup>1</sup> See for instance Thomas Schultz, 'Arbitral Decision-Making: Legal Realism and Law & Economics' (2015) 6 Journal of International Dispute Settlement 231.

operates with a certain level of autonomy from states control, a degree of autonomy we associate with the demarcation of two legal systems.<sup>2</sup> Yet another may be that perhaps it should strive for a certain type of internal consistency, a degree of predictability that we attribute to the rule of law, a form of dependable signposting that we have come to associate with the very idea of what counts as law.<sup>3</sup> At a different level, the idea that investment arbitration is viewed as a legal system means that, when we try to understand it, we use roles, relations between actors, mechanisms of accountability, pursuits of values that are taken from national and other well studied legal systems.<sup>4</sup> They lead us to see workings of investment arbitration that neither the legal nor the business approach put to light.

Some of these views are descriptive: they offer a description of arbitration, an account of what it is. We falsify them by pointing to an inaccuracy, to an aspect of arbitration that the account has failed to represent satisfactorily. Other views are normative: they prescribe a direction that investment arbitration should take, a goal it ought to attain. We counter them, for instance, by axiological debates (or simply by academically voting for other alternatives).

Still other views are neither descriptive (properly speaking) nor normative: they make no claim, as a theory, to be accounting for what is really happening, for what investment arbitration actually is; nor do they argue about how it should develop or change. They simply claim that, if we look at investment arbitration from a certain perspective, *pretending* it is a certain thing, we gain a useful understanding of its workings, an understanding that other views do not reveal. If, for instance, we view investment arbitration as the court of the international investment regime, we understand certain relationships between arbitral tribunals and some constituencies. But it does *not* mean that we posit that investment arbitration *is* a court or *should be* a court. Such views are closer to metaphors than to pictures. This is what a heuristic view, or model is. (Or, to be precise, this is the meaning of a heuristic model that we use in this article.) As Ludwig Wittgenstein put it, “The aspects of things that are most important for us are hidden because of their simplicity and familiarity. (One is unable to notice something – because it is always before one’s eyes).” The point of a heuristic model is to make familiar things unfamiliar, and thereby make them differently noticeable.<sup>5</sup> Such a heuristic approach takes to an extreme the idea, expressed for instance by Karl Popper, Bertrand Russell, and Ernest Nagel in economics, that complete and infallible knowledge is impossible,<sup>6</sup> and focuses on what the

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<sup>2</sup> Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff 2010) (focusing mainly on commercial arbitration, but the idea is general).

<sup>3</sup> Thomas Schultz, *Transnational Legality: International Arbitration and Stateless Law* (OUP 2014).

<sup>4</sup> Alec Stone Sweet, *The Institutional Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (OUP, forthcoming).

<sup>5</sup> For a somewhat similar approach, applied to international law, see Andrea Bianchi, ‘Reflexive Butterfly Catching: Insights from a Situated Catcher’ in J. Pauwelyn, R. Wessel, and J. Wouters, *Informal International Lawmaking* (OUP 2012).

<sup>6</sup> Karl Popper, *The Logic of Scientific Discovery* (Hutchinson 1959, first published 1935); Bertrand Russell, *Human Knowledge: Its Scope and Limits* (Simon & Schuster 1948); Ernest Nagel, ‘Assumptions in economic theory’ (1963) 53 *American Economic Review* 211, 214: “a trivial way in which any statement can be said to be

heuristic view allows us to understand instead of what it fails to correctly account for: this is why it is not, strictly speaking, a descriptive view.

Our claim is that one way to make better sense of the fragmented knowledge we have today of investment arbitration is to view it as a political system: one that transforms the input of key actors into output, with feedback loops from the latter to the former. This heuristic model, we contend, allows us to bring together in an intelligible way some of the key insights of legal approaches and political science approaches to investment arbitration. To be clear, we do not seek to provide anything near a complete account of neither the legal nor the political science aspects of investment arbitration. We do not, either, suggest that any of the existing accounts is inaccurate. And we do not argue that investment arbitration *is* a political system or that it *should be* a political system. We simply contend that seeing investment arbitration as political system allows us to bring out elements of its workings with greater clarity, helping us to form an additional understanding that is particularly expressive of the actions and interactions of the various actors of investment arbitration, their uses of it and their adaptations to it. We claim that, altogether, this helps us get a better, simpler sense of some of the key dynamics of investment arbitration, one that, in particular, puts the empirical studies featured in this Special Issue in a broad and dynamic context.

In the first section of this article, we explain in what sense we use the idea of a political systems, what this means for investment arbitration at the modelling level, and briefly introduce the main actors of the system. The remainder of the article uses this model to canvass some of the key existing research and present certain main points of the contributions to this Special Issue. It is structured in four parts, reflecting the four main actors of the system.

### **The model of a political system**

By the phrase “political system”, we mean, at its most general, a mechanism of collective goal attainment. More precisely, we mean a mechanism that transforms certain types of input into certain types of output, thereby furthering certain goals by “authoritatively allocating values”, as David Easton put it.<sup>7</sup> The output in turn feeds back to the actors providing the input, leading them to adapt that input in order to maximise their own preferences and perceived interests. Such a political system is thus dynamic, constantly evolving through reactions to its own outputs.

Two quick clarifications are in order. First, the authoritative allocation of values such a system effects is in contrast to non-authoritative allocation, which is for instance carried out through “active protest, looting, or revolution, or even ... pluralist competition – frequently uncoordinated and even

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unrealistic is that it can never give a complete description of all the infinite aspects of any real objects or situation.”

<sup>7</sup> David Easton, *A Framework for Political Analysis* (Prentice Hall 1965) 79-83.

chaotic – among different sets of values.”<sup>8</sup> Second, the reference to “values” is not axiological; it merely refers to “anything to which a value could be attached.”<sup>9</sup>

At the international level, such a political system creates or contributes to the creation or the operation of an international regime in Krasner’s sense, namely “implicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge in a given area”.<sup>10</sup> What matters, however, in an approach based on this understanding of a political system is not, or at least not primarily, the contents of these norms, rules and procedures. It rather is, as Harold Laswell summarised politics itself, “who gets what, when, how”:<sup>11</sup> that is, such an approach addresses itself to the identity of the actors providing the input, the contents of their input, the mechanisms by which they provide it and react to feedback from the system’s output, and the existence of possible stabilisation mechanisms which keep these interactions within certain boundaries and eventually ensure the system’s own persistence, its own survival.<sup>12</sup> In other words, it is the mechanisms and dynamics of the system that are the centre of attention and thus structure the thinking. If we were to make a radical parallel (itself a heuristic view, obviously), where legal scholars were to be seen as taking a creationist approach to regimes, one in which the mechanisms of creation are in the realm of myths and beyond the scope of a lawyer’s search,<sup>13</sup> an inquiry based on this idea of a political system would rather take an evolutionary approach, putting the focus on how the object of study is changing and adapting.

Applied to investment arbitration, this idea of a political system leads us to ask, at its most general, who gets to decide, when and how, what collective goals are being pursued by investment arbitration and to what extent, which values it allocates and how, thereby shedding light on the dynamics of its contribution to the international investment regime. More concretely, it leads us to concentrate on the identity of the main actors who shape and use the system, thereby setting its goals, and on how they adapt or more generally react to what the system produces, which are thus reactions to the goals the system effectively pursues and how it pursues them. Put in the words David Easton uses to explain the operations of a political system (although we take some distance with Easton’s model, as explained below), we seek to identify the key actors in the system of investment arbitration, their main inputs into the system, the principal output of the system, and the feedback loops from that

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<sup>8</sup> Michael Freeden, *The Political Theory of Political Thinking: The Anatomy of a Practice* (OUP 2013) 49)

<sup>9</sup> *ibid.*

<sup>10</sup> Stephen D. Krasner, “Structural Causes and Regime Consequences: Regimes as Intervening Variables” in Stephen D. Krasner (ed.) *International Regimes* (Cornell University Press 1983) 2.

<sup>11</sup> Harold D. Lasswell, *Politics: Who Gets What, When, How* (P Smith 1950 [1936]).

<sup>12</sup> Henrik Bang, “‘Nothing but Survival?’ On David Easton’s Concept of Political Persistence” 5 *Scandinavian Political Studies* 117 (1982)

<sup>13</sup> Jacques Lenoble and François Ost, *Droit, mythe et raison. Essai sur la dérive mythologique de la rationalité juridique* (Pub. FUSL 1980); Pierre Schlag, *The Enchantment of Reason* (Duke University Press 1998).

output to the key actors and their input. In subsequent research we will further include actual and possible stabilisation mechanisms of the system.

We understand the key actors in the political system of investment arbitration to be the following. First are the states, because their consent to investment arbitration is a necessary requirement for the system to operate. Their input, in general terms, revolves around the ways in which they express that consent, namely their treaty-making activity, their contractual practices with foreign investors, and their domestic legislative actions. Another type of states' input relates to their behaviour during arbitration procedures. Yet another is their role in choosing arbitrators for institutional lists.

Investors make the second category of key actors. In almost all cases, they activate the system by filing claims. They are principally corporations but may also be individuals. Their input, again in general terms, revolves around the claims they file or threaten to file, for instance under what conditions they do so, against which states, which procedural rules or institution they use, what they seek to obtain in doing so, how they frame their claims, and so on. Another type of investors' input relates, here too, to their behaviour during arbitration procedures.

The third category of key actors comprises the arbitrators. They are the direct producers of awards, within the framework, guideposts, and constraints set by the states and the investors. Their input are their choices, conscious or not, in crafting the awards within that framework, and the interactions and collisions between that regime and their own individual or collective incentives, constraints, and other determinants bearing on their decision-making.

The fourth category of key actors consists of arbitration institutions, because of their role in drafting their own procedural rules and their residual capacity in appointing arbitrators. Their input revolves mainly around the ways in which they exercise this role and this residual capacity, but also extends to their own efforts in exhibiting a successful caseload.

