

Rage against the regime: Policy responses to international
investment arbitration

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ABSTRACT

Common in political discourse and academic literature is the notion that the international investment regime is experiencing backlash. At the center of this backlash is the belief that international investment treaties unduly restrain states' ability to regulate in the public interest, most notably by allowing foreign investors to file international arbitration claims directly against governments for a variety of regulatory acts. The rise of investment arbitration—also known as investor-state dispute settlement (ISDS)—has provoked a regime-wide reassertion of states' autonomy to regulate foreign investment under investment treaties. However, states have embarked on this process in different ways and to different extents. While some have become more cautious of how much legal autonomy they sacrifice in the future, others have partially or completely recovered autonomy lost to previous treaties.

My dissertation explains why states pursue different policies in the aftermath of ISDS. I argue that negative ISDS experiences are filtered through ideational lenses that incline policy-makers to reclaim more or less legal autonomy. Yet policy-makers face constraints and opportunities when acting on these emerging preferences. Thus, I also argue that policy outcomes depend on the combination of a domestic and external variables. Most scholarly attention has been placed on the political behavior of economic actors, either domestic firms or foreign investors. However, ISDS disputes also affect a broad and diverse ensemble of local and transnational civil society groups. These actors have competing interests regarding continuity and change in investment treaty policies. Thus, I examine the conditions under which their mobilization can

enhance or hinder policy-makers' ability to implement their desired policies.

I test the expectations derived from this argument using a mixed methods research design that combines quantitative statistical analysis and qualitative case studies. Through regression analysis of an original measure of international legal autonomy, I show that after ISDS claims hit, states are less willing to sacrifice their legal autonomy and in some cases start to recover it. Further analysis of three original datasets of treaty signature, treaty content and treaty termination shows these actions are not equally likely across states. Through within- and cross-case comparisons of investment treaty policy-making in the United States, Ecuador and India, I show how alternative combinations of the explanatory variables make a given policy reaction to ISDS more likely.

Whether states continue to endorse strong treaty protections is a pressing question, given the recent rise in the number of governments elected on nationalist platforms. There are also normative stakes in the answers to these research questions. Policy variation does not simply revolve around technical legal disagreements; it reflects fundamental disagreements about the limits of state authority in a globalized economy.

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Chapter 1

Introduction

In 2002 Germany decided to phase out peaceful uses of nuclear energy. The coalition government of the social democrats and the greens restricted the life of existing nuclear power plants to the amount of time it would take them to reach a set volume of energy output. When a tsunami hit Japan on 11 March 2011 and provoked three core meltdowns in the Fukushima nuclear plant, over 200,000 demonstrators took to the streets in the biggest anti-nuclear protests Germany has ever seen. Shortly after, the German Parliament decided that nuclear energy would be completely abandoned by the year 2022, however much was left to reach the set output level. Two plants affected by this measure are owned by the Swedish firm Vattenfall. In 2012, the firm initiated an international dispute under the Energy Charter Treaty, which both Germany and Sweden are members of, to obtain compensation for the financial losses that would result from the shutdown. The Energy Charter includes provisions against expropriation without compensation as well as a dispute settlement mechanism in which foreign investors can initiate legal actions against their host states before international arbitral tribunals; a system widely known as investor-state dispute settlement or ISDS. While details about the arbitration remain scarce -both parties agreed to strict confidentiality- it is known that Vattenfall is seeking €4.7 billion in compen-

sation and that, as of December 2015, the German government had spent over €3.2 million to defend the case.

The political consequences of the Vattenfall case were vast. The unfolding of the dispute coincided with negotiations for the Transatlantic Trade and Investment Partnership (TTIP) with the United States. Investor protections were at the center of the TTIP debate in Europe, especially in Germany. Businesses from both sides of the Atlantic believed ISDS should be included in the agreement's investment chapter. Investment arbitration, multinational firms like Vattenfall claim, offers an efficient and neutral forum for the resolution of disputes. Substantive and procedural protections found in investment treaties increase legal certainty and minimize political risk when an investor is assessing whether to invest in a particular foreign market. Activists saw ISDS as a means of corporate control and a threat to democracy. Corporations would be able to bypass national courts through secret arbitration processes and government standards for the protection of the environment, health, and consumers - like Germany's phasing out of nuclear energy- would be at risk. A pan-European umbrella group, 'STOP TTIP', set up headquarters in Berlin and took over the coordination of an alliance of more than 500 European civil society organizations. Thousands of protesters took to the streets in cities across Europe and activists issued a Europe-wide petition to stop TTIP. By 20 February 2015, the number of signatures had reached 1.4 million, 860,000 of which were German. As a result of the public criticism, the European Commission interrupted TTIP talks and launched a three-month public consultation on the matter, receiving nearly 150,000 responses. At this point, the EU Trade Commissioner acknowledged, "ISDS is now the most toxic acronym in Europe."¹

¹ISDS: The most toxic acronym in Europe. (17 September, 2015). Politico.

The European Commission's response to the public outcry was the adoption of a German proposal to replace the system of ad hoc arbitral tribunals with a multilateral investment court. The proposal addressed some of the charges levied against ISDS. Because decisions from ad hoc arbitral tribunals are criticized for their inconsistency, the court would include an appeals stage. To correct the issue of secrecy, all proceedings would be open. Since it is argued arbitrators are biased in favor of the firms that appoint them, judges would be selected under high qualification requirements. Because critics see ISDS as allowing firms to use the threat of litigation to deter public regulations, the court would also include mechanisms to avoid forum shopping, parallel proceedings and frivolous claims. The court proposal was a direct response to civil society mobilization in the aftermath of Vattenfall and yet activists were not pleased. In their view, the proposal reinforces the one-sided nature of investment arbitration because, much like traditional ISDS, it still only enables foreign investors to bypass the national legal system to launch an international claim seeking compensation.

What happened in Germany was not an isolated instance. More than 3,000 bilateral and plurilateral investment treaties are in force at present and most of them include access to ISDS. Under these treaties, foreign firms have brought lawsuits against 117 countries. As more and more governments started to experience the costs of having signed investment treaties -either in the form of expensive international litigation or foregone regulations- the international investment regime has come under fire. According to the United Nations Conference on Trade and Development (UNCTAD), “[t]he question is not about whether to reform or not, but about the ‘what’, ‘how’ and ‘extent’ of such reform” (UNCTAD, 2015, 120).

The policies that governments have introduced in reaction to their own ISDS

experiences suggests states have widely different views about the ‘what’, ‘how’ and ‘extent’ of the desired changes. After Vattenfall, Germany devised a proposal to replace ad hoc arbitral tribunals with a permanent court. Much differently, after its own brushes with ISDS, Colombia remains a supporter of investment arbitration. The Colombian government adopted a new treaty model that addresses some of the problems associated with ISDS by, among other things, increasing precision in the drafting, enhancing the transparency of arbitral proceedings and including exceptions and carve outs to protect particular policy goals from being challenged as treaty violations. This new template is to guide all future negotiations and any eventual renegotiation of older treaties. Colombia has made it clear, however, that it will always seek the consent of its partners when it comes to renegotiations and will not cancel its existing agreements unilaterally.

South Africa has developed a different approach to Germany’s or Colombia’s. After an infamous arbitral dispute in which foreign investors challenged the legality of affirmative action policies, South Africa became convinced that investment treaties and the ISDS system that enforces them unduly constrain the space of governments to implement measures in the public interest. Amid strong criticism from multinational companies and foreign officials, South Africa adopted a domestic regulatory framework under which foreign investors only have recourse to domestic mediation and courts, rather than to ad hoc international arbitral tribunals or a permanent international court. Furthermore, the government has unilaterally initiated the process to terminate its investment treaties. Existing international investment agreements, according to South Africa, are based on outdated models that are focused on the interests of investors from developed countries and do not address the issues of con-

cern for developing nations. In sum, while a ‘rage against the regime’ has emerged all over the world, states have acted on it differently. This dissertation explains why. Understanding this variation in policy reactions to ISDS disputes is not only important for the international law governing foreign investment; it speaks to fundamental disagreements about the limits of state authority in a globalized economy. As international economic governance faces increasing challenges from dissatisfied states, the changes undergone by the investment regime can provide valuable lessons for the future. Most importantly, about the degree to which alternative projects can be accommodated within existing international institutions.

This Chapter proceeds as follows. Section 1.1 provides a succinct history of international investment law. Section 1.2 deals with the rise of international investment arbitration. I provide an account of the main charges levied against ISDS that have led to the emergence of a ‘backlash’ against the international investment regime. Section 1.3 unpacks the notion of a backlash and offers a novel conceptualization of policy reactions to ISDS. In doing so, I introduce the puzzle for the dissertation. Namely, why do states attempt to recover varying degrees of legal autonomy from the investment regime in reaction to their own experiences with ISDS. Beyond being empirically puzzling, I also explain why this variation is both politically salient and normatively important. Lastly, sections 1.4 and 1.5 briefly explain the dissertation’s theoretical argument and layout.

1.1 A brief history of international investment law

1.1.1 International investment protections before treaties

That states use international legal instruments to establish what they can and cannot do to foreign investors operating within their territories is not a recent practice. The 3,300 some investment treaties that have been signed since the 1950's did not appear out of thin air. They have their origins in an earlier period when states attempted to resolve conflicting economic interests through the means that international law offered at the time (Salacuse, 2015). The regulation of investment across borders dates from the late 19th and early 20th centuries. As former colonies, mostly from Latin America, started to assert their newly acquired sovereign rights, great powers needed a new framework of doctrines and rules that would protect their nationals' property from government authority (Miles, 2013).

One available source of standards for the treatment of foreigners by governments was the customary law of state responsibility for injury to aliens and their property. Differently from the investment law of today, this body of customary rules did not provide affected individuals with a way to assert their claims directly, either before the host state's courts -that is, the courts of the country receiving the investment- or an international tribunal. The only available mechanism was diplomatic protection from the home country -that is, the foreign investor's country of origin.² Great powers, normally in the position of the home state, grounded the legality of diplomatic

²Although I do not offer an analysis of the appropriateness of the category of 'home state' every time I use it; I am aware of the difficulties involved in determining the home of an investor given that corporate ownership structures have increased in complexity. This has, in turn, contributed to the practice of treaty shopping (Lee, 2015). Thus, when discussing particular arbitration disputes I do not address whether investors have real ties to their claimed nationality unless the issue became a salient aspect of the dispute.

protection on the basis that they had a right recognized in international law to pursue the claims of their nationals against foreign governments that had injured them and seek redress on their behalf. International law allowed this right to be enforced through the use of force, giving way to a period of gunboat diplomacy. While the most common actions taken by home states were diplomatic claims or supranational judicial adjudication, unlike today these took place under the shadow of the use of force. Furthermore, unlike the ISDS system of today, diplomatic protection was always subject to the willingness of the home country to provide it.