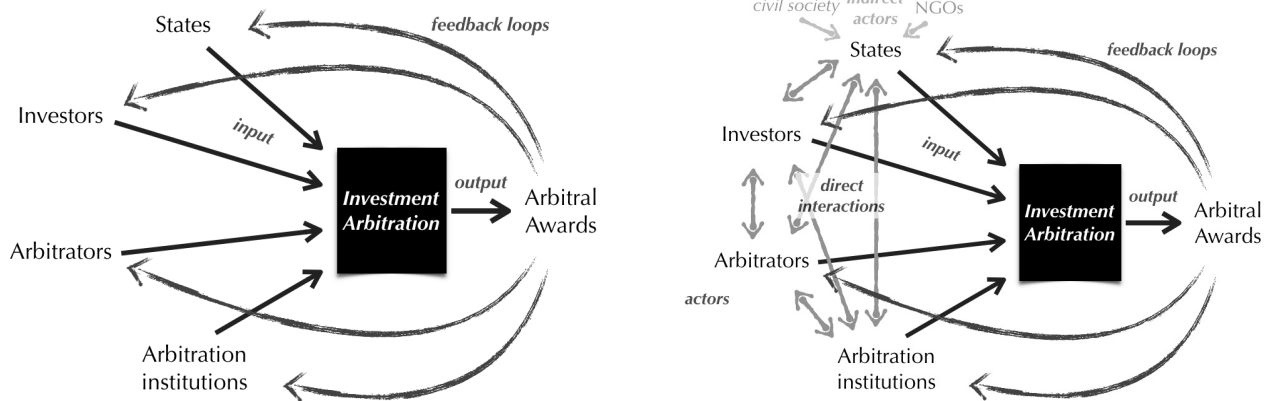
There are also indirect actors, which provide indirect input by directly influencing one or several categories of key actors. They include NGOs and various expressions of civil society, which influence states for instance.

We consider the system's output to be the arbitral awards, taken in the aggregate, and including all their variegated effects, from the determination of rights, to their precedential value, to their actual financial implications on all actors involved, to their impact on the reputation of all actors involved, and including all forms of legal, economic, social, and political dimensions.

This output has feedback effects on the key actors of the system, who react to it, either by adjusting their input so as to maximise the realisation of their own preferences and perceived interests, or by adjusting their actions without seeking to alter the system itself, for instance by simply complying with it or by exiting it. These reactions create the system's dynamics.

Finally, the various actors may also directly interact with one another, without these interactions amounting to direct input on the political system that we take investment arbitration to be. These direct interactions may for instance take the form of lobbying or other forms of persuasion.

Figures 1 and 2 show these actors and the system's different interactions. Figure 1 focuses on the key actors, their input, the system's output, and feedback loops. Figure 2 adds the other elements discussed above.



Our use of the concept “political system” is inspired by the work of David Easton, who notably uses it to shed light on some of the workings of NATO, the UN, and SEATO, which he calls “international political systems”.<sup>14</sup> Our use of the concept, however, differs from Easton’s in a few but significant ways.<sup>15</sup>

Before we consider these differences, it is important to note – as was already done above but the point is important enough to warrant repetition – that we do *not* seek to show that investment arbitration is a political system in Easton’s sense, or indeed in our sense. We do not engage here in the syllogistical reasoning habitual to lawyers. Had we done this, our argument would have looked like this: if  $p$  then  $q$ ; if  $q$  then  $r$ ; thus if  $p$  then  $r$ , where  $p$  would have been Easton’s (or our own) conditions for something to be a political system,  $q$  the characterisation of something as a political system, and  $r$  the consequences of something being a political system. This translates as follows: if Easton’s (our or own) definitional conditions for something to be a political system are satisfied ( $p$ ), then that something gets the label of a political system ( $q$ ); if something gets the label of a political system ( $p$ ), then... some consequence follows ( $r$ ). The whole point would have been to show that investment arbitration satisfies the definitional conditions  $p$ , so that  $r$  follows. But the whole point of a heuristic model is, precisely, that there is no determinate  $r$ : nothing determinate follows from

<sup>14</sup> David Easton, *A Systems Analysis of Political Life* (Wiley 1965) 484ff.

<sup>15</sup> David Easton, “An Approach to the Analysis of Political Systems” (1957) 9 *World Politics* 383.

labelling investment arbitration as a political system or not.<sup>16</sup> Viewing investment arbitration as a political system only leads us to look at it through a certain lens, which has no particular epistemic claim. It structures our thinking about investment arbitration in a certain manner. What validates the heuristic model is the interest of the observations it leads us to make, whether or not investment arbitration amounts to a political system.<sup>17</sup>

This being said, for the sake of clarity, our conception of a political system differs from Easton's in our understanding of "inputs" and of the demarcation between the political system and its environment. For Easton, "the boundary of a political system is defined by all those actions more or less directly related to the making of binding decisions", where "binding decisions" constitute the system's output.<sup>18</sup> This entails that those actors that take actions directly related to the making of binding decisions, in other words directly shaping the system's output, are actors within the boundaries of the system, they are part of it, as opposed to being part of the system's environment. Easton's calls their influence on the system "withinputs", in contrast to "inputs", which are "demands and support" expressed by the system's environment, thus by actors with no decision-making power and no direct impact on the system's output.<sup>19</sup> For Easton, certainly arbitrators, and probably states, investors, and arbitration institutions would be actors within the system and their efforts to shape the system would be "withinputs". We, however, shift the boundaries of the legal system radically inwards, so that within the political system there are only actual individual arbitration procedures, leaving states, investors, arbitrators, and arbitration institutions in the system's environment, and making their actions "inputs" and not "withinputs". To be clear, just to settle the semantics, we nevertheless consider states, investors, arbitrators, and arbitration institutions to be actors of the system, even though they are situated in its environment. The reason for this departure from Easton's model is a belief that the model – when applied to investment arbitration – thus becomes simpler, easier to handle, and that it gains rather than loses in explanatory purchase.

But again, what matters is not the analytical tidiness of the theoretical model. What matters is the extent to which the heuristic model allows us to understand the object of study, to make sense of

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<sup>16</sup> For Easton himself, what follows from the use of his understanding of a political system is this: "The very idea of a system suggests that we can separate political life from the rest of social activity", that the system has boundaries and that we can identify by contrast to other political systems and, again, to social activity in general. See *ibid*, 384-5.

<sup>17</sup> Were we to err in applying the model, because in truth *p* is not given and investment arbitration does not amount to a political system in Easton's sense (or indeed in our own sense), little would follow from our error. If the observations it led us to make are interesting, they are still interesting, regardless of the accuracy with which we affixed the label. There is no reason, in our heuristic approach, to be greatly concerned about whether investment arbitration really is a political system or not. If this article were an attempt to contribute to Eastonian studies, then the proper characterization of investment arbitration as a political system would crucially matter. But this article rather is an attempt to contribute to the literature on investment arbitration, and more generally to the literature on investment disputes and investment law and policy.

<sup>18</sup> *ibid*, 385.

<sup>19</sup> *ibid* 386.



the available knowledge about investment arbitration. And this is, precisely, what we set out to do in the remainder of this article: we use this model to structure our discussion of both some of the existing research and the contributions to this Special Issue. We focus, in turn, on each of the key actors of investment arbitration as a political system, and discuss their respective use of the system and their strategies to react to the system's output.

### **The states' use of and adaptation to the system**

The states are probably the most important actors of the system of investment arbitration, the ones that have the greatest influence over it and the ones that have adapted or should adapt most to its output (although, to be fair, precisely quantifying the importance of each actor, their influence and their adaptation to it would be an intriguing task). Clearly, as Rachel Wellhausen shows, this is today a global, not regional phenomenon: as she puts it, "124 states have been sued via ISDS from 1990-2014. These states span the world."<sup>20</sup> More precisely, she continues, "Argentina and Venezuela top the list [of respondents], but states as diverse as the Czech Republic, Egypt, Kazakhstan, Turkey, and Costa Rica have seen significant numbers of filings against them. Canada and the United States are on the list, too, thanks to ISDS provisions in [NAFTA]."<sup>21</sup> And importantly, developing nations do no longer stand out today as so many sore thumbs: "none of the top 20 respondents are classified by the World Bank as low-income economies ... Only Egypt, Ukraine, and India are lower-middle-income economies."<sup>22</sup> What, then, do we know about states' use and adaptation to the system, about what they do and what they may want to do in reaction to the decisions the system produces?

The primary question, in many respects, to entertain in order to understand the states' dynamic input into investment arbitration as a political system, is the following: what is the interest of states in signing and ratifying BITs and other investment protection treaties, and allowing investment arbitration in the first place?

From pre-existing work, we can cast doubt on the positive role of the availability of international legal institutions via the signing of BITs, contrary to frequent arguments that BITs improve domestic institutional quality by creating a rule-of-law competition between (international) investment arbitration and domestic judges.<sup>23</sup> Substitution, and not spill-over effect or race to the top, seems to be the watchword here. But is such substitution valuable for host states? Many prior studies

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<sup>20</sup> Rachel Wellhausen, "Recent Trends in Investor-State Dispute Settlement" 7 *Journal of International Dispute Settlement* xxx (2016), xxx.

<sup>21</sup> *ibid*, xxx.

<sup>22</sup> *ibid*, xxx.

<sup>23</sup> Tom Ginsburg, "International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance" 25(1) *International Review of Law and Economics* 107 (2005).

have at least cast doubt on its effectiveness in attracting investments.<sup>24</sup> Jason Yackee, in his contribution to this Special Issue, adds further reason to entertain these doubts: it appears that one does not obtain more foreign investment from French investors by concluding a BIT with France. More precisely, having a BIT with France does not seem to increase the host state's share of French outward FDI. As he puts it, his statistical models "provide no evidence in support of the thesis that BITs 'work' at promoting investment, at least if the BIT in question is a French one."<sup>25</sup>

Even if BITs do work in attracting foreign investments, this may not necessarily be in the interest of the state receiving the investment, as Jonathan Bonnitcha points out. In his contribution to this Special Issue, he draws our attention to the empirical literature on investment, to remind us that states, perhaps, should not want more inward investment, but more growth. While the two are not mutually exclusive, the former does not necessarily lead to the latter.

First, Bonnitcha takes us back to the importance of distinguishing between foreign direct investment (FDI, which may be understood as "long-term investment in which the investor has 'a significant degree of influence' over the management of an enterprise in the host state"<sup>26</sup>) and foreign indirect investment (portfolio investments, which "comprises smaller equity interests and non-equity cross-border financial flows, such as loans"<sup>27</sup>): while BITs and other investment treaties often protect them indiscriminately, there appears to be fairly little reason to believe that indirect investment really contributes to the economic development of the host state, or more precisely its growth. As he puts it, "The weight of evidence suggests that increased inward foreign portfolio investment does not have a positive impact on the economic growth of host states. These findings are consistent with arguments that portfolio investment portfolio investment is less likely to involve the transfer of technology, skills and know-how into the host state and evidence that portfolio investment flows are much more volatile than FDI flows."<sup>28</sup> States may thus want to exercise particular caution when deciding what rights to grant to foreign indirect investors, including the right to file investment arbitration claims, and in which instrument such rights, if any, should be granted – treaties, contracts, or national legislation.

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<sup>24</sup> See for instance the discussion in Jason Webb Yackee, "Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence" 51 *Virginia Journal of International Law* 397 (2011); Jason Webb Yackee, "Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?" 42 *Law & Society Review* 805 (2008); Andrew Guzman, "Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties" 38 *Virginia Journal of International Law* 639 (1998).

<sup>25</sup> Jason Webb Yackee, "Do BITs 'Work'? Empirical Evidence from France" 7 *Journal of International Dispute Settlement* xxx (2016), xxx.

<sup>26</sup> Jonathan Bonnitcha, "Foreign Investment, Development and Governance: What international investment law can learn from the empirical literature on investment" 7 *Journal of International Dispute Settlement* xxx (2016), xxx, referring to OECD, *OECD Benchmark Definition of Foreign Direct Investment* (4th edn, OECD 2008) 17.

<sup>27</sup> *ibid.*

<sup>28</sup> *ibid.*, xxx.

Second, even if we focus on FDIs, and leave indirect investment aside, the connection between inward investment and growth is undoubtedly worth the states' attention. Indeed, Bonnitcho flags the existence of at least "some rigorous and methodologically sound studies suggest[ing] that FDI did not have any independent causal impact on growth."<sup>29</sup> And beyond simply not being beneficial for growth, increased FDI, other studies have shown, may actually harm a state economically: in developing states with abundant natural resources but governance quality, "increased investment in the resource sector may leave the host state worse off."<sup>30</sup>

More naively, it may further be helpful, at least analytically, to distinguish between state as government and state as citizens: should investments be offered BIT protection if, without having been obtained by corruption, they only really benefit, for instance, the ruling family and its entourage and possibly harm the citizenry?<sup>31</sup> Should they be offered protection in the hope of attracting them? In many ways the question is naive, since those able to offer the protection are likely to be those who will benefit from any induced investment.

But let us indeed return to the question of attracting investment by protecting them through treaties, or through other legal instruments guaranteeing rights for that matter. Let us posit the hypothetical that states redefine the types of foreign investment that they protect, so that the protection only covers investments that are really likely to contribute to the host state's growth. How likely, at the level of theory, would it seem that such newly shaped protection indeed attracts the intended investments? Put differently, how credible, at the level of hypothetical soundness, is "the BIT story", namely that better protection through better commitment leads to more investment or, simply put, that investors find the rule of law alluring?

To see the point, let us imagine a radically simplified metric: investors want a rule of law score of 50/100 on an imaginary scale in order to invest; countries with poor quality governance have 30/100 and countries with high quality governance get 70/100; a BIT with an arbitration clause adds a bonus of 30 points. It would follow that having such a BIT would make much bigger difference, in terms of attracting investors, for poor governance countries than for high quality governance countries. On this point, Bonnitcho reports this: "Some studies have found that investment treaties are more effective in attracting FDI to countries with relatively strong domestic institutions; others have

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<sup>29</sup> Jonathan Bonnitcho, "Foreign Investment, Development and Governance: What international investment law can learn from the empirical literature on investment" 7 *Journal of International Dispute Settlement* xxx (2016), xxx, referring to Maria Carkovic and Ross Levine, "Does foreign direct investment accelerate economic growth?" in Theodore Moran, Edward Graham and Magnus Blomström (eds) *Does Foreign Direct Investment Promote Development* (Institute for International Economics 2005) 219.

<sup>30</sup> *ibid* xxx.

<sup>31</sup> *ibid*, xxx [section "Conceptions of 'good governance' in debates about investment treaties"]

found the opposite.”<sup>32</sup> Now consider Yackee’s study again: there is no positive relationship between having a BIT with France and getting investment from France. As he then points out, “[t]he lack of a positive relationship is interesting because many of France’s BIT partners are countries in which political and legal institutions are relatively weak, and where we might expect the risk of investor mistreatment to be relatively high. That is, even where there might plausibly be some ‘work’ for BITs to do, BITs don’t, on the other hand, seem to be very effective. It seems even less plausible, then, to expect BITs to ‘work’ when the host state involved has high-quality domestic institutions and a long track record of treating investors quite favorably.”<sup>33</sup> In other words, one may wonder how decisive the rule of law really is for investors, despite their frequent public claims of its essential character.<sup>34</sup>

Now of course, to say that the rule of law is *not* a crucial element in investment decision-making is as much a sweeping over-generalisation as the usual contention that it *is* crucial. As Yackee points out, this calls for firm-level studies, as “the most important economic theories of FDI typically emphasize firm-level variables that determine whether or not a particular company is likely to see value in investing abroad”.<sup>35</sup> And indeed Quintin Beazer and Daniel Blake, in an unpublished paper, recently found that investors are more likely to value the rule of law in the host state if they are used to a high level of rule of law in their home country.<sup>36</sup> Cultural idiosyncrasies at home, then, would importantly influence investment strategies.

Then again, at a level of greater generality, Yackee argues that the BITs-attract-investors hypothesis it is not terribly sound: the states at least do not seem to believe the story. They do not showcase their BITs to attract investors: as he puts it, “Even today, states rarely spend much time advertising their BITs to investors, suggesting that they believe investors don’t care

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<sup>32</sup> *ibid*, xxx, referring to Rodolphe Desbordes and Vincent Vicard, “Foreign Direct Investment and Bilateral Investment Treaties: An International Political Perspective” 37 *Journal of Comparative Economics* 372 (2009); Jennifer Tobin and Susan Rose-Ackerman, “When BITs have some Bite: The Political-Economic Environment for Bilateral Investment Treaties?” 6 *The Review of International Organizations* 1 (2011); Eric Neumayer and Laura Spess, “Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?” 33 *World Development* 1567 (2005); Peter Rosendorff and Kongjoo Shin, “Importing Transparency: The Political Economy of BITs and FDI Flows” (2012) Working Paper <<http://irworkshop.sites.yale.edu/sites/default/files/RosendorffShinAPSA2012.pdf>>

<sup>33</sup> Yackee, “Do BITs ‘Work’?”, xxx.

<sup>34</sup> To be clear, wanting BITs does not boil down to wanting BITs in order to invest: investors may well indeed have a great appetite for the rule of law, yet it may not feature prominently in their actual investment strategies. As Aisbett has argued, when a study does find a positive correlation between investment and BIT protection, it may well be that the BIT was signed not in order to attract the investment, as it was going to take place anyway, but simply to protect it: state A thinks or knows that its investors will invest in state B, so asks state B to sign a BIT; state B signs it without giving it much thought, as Poulsen’s research, discussed below, would suggest is credible. See Emma Aisbett, “Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation”, in *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (Sauvant & Sachs, eds. 2009), cited by Yackee, “Do BITs ‘Work’?”, xxx.

<sup>35</sup> Yackee, “Do BITs ‘Work’?”, xxx, referring to Bruce A. Blonigen, “A Review of the Empirical Literature on FDI Determinants” 33 *Atlantic Economic Journal* 383 (2005).

<sup>36</sup> Quintin H. Beazer and Daniel J. Blake, “It’s All Relative?: Institutional Experience, Political Capabilities and Investment”, paper delivered at The Graduate Institute of International and Development Studies, 11 April 2014.

much about the treaties.”<sup>37</sup> And, Yackee continues, they probably are right: the theory of why BITs should work, the “BITs cause FDI” hypothetical, is not all that convincing. Signalling intentions not to treat investors poorly (this is indeed one way to understand BITs: as “costly signalling” mechanisms<sup>38</sup>) only expresses what every state would in principle do anyway, namely not harm the investor if it can avoid it. And so the “BITs cause FDI” hypothetical probably overestimates the states’ “obsolescing-bargain temptations”,<sup>39</sup> because much if not most FDI today is not of a nature that is prone to obsolescing-bargain dynamics, and it underestimates the states’ “reputational incentives to avoid acting upon obsolescing bargain incentives”.<sup>40</sup>

All in all, then, the “BITs cause FDI” hypothetical overestimates the states’ incentives to “treat investors poorly”.<sup>41</sup> But of course, when serious political risk materialises, such as economic hardship, resource or economic nationalism, or governance disarray,<sup>42</sup> then promises, genuine or not, may have to give way to harder, more multifaceted, fact-dependent realities, and there BITs would be significant. Or so one may think. Our study in this Special Issue tends to show that this is only the case with regard to problems of corruption and lack of rule of law: it does not seem to be the case that, as a general matter, the materialisation of political risk boosts investment claims in a statistically significant way.<sup>43</sup>

Let us pause to consider this: On one side, the treaty system of investment protection, whose hardest edge and in many ways most important aspect is investment arbitration, is not so clearly beneficial to host states. On the other side, the treaty system of investment protection may clearly be damaging for them, be it only because of the reputational effect that investment arbitration claims (regardless of outcome) may have on investment flows, as Allee and Peinhardt have shown a few years ago,<sup>44</sup> and on the costs of borrowing in sovereign bond

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<sup>37</sup> Yackee, “Do BITs ‘Work’?”, xxx. See further Jason Webb Yackee, “Do investment promotion agencies promote bilateral investment treaties?” in *Yearbook of International Investment Law & Policy* (Karl Sauvant, ed., 2015).