Peripheral nations -the most frequent targets of diplomatic protection- disputed the validity of these actions which they perceived as illegal affronts to state sovereignty. Jurists from Latin American and Asian nations toured diplomatic circles contesting the extent to which diplomatic protection could be justified under international law (Lorca, 2014). Later on, these rules got caught in two major international processes: the competition between East and West during the Cold War and the decolonization process. States from the socialist camp disputed international norms grounded on the protection of private property while post-colonial states opposed limitations to their ability to pursue industrialization policies when these affected the interests of foreign investors. The height of diplomatic resistance to such norms came in the 1970s when the United Nations (UN) General Assembly adopted a resolution calling for the establishment of a New International Economic Order (NIEO). The NIEO asserted the principles permanent national sovereignty over natural resources and states' right to regulate their economies for the purpose of development (Sornarajah, 2017). By mid-twentieth century, investors had little guarantees that their host governments would not revise their commitments when they so desired. Earlier rules of diplomatic pro-

tection hinged too much on the willingness of the home country to enforce them and, with the degree of opposition from the socialist and developing worlds, great powers had no interest in continuing to employ forceful measures to protect the claims of private individuals.

Developing nations were not asserting sovereignty over resources and the role of state intervention for development purely as a matter of principle; they had a substantial interest in implementing economic policies that would end up affecting foreign investors negatively. Thus, expropriation and forced renegotiation of contracts were not uncommon (Vernon, 1971). Because the property of their nationals was insecure, home states started to negotiate international treaties to restrict the behavior of host countries. These would be superior to customary law in the sense that they would be clearer, more specific, and most notably, enforceable. These treaty efforts took place at both the bilateral and multilateral levels and gave way to the *treatification* of international investment law (Schill, 2009). In 1959 Germany and Pakistan signed the first international investment agreement.

In agreement with the idea that investment treaties were born to replace the now unviable practice of diplomatic protection, these were mostly signed between European states and former colonies. While bilateral treaties were slowly emerging, states were still trying to arrive at a multilateral set of rules to govern transnational investment within the United Nations. The UN of the 1960s and 1970s was dominated by developing countries (Luard, 2016). This was the era of the NIEO and, keeping with that spirit, developing countries wanted rules to control multinational firms and minimize any negative effects they could have, whether economic or political. Developing countries were virtually absolute capital importers, thus their interest was

purely to adopt rules for corporations and not the other way around. Developed nations were in a different situation. Investment flows between high income states were already governed by a set of instruments adopted within the Organization for Economic Co-operation and Development (OECD). Their investments in developing countries, however, did not enjoy the same level of protection (Sauvant, 2015). For this reason, they were more interested in devising a set of rules for host states than in restricting the operations of firms. With conflicting interests, developed and developing countries started negotiations for the adoption of the United Nations Code of Conduct on Transnational Corporations. Negotiations dragged from 1977 to 1992 with no final success. As time passed and consensus remained unattainable, developed countries concluded the code was outdated. According to a diplomatic memo, the US position was that “the Code is a relic of another era, when foreign direct investment was looked upon with considerable concern...Washington agencies have decided to seek the support of host government officials responsible for foreign investment and quietly build a consensus against further negotiations.” (p. 54). At this point investment treaties were much more common than when negotiations started, and more importantly, the US treaty program was already in full swing. Because these instruments provided developed states with the type of commitments they wanted from host countries in the first place, they lost interest in the Code.

1.1.2 The rise of investment treaties

In the 1980s FDI became the major source of capital for developing countries. Around this time, market-based approaches to economic development became widely accepted (Jandhyala et al., 2011). Governments dismantled barriers to FDI and actively

courted foreign multinationals hoping these investments would generate both economic growth and valuable transfers of skills and technology (Pandya, 2014). One way to signal to foreign investors the attractiveness of a particular location was to sign investment treaties that would guarantee openness and stability (Büthe and Milner, 2009). The network of over 3,000 that is in place today consists mostly of bilateral investment treaties (BITs) but it also includes wider economic agreements containing investment chapters, like NAFTA or the Trans-Pacific Partnership.³

Investment treaties tend to have a similar structure. They establish standards of treatment that host states commit to observe in their relations with foreign investors, like national, fair and equitable, or most favored nation treatment. They also include substantive obligations for the host state, such as a prohibition of expropriation or a commitment to provide freedom of capital transfers.⁴ One of the most singular characteristics of investment treaties is their investor-state dispute settlement (ISDS) mechanism. Investment treaties give a right to foreign investors to initiate disputes against their hosts states before an international arbitral tribunal. Unlike the arbitrations of the early 20th century that required states to consent to each arbitration on a case-by-case basis, investment treaties establish the host state's consent to ISDS arbitration for all future disputes. Furthermore, differently from the dispute settlement mechanism of the World Trade Organization -where states bring disputes against other states- disputes for alleged violations of investment treaties are handled solely between private investors and sovereign states. David Schneiderman (2008) termed the expansion of international investment treaties as the 'constitutionalization' of the

³According to UNCTAD, as of April 2019, 2,932 bilateral investment treaties and 387 economic treaties with investment provisions have been signed.

⁴Chapter 3, section 3 provides a detailed account of the structure of investment treaties and the ways in which alternative drafting choices can affect states' ability to regulate under a given BIT.

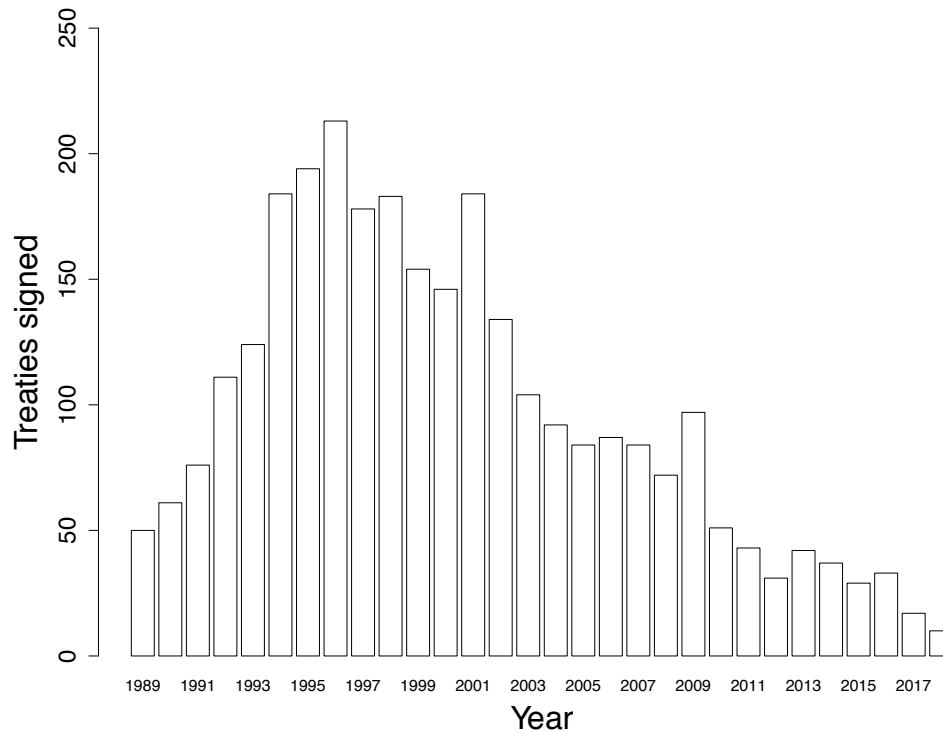


Figure 1.1: Number of treaties signed by year. UNCTAD.

global economy, because of the limits it places on the capacity of states to negatively affect foreign investors and the powers it gives to international arbitral tribunals to review sovereign acts.

Treaty-signing peaked in the 1990s (Figure 3.6). During this period, more than one hundred treaties were being signed each year. Given the high sovereignty costs associated with this system, scholars have puzzled about the willingness of governments to sacrifice their regulatory autonomy by entering into these strict commitments. The mainstream explanation for why states ‘sign treaties that hurt them’ (Guzman, 1997) is that they help governments achieve important objectives, in this case, attracting FDI. By making investors’ rights a matter of international law, states raise the costs

of infringing on those guarantees. In turn, this credibility-enhancing function helps states compete for FDI (Elkins et al., 2006). Other explanations see the expansion of investment treaties as the result of emulation (Jandhyala et al., 2011). Because in the 1990s BITs became a symbol for economic liberalism, states wanting to project that image saw signing investment treaties as something they were supposed to do. Differently, Poulsen (2015) argued that developing states entered into these treaties because, due to cognitive constraints, they miscalculated the costs and benefits that would come from them. Governments overestimated the economic gains from signing BITs and they ignored the risks entirely until they were hit with ISDS claims.

1.2 The ‘backlash’ against investment arbitration

My analysis begins where Poulsen leaves off. I am interested in understating the variety of treaty policies that states put in place after the claims hit. In 1987 a British shrimp farming firm initiated the first even treaty-based arbitration dispute against Sri Lanka. As more and more treaties that gave investors’ access to ISDS were being signed, the number of disputes over alleged violations of these treaties has grown steadily, with a total of 71 arbitrations initiated in 2018 alone (Figure 1.2). Although a minimum level of enforcement is required if treaties are to be meaningful (Büthe and Milner, 2009), some are of the view that the system has gone too far in allowing investors to challenge a much wider array of measures than was initially intended.