<sup>38</sup> Yoram Z. Haftel, “Ratification Counts: U.S. Investment Treaties and FDI flows into Developing Countries”, 17 *Review of International Political Economy* 348 (2007), cited by Yackee.

<sup>39</sup> Yackee, “Do BITs ‘Work’?”, xxx.

<sup>40</sup> *ibid*, xxx.

<sup>41</sup> Yackee, “Do BITs ‘Work’?”, xxx.

<sup>42</sup> For a simple theory of political risk in the context of investment protection, see Cédric Dupont, Thomas Schultz, Melanie Wahl, and Merih Angin, “Types of Political Risk Leadings to Investment Arbitrations in the Oil & Gas Sector” 8 *Journal of World Energy Law & Business* 337 (2015)

<sup>43</sup> Cédric Dupont, Thomas Schultz, and Merih Angin, “Political Risk and Investment Arbitration: An Empirical Study” 7 *Journal of International Dispute Settlement* xxx (2016).

<sup>44</sup> Todd Allee and Clint Peinhardt, “Contingent credibility: The impact of Investment Treaty Violations on Foreign Direct Investment” 65 *International Organization* 401 (2011). Rachel Wellhausen has more recently found this effect to be particularly strong among investors sharing a nationality: Rachel L. Wellhausen, “Investor–State Disputes: When Can Governments Break Contracts?” 59 *Journal of Conflict Resolution* 239 (2015); Rachel L. Wellhausen, *The Shield of Nationality: When Governments Break Contracts with Foreign Firms* (CUP 2014).

markets, as Rachel Wellhausen shows in a recent study.<sup>45</sup> In consideration of these two sides, one may expect states to opt for the exit strategy, to remove themselves from this political system: they would at least renegotiate their BITs' dispute settlement clauses.<sup>46</sup>

But ongoing research by Yoram Haftel and Alexander Thompson "indicates that states have not made a systematic effort over the years to recalibrate their BITs for the purpose of preserving more regulatory space. In fact, most renegotiations either leave ISDS provisions unchanged or render them more investor-friendly."<sup>47</sup> So, put bluntly, states do not seem to showcase BITs much in order to attract investors and they do not seem to really bother to renegotiate vexing BIT provisions.

One might wonder, drawing on Daniel Blake's finding that governments with longer time horizons are more careful in safeguarding policy autonomy in their BITs,<sup>48</sup> whether that relatively gentle reaction of the states may not be caused, in part, by the time horizon of governments compared to the time horizon of investment disputes.

Much of this echoes, to some extent, the reasons why states seem to have signed BITs in the first place. The best overarching explanation is not, one may euphemistically put it, that states went to elaborate examinations and calculations to determine the exact best protection to offer investors in order to maximise their own economic interests.

Granted, the general story may well be, as Lauge Poulsen and Emma Aisbett remind us in their contribution to this Special Issue, that "[f]or most Western states, the treaties were designed and negotiated primarily to protect their investors abroad, whereas for most states in Africa, Latin America, Asia, and Eastern Europe the treaties were entered into primarily in the expectation that it would help them attract foreign investment."<sup>49</sup> Yet what exactly this concretely meant is a different matter.

Indeed, as Poulsen showed in prior research, "trivial diplomacy" was a common factor for many developing countries: when governments wanted to show international co-

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<sup>45</sup> Rachel Wellhausen, "Bondholders v. Direct Investors? Competing Responses to Expropriation" 59 *International Studies Quarterly* 750 (2015), 750-751: "I find a substantial and robust long-term punishment in sovereign bond markets when governments expropriate without generating revenue and face a public arbitration. In stark contrast, revenue-generating expropriations and resulting public arbitrations are associated with significant reductions in the long-term costs of borrowing. In some specifications, they produce null results that suggest bondholder indifference."

<sup>46</sup> Beth Simmons would seem to give concurring evidence: she found that the more BITs a country is party to, the more likely it is to be sued: Beth A. Simmons, "Bargaining over BITs, Arbitrating Awards: The Regime for Protection and Promotion of International Investment" 66 *World Politics* 12 (2014), 30.

<sup>47</sup> Yoram Z. Haftel and Alexander Thompson, "Legitimation through Renegotiation: Do States Seek More Regulatory Space in their BITs?", working paper delivered at the conference "Empirical Perspectives on the Legitimacy of International Investment Tribunals," PluriCourts/University of Oslo, 27-28 August 2015.

<sup>48</sup> Daniel J. Blake, "Thinking Ahead: Government Time Horizons and the Legalization of International Investment Agreements" 67 *International Organization* 797 (2013).

<sup>49</sup> Lauge Poulsen and Emma Aisbett, "Diplomats Want Treaties: Diplomatic Agendas and Perks in the Investment Regime" 7 *Journal of International Dispute Settlement* xxx (2016), xxx.

operation, for instance when a prime minister went abroad, negotiating BITs seemed to be a matter of course because they “were easy and quick to adopt”.<sup>50</sup> Analysis of their actual implications had little to do with it.<sup>51</sup> Promoting investment simply seemed politically unobjectionable – not only a worthwhile pursuit but even an unqualified political desideratum, like growth or the rule of law.<sup>52</sup> In this context, BITs were often signed not as treaties but, in Kenneth Vandeveld’s words, “as political symbols”.<sup>53</sup>

And not necessarily as political symbols of efforts to promote investments, Poulsen and Aisbett find in their contribution to this Special issue. BITs have for instance often been signed to mark political alliances and alignments: to show that a government is “now fully on-board with the Washington Consensus and on friendly diplomatic terms with the American government”;<sup>54</sup> to “strengthen the ties of friendship and mutual understanding between ... countries and peoples”;<sup>55</sup> to nurture the “broader relationship” with the treaty partner;<sup>56</sup> or, quite simply, as “photo-ops”,<sup>57</sup> for instance when a “state visit was under preparation and ... a BIT was suggested just for this reason alone”.<sup>58</sup> On a number of occasions, BITs even more straightforwardly served as a stamp of approval for a government’s overall politics: “to support the reform process in central- and eastern European countries”;<sup>59</sup> as a “symbolic show of ... regard” for the treaty partner,<sup>60</sup> which is welcome “as a full partner in the community of nations”;<sup>61</sup> to “put the name of [a country] among the international community coming back from Dictatorship”;<sup>62</sup> signalling not only a government’s satisfaction with the treaty partner’s “economic reforms, but also [the] new political stature [of its political leader] in the international community.”<sup>63</sup> In sum, BITs range here all the way from “good-will gesture[s]”<sup>64</sup>

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<sup>50</sup> Lauge N. Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (CUP 2015) 127, quoting a former Latin American negotiator.

<sup>51</sup> *ibid*, 148: “no discussion, analysis goes into it... No one cares until the dispute comes.” (quoting a former Latin American negotiator).

<sup>52</sup> On this idea of the rule of law as an unqualified political desideratum, see Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP 2004) 1: “For all but the most sanguine observers, the triumphalist confidence of the 1990s has dissolved. Amidst this host of new uncertainties there appears to be widespread agreement, traversing all fault lines, on one point, and one point alone: that the “rule of law” is good for everyone. Among Western states this belief is orthodoxy.”

<sup>53</sup> Kenneth J. Vandeveld, *U.S. International Investment Agreements* (OUP 2009) 46.

<sup>54</sup> Poulsen and Emma Aisbett, “Diplomats Want Treaties”, xxx.

<sup>55</sup> *ibid*, xxx, quoting from a ceremony celebrating the conclusion of a BIT between Denmark and Albania.

<sup>56</sup> *ibid*, xxx, quoting the Danish Foreign ministry.

<sup>57</sup> *ibid*, xxx.

<sup>58</sup> *ibid*, xxx, quoting a former Austrian negotiator.

<sup>59</sup> *ibid*, xxx, quoting from a BIT between Denmark and Czechoslovakia.

<sup>60</sup> *ibid*, xxx, quoting the Washington Post on a US-Kazakhstan BIT, concluded “during talks about a nuclear arms deal”.

<sup>61</sup> *ibid*, xxx, quoting the Washington Post on a US-Poland BIT.

<sup>62</sup> *ibid*, xxx, quoting a former Chilean BIT negotiator.

<sup>63</sup> *ibid*, xxx, quoting the Washington Post on a US-Argentina BIT.

<sup>64</sup> *ibid*, xxx, referring to a BIT between Denmark and Iran.

to signals that an “invasion had been a success and that conditions for foreign investment in [the invaded state] now were favourable”.<sup>65</sup>

Quite clearly, then, BITs are not only signed for economic reasons, or at least not for economic reasons related to foreign investment. And indeed, Adam Chilton recently showed that investment protection only marginally accounts for US BIT signings: as he puts it, “investment considerations do not help to explain the pattern of U.S. BIT formation, but ... political considerations do.”<sup>66</sup> The effect of investment protection goals on the United States’ selection of BIT partners is “far from conventional levels of significance”.<sup>67</sup> Poulsen and Aisbett concur: BITs are often signed to “promote, or tie in, diplomatic links between states”<sup>68</sup> and because of “foreign policy considerations”.<sup>69</sup>

Even more mundanely, they further argue, diplomats have to “justify [their] work”<sup>70</sup> and in this context “saw the treaties as an indicator of their performance”.<sup>71</sup> More BITs signed, then, would be better than fewer. And it is not only the conclusion of the treaty that matters for diplomats, they point out. For representatives of developing countries in particular, BIT negotiations offer “opportunities for travel, inter-governmental prestige and power, and larger budgets”.<sup>72</sup> Factors as marginal as the comparative importance of per diems in a diplomat’s income and the attraction of luxury travels, the authors contend, are likely to have fathered BITs.<sup>73</sup>

Much of this joyful lightheaded attitude, however, largely came to a close when the states started to realise that the BITs they were giving away can actually be used to hit them: after developing countries experienced their first claims, the diplomats’ leeway to sign BITs was reduced.<sup>74</sup> This is consistent with the authors’ earlier study showing that developing countries only really realised what they were signing when they were hit by the first investment arbitration claims.<sup>75</sup>

So far, then, in the terms of our heuristic model, states seem to react quite gently, if at all, to the system’s feedback, in the sense that they seem to do little to recalibrate their input

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<sup>65</sup> Kenneth J. Vandevelde, “U.S. Bilateral Investment Treaties: The Second Wave” 14 *Michigan Journal of International Law* 621 (1993), 635, cited by Poulsen and Emma Aisbett, “Diplomats Want Treaties”, xxx.

<sup>66</sup> Adam S. Chilton, “The Politics of the United States’ Bilateral Investment Treaty Program”, Coase-Sandor Working Paper Series in Law and Economics No. 722, 2015, 1.

<sup>67</sup> *ibid*, 19.

<sup>68</sup> Poulsen and Emma Aisbett, “Diplomats Want Treaties”, xxx.

<sup>69</sup> *ibid*, xxx.

<sup>70</sup> *ibid*, xxx, quoting a former Mexican BIT negotiator.

<sup>71</sup> *ibid*, xxx, quoting a Ghanaian official. This is further elaborated on in Poulsen, *Bounded Rationality*, 100-2.

<sup>72</sup> Poulsen and Emma Aisbett, “Diplomats Want Treaties”, xxx.

<sup>73</sup> *ibid*, xxx.

<sup>74</sup> *ibid*, xxx.

<sup>75</sup> Lauge N. Skovgaard Poulsen and Emma Aisbett. “When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning” 65 *World Politics* 273 (2013).



into the system. Yet it may well be that, if they do not adapt the system much to their needs, they adapt themselves to the system. To best see this, it helps to not focus on states as monolithic entities and at least consider the relations between ministries within states. This, in many ways, is the story that Gus van Harten and Dayan Scott tell us in their contribution to this Special Issue.<sup>76</sup> Radically simplified, their study suggests that one important effect of BITs is to empower trade ministries vis-à-vis other ministries. One might, then, envisage the following story: BITs are not renegotiated as much as one might expect because trade ministries, which would in many cases handle such renegotiations, hold them dearly because they are empowered and not threatened by possible investment arbitration claims based on BITs. Meanwhile, other ministries see their projects vetted by trade ministries invoking, precisely, the risk of such claims.

Van Harten and Scott's study reveals that in the Canadian province of Ontario, the risk of investment arbitration – that is, latent or explicit threats by investors to file investment arbitration claims – has led to policy changes. In other words, policy projects were abandoned because of the risk that investment arbitrations would be filed: there were clear, actual instances of regulatory chill caused by the investment arbitration system. This regulatory chill affected, quite understandably, ministries other than trade ministries, for instance those with an environmental mandate. Their regulatory space shrank, and this shrinking concretely took the form of trade ministries vetting regulatory proposals in inter-ministerial processes: investment arbitration, so the authors put it, “has led to internal vetting of proposed decisions in government and ... some officials have a greater role in the vetting process than others do.”<sup>77</sup>

Three further points are worth noting in their study. First, this vetting often occurred when the proposals were still in the hands of government lawyers and bureaucrats, before they even came to political representatives.<sup>78</sup> Second, investment arbitration objections raised by trade ministries seem to go beyond what industry stakeholders actually raise.<sup>79</sup> There is a sense of over-cautiousness in their reactions to investment arbitration risks. Third, there is a simple reason for regulatory chill to increase over time, as risk assessment schemes expand:

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<sup>76</sup> Gus Van Harten and Dayna Scott, “Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada” 7 *Journal of International Dispute Settlement* xxx (2016).

<sup>77</sup> *ibid*, xxx.

<sup>78</sup> *ibid*, xxx: “Yet the policy advisor also expressed a concern that, if the minister’s advisor was not also a lawyer (and so able to evaluate claims of litigation risk critically) then the advisor may be swayed before a proposal even reached the minister. According to the policy advisor: ‘It’s not the usual course to have a lawyer as policy advisor to the minister. So... it may not even get as far as the Minister saying ‘I’m a lawyer and I’m not swayed’ because the policy advisor may not let it get that far when they’re swayed.’”

<sup>79</sup> *ibid*, xxx: “a former policy advisor in an environment-related ministry [stated that] ‘I really noticed on some files, when I had a lot of familiarity with the stakeholders [in industry], I knew darned well that stakeholders were not raising those issues and that MEDT [the trade ministry] was raising issues that they thought their stakeholders would or should raise.’”

when investment arbitration is perceived as a serious risk, this leads to demands for better risk analysis, and as risk analysis improves, investment arbitration comes more often on the legislative decision-making table.<sup>80</sup> As a former high-level policy advisor in the Canadian federal government interviewed by the authors put it “every policy would be subject to some type of trade scrutiny”.<sup>81</sup>

At this juncture, one may be led to think that ministries with mandates other than trade should simply seek to empower themselves by pushing for treaties in their areas of responsibilities: environmental treaties, for instance, would then cause the shrinking of the policy space of trade ministries. Yet, according to Van Harten and Scott, it is not the case: the regulatory chill effect caused by investment protection seems stronger than the regulatory chill effect caused by other international law regimes, probably because they are not equipped with compliance mechanisms as effective as investment arbitration.<sup>82</sup>

In the terms of our heuristic model, Van Harten and Scott’s study is evidence that states do adjust to feedback from the system’s output, in that they comply or possibly over-comply with it, rather than really ask for change in the system’s rules, as we noted above. Moreover, this type of adjustment seems to take place to a significant degree in the locus of government lawyers and bureaucracies, as opposed to political representatives.

States may also use strategies, in reaction to the system’s output, that concern their behaviour during arbitration procedures. For instance, the bad press states get from public losses in investment arbitrations, which creates a risk of unwelcome reactions from investors and from the states’ own internal constituencies, seems to lead them to favour confidentiality strategies. Chief among them appears to be the states’ willingness to settle cases: they may end up owing similar, or even higher, levels of compensation, but that compensation may well be less damaging than the collateral effects of bad press. A few years ago, Emilie Hafner-Burton, Zachary Steinert-Threlkeld, and David Victor found that arbitrations regarding capital intensive investments, which require long payback periods and thus ongoing relationships between investors and hosts, are 12.3% more likely to be kept confidential, likely because of reputational and long term management concerns.<sup>83</sup> The contribution of Emilie Hafner-Burton and David Victor to this Special Issue points in the same direction: they find that states losing investment arbitration are more likely to ask for confidentiality in future cases (it bears noting that confidentiality, or secrecy in the authors’ terminology, is something that obtains by

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<sup>80</sup> *ibid*, xxx: “The Ontario trade ministry has pushed to expand a centralized regulatory assessment process for evaluating proposed government decisions for trade and ISDS risks. From the interviews, we learned that the Ontario trade ministry works to ensure that proposed decisions are reviewed internally from a trade perspective.”

<sup>81</sup> *ibid*, xxx.

<sup>82</sup> *ibid*, xxx.

<sup>83</sup> Emilie M Hafner-Burton, Zachary C Steinert-Threlkeld, and David G Victor, “Leveling the Playfield Through Investor-State Arbitration” [2013] ILAR Working Paper #18, 10-11, 14.

degrees, in that investment arbitrations are more or less confidential, and typically neither entirely public or entirely confidential): “Respondent states are more likely to be parties to secret cases when they have past experience publicly losing cases, even when controlling for the number of public cases they have experienced. ... For a state with no previous experience of losses, the model predicts less than a 14% likelihood of secret arbitration. A state with 2 previous public losses is likely to be a party to secrecy more than 60% of the time, whereas a state that has lost 4 or more past (public) cases is predicted to engage in secret arbitration nearly 100% of the time.”<sup>84</sup> States, they further find, make future cases more confidential mainly by settling them, by being more inclined to enter into a settlement agreement with the investor: “[s]ettlement”, as they put it, “is the principal means for attaining secrecy”.<sup>85</sup> In short, losses by states lead to future settlements, for instance because of reputation concerns: “All of the substantive variables that predict Secret are also strong predictors of Settlement, which is not surprising since three-quarters of all secret cases are settlements.”<sup>86</sup>

Also during arbitration procedures, or more precisely just at their outset, states may react to the system’s output by adapting their strategies on arbitrator appointment. The classic view is that states, if they intend to serve their own interests, should appoint state-friendly arbitrators, just as investors should favour investor-friendly arbitrators. The questions then are what makes an individual be state- or investor-friendly, and how much impact such inclinations, and the choices based on them, have on voting patterns. In other words, these are matters that relate to the states’ input (and the investors’ input, but we will turn to this in the next section) into the system, using arbitrators as instruments to maximise their own preferences and perceived interests.

Previous work has identified many arbitrators who tend to be appointed only by states or only by investors.<sup>87</sup> Sergio Puig draws from this observation the argument that “*party* appointments play a fundamental role in propelling arbitrators’ centrality, based in part on effective means to signal identifiable preferences detectable to litigants.”<sup>88</sup> This suggests that it is serviceable for the arbitrators’ own interests, to which we will return in a later section, to be perceived as pro-states or pro-investors – that is, in less sapid words, to be perceived as biased. But are such appointments, based on such perceived orientations, effective in furthering the appointing parties’ interests? Michael Waibel and Yanhui Wu have for instance shown that arbitrators with previous experience as counsel to investors seem more likely to affirm jurisdiction, though without a similar effect on liability decisions. Experience in international organisations, moreover, was linked to affirmative votes for jurisdiction

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<sup>84</sup> Emilie M. Hafner-Burton and David G. Victor, “Secrecy in International Investment Arbitration: An Empirical Analysis” 7 *Journal of International Dispute Settlement* xxx (2016), xxx.

<sup>85</sup> *ibid*, xxx.

<sup>86</sup> *ibid*, xxx.

<sup>87</sup> Sergio Puig, “Social Capital in the Arbitration Market” 25 *European Journal of International Law* 387 (2014).