Complaints against the investment regime are not just procedural. That is, critics do not simply have problems with the treaties’ enforcement mechanism. The substantive rights and obligations included in the treaties have also been criticized as

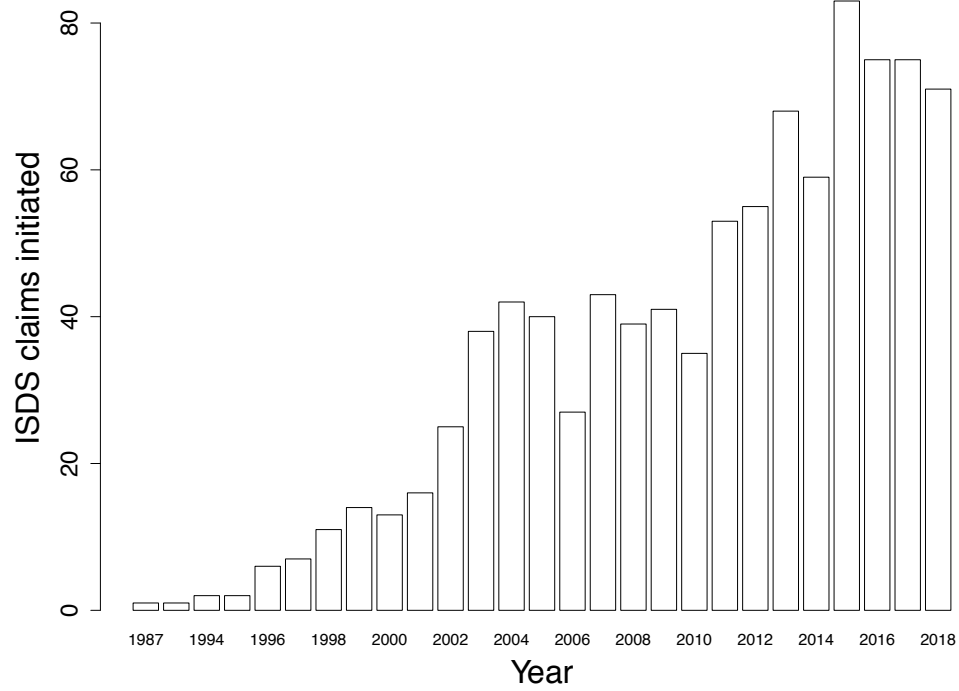


Figure 1.2: Number of new ISDS claims by year. Source: UNCTAD.

excessively in favor of investors. In fact, the commonly raised problems are caused by the combination of both aspects -substantive and procedural. For example, the ability of investors -and only investors- to bring claims against host states is a procedural aspect. This generates perverse incentives for arbitrators whose (well-paid) jobs are dependent on there being cases to arbitrate. For a demand for international arbitration services to exist, investors have to perceive that ISDS serves their interests in some form. At the same time, substantively, investment treaties give rights to investors and obligations to states. Existing treaties are, for the most part, vaguely worded and this has provided arbitrators with great discretion in their interpretation. As one Argentine state official put it, “no state that signed BITs in the 1990’s could have foreseen what the interpretation of those treaties was going to be in the decade of the 2000s.”⁵ It has been argued that at the jurisdictional stage (when arbitrators consider whether the tribunal has authority to hear the case) tribunals tend to interpret definitions of ‘investor’ and ‘investment’ extensively (Van Harten, 2012; Kahale, 2018). Moreover, Pelc (2017) argues the investment regime has gradually moved away from direct expropriation as the most commonly adjudicated offense towards indirect expropriation through different policy measures, including environmental and social regulations. As corporate lawyers became savvy users of ISDS, governments found themselves immersed in costly litigation battles for actions like terminating the lease of an airport duty free store; imposing a tax on soft drinks that use high fructose corn syrup as sweetener; requiring offshore petroleum operators to dedicate a percentage of their profits to research and education; and passing legislation to increase the minimum wage.

The costs associated with ISDS disputes are varied. For starters, sustaining liti-

⁵Interview I.

gation efforts is expensive. According to a study by lawyers from the firm Allen & Overy of publicly available cases released up to 2017, the average respondent costs (i.e. fees and expenses of counsel, experts and witnesses) are USD 4,855,000 (Hodgson and Campbell, 2017). If states lose the disputes, awards can be pricey. In the *Occidental v. Ecuador* case, for example, the American claimant received 2.3 billion dollars. While not all awards reach this magnitude, they represent significant amounts of money nonetheless. There is also evidence that FDI inflows suffer when arbitral disputes ensue (Allee and Peinhardt, 2011). Furthermore, there is the potential cost of foregone regulations. It is argued that the expected financial and political costs of being immersed in ISDS disputes have a deterrent effect on states, who end up foregoing regulations when they expect (and in some cases, are explicitly threatened⁶) to be challenged before arbitral tribunals, a phenomenon often referred to as ‘regulatory chill’ (Tienhaara et al., 2009).

As claims continued to accumulate, a wide array of voices started to express their dissatisfaction. From Hillary Clinton who in her 2008 campaign promised to “take out the ability of foreign companies to sue us because of what we do to protect our workers”⁷; to late Venezuelan President Hugo Chávez, who claimed the system worked in tune with the interests of the American empire.⁸ These increasingly ubiquitous assertions have made the investment regime one of the most controversial areas of international law. As put by Anthea Roberts, “many states view investor-state arbitration

⁶A government official in Ottawa is quoted recounting many instances of legal threats: “I’ve seen the letters from the New York and DC law firms coming up to the Canadian government on virtually every new environmental regulation and proposition in the last five years. They involved dry-cleaning chemicals, pharmaceuticals, pesticides, patent law. Virtually all of the new initiatives were targeted and most of them never saw the light of day.” Quoted in *Investor protections in NAFTA are one manifestation of a broad, backdoor effort to restore the primacy of property against society’s broader claims.* (15 October 2001). *The Nation*.

⁷*The Democratic Debate in Cleveland*. (26 February 2008). *The New York Times*.

⁸*Evo Morales plantea buscar fórmula para neutralizar el CIADI.* (29 April 2007). *El Economista*.

as akin to a horse that has bolted from the barn” (2018, 410). A broad discussion is underway -among governments, civil society groups, international organizations and scholars- about how the international investment regime can be improved (Puig and Shaffer, 2018). This growing backlash, however, has already moved beyond rhetoric (Simmons, 2014). States have started to be more mindful of the ways in which treaties constrain their legal autonomy to regulate foreign investment. In some cases, they have even started to recover some of that autonomy from international investment treaties.

1.3 What does ‘backlash’ entail?

Common in political discourse and academic literature is the notion that the international investment regime is experiencing backlash. Furthermore, it is understood that at the center of this backlash is the belief that international investment treaties unduly restrain states’ ability to regulate in the public interest (De Mestral, 2017; Morosini and Badin, 2017; Waibel, 2010; Sornarajah, 2015; Van Harten, 2013). This raises a simple but crucial question: what does ‘backlash’ actually entail? What kind of state actions are included under the large conceptual umbrella of backlash? And given that a concern with states’ ability to regulate is at the center of the discontent, to what extent do alternative policy reactions affect states’ level of commitment to the international investment regime?

To answer these questions, I consider policy reactions in terms of their overall effect on a country’s international legal autonomy to regulate foreign investment. By international legal autonomy I refer to the degree of legal constraints that international investment treaties place on a given state in relation to its treatment of foreign

investors in its territory. A state that has never entered into an investment treaty has maximum international legal autonomy because no treaty creates obligations regarding its treatment of foreign investors. As states sign BITs with other countries, their legal autonomy decreases. However, a country that has signed BITs with absolutely every country in the world has not lost its legal autonomy entirely. Investment treaties vary substantially in terms of the rights they provide to investors and the obligations they impose on states. Thus, a country’s international legal autonomy (ILA) depends on the number of the treaties it has committed to as well as their content.⁹

I am interested in understanding how the treaty policies that states put in place in reaction to their ISDS experiences affect their overall ILA. Recent work in IPE has found that involvement in investment disputes can lead to a variety of state actions that affect a country’s legal autonomy in different ways. For example, Poulsen and Aisbett (2013) argue that developing states who face arbitration disputes sign lower numbers of treaties. However, treaties are still being signed. Per UNCTAD figures, in 2018 states signed 41 investment treaties. At the same time, recent treaties are different from the ones signed in the 1990s and early 2000s when arbitral disputes were not commonplace. According to UNCTAD’s Investment Division, “(t)oday’s reform-oriented treaty making is in striking contrast to treaty making at the turn of the millennium” (2018a, 3). Supporting this view, Manger and Peinhardt (2017) find that treaties have become more precise because states’ have learned from their experience with ISDS that open-ended and vague provisions can be interpreted broadly by arbitrators. Furthermore, Haftel and Thompson (2018) argue that states with a

⁹Chapter 3 expands on the concept of international legal autonomy and presents an empirical measure of state-level ILA.

great deal of ISDS experience are more likely to renegotiate their treaties. And when they do, they tend to replace them with treaties that better preserve their ability to regulate (Broude et al., 2018). While in general treaty-making preferences have shifted towards provisions that better safeguard host states’ regulatory space; there is still significant variation in treaty texts. For example, some new models born out of states’ experiences with arbitral disputes continue to provide for ISDS (United States); others do not (Australia); and others severely limit the conditions under which investor can reach arbitration (India).

While available work on the consequences of ISDS experience is helpful, considering these actions in isolation cannot tell us whether states’ ILA increases or decreases as a result and to what extent. For example, states that keep signing BITs in the aftermath of ISDS disputes continue to lose their ILA to investment treaties. However, by signing more precise BITs countries lose less ILA than if they sign traditional, open-ended treaties (Manger and Peinhardt, 2017). At the same time, if these more ILA mindful treaties are actually replacing old and less ILA friendly BITs (Broude et al., 2018), states are actually increasing their international legal autonomy as a result. I improve on this research by offering an alternative -and more empirically valid- conceptualization of state reactions that accounts for combinations of these behaviors. In doing so, I join an emerging group of scholars trying to make sense of the different state strategies that constitute this backlash (Roberts, 2018; Puig and Shaffer, 2018; Langford et al., 2018). My conceptualization probes policy responses to ISDS on two dimensions. The first dimension is future-oriented and it refers to what states do about signing new treaties: do they keep signing the old type of pro-investor BITs, do they adopt new treaty templates, or do they refrain from signing

treaties. This dimension indicates how much ILA states are willing to compromise in the future. The second dimension is past-oriented and it refers to states’ preferences towards their existing treaties: do they keep them or do they get rid of them. This dimension indicates how much ILA states are attempting to take back from their existing network of BITs.

So far my treatment of policy variation has been mostly anecdotal. In the rest of this section, I dive into this variation analytically.¹⁰ Before doing so, I should note that states’ experiences with ISDS will not necessarily be perceived as equally negative. What counts as negative is subjective. However, by negative experiences I mostly refer to two situations. (a) When a country has been hit with multiple ISDS lawsuits in a short period of time. For example, Argentina was hit heavily with arbitral claims for the emergency measures adopted during its 2001 economic crisis. The total number of ISDS disputes against Argentina went from 8 in 2001 to 45 in 2005. Or (b) when a country faced a particularly controversial dispute, either due to the amount of money awarded to investors or because it challenged a particular policy or regulation that powerful constituencies felt strongly about. The most clear example of this type of dispute is *Piero Foresti v. South Africa*. The Italian owners of a mining firm headquartered in Luxembourg claimed that the black economic empowerment laws that required the company to divest 26% of its investment was a violation of South Africa’s international investment treaties.¹¹ This was South Africa’s first known ISDS dispute yet was enough motivation for the government to

¹⁰As scholarly interest on the backlash against investment arbitration spiked in recent years, other conceptualizations of state behavior have emerged (See for example Puig and Shaffer, 2018; Roberts, 2018; Langford et al., 2018). There is no correct way to make sense of empirical variation, as it can be done according to different criteria depending on specific research questions. That said, existing work has been done mainly by legal scholars and has remained, for the most part, descriptive.