<sup>88</sup> *ibid*, 418-9, emphasis added.

and liability.<sup>89</sup> In other words, bad choices for states, at least in the classic view. One should note, however, that Waibel and Wu do not find a case specific bias but a general one: no statistically significant relationship between a claimant-appointed arbitrator and his voting for the claimant in a given case, but a significant relationship for the total number of appointments by claimants and his votes.<sup>90</sup> Finally, they find that “the number of appointments as president is correlated with a higher likelihood of upholding liability, without a significant impact in the jurisdictional phase [and that] arbitrators with a track record of past appointments by investors are more likely to affirm jurisdiction than the average arbitrator, and arbitrators with a track record of appointments by the host country are less likely to uphold jurisdiction than the average arbitrator.”<sup>91</sup> One may think, then, that states would be well advised to choose arbitrators who have previously been chosen by other states (and investors to choose arbitrators previously chosen by other investors). But a study by Daphna Kapeliuk suggests otherwise: she finds no statistically significant relationship between panel composition in terms of previous experience and outcomes.<sup>92</sup> She also finds no significant relationship between arbitrator experience and likelihood to issue a dissenting opinion, which may be seen as a strong, qualified vote.<sup>93</sup> Hence, she says, the parties’ cautious practice of selecting experienced arbitrators do not, in fact, seem to increase their chances of outcomes favourable to them. Going for the usual suspects appears not to be helpful if the point is to win the case.

In his contribution to this Special Issue, Todd Tucker takes these considerations quite a bit further. If states want to further their own interest, their screening and appointment procedures should be significantly more complex than simply aiming for pro-state arbitrators (leaving aside the obvious importance of selecting an arbitrator adapted to the specificities of the case at hand). Put differently, seeing arbitrators as simply pro-state or pro-investor is not a good proxy for arbitrator selection, because it may backfire. Examining various aspects of the real and likely influence of different types of arbitrators on deliberations, Tucker comes to the conclusion that “states have incentives to make more moderate wingman appointments (to maximize influence with the other two, who are appointed totally or partially by the investors)”<sup>94</sup> because “State-friendly dictators are unlikely to survive”,<sup>95</sup> where survival means to have a chance to influence the outcome of deliberations, to do more than have a chance to issue a dissenting opinion.

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<sup>89</sup> Michael Waibel and Yanhui Wu, “Are Arbitrators Political?”, working paper 2012, <https://www.wipol.uni-bonn.de/lehrveranstaltungen-1/lawecon-workshop/archive/dateien/waibelwinter11-12>, 34.

<sup>90</sup> *ibid*, 36.

<sup>91</sup> *ibid*, 34-5.

<sup>92</sup> Daphna Kapeliuk, “Collegial Games: Analyzing the Effect of Panel Composition on Outcome in Investment Arbitration” 31 *Review of Litigation* 267 (2012), 307–8.

<sup>93</sup> *ibid*, 310.

<sup>94</sup> Todd Tucker, “Inside the Black Box: Collegial Patterns on Investment Tribunals” 7 *Journal of International Dispute Settlement* xxx (2016), xxx.

<sup>95</sup> *ibid*, xxx.

Regardless how states adapt their practice in appointing arbitrators, Tucker continues, the resulting arbitral tribunals will on the whole still be more instrumental in serving the investors' interests than the states'. Based on an analysis of the main types of arbitrators currently in activity, the way in which they are appointed and then interact with one another, Tucker states that "the more likely scenarios for states is that they will deal with investor-friendly dictators (in which case states get nothing), social chairs (who – through the logic of horse-trading – will [grant] lower damages but proliferate investor-friendly merits decisions), or managerial chairs (who will generate fact-intensive decisions and concede as little to the state as possible, and only that if the state appointee is needed for a majority vote)."<sup>96</sup> This is bad news for the states' interests, because "[t]he net result is a gradual creation of investor-friendly or highly fact-specific decisions. The first is likely to have negative implications for sovereignty and development, while the latter breeds uncertainty as to future rulings."<sup>97</sup> In the terms of our model, this suggests that the states' input in reaction to the system's output, if they intend to make a meaningful difference for the maximisation of their own interests, should be to significantly reform the appointment mechanisms of arbitrators.

Finally, states may have reasons to choose strategies to promote investment and handle investment disputes that imply or at least allow them to exit the system of investment arbitration. Recall that the conventional view on the objective of the international investment regime, which is to advance the rule of law and ensure the respect of property rights. But Brazil, for instance, which is again signing BITs, sees in the treaties a quite different purpose, namely to "focus[...] instead on consolidating economic relations with its partners and establishing political mechanisms to promote FDI."<sup>98</sup> Investor-state arbitration is not part of the picture. When there is arbitration in Brazil's BITs, in it is only at the interstate level, between the home state and the host state.<sup>99</sup> And indeed the home state may have a greater role to play with regard to the protection of investments than is acknowledged in the conventional view in legal scholarship: in their contribution to this Special Issue, Clint Peinhardt and Todd Allee examine what in effect amounts to home states displacing investment arbitration by providing public political risk insurance. First of all, they note that "since 2009 overall [political risk insurance] growth has outpaced FDI into developing countries".<sup>100</sup> It is, in other words, not an unusual or unknown mechanism. But more importantly, *public* political risk insurance, provided by a state agency, has certain key advantages with regard to dispute resolution.

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<sup>96</sup> *ibid*, xxx.

<sup>97</sup> *ibid*, xxx.

<sup>98</sup> Nicolás M. Perrone and Gustavo Rojas de Cerqueira César, Brazil's bilateral investment treaties: More than a new investment treaty model?, *Columbia FDI Perspectives* Perspectives on topical foreign direct investment issues No. 159 October 26, 2015.

<sup>99</sup> See for instance an article forthcoming in this journal by Nitish Monebhurrin, "Novelty in International Investment Law: The Brazilian Agreement on Cooperation and Facilitation of Investments as a Different International Investment Agreement Model" 7 *Journal of International Dispute Settlement* (2016), forthcoming.

<sup>100</sup> Clint Peinhardt and Todd Allee, "Political Risk Insurance as Dispute Resolution" 7 *Journal of International Dispute Settlement* xxx (2016), xxx.

As they put it, “[t]hanks to their government connections, public insurers have one distinct competitive advantage: they can rely on interagency linkages to help resolve questions involving political risk.... Private insurers, even those with strong lobbying histories, will never be able to marshal the power of multiple government agencies to resolve a potential claim. And this advantage extends past the claim stage to the recovery of asset paid. Historically, [the United States’ Overseas Private Investment Corporation] has maintained a recovery rate of over 90%, meaning that it eventually recovers almost all of the money it pays out in claims.”<sup>101</sup> It thus appears that states, instead of signing BITs meant to advance the rule of law and ensure the respect of property rights, should at least consider the possible advantages of instead of expanding their provision of political risk insurance.

### **The investors’ use of and adaptation to the system**

The investors are probably the second most important actors of the system of investment arbitration, since they decide when and how to use the system on concrete occasions. Clearly, they have adapted or should adapt significantly to the system in order to make the most of it. To say the least, they are loyal users, zealous users even, of the system, having brought it to a caseload of over 775 claims according to our count.<sup>102</sup> The number of investors, and their diversity, is steadily increasing, as Rachel Wellhausen shows in her contribution to this Special Issue.<sup>103</sup> More precisely, US investors top her list with 151 filings (which amounts to nearly a staggering quarter of all claims), followed by Dutch investors (69 filings, but the Netherlands are “notorious as a site for ‘treaty shopping’”<sup>104</sup> – a conventional wisdom confirmed by a recent UNCTAD report showing that 64% of Dutch claimant companies have no substantial business activity in the Netherlands),<sup>105</sup> British (53 filings), French (46), German (45), Canadian (40), Spanish (35) and Italian (32).<sup>106</sup> Overall, “investors from over 70 different home countries have filed investment arbitrations”,<sup>107</sup> representing increasingly diversified industries, which are clearly “not limited to those industries in which assets are location-specific.”<sup>108</sup> What, then, do we know about how the investors use and adapt to the system, about what they do and what they may want to do in reaction to the decisions the system produces?

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<sup>101</sup> *ibid*, xxx.

<sup>102</sup> Dupont, Schultz, and Angin, “Political Risk and Investment Arbitration”, xxx.

<sup>103</sup> Wellhausen, “Recent Trends in Investor-State Dispute Settlement”, xxx.

<sup>104</sup> *ibid*, xxx.

<sup>105</sup> United Nations Conference on Trade and Development, Division on Investment and Enterprise, “Treaty-based ISDS cases brought under Dutch IIAs: An Overview”, 30 June 2015, 6.

<sup>106</sup> *ibid*, xxx.

<sup>107</sup> *ibid*, xxx.

<sup>108</sup> *Ibid*, xxx.

At the outset, it bears recalling that it is at best a contested idea that investors, as a general matter, see the system as an incentive to invest – we discussed the relationship between BITs, the rule of law and investment flows in enough detail in the previous section to make the point. Yackee, in his contribution to this Special Issue, gave further evidence that at least French investors do not seem to react to the availability of investment arbitration by investing more.<sup>109</sup> Yackee's earlier research suggests that political risk insurers, at least, would seem to approve of this attitude: they tend to underwrite insurance decisions without factoring in the presence of a BIT.<sup>110</sup> Correspondingly, BITs, and in them investment arbitration, cannot representatively be pictured as red capes that states whip around in order to get the investors' attention, Yackee further argues in his current study.<sup>111</sup> There is, then, not a great deal of reason to believe that investors provide input into the political system of investment arbitration that seeks to make it more investment-conducive, that aims at reforming the system so as to maximise their own interests if these interests were only to invest more. Plainly put, if investors try to change investment arbitration, for instance in order to make it more powerful or otherwise more protective of their interests, there is little good reason to believe that they do it with the purpose of giving themselves what they need in order to invest more. If BITs "don't work", to use Yackee's language, it is either because they do not give investors enough, or because what they give investors is not of a nature that matters much to them (for they investment decision-making) and then giving more of it makes no difference. What Yackee's study suggests, and the other studies he discusses, is that the latter applies, not the former: it is a qualitative issue, not a quantitative one. Again, these claims only concern BITs and investors in the aggregate. It may well be, contrariwise, that a specific BIT is of decisive importance for a specific investor in a specific case.

What then, the next question would be, do investors seem to use the system for when they use it? One may distinguish here between actual use and threats to use it. With regard to the latter, we have already discussed Van Harten and Scott's findings that both implicit and explicit threats to file investment arbitration claims lead, at least in Ontario, Canada, to identifiable reactions of host states abandoning legislative projects. The mirror image of this suggests investors threatening, implicitly or explicitly, to use investment arbitration in order to block policies that would harm their perceived interests.