¹¹*Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01.

order a review of its entire treaty network and to eventually terminate all of its BITs (Schlemmer, 2015).¹²

In my framework, states answer two questions when considering how to react to costly ISDS disputes. An important reminder, I explain policy *reactions* to ISDS. I am interested in how much policies change as a consequence of arbitral disputes. Thus, I consider post-ISDS policies in terms of how much they deviate from pre-ISDS ones. The first question is how much legal autonomy are they willing to compromise in the future *in comparison to* how much they would be compromising if their current treaty practice remained in place. Second, how much legal autonomy are they trying to recover *from their current* involvement with international investment treaties. States’ answers to both of these questions will guide the scope of changes to existing treaty policies. To assess those changes, each policy reaction needs to be examined on two dimensions along which it can fall at some point between continuity and change.¹³

1.3.1 How much international legal autonomy to compromise?

This first dimension refers to what states do about signing new treaties. To keep signing the same types of BITs occupies the *Continuity* end of the spectrum. By ‘old’

¹²Other examples of controversial disputes are the Philip Morris v. Australia and Philip Morris v. Uruguay cases for alleged violations of intellectual property rights after both governments adopted plain packaging laws as part of anti-smoking campaigns.

¹³I make an important assumption here. The only options for states are to continue their present policies or to change to policies that provide more international legal autonomy for the state. That is, I do not consider the possibility of states changing their treaty policies towards more pro-investor ones. This could be possible in theory and, in fact, China started to sign more pro-investor BITs in the late 1990s (Schill, 2007). However, this is related to China being a late adopter of the old models and not a response to ISDS since the first dispute against China was filed in 2011. Since it is highly unlikely that a state would switch to more pro-investor models in the aftermath of controversial ISDS experiences, I do not theorize that possibility.

BITs I refer to the typical treaty from 1990s, the expansion period in the investment regime. In relation to more recent treaties, these were in general markedly pro-investor. Among other characteristics, they lacked in precision which meant that arbitrators could interpret them expansively; they rarely contained exceptions for state obligations; and they provided unrestricted access to investment arbitration (Spears, 2010). On the *Change* end of the spectrum lies the decision to not sign any new investment treaties.

In between these two extremes, states can continue to sign treaties but basing them on different models. Where on this dimension the new models fall depends on how much of a break from the old BITs they represent. That is, the new models can include moderate or major changes. Major changes mean the treaty is rid of fundamental provisions from the older BITs or that it incorporates new elements that investors dislike strongly. For example, regarding substantive issues, models that do not offer any of the traditional standards of treatment -especially Fair and Equitable Treatment (FET)- are major breaks from the past.¹⁴ Similarly, treaty templates that include multiple, mandatory and enforceable investor obligations also represent a substantial change.¹⁵

¹⁴The obligation to provide fair and equitable treatment to foreign investors is one of the most common standards of treatment in international investment law (Grierson-Weiler and Laird, 2008); 2,440 of the 2,571 treaties in UNCTAD’s treaty database include it. To date, ISDS claimants invoke breaches of FET standards more than any other breach in their suits. Of the 553 ISDS disputes for which alleged breaches are known, 459 list the FET standard among the clauses violated by the respondent state. FET, in contrast to other standards of treatment like most favored nation (MFN) or national treatment (NT), has an absolute quality. MFN treatment is determined in relation to the treatment provided to firms from other nations. NT is measured against treatment provided to national firms. The terms of FET, however, need to be determined by reference to specific circumstances. The frequency with which FET has been invoked required tribunals to repeatedly weigh in on the meaning of the standard and states have been unhappy with the result, claiming interpretations have gone beyond the intentions of the drafters.

¹⁵Discourse surrounding investment treaty reform efforts is often talked about as a ‘rebalancing’ of instruments that have traditionally been tilted in favor of investors. Investment treaties are long lists of investor rights and state obligations and only investors can start ISDS claims. Thus, no

Procedurally, a model not providing for ISDS, making it conditional on the exhaustion of domestic remedies, or requiring consent to arbitration on a case-by-case basis would represent a major break from the past. For example, in 2013 Brazil developed a model which does not include ISDS and only allows for state-to-state dispute settlement (Maggetti and Choer Moraes, 2018; Campello and Lemos, 2015, see). Brazil has a fundamental problem with traditional BITs because ISDS gives rights to foreign investors that national investors do not have.¹⁶ Unlike other known problems of ISDS, i.e lack of transparency or arbitrators’ conflicts of interest, this cannot be solved through targeted reforms. A treaty either does provide for ISDS or it does not. “From our perspective, ISDS is intrinsically flawed. No reforms would be enough to redeem the system...the best solution is simply throw it out of the window and use something different,” Brazilian delegates expressed during current talks about investment arbitration reform (quoted in Roberts and Bouraoui, 2018b).

Conversely, moderate changes do not affect fundamental principles of BITs. Most importantly, these models maintain direct access to international arbitral tribunals but introduce an array of definitions, carve-outs, exceptions and limitations that reduce the scope of state actions that investors can challenge through ISDS. For example, Canada has tweaked its model BIT in different occasions yet has never eliminated ISDS. It has rather addressed problematic issues through targeted fixes like introducing transparency to arbitral proceedings, developing mechanisms to screen out frivolous claims at an early stage, and imposing rules on arbitrator conflicts of interest, qualifications and ethics (De Mestral and Vanhonnaeker, 2017). The EU’s

element could work more towards a rebalancing treaties than the inclusion of enforceable investor obligations (Bjorklund, 2013; Dumberry and Dumas-Aubin, 2012; Mann et al., 2005). However, these remain rare and are one of the most resisted elements by firms.

¹⁶Interview X (Brazilian diplomat).

approach started in a similar way but has evolved to a proposal for an international investment court. Unlike ad hoc arbitral tribunals, this court would be permanent and would have an established bench of judges. But private investors would still have access to it directly, making it a form of ISDS (Titi, 2016). In this sense, while both approaches retain ISDS, the EU would be closer to the *Change* end of the spectrum than the Canadian model. In terms of changes to a country’s international legal autonomy, where a policy falls along this dimension ranges from not sacrificing legal autonomy any further from compromising as much as it has been done in the past. In between these two alternatives, different types of revised treaty models compromise more or less autonomy depending on their content.

1.3.2 How much international legal autonomy to recover?

The second dimension refers to states’ behavior towards their existing treaties. The principle of *Pacta sunt servanda* (agreements must be kept) represents the *Continuity* end of this dimension. Logically, the least break with the past is to keep all previous treaties intact. On the opposite end of the spectrum, terminating all existing BITs represents the greatest degree of *Change*. It is possible that states’ behavior falls somewhere in between if they decide to terminate some treaties and not others. For example, Venezuela terminated its BIT with The Netherlands in 2008 and left the International Centre for Settlement of Investment Disputes (ICSID) in 2012 but has not terminated any other treaties since. These two terminations are significant nonetheless. The Dutch BIT had been particularly dangerous for Venezuela since many energy firms routed their investments through corporations incorporated in

The Netherlands.¹⁷ Terminating the ICSID convention, while it does not extinguish rights contained in BITs, means foreign investors have to take their ISDS claims elsewhere.¹⁸

Another intermediate position is to keep the treaties and either amend certain clauses or adopt interpretative understandings. Amendments modify the content of an existing treaty by introducing new provisions or altering or removing existing ones. For example, Singapore and Australia revised the investment chapter of their trade agreements to, among other things, add exceptions to ISDS.¹⁹ Interpretative understandings clarify the content of a treaty and narrow the scope of interpretive discretion of tribunals. For example, Colombia and Singapore issued a joint interpretative understanding that clarified several provisions of their BIT, including the FET and most favored nation clauses (UNCTAD, 2017, 10).

In relation to states’ actions towards their existing treaties, I should be explicit about where treaty renegotiation fits within this scheme. States can discard old treaties in two different ways: unilateral termination and renegotiation. For states that are still willing to sign treaties, renegotiation and termination can ultimately lead to the same result. When this is the case, whether they end up terminating unilaterally or renegotiating with the consent of the other party generally depends on the attitude of their treaty partners. For example, if country A in a dyad would prefer to renegotiate the treaty but country B is satisfied with the terms of the current agreement, B can simply refuse to renegotiate. For example, after receiving eleven arbitration notices in 2016, Colombia drafted a new model BIT that would guide

¹⁷Venezuela surprises The Netherlands with terminations notice for BIT; treaty has been used by many investors to “route” investments into Venezuela. (16 May 2008). Investment Arbitration Reporter.

¹⁸See Chapter 5 for a detailed explanation of the significance of leaving ICSID.

¹⁹Agreement to Amend the Singapore - Australia Free Trade Agreement. 13 October 2016.

future negotiations but should also replace existing treaties. In this regard, Colombia opted to take the renegotiation route and “always [look] after the consensus of the other State in the game.”²⁰ However, while a Colombian official noted his government was working on replacing its two oldest BITs, any progress on that front ultimately depended on the partners. “One of the countries has been very receptive...The other one is still pending”, noted the official.²¹

However, if A unilaterally terminates the treaty, then B will have a stronger incentive go back to the negotiating table because B’s investors in A will eventually become unprotected and will remain so until a new treaty is signed. For example, Indonesia was not as concerned as Colombia with first attaining the consent of its partners when it announced it would end its bilateral treaties before adopting a new model to replace them.²² In sum, regarding past treaties, renegotiation and unilateral termination are two ways to no longer be bound by certain BITs. That said, I treat unilateral termination as more indicative of ‘Change’ because the fact that a country is not willing to wait for all its partners to accept the renegotiation is a stronger indicator of a desire to break with the past. Moreover, while states can terminate a large number of BITs at once, even resourceful governments do not handle more than a couple treaty negotiations at the same time. Thus, large-scale renegotiation is more gradual and this also indicates lesser urgency to be rid of BITs. In sum, in terms of changes to a country’s international legal autonomy, where a policy falls along this dimension ranges from not recovering any legal autonomy -if all existing BITs remain

²⁰Remarks by Samuel Trujillo (Attorney, Directorate of Foreign Investment and Services, Ministry of Trade, Colombia) at the 11th Annual Forum of Developing Country Investment Negotiators held in Nairobi, Kenya, 2018. P. 21.

²¹Ibid.

²²As Indonesia reconsiders its investment treaties, arbitrators don’t want to slow down mining case by separating liability and damages phases. (28 April 2014). Investment Arbitration Reporter.

in place- from restoring it completely -if all treaties are terminated. In between these two extremes, terminating some BITs but not others or replacing them with updated treaties (as long as they are more deferential to states’ ability to regulate) translates into varying degrees of recovered ILA.

Combining these two dimensions it is possible to assess the true impact of policy reactions on states’ level of involvement with the international investment regime. Both dimension should be considered together because policies that involve comparable approaches to future treaties can affect a country’s legal autonomy differently depending on their approach to past treaties. Consider four distinct policies as represented in Table 1.1. If a country’s ILA could be quantified as ranging from 0 to 1, policies A and C are identical in terms of approaches to future BITs. Both countries decided to not sign any more treaties. Policies B and D are also identical. Both revised their treaty models so that their next BITs would only represent a .2 compromise of ILA, instead of, for example .4 as with their current models. At the same time, A and C are markedly different regarding what they decide to do regarding their old BITs. Policy A involves the termination of a series of BITs, which has a positive effect on the country’s ILA. In this regard, A is comparable to B. Differently, policy C leaves the existing treaties untouched and thus has no impact on the country’s ILA. In this dimension, C is equal to D. The last row indicates the change in each country’s overall legal autonomy *vis a vis* international investment treaties as a result of their policies. It is the combined effect of both future- and past-oriented decisions what determines the magnitude of the change. Available research on state reactions to ISDS tends to consider these behaviors in isolation focusing, for example, on the relationship between ISDS disputes and treaty drafting, the content of renegotiated

treaties or the number of treaties signed. I improve on this work by offering an alternative -and more empirically valid- conceptualization that accounts for combinations of these behaviors.

	A	B	C	D
Future-oriented actions	0	-.2	0	-.2
Past-oriented actions	.4	.4	0	0
Resulting ILA change	+.4	+.2	0	-.2

Table 1.1: ILA change as a result of policy reactions

1.3.3 The outcome of interest: changes in international legal autonomy

Considering how policy reactions to ISDS vary along *both* of these dimensions they can be placed along a single space representing the change in international legal autonomy that comes as a result of implementing such policies. Figure 2.1 visualizes this space. Since I am explaining reactions to ISDS experience, the starting point is a situation in which states are already embedded in the system of investment agreements. Otherwise, investors would have not had the legal means to initiate the claims in the first place.

From this starting point, status quo policies represent a negative change in legal autonomy. As states preserve their old BITs and continue signing treaties over the

same pro-investor models, they keep losing autonomy to the regime (- -). Adherence to the status quo in the face of costly ISDS disputes is rare. While most treaties do remain in place -of the 2,611 bilateral investment treaties that have entered into force in UNCTAD’s treaty database, only 265 have been terminated- states have changed the content of the treaties they have signed over time, even if merely as a result of demands from the other negotiating party or by mindless emulation as investment treaty reform became more prominent. Figure 1.4 shows how the content of BITs signed between 1989 and 2016 scores in terms of how much “state regulatory space” it provides to its parties. Regulatory space is understood as the ability of a state to freely adopt policies and regulations that might affect foreign investors without violating the treaty Broude et al. (2019).²³ Higher values represent more ability to regulate and lower values represent less policy autonomy under the treaty.²⁴ The shape of the marker indicates ISDS experience. Dots indicate that neither treaty party has faced any ISDS disputes and triangles indicate that at least one of the signatories has been sued at least once. The figure suggests an upward trend over time towards treaties that better preserve states policy autonomy. Yet some treaties still take values comparable to those of the most pro-investor BITs signed in the 1990s.

On the other end of the spectrum are policies of Exit. By cancelling all their BITs and not signing new ones, states set off to recover their entire legal autonomy *vis a vis* investment treaties. This is the maximum possible positive change (+ +). For

²³I calculated regulatory space scores for all treaties in my dataset using Broude et al. (2019) coding guidelines. The authors have so far only examined re-negotiated treaties; thus, only scores for that sub-set of treaties are available from their research.

²⁴For example, all else equal, BITs that do not include ISDS score higher than those that do, and among the latter, those that specify policies that cannot be challenged through ISDS score higher than those that do not limit the scope of state measures that can be brought before an arbitral tribunal (see Chapter 3 for a detailed explanation of this measure).

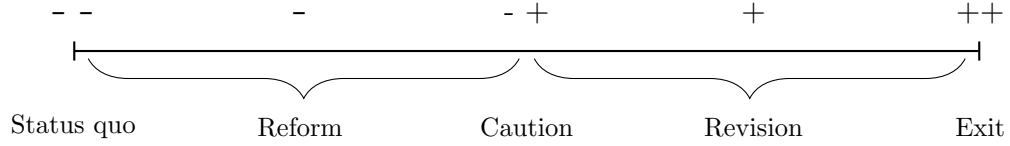


Figure 1.3: Change in international legal autonomy as a result of policy reactions

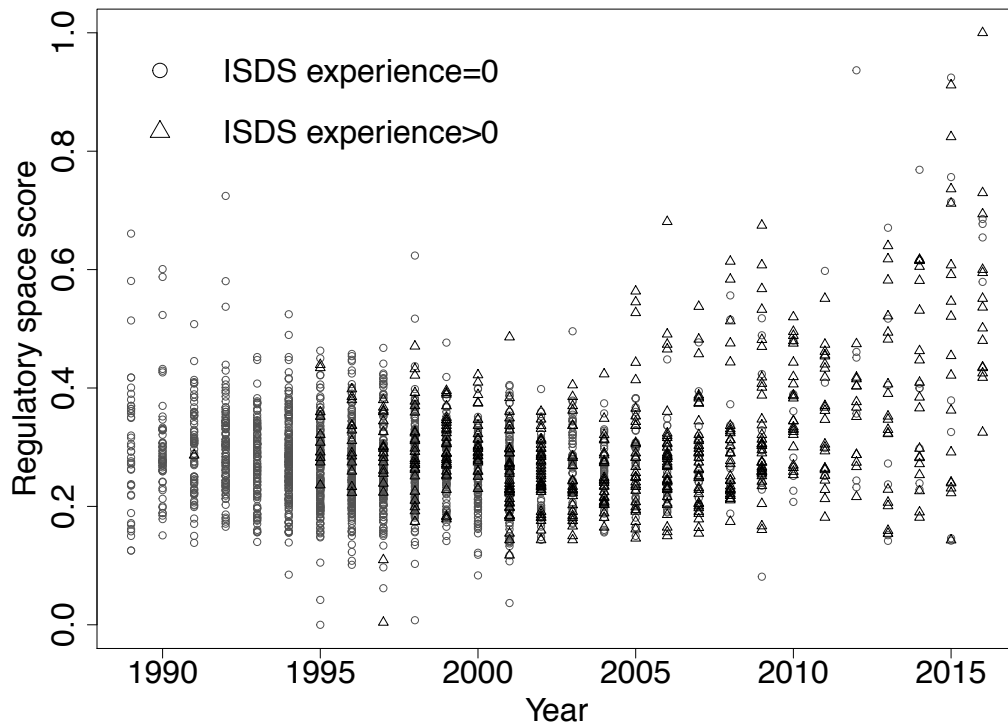


Figure 1.4: Regulatory space values for treaties signed between 1989-2016 by parties with ISDS experience. Calculations are my own using coding guidelines from Broude et al. (2019).

example, by 2014, Bolivia had denounced its twenty-one BITs and has not signed any new ones since.²⁵ Another exponent of this approach is South Africa. After terminating a dozen investment treaties with capital exporting states, South Africa adopted a domestic regulatory framework under which foreign investors only have recourse to domestic mediation and courts.²⁶ Complete exit policies are also rare. For now, only Bolivia under Evo Morales, Ecuador under Correa, and South Africa under Zuma fit this label. Even these states still declared at points they were not opposed to signing new treaties in the future. However, as long as states terminate all their BITs and do not make efforts to sign any new ones, I consider their policies as exits.

In the middle point are policies of caution. States do not recover legal autonomy -they keep their treaties in place- but they do not compromise it further either as long as they do not sign more treaties either (- +). For example, the Kirchner administrations in Argentina proceeded with caution after being hit heavily by investors for the economic measures taken during the 2001 economic crisis. For as long as they were in power -twelve years- Argentina did not sign any new BITs and did not terminate any of its existing ones either.²⁷ An official from the Argentine Attorney General’s office illustrated the government’s reaction to ISDS with a common Argentine say-

²⁵The timing of terminations is a complex issue because of two design elements commonly found in BITs. First, most treaties have initial duration periods during which they cannot be terminated. Second, they generally include sunset provisions that specify how many years the treaty continues to have effects after its termination. I focus on the implementation of a policy that will eventually lead to a termination, even if its legal effects are not immediately felt. For example, while some agreements that Bolivia took steps to terminate are still binding, what matters is that -in the words of the Bolivian Deputy Minister for Trade- “our understanding is now that we do not have bilateral investment agreements” (quoted in Orellana Lopez, 2014).

²⁶Protection of Investment Act, 2015.

²⁷Except for the BIT with Indonesia which was terminated by mutual consent but the initiative came from the Indonesian government’s own policy of termination *en masse*.

ing: ‘if you burn yourself with hot milk, you cry at the sight of a cow.’²⁸ Another example of caution can be found in Norway. A public consultation on a draft model investment treaty in 2007 and 2008 ended in the government shelving the text entirely (Vis-Dunbar, 2009). Since then, Norway has not signed any new BITs.²⁹

The space between these three points is occupied by what I refer to as reformist and revisionist policies. Because reformist policies imply states continue to sign treaties but do not seek to get rid of their existing ones, they do not recover or even preserve a country’s legal autonomy. However, by signing on the basis of reformed treaty models, less autonomy is compromised than if they had continued to sign BITs under their previous templates (-). Revisionist states terminate their old treaties and replace them with significantly more pro-state ones, leading to a recovery of legal autonomy, albeit not to the degree of states that exit the regime (+). While a revisionist policy leads to a positive change in legal autonomy and a reformist one represents a negative change, different points within each space also imply varying magnitudes of negative and positive changes.

Most policy reactions tend to fall within the revision and reform sections of the scale. Proponents of reformist policies tend to acknowledge problematic aspects of the investment regime but also reflect a conviction that those can be addressed with targeted reforms and that the overall system is better than the alternatives. Reformist policies also do not attempt to ‘shake things up’ by terminating large amounts of treaties at once. Their energy is geared more towards the future. One example of reformist policy can be found in Nigeria. In 2016, the government developed a

²⁸Interview I.

²⁹Norway has signed several free trade agreements as part of the European Free Trade Association but these only touch on investment liberalization. Investment protection issues are left to the BITs of individual states.

new model BIT that has been used as a template in subsequent negotiations and is reflected in the 2016 Nigeria - Morocco BIT. In general, the BIT’s substantive provisions reflect consolidated treaty practice and it also provides access to ISDS (Gazzini, 2017). However, the agreement also includes novel elements in terms of investors obligations with respect to, for example, environmental and social impact assessments, anti-corruption, labour standards, human rights and Corporate Social Responsibility. But the degree to which these obligations are enforceable is unclear.³⁰ In terms of past treaties, Nigeria has not terminated any of its existing BITs.