With regard to the actual use of the system of investment arbitration – that is, filing arbitration claims – our previous research showed that investors seem to have been using it, until the mid-to-late 1990s, mainly to make up for dysfunctional rule of law institutions in the host states. They used it to

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<sup>109</sup> Yackee, "Do BITs 'Work'?", xxx. This corroborates his earlier study, in which he showed that general counsels of United States-based corporations believed that the presence of a BIT did not impact their company's investment decisions: Yackee, "Do Bilateral Investment Treaties Promote Foreign Direct Investment?", 426-34.

<sup>110</sup> Yackee, "Do Bilateral Investment Treaties Promote Foreign Direct Investment?", 422-6

<sup>111</sup> Yackee, "Do BITs 'Work'?", xxx: "Even today, states rarely spend much time advertising their BITs to investors, suggesting that they believe investors don't care much about the treaties."

‘unjudicialise’ investment disputes as it were (that is, to remove them from courts) in countries with a weak law and order tradition. Since then, however, this is no longer a representative use of the system by investors. Instead, they appear to use it in order to vindicate their rights without much further qualification,<sup>112</sup> although dysfunctional rule of law institutions in the host states still constitute a political risk that increases the likelihood that there will be an arbitration claim.<sup>113</sup> Perhaps surprisingly, and in contradiction to what Beth Simmons has found,<sup>114</sup> it seems that not even the materialisation of economic political risk – economic crises or hardship in the host state – characterises the situations in which investors file investment arbitration claims, as both our previous research<sup>115</sup> and our contribution to this Special Issue suggest.<sup>116</sup> One qualification, however, does seem to apply particularly clearly to the types of situations in which investors vindicate their rights by means of investment arbitration: a sort of short-term mimicking effect, where previous claims attract future claims in the near future. (Think, if you will, of a shark attracted by the blood caused by the bite of another shark.) Simmons indeed found that claims in the previous year were a “very strong predictor” of claims in any given year.<sup>117</sup> One of the best criteria to predict whether investors will use investment arbitration against a given country is that an arbitration claim has been filed against that state within the last year, by any investor.

An important way in which investors use the system and adapt to its output is in appointing arbitrators. According to Tucker, in his contribution to this Special Issue, the way for investors to maximise their own interests when choosing arbitrators is much more straightforward than it is for states, which we discussed in the previous section: “while states have incentives to make more moderate wingman appointments (to maximize influence with the other two - appointed totally or partially by the investors), investors do not. Indeed, investors are well served to pick vigorous partisans that have been known to vote or dissent in favour of investors. The centre of ‘tilt gravity’ on the typical tribunal is thus closer to the investor interest from the outset.”<sup>118</sup>

The crucial and usually forgotten question about arbitrators, Tucker essentially explains, is how likely they are to influence the other two arbitrators on the tribunal, and not only in which direction they are likely to pull. Their likely persuasive effectiveness depends, among other things, on how willing they are to try, for reasons of personality but also other interests of their own, and how

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<sup>112</sup> Thomas Schultz and Cédric Dupont, “Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study” 25 *European Journal of International Law* 1147 (2014).

<sup>113</sup> Dupont, Schultz, and Angin, “Political Risk and Investment Arbitration”.

<sup>114</sup> Simmons, “Bargaining over BITs”, 30-2: she finds that higher inflation, deteriorating external finances (decrease in reserve/imports ratio, outflow of FDI, worsening of foreign debt service), and LIBOR risk premiums are positively associated with increased litigation.

<sup>115</sup> Cédric Dupont and Thomas Schultz, “Do Hard Economic Times Lead to International Legal Disputes? The Case of Investment Arbitration” 19 *Swiss Political Science Review* 564 (2013); Dupont, Schultz, Wahl, and Angin, “Types of Political Risk”.

<sup>116</sup> Dupont, Schultz, and Angin, “Political Risk and Investment Arbitration”.

<sup>117</sup> Simmons, “Bargaining over BITs”, 30.

<sup>118</sup> Tucker, “Inside the Black Box”, xxx.



persuasive they can be if they do try. And here, crucially, in the words of Tucker, “wingmen that survive for long in the system will be dependent on their reputation *in the arbitration community*. If states are conscious of these incentives, they would appoint arbitrators that are closer in ideological-spatial terms to the median (pro-investor) arbitrator than to the outlier zealous protectors of sovereign interests.”<sup>119</sup>

Distance from the median, to be clear, is not only a question relating to the contents of an arbitrator’s legal, political, and axiological views. It is also a question relating to how entrenched these views are and, independently of this entrenchment, how flexible an arbitrator is about departing from whatever view he or she holds in order to settle a point in the panel’s deliberations. On this last point, at one end of a spectrum, there are individuals who essentially do not care about where a discussion settles and agree to anything: Tucker calls them “weak chairs” and “followers” (when they are co-arbitrators).<sup>120</sup> At the other end are individuals who unbendingly stand their ground, come what may: Tucker calls them “dictators” when they are chairs and “partisans” when they are co-arbitrators. Neither type is persuasively effective. Weak chairs and followers do not meaningfully determine the outcome in any way. Dictators and partisans determine the outcome only by their ‘un-collegial’ vote. In between these two extremes are “neutrals”, who further qualify, when they are chairs, as either calculating “managers”, who tend to compromise on the facts and to the lowest degree “necessary to remain in a majority of two”, and consensual “socialites”, who tend to compromise on the law and “to the point necessary to secure a unanimous award.”<sup>121</sup> Bluntly simplified, if the median of arbitrators views is closer to what investors want than to what states want, as Tucker argues, investors have less need for flexibility in their appointees, thereby narrowing down the zone of agreement. Hence the relative straightforwardness of their effective strategies in arbitrator appointments as input into the system. Now, to be sure, what exactly it is that host states want or should want, what exactly it is that investors want or should want, whether it is a usefully workable representation of reality to see them as necessarily opposed on a one-dimensional continuum, and where arbitrators fit on this continuum, individually, collectively, and the mean and median of that

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<sup>119</sup> *ibid*, xxx (emphasis added). The point can be further elaborated as follows: if we draw three people from a given group, the further away from the median view on X a person is, the less likely that person is to be able to persuade the two others to adhere to his or her view on X, if all it takes to reach a decision is for two of these three people to agree. In such a situation, risk mitigation strategies may well lead states to favour a person who will most likely make them lose but not so badly, over a person who may lead them to a full victory but has only a small chance of achieving it. To see the point more easily, consider two people. The first tries to pull the decision only a bit towards states – for instance agreeing on a win for the investor but with low compensation – yet is likely to succeed, precisely because he pulls only a bit. That would be a person close to the median. The second person tries to pull the decision strongly towards states – for instance pledges to agree on nothing but a full win for the state – yet is therefore unlikely to succeed. A radical outlier, a “zealous protector of sovereign interests” in Tucker’s terminology, would often be such a person, and would end up alienating the other two. Risk mitigation strategies would favour the first person “especially ... when the amount of quantum on the line matters for short-term state budgets, which it often does”, as Tucker puts it at xxx.

<sup>120</sup> *ibid*, xxx.

<sup>121</sup> *ibid*, xxx.

collectivity, are all meaningful questions to be explored. Meanwhile, Tucker's study greatly unpacked the arbitrator-appointment strategies of investors, and what these strategies actually are and what they should be, and thereby clarified the investors' input and input opportunities into the system.

Investors, of course, are not stuck in the system of investment arbitration. They may have an interest in considering something else than their input into the system. Indeed, the enthusiastic use of arbitration by investors, and the historical and conceptual opposition of investment arbitration and diplomatic protection, may have led investors, and us as analysts, to inappropriately disregard an important alternative, namely the use of public political risk insurance. Peinhardt and Allee, in the contribution to this Special Issue, focus precisely on this question, where public political risk insurance essentially replaces, or at least strongly displaces, investment arbitration. This is how they put it: "An examination of [the] record [of the United States' Overseas Private Investment Corporation (OPIC)] shows that investors file claims with OPIC first, and that if denied, claims may then proceed to international arbitration... OPIC claims precede attempts to resolve disputes via arbitration [but] the vast majority ... are resolved earlier, as a result of negotiations among home, host, and investor(s)."<sup>122</sup> At least in theory, it could also be used as a complement to arbitration, in aid of it, but this is not the point here.<sup>123</sup> In a number of situations, it might be preferable to take the insurance route and, Peinhardt and Allee's study suggests, the route of *public* insurance has distinct advantages.

Political risk insurance, when provided by a public body, at least in the case of OPIC, really acts like a diplomatic channel. Simplified to extremes, OPIC, through the U.S. government, negotiates with the host state and, when it obtains the money, settles its own insurance claim with the investor and forwards it the money. As the authors explain, "settlement of [insurance] claims is often accompanied by efforts [on the part of OPIC] to communicate with the host government and to discuss settlement options. Thus, agreement to pay the claim is often accompanied by the agreement of the host government to compensate the insurer for its payout."<sup>124</sup> Indeed, they continue, "[o]ur impression is that claims and recovery are often settled simultaneously, and the data should reflect that joint determination."<sup>125</sup> The settlement of the investment claim and the recovery of the ensuing debt, if any, are "more directly a bilateral negotiation between two countries."<sup>126</sup>

Quite possibly, then, one advantage of this form of political risk insurance may be, in certain situations at least, a higher likelihood that settlement succeeds. One may expect it to be easier for certain governments to negotiate and settle with a foreign government than with a foreign company.

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<sup>122</sup> Peinhardt and Allee, "Political Risk Insurance as Dispute Resolution", xxx.

<sup>123</sup> See further Jason Webb Yackee, "Political Risk and International Investment Law" 24 *Duke Journal of Comparative & International Law* 477 (2014) and Mark Kantor, "Comparing Political Risk Insurance and Investment Treaty Arbitration" in Borzu Sabahi, Nicholas J. Birch, Ian A. Laird and José Antonio Rivas (eds), *Revolution in the International Rule of Law: Essays in Honor of Don Wallace* (Juris 2014).