Another example of reform comes from Canada. Claims under NAFTA’s ISDS mechanism have had profound effects on Canadian investment treaty policy (De Mestral and Vanhonnaeker, 2017; Lévesque, 2007). Treaties have become more precise over time. The most recent BITs reaffirm the host state’s ‘right to regulate’, include public health, environmental and other public policy exceptions and require all ISDS proceedings and documents to be public. However, Canada remains a staunch supporter of ISDS.³¹ At the same time, Canada has not attempted to terminate any of its past treaties.³²

Like reform advocates, states pursuing revisionist policies are not against regulating FDI via international investment treaties. Rather, they have problems with the specific form of international investment law that has developed under the cur-

³⁰It is not clear who can bring such an action against the investors and if (besides charges of corruption), other breaches of the obligations can be enforced in the courts of the host State (Nweke-Eze, 2017).

³¹During the 2018 International Investment Agreements Conference organized by UNCTAD in Geneva, the representative of Canada stated in his intervention that “countries that are terminating treaties are coming forward with models that our investment community does not want. They still need ISDS to back up commitments included in the treaty.” Field notes.

³²The elimination of ISDS in USMCA (the renegotiated NAFTA) was an initiative of the United States. Canada and Mexico agreed to do so because both are members of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) which offers many of the same protections accorded to investors under NAFTA.

rent investment regime. A revision of the regime entails revisiting its fundamental goals. Investment treaties have traditionally been conceived as mere instruments of investor protection. Alternative views argue economic agreements should rather be thought of as instruments of sustainable development. This change is meaningful. As instruments of investor protection, treaties perform a function which is to restrict host state interference with the way markets allocate wealth. The goal of sustainable development might at times require such intervention and BITs, in their traditional form, hinder states’ ability to do so. Revisionist states do two things. They develop alternative treaty models and they look to replace old treaties with them. For example, after a costly arbitral dispute with a mining firm, Indonesia adopted a revisionist policy. The government announced in 2014 that it would discontinue all of its existing treaties.³³ Then President Yudhoyono referred to the BITs as “contracts with foreigners of 20 or 30 years ago [that] turn out to be inappropriate and unjust” (quoted in Price, 2017, 125). The government also announced it would adopt a new treaty model that would be compatible with pursuing national development goals. An article authored by the Foreign Affairs official in charge of economic agreements reported Indonesia was considering excluding the provision on indirect expropriation and making investors’ access to ISDS subject to case-by-case consent of the host state (Jailani, 2015).

The distinction between revision and reform is based on both policy dimensions. Regarding the future, both reformist and revisionists are willing to keep signing BITs. However, revisionist treaties deviate further from old, pro-investor models than reformist treaties. In terms of past treaties, revisionists terminate their treaties unilat-

³³According to UNCTAD data, as of April 2019 twenty-six BITs are effectively terminated as a result of this policy.

erally, without necessarily waiting for their partners to be on board. The further a retooled treaty model deviates from the status quo, the greater the gains in terms of ILA that come from ditching old treaties. Reformists either preserve their old BITs or replace them gradually through renegotiations. That is, reformists do not act without the consent of the other treaty parties. This condition makes discarding old BITs a much lengthier process and, given that reformist models do not deviate greatly from the status quo, the increase in ILA that might come from a renegotiation is unlikely to compensate the loss of autonomy that comes from entering into moderately tweaked BITs.

Within this framework, nothing precludes a country from developing a very progressive treaty model, for example one that does not provide for ISDS, while at the same time not terminating any of its existing BITs. This is what Australia did immediately after its disputes with Philip Morris. However, in practice radical new models tend to be accompanied by large scale terminations, as in the cases of India and Indonesia. It is logical that they would. If states have urgency in disengaging from their old BITs to the point that they will not wait until a renegotiated treaty is agreed to by both parties, they must consider them to be deeply flawed. Thus, they will not be willing to enter into new treaties unless they find ways to address all those problems. At the same time, if states think targeted reforms to their models are enough to fix the perceived problems, then existing treaties must not be costly enough to make getting rid of them a policy priority.

In sum, in the aftermath of ISDS disputes states can put in place different policies. These policies vary in terms of the past-oriented actions -what are states doing with old, costly BITs- and also in terms of the future -what types of BITs, if any, are states

willing to sign. This way of thinking about policy reactions improves on available work because it accounts for meaningful combinations of behaviors that so far had been studied in isolation. This allows me to compare policies in terms of how much they deviate from the status quo and thus how much of their lost international legal autonomy are states attempting to recover. That is, after all, the crucial question for the future of the international investment regime.

1.3.4 The importance of understanding the backlash

Variation in states’ policy reactions to arbitration is not only empirically puzzling; it is politically relevant as well. In 2018 only, foreign investors initiated 71 new ISDS disputes. As the number of claims continues to grow, governments, civil society organizations (CSOs), firms and the community of arbitration lawyers keep debating about the future of ISDS in investment treaties. Case in point, the United Nations Commission on International Trade Law (UNCITRAL) has recently launched multilateral talks over ISDS reform.³⁴ Whether states continue to endorse supranational dispute settlement mechanisms is a pressing question, given the recent rise in the number of governments elected on nationalist platforms. At the same time, a move towards domestic jurisdictions raises another set of relevant questions in light of signs of political interference with the judiciary, mostly from Central and Eastern Europe.

There are also normative stakes in the answers to these research questions. Policy alternatives can be traced to divergent views of what the underlying goals and principles of the international investment regime should be. The international investment regime of today has been built on two complementary distinctions. The first one is

³⁴In the concluding Chapter I examine these ongoing talks in light of the dissertation’ findings.

a distinction between the logic of markets and the logic of politics. Starting from a fundamental “distrust of public authority” (Schneiderman, 2017, 131), decisions about the establishment and management of foreign investments should thus be governed by the former rather than the latter. In this sense, the function of investment treaties was “to depoliticize investment matters by placing the protection of private investment under an apolitical legal regime” (Vandevelde, 1993, 161). The second distinction is that between domestic *politics* and international *expertise*. Given that domestic legal regimes could not be trusted to remain apolitical, international experts are charged with keeping public power in check so that economic forces can operate freely (Kennedy, 2018). Thus emerged an equivalence: to depoliticize meant to internationalize. Following this imperative, states began to provide foreign investors with an exit from domestic legal processes by allowing them to challenge (politically motivated) sovereign acts before international tribunals. Yet the system of international investment arbitration is anything but apolitical. As put by Martti Koskenniemi,

“ISDS is not only a small (indeed very small) group of experts floating freely in the international air as ‘neutral’ adjudicators of formally equal claims but part of a historically specific complex of ideas about government and democracy held by influential elites today that has enormous consequences for the distribution of material values among and between societies.” (2017, 347)

Thus, for many stake-holders, opposing ISDS is tied to opposing the ‘complex of ideas about government and democracy’ that gave it rise. In recent years, the value and the legitimacy of insulating markets from politics has been challenged. The international investment regime -itself an effort to isolate markets from local political

contestation over the distributional consequences of those markets- has experienced these challenges in full force. Once created to alleviate foreign investors' distrust of governments, ISDS has fueled public distrust in a regime that allows the conditions of local lives to be decided by removed experts in faraway rooms and in foreign languages. Furthermore, especially for developing states, the once-held view that participating in the investment regime would allow them to attract FDI is now only referenced in international conferences as a reminder of an unfulfilled promise. Given the political stakes behind pursuing different policies, understanding the possibilities and limits of these alternative governance projects is crucial.

1.4 The argument in brief

In a recent article in the *American Journal of International Law*, Sergio Puig and Gregory Shaffer survey the landscape of reform proposals for investment arbitration and conclude by warning against one-size-fits-all solutions. They argue that “policy-makers and scholars should recognize that countries face a range of contexts -in terms of capital endowment, market size, ideology, institutional development, and historical legacy- and that these contexts will affect their institutional choice” (2018, 362). This assessment fits hand-in-glove with my argument. In explaining responses to investment arbitration, I focus on how the interaction of such factors makes some policy choices more likely than others.

My theoretical starting point for explaining why countries pursue alternative policies in the aftermath of negative ISDS experiences are the ideas -worldviews as well as principled and causal beliefs- held by government actors. I treat ideas as a lens through which political actors filter their experiences with investment arbitration,

diagnose what went wrong and develop plans for avoiding similar setbacks in the future. For example, the set of beliefs that political actors -individual or collective- hold makes them more inclined to perceive a contrary arbitral ruling as one of three things. One possible diagnosis is that the respondent state lost because it put up a bad legal defense in court. Another diagnosis is that the applicable law -in this case a BIT- favored the investor by, for example, allowing the claimant to import a more favorable provisions from another BIT through the most favored nation clause. Yet another possible diagnosis is that the state never had a chance of winning. The system is biased in favor of investors because they are the ones who create a demand for the well-paid services that arbitrators provide. In turn, these diagnoses can lead to very different policy prescriptions. The first would lead states to hire better lawyers or to develop legal expertise in house. The second one would make policy-makers more attentive to what they write in their treaties and they might, in this example, stop including a particularly problematic provision in their future BITs. The last diagnosis, much differently, would lead states to abandon ISDS.

Various ideational frameworks can inform the way in which state actors perceive their arbitral experiences. Nationalism values autonomy from supranational institutions and this desire can be exacerbated after an international arbitral tribunal rules national policies to be unlawful. For different reasons, left-wing policy-makers might also come to view ISDS in a negative light. Leftist ideologies are suspicious of a system that allows corporations to challenge regulations that protect the public interest when these hurt their profits. That is, strong nationalist and/or leftist inclinations can lead policy-makers to conclude that the only viable solution to the problems of the investment regime is to exit from it or to fundamentally change it. Alternatively,

governments with pro-market and/or internationalist convictions might be less sanguinary in their assessment and would prefer to preserve the current system and, instead, introduce targeted reforms.

That said, government actors -whatever their initial inclinations might be- make decisions in a particular political domestic and international context that imposes constraints and provides opportunities. Governments face two interested domestic constituencies: the private sector and the civil society sector. Most scholarly attention has been placed on the political behavior of firms when it comes to explaining policies in the realm of foreign investment. While they are crucial for understanding investment treaty policies, they are not the only non-state actor that matters. Investment treaties and ISDS disputes also affect a broad and diverse ensemble of local civil society groups like environmental, public health and consumer protection organizations. For civil society actors, restricting states' regulatory sovereignty for the sake of investment protection is seen as a blatant example of 'corporate rule.' The terminology that civil society uses to describe investment provisions in international agreements often emphasizes this aspect, using terms like 'corporate power grab,' 'corporate attacks' or 'corporate hijacking.' I analyze the role of civil society actors through the theoretical lenses of the contentious politics framework (Tilly and Tarrow, 2015). That is, I focus on how civil society has different effects when it is organized as a social movement rather than as an interest group -a distinction that affects the availability of resources- and when their access to the policy-making process varies.

On the external front, I theorize the impact of two sets of variables. The first one induces policy continuity and discourages radical policy changes. It includes the

pressures of foreign investors and their home governments. Foreign investors are interested in preserving strong international legal protections. This includes direct access to ISDS which provides them with a means to demand compensation for government policies that they deem unlawful. Furthermore, the home governments of those investors will favor their interests in their foreign economic policy. By manipulating material benefits -in the form of further FDI and market access for exports- foreign firms and their home governments can coerce revisionist governments into adopting more moderate policies instead.

The second set of factors works in the opposite way; they can encourage the adoption of revisionist policies and discourage limited reforms that do not tackle the fundamental problems of the investment regime. These are the political support of like-minded governments and the technical support of international civil society organizations. Because discontent with the investment regime has emerged in multiple parts of the world, opportunities for policy coordination have increased. In several international fora, policy-makers meet with peers from other countries, learn about how they think about their common problems and assess the extent to which interests overlap. International civil society organizations are also regular attendees at these fora where they can engage with policy-makers and offer their technical expertise with the goal facilitating the adoption of radical policies.

The relative availability and intensity of these factors will determine if, for example, an originally revisionist government will follow through with its policies or not. Even the most radical revisionist projects can result in limited reformist policies if constraints are too powerful. Alternatively, revisionist policies, originally aimed at promoting alternative institutional projects, might lead to a country disengaging

from the regime if no other countries are willing to accept its alternative model.

1.5 Layout of the dissertation

The dissertation is structured as follows. Chapter 2 starts by reviewing the existing literature for answers to the puzzle of policy variation in policy responses to ISDS exposure. The first alternative explanation is based on the influence of international arbitral tribunals (Alter, 2014). Policy variation is seen as a ‘noise’ during a period of adjustment to what tribunals say international investment law is, and thus, what should states’ treaty policies look like in order to comply with that assessment. The second explanation focuses on firms’ preferences and derives from recent work on investment protection in New-New Trade Theory (Kim et al., 2019). Since different *types* of firms (i.e. multinational, exporting, domestic) have different priorities regarding foreign investment, resulting policies will depend on the relative influence of types of firms. The flip-side of a firm-centered argument is a state-centric one. Thus, I also consider state autonomy explanations (Evans, 1995). Here, policy choices are a function of the degree to which governments formulate and successfully pursue policies that are not simply reflective of the demands of societal actors but of the goals policy-makers set for the state. The last explanation is based on power. The attention is set on what policies the most powerful states prefer and on the capacity of states with alternative preferences to sustain the costs of deviating from that path (Gruber, 2000).

In addition to these alternative arguments, the main theoretical foils for this dissertation are two variations of a rational learning argument. I derive these alternative arguments from the two most prominent accounts of how the investment regime came

about: the rational competition + rational design approach (Elkins et al., 2006; Koremenos et al., 2001) and Lauge Poulsen's highly influential bounded rational argument (2015). The rational learning account assumes that states make policy choices based on the available information at any given point in time while the bounded rational version also assumes there are cognitive limitations to the ability of policy-makers to process that information. Once the arbitral claims hit, learning arguments argue, states find out that investment treaties and ISDS have unforeseen costs. In the pure rational learning argument, unanticipated costs result from a previous lack of information about the future. In the bounded rational argument, the problem is not the lack of information but the cognitive biases of policy-makers, even when faced with new information. For this reason, bounded rational actors only learn when the costs of keeping policies in place become sufficiently vivid. Differences aside, both learning arguments assume states learn from (vivid) experience. Policy-makers now possess more information than in the past; they have learned a lesson and are expected to do things differently. Because the only theorized variation in available learning arguments is longitudinal -pre- and post-ISDS experience- these explanations provide the null hypothesis for my argument, namely that after the claims hit, there are no differences between states in terms of policy reactions.

The rest of Chapter 2 introduces the concept of international legal autonomy and develops the theoretical argument. International legal autonomy reflects the degree to which international investment law restricts a state's freedom to regulate foreign investment. Each of the policy types described above impacts a country's autonomy *vis a vis* investment treaties differently. Thus, the outcome of interest for the rest of the dissertation is the change in international legal autonomy that results from

the policies that governments put in place in reaction to ISDS experience. That is, I explain under what conditions states attempt to recover more or less of the legal autonomy they once lost to the international investment regime. Lastly, I explain the choice of a mixed methods research design that combines quantitative statistical analysis and qualitative case studies.

Chapter 3 provides quantitative evidence of the empirical trends introduced in this Chapter and explores some of the theoretical expectations emerging from Chapter 2. I present an original measure of international legal autonomy (ILA) at the country level and show that yearly differences in a country's ILA score are positively related to ISDS experience. That is, after the claims hit, states are less willing to sacrifice the same amounts of legal autonomy and might even start to recover some of it. Yet this transformation is highly contested due to the existence of interests in favor and against the continuation of previous policies. As a result, the forms in which this reclaiming of legal autonomy has taken place vary and they leave states in different positions *vis a vis* the regime. The rest of Chapter 3 analyzes three original datasets of treaty adoption, treaty content and treaty termination. Against the null hypothesis of common reactions to common stimulus, I find that the effect of ISDS experience on these behaviors -choices about treaty content, treaty signature, and treaty termination- are conditional on levels of economic development.

Chapters 4, 5 and 6 are case studies of investment treaty policies in three countries: the United States, Ecuador and India. Through within- and cross-case comparisons, the cases show how alternative combinations of the explanatory variables -namely policy-makers' ideas, non-state actors' mobilization and diplomatic pressures- make a given policy reaction to ISDS more likely. I provide more details on case selection

at the end of Chapter 2 and at the beginning of each case-study chapter. Lastly, the concluding Chapter outlines theoretical, policy and normative implications of the dissertation's main findings.

Chapter 2

Literature review and theoretical framework

As discussed in Chapter 1, the international investment regime is undergoing substantial changes. Although lawyers in the arbitration community downplay the existence of a backlash against the regime's institutions (Sweet et al., 2017; Brower and Blanchard, 2013), experts and scholars talk plenty of a 'paradigm shift' in international investment law (Hindelang and Krajewski, 2016; Aisbett et al., 2018; Morosini and Badin, 2017; De Mestral, 2017). Furthermore, a recent wave of research suggests ISDS experience causes governments to modify aspects of their investment treaty policies. Poulsen and Aisbett (2013) argue that after arbitral claims, developing states sign fewer treaties. Manger and Peinhardt (2017) find that states include more elaborate and less ambiguous language in their treaties after getting involved with arbitral tribunals; a step aimed at reducing arbitrator's space for expansive interpretations of the law. Similarly, Broude et al. (2019) argue that states with a great deal of ISDS experience are more likely to replace old treaties with agreements that better safeguard their regulatory autonomy. This research has made substantial empirical contributions. As part of a move towards 'text as data', automated text analysis

tools facilitated the study of differences between treaties (Alschner, 2017; Alschner and Skougarevskiy, 2016a; Manger and Peinhardt, 2017; Blake, 2013). More recently, thanks to UNCTAD's newly available database of hand-coded treaties, Broude et al. (2019) were able to leverage variation in terms of specific treaty provisions to capture dimensions that are more theoretically meaningful than just text similarity.

However, theoretical tools to understand these changes are relatively underdeveloped. The uncovered correlations between ISDS experience and various state actions simply suggest that states alter their behavior after their investment treaties impose high costs in them. Yet, as shown in the previous Chapter, governments are pursuing a variety of policies in reaction to arbitration disputes that leave them in different positions *vis a vis* the system of investment treaties. This suggests that experiencing high costs from enforcement is not enough explanation for this variation. Furthermore, current debates around the investment regime do not simply revolve around technical disagreements; about which of several routes is the most efficient way to get to the same place. These reflect fundamental disagreements about the limits of state authority in a globalized economy. By recognizing dissent and the existence of alternative institutional projects, I bring the politics back into the investment regime.

This Chapter offers a theory to explain why states pursue different policies in the aftermath of ISDS. As a starting point, I argue that negative experiences with investment arbitration are filtered through ideational lenses. Ideas give meaning to an observable situation, provide a standpoint from which to critique it and allow actors to develop blueprints for a desired future (Sikkink, 1991). Yet states face constraints and opportunities when acting on these emerging preferences. Thus, I also argue that policy outcomes depend on the combination of a domestic and external

variables. When constraints prevail, resulting policies will be more moderate than originally intended. At the same time, when policy-makers are presented with opportunities to draw support from other actors, they will be better able to stick to their original policy preferences. The two pillars of the argument -the ideational sources of policy preferences and the assemblage of constraints and opportunities affecting their implementation- are not completely independent from each other. After all, the willingness of states to make concessions and accept punishments is itself a function of their commitment to the ideas informing policy preferences. The Chapter proceeds as follows. Section 2.1 presents existing explanations for variation in treaty policies after ISDS disputes. After discussing existing arguments' weaknesses and omissions, I present the theoretical argument in Section 2.2. Lastly, Section 2.3 explains the research design employed in the dissertation.

2.1 Existing explanations

When trying to explain why states react differently to their experiences with investment disputes, is it necessary to open up the policy-making process or are final policies epiphenomenal to predetermined state interests? Moreover, are state preferences autonomous or are policy outcomes completely determined by the actions and interests of other actors? I reflect on these questions from the standpoint of diverse explanations offered by theories of international relations and comparative politics.

2.1.1 International tribunals

Given that much of the backlash against investment treaties is directed towards the arbitration tribunals tasked with their enforcement, one must consider how a theoretical approach centered on the effects of international tribunals would explain variation in investment treaty policies as a reaction to ISDS experience. These theories explain changes in domestic policies by reference to the legal oversight of international courts (Alter, 2014). Changing treaty policies are seen as the result of decisions and mandates from international institutions that have been given the authority to enforce and, in doing so, further develop international law. This explanation starts from a contract theory idea that international legal agreements are incomplete contracts. Parties cannot write down rules for every single situation that might emerge under the treaty (Van Aaken, 2009). Tribunals' enforcement of the treaties reduces legal uncertainty over time as they interpret and clarify treaty law. In turn, states as treaty-makers incorporate jurisprudence in their subsequent treaty drafting choices. In this sense, changes in international treaties are understood as manifestations of a linear progress through which the legalization of world politics evolves, towards more precise rules that are better suited to promote international cooperation. Observed variation in treaty policies, these arguments would thus suggest, is typical of a transition time. Some states have been more exposed than others to international courts and tribunals. Alternatively, some states have more technical resources to follow the latest judicial developments. Nonetheless, international investment law, these arguments would expect, will eventually become more cohesive around the findings of the tribunals tasked with enforcing their rules.