<sup>124</sup> Peinhardt and Allee, "Political Risk Insurance as Dispute Resolution", xxx.

<sup>125</sup> *ibid*, xxx.

<sup>126</sup> *ibid*, xxx.

Government officials could, just possibly, more easily save face and justify their actions to their constituencies. The home state may become more implicated in the settlement negotiations because of the insurance relationship: as Peinhardt and Allee point out, '[i]f a public insurer has to pay a claim, then the dispute can be transformed from an investor-state dispute to a state-to-state dispute. Presumably such a change would elevate the political importance of a dispute, as well as its potential consequences for diplomatic relations and foreign policy.'<sup>127</sup> The host state may further have an incentive to settle so as to give signals to other investors of the insurers' country that it is amenable to discussions. And indeed, the authors, though focusing only on disputes with US investors, find that host states' dependence on economic flows from the insurer's country significantly contributes to their willingness to settle investment disputes with the insurer, which acts "on behalf of" the investor. More precisely, they find that claims are resolved more quickly when host countries "are more dependent on international trade";<sup>128</sup> "receive high levels of foreign investment from American companies";<sup>129</sup> have "a disproportionately large share of American direct investment";<sup>130</sup> or have better "political and economic relations" with the insurer's government, in this case the USA.<sup>131</sup> And, conversely, if investors from the insurer's country are comparatively less important, then the interest of the host state to settle seems to drop: "The biggest obstacle to resolution is net FDI flows from the world at large - countries with other foreign investors appear least willing to negotiate."<sup>132</sup>

### **The arbitrators' use of and adaptation to the system**

The first year law school view on arbitrators, just as on judges, is that they just apply the law, mechanically. They could not, then, provide any real input into investment arbitration as a political system. They would only be cogwheels of the system. That view, however, was really only meant as a heuristic model of its own, bringing to light many aspects of the actual workings of the law and dispute settlement. It was never really meant as a descriptive model, pretending that arbitrators do indeed nothing else than mechanically apply rules, with the implication that arbitrators would not be ordinary human beings, whose decision-making is inevitably marked by beliefs and personal preferences, and all sorts of other incentives, constraints, and determinants.<sup>133</sup>

As for all other actors of the system, our heuristic model of investment arbitration as a political system makes us look at arbitrators as actors providing input into the system with the objective of maximising their own preferences and perceived interests. To be clear, nothing in our model or approach implies that this is the only thing that arbitrators do. We do not offer any theory about the

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<sup>127</sup> *ibid*, xxx.

<sup>128</sup> *ibid*, xxx.

<sup>129</sup> *ibid*, xxx.

<sup>130</sup> *ibid*, xxx.

<sup>131</sup> *ibid*, xxx.

<sup>132</sup> *ibid*, xxx.

<sup>133</sup> This is discussed in greater detail in Schultz, "Arbitral Decision-Making".

general, overall behaviour or role of arbitrators. We only choose a lens to bring out with greater clarity some of the things they do or may do if they understand their serviceability for the furtherance of their own preferences and perceived interests.

The question, then, is to what extent they do or can adapt their input into the system in order to pursue these objectives. The main type of input we consider here is the way in which they shape existing rules and create new ones, to the exclusion, then, of their scholarly views, although they may of course also be instrumental in pursuing their interests.<sup>134</sup>

Arbitrators have the remarkable possibility to expand or shrink their own industry. For a parallel, think of architects empowered to issue construction permits themselves. One would expect the issuance of such permits to rely on an expansive rather than a restrictive interpretation of the law. Similarly, it would seem rational to expect investment arbitrators' interpretation of jurisdictional and admissibility standards to be expansive rather than restrictive. Not doing so would be either an error, from a rational choice perspective, or the result of a complex rational calculation that we cannot entertain here. Whether, indeed, arbitrators behave rationally in this context is quite precisely what Gus Van Harten investigated a few years ago, and the results matched the expectations.<sup>135</sup> Looking at the binary final decision on jurisdiction, he used content analysis to code the awards for the resolution of seven ambiguous issues of jurisdiction and admissibility as either expansive or restrictive. The immediate research question related to how arbitral decision-making, taken collectively, responds to rational industry-wide incentives. Yet the deeper, underlying proposition was that such responses amount to systemic bias in investment arbitration: in systematically adopting more expansive approaches to contested jurisdictional and admissibility issues, arbitral tribunals would be opening the way for litigation, thereby enabling an increase in investor compensation and host state liability, and thus favouring investors over respondent countries. And Van Harten did indeed find strongly significant statistical indications that arbitrators, on average, tend to adopt expansive approaches.<sup>136</sup> Moreover, he found indicators showing that this tendency is stronger when the investor is from a capital exporting State (UK, US, France, Germany).<sup>137</sup> Arbitrators, then, do behave rationally on this front and do seem to provide input into the system that serves their own interests.

Arbitrators also have, as in mostly every other profession, the ability to profile themselves, individually, in ways that are more or less appealing to those who appoint them. Arbitrators do not have to accept appointments, so it seems sensible to assume that when an arbitrator serves on a tribunal, he or she wanted it, and will want it again. Granted, lawyers may well be paid less by time and effort for being an arbitrator than for being counsel or other legal work – one occasionally encounters the statement that serving as arbitrator is comparatively “pro-bono work” for certain

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<sup>134</sup> On how scholarship in arbitration relates to its authors' interests, see Thomas Schultz, “International Arbitration Scholarship: Forms, Determinants, Evolution” in Stavros Brekoulakis, Julian Lew, and Loukas Mistelis (eds), *Evolution of International Arbitration* (Kluwer Law International, The Hague, forthcoming 2016).

<sup>135</sup> Gus Van Harten, “Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration” 50 *Osgoode Hall Law Journal* 211 (2012).

<sup>136</sup> *ibid*, 237.

<sup>137</sup> *ibid*, 242.

individuals. But this only tells us that such individuals must have other reasons for wanting to be appointed, an issue that we do not address here. Our interest lies in effective input strategies used by individuals to maximise their chances of being appointed. Tucker, in this Special Issue, essentially tells us that it is not only, as is often assumed, a question of tilt – profiling oneself as pro-state or pro-investor, in the decisions and elsewhere, but again we only focus here on decisions – but it is also a question of persuasiveness regarding co-panellists. And, as we discussed at length above, the degrees of tilt and persuasiveness may be mutually antagonistic. Without returning to this discussion, let us simply recall the net result of these dynamics, according to Tucker, on the output of the system of investment arbitration: either “states get nothing”, or tribunals “through the logic of horse-trading” will award “lower damages but proliferate investor-friendly merits decisions”, or “generate fact-intensive decisions and concede as little to the state as possible”, which overall leads, he says, to a gradual creation of either “investor-friendly or highly fact-specific decisions”.<sup>138</sup>

### **The arbitration institutions’ use of and adaptation to the system**

Arbitration institutions probably constitute the most under-explored set of actors of the system of investment arbitration, in regard to their use and adaptation to the system. What, one may ask from the outset, would arbitration institutions want from the system? What are their own preferences and perceived interests in it? To be sure, exit strategies are not an option for them: whereas states, investors, and arbitrators could all live on, in different capacities for arbitrators, without investment arbitration, the institutions’ survival is entirely conditioned on the survival of the system. Beyond that, one may imagine that institutions would, at least in general, entertain a desire to be successful: as places that administer arbitrations, success would seem to at least include a measure of the number of arbitrations administered, and the number of procedures that were facilitated. In sum, success may be measured, at least in part, by caseloads. Arbitration institutions would, then, have an incentive to globally increase the number of investment arbitrations.

To achieve this, what should the arbitration institutions’ input be? The institutions can provide at least two main types of input: they can exercise their residual arbitrator appointment powers (when the parties fail to do so for arbitral tribunals and in any case for ICSID ad hoc annulment committees) and they can reform their procedural rules, within the limits of applicable treaties, if any. On the first tack, ICSID, the most important player, has often been criticised for the concentration of powers in the hands of its chairperson and for what the chairpersons have done with that power.<sup>139</sup> How far ICSID could really go on its own without simply driving claimants to competing institutions is, however, a tricky question. On the second tack, arbitration institutions seem to be reacting to the system’s output by increasing transparency through internal regulatory reform. As Hafner-Burton and Victor explain in their contribution to this Special Issue, this is largely a reaction to “the shortage of

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<sup>138</sup> Tucker, “Inside the Black Box”, xxx.

<sup>139</sup> See for instance David Collins, “ICSID Annulment Committee Appointments: Too Much Discretion for the Chairman?” 30 *Journal of International Arbitration* 333 (2013).

legitimacy of investor-state arbitration [which] continues to be a source of anxiety".<sup>140</sup> In other words, arbitration institutions are reacting here to the perceived lack of legitimacy of the system's output, which is probably perceived to be harming its growth, which in turn is nevertheless quasi-exponential.

## **Conclusion**

This article experimented with a new heuristic model, which, almost metaphorically, represents investment arbitration as if it were a political system. This led us to review some of the input that the system's four main actors – states, investors, arbitrators, and arbitration institutions – provide into the system in order to best serve their perceived interests, or could provide if the input's serviceability for their preferences and interests were understood. This input adjusts, or should adjust, to the system's output, through feedback effects. Investment arbitration is then, in this view, a dynamic, constantly evolving system, driven by its four main actors, each of which reacting to the results of the others' input into the system.

A tentative general picture emerges at this stage of the experimentation. In that picture, states seem to have the strongest potential of input but significantly underreact to the system's output. Investors seem to react much more swiftly to changes in the system and other new feedback from it, and thus have a much better understanding of how to play it to their advantage, using it ever more frequently and widely. Arbitrators also seem to have a fairly acute understanding of the directions in which the system should be pushed in order to serve their own interests, at least in the short run. This is not surprising if one considers that there are many competitors for comparatively few opportunities, leading to a selection process one may think of as Darwinian: only the best make it to the top, the best at using and influencing the system to their own advantage. Finally, arbitration institutions come across as players who would rather not play, yielding more power than they care to admit.

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<sup>140</sup> Hafner-Burton and David G. Victor, "Secrecy in International Investment Arbitration", xxx.