Sweet et al. (2017), a collaboration between international legal scholars and practicing lawyers, have made this argument in relation to international investment law. They argue that observable changes in the content of investment treaties towards more state autonomy are not a reaction against bad arbitral decisions but a reaffirmation of the good ones. To prove this argument, the authors dive into the reasoning of arbitrators in a way that political science researchers hardly ever do. They analyze arbitral decisions in which arbitrators explicitly grappled with how to balance investors legitimate expectations and states' regulatory interests and they find that awards generally make explicit reference to the arbitrator's *bona fide* efforts to consider host state's right to regulate. Thus, they would argue, the variety of steps that states have taken in the aftermath of arbitrations should be understood as a consolidation of ISDS case law. For example, changes to the content of treaties that emphasize state autonomy -i.e. by introducing exceptions and increasing precision- are simply picking up the reasoning of a few influential tribunals. In the same vein, states that terminate or renegotiate treaties would be bringing their outdated commitments in line with what arbitrators have determined international investment law is.

However, this seamless progression towards a 'better' international investment law is a mischaracterization of international investment politics and does not fare well against the backdrop of highly critical discourse towards ISDS in politics, academia and the press (Sornarajah, 2015). This is simply not the language that state actors use when justifying changes to their treaty practice. Furthermore, if as Stone Sweet et al. suggest, arbitrators are already interpreting BITs in an unbiased way and mindful of states' right to regulate in the public interest, states would not have incentives to

update their treaties after all. And more importantly, why would states be adopting changes that are geared towards reducing, or even eliminating, investors' access to arbitration? The authors seem to miss an essential point at the heart of the criticism levied against the regime. States are not hurt as much by arbitrators' final decisions but by the onset of disputes, especially frivolous ones (Pelc, 2017). It has been argued that at the jurisdictional stage, that is when arbitrators consider whether the tribunal has authority to hear the case in the first place, tribunals tend to interpret definitions of 'investor' and 'investment' extensively (Van Harten, 2012). Furthermore, legal expenses are high, even higher than in trade disputes. And there is evidence that disputes hurt FDI inflows, even when the host state is successful (Allee and Peinhardt, 2011). For these reasons, states have incentives to avoid getting bogged down in protracted litigation even when they have good chances of coming out victorious.

A prolific strand of international investment law research attempts to determine whether arbitrators are in fact biased and if so, in which direction (Behn et al., 2017; Donaubauer et al., 2017; Sweet et al., 2017; Van Harten, 2012; Waibel, 2010). This type of survey of arbitral behavior is an important exercise. However, if the goal is to determine whether the regime is experiencing some form of backlash and states are dissatisfied with ISDS; what matters is not that arbitrators are 'truly' biased but that they are perceived to be so by critical actors. Take the example of the tobacco carve-outs in the text of the Trans-Pacific Partnership Agreement (TPP).¹ This provision prevents investors from using ISDS to counter anti-tobacco regulations, as Philip Morris did against Australia and Uruguay.² The tobacco giant lost both cases but the

¹Now in force as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

²Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12; Philip Morris Brands Sarl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7.

claims resonated loudly and generated strong reactions. The TPP exception cannot be understood without this litigation precedent. The Australian government specifically sought this carve-out; as Trade Minister Andrew Robb declared, “Australia will only sign up to a TPP deal that includes appropriate safeguard[s] for public health.”³ Even though general trends in arbitration uncovered by Stone Sweet et al. would suggest that tribunals were already recognizing states’ right to regulate for the protection of public health, Australia’s own experience with arbitration generated a need for reassurances. What mattered was the perception that, independently of the final decision, the regime failed to protect an important goal for the state by allowing this dispute to exist in the first place.

Moreover, an account in which it is tribunals who, by engaging in judicial law-making, carry international law forward by providing their own interpretations and elaborations leaves states as passive takers of these innovations. While this phenomenon captures much of the way in which international law evolves in different issue areas, it is not an appropriate portrayal of the processes underlying recent changes in the international investment regime. A judicial law-making model better suits legal development in areas with large, multilateral conventions and permanent courts tasked with the enforcement of those treaties, like it is the case of human rights law, international criminal law or the law of the sea (Danner, 2006; Føllesdal et al., 2013; Schabas, 2008; Teitel, 2015). In these contexts, states have little capacity to react to judicial law-making by changing the sources of law that tribunals interpret and elaborate on because it is extremely rare that states terminate or renegotiate multilateral conventions (Pauwelyn et al., 2014). This puts international judiciaries in a

³Letter from Australian Trade Minister Andrew Robb to Australian newspaper *The Age* published on December 16, 2013. Cited in Chapman and Freeman (2013).

privileged position to influence the evolution of the law in their issue area. However, the investment regime of today did not come about as the result of one large instance of legalization and subsequent moments of judicial law-making. Instead, it resulted from thousands of moments of mostly bilateral and plurilateral treaty-making over time. Thus, states can better control the tempo of legalization, as they evaluate their and others' experiences with past commitments and, if so desired, revise their preferences accordingly.

2.1.2 The interests of firms

This explanation attributes the adoption of different investment treaty policies to the pressures of powerful economic actors. Recent work from New-New Trade Theory (Melitz, 2003) -premised under the notion that firms, rather than economic sectors or industries, are the relevant unit of analysis- argues that different types of firms have different policy priorities regarding investor protection (Kim et al., 2019). Multinational firms and firms embedded in global value chains care about foreign investment protection, and thus value BITs, while purely exporting or local firms have other concerns. Variation in treaty policies would thus be understood as a product of the differential influence of types of firms. Recent research finds that all firms lobby but also indicates that the biggest firms -multinational ones- are the most politically active (Kim, 2017; Kim et al., 2019; Blanchard and Matschke, 2015). Thus, if multinational firms outspend others in their lobbying efforts, then states reactions to ISDS should not seek to scale down the rights offered to investors in investment treaties. And if they do, the mobilization of multinational firms should work as a corrective.

There is much that is convincing about this argument. In fact, an important part

of my argument recognizes the role of multinational firms -either as domestic firms in developed states or foreign investors in developing ones- in limiting revisionist and exist policies when these emerge within dissatisfied states. But the interests of firms do not predetermine policy choices. Rather, they might help contour the space of possible choices. Firm's power to threaten or offer side-payments enters the equation in relation to the policy options already on the table, which themselves might emerge from a variety of considerations or from the influence of alternative actors, like state officials committed to revisionist agendas or civil society groups.

A recent example of the limits of multinational firms' influence is the fate of ISDS in the recently renegotiated NAFTA, the United States-Mexico-Canada Agreement (USMCA) signed in November of last year. The US government entered negotiations with the goal of dropping ISDS in the new treaty. Opposition from international firms emerged immediately. "We urge you to retain strong investment protections and Investor-State Dispute Settlement (ISDS) in NAFTA" claimed four of the largest business groups in the US in a letter to President Trump.⁴ Firms even recruited over a hundred lawmakers to make the case that ISDS should not be dropped and, if anything, should be strengthened in a new NAFTA.⁵ Yet despite the mobilization of American multinational enterprises and their allied lawmakers, USMCA eliminates ISDS between the US and Canada and seriously restricts US investors' access to arbitration against Mexico.⁶ Given that the US original proposal was to eliminate

⁴"Associations Letter to POTUS on NAFTA and Investor-State Dispute Settlement (ISDS)." Letter from the American Petroleum Institute, the Business Roundtable, the National Association of Manufacturers and the U.S. Chamber of Commerce. 2 May 2018. On file.

⁵"Congress expects that both the substantive protections and the enforcement mechanisms for investment commitments will be more or equally robust in an updated NAFTA relative to the existing agreement," the legislators wrote in a letter to the USTR. GOP to USTR: Maintain Key NAFTA Provision. (21 March 2018). United States Senate. Committee on Finance. Available at: <https://www.finance.senate.gov/chairmans-news/gop-to-ustr-maintain-key-nafta-provision>

⁶US investors in Canada will no longer be able to sue the Canadian government before interna-

investment arbitration altogether, that a form of ISDS remains in place for some disputes between American investors and the Mexican government was a concession to multinational firms. However, the resulting arrangement is still far from what firms originally wanted.

I do not seek to discount the power of economic actors, especially multinational firms. In fact, there would be no international investment regime if there were no foreign businesses to protect. More than anything, I want to highlight an aspect that is less frequently acknowledged when examining the political power of economic actors. On the other side of powerful firms who successfully lobby for a particular policy is a state actor that decides not to bear the costs of pursuing an alternative course of action. That calculation, however, does not need to always go in that direction.

2.1.3 State autonomy

The flip-side of the previous argument comes from theories of state autonomy. While there are variations of state autonomy arguments in the literature on economic development (Evans, 1995), what they have in common is that the state is at the center of the analysis. Rather than focusing on a variety of socioeconomic actors and then asking what is their relative power to dictate policy; the main explanatory variable is the degree to which the state can formulate and successfully pursue policies that

tional tribunals. For American investors in Mexico, a special annex applies that allows investment arbitration to continue but subject to significant limitations. For example, established investors can only bring claims of expropriation and non-discrimination; other USMCA's provisions are not enforceable via ISDS. Also, claimants need to first try to resolve issues in domestic courts and can only afterward bring disputes to the international level. The oil, gas and some public service sectors are not subject to the exhaustion of local remedies requirement and can bring a wider number of claims but, in comparison to NAFTA, their access to arbitration is much more restricted.

are not simply reflective of the demands of societal actors. Thus, states with low autonomy could be captured by foreign capital and thus remain tied to bad investment treaties even when they have proved costly. But they could also be captured by other groups like local firms, unions or civil society organizations that might demand the opposite policies. Differently, states with high autonomy would be seen as capable of adopting the necessary policies to promote their goals even if they hurt important constituencies. Thus, in a sense, the less autonomous the state, the more capable are groups to make the state deviate from the ‘right’ policy path.

State autonomy arguments have limited value for explaining variation in policy reactions to ISDS. They highlight reasons why, for example, certain states are more susceptible to the pressures of foreign investors than others but they do not help in understanding the type of policies that are eventually adopted. In cases of low autonomy, much depends on the social and political context. An equally non-autonomous state would pursue different policies before different sets of societal interests. For example, as I argue later, civil society sectors vary across levels of economic development in ways that matter for their influence on treaty policy.

Similarly, in cases of high autonomy, how do policy-makers decide what are the ‘right’ policies to pursue after negative experiences with ISDS? Are policies preferred by autonomous state officials necessarily different than those preferred by some groups? The state autonomy literature has sought to explain why some states were able to pursue developmental policies successfully while other were not. Within this area, the ‘right’ policies are those that would have advanced the economic development of the country as a whole. However, applied to other policy areas, these arguments require additional explanations for policy-makers’ autonomous preferences.

Otherwise, it is impossible to establish a baseline for the policy that the perfectly autonomous state would pursue and against which any deviations should be measured. State autonomy arguments tell us more about where the ultimate power to dictate policy resides than about what kinds of policies will those with power pursue.

2.1.4 Power and hegemonic ideas

A power-based explanation for policy reactions to ISDS would focus on which policies do the most powerful states prefer and would then expect everybody else to follow suit or otherwise be punished. These arguments, however, have limited value for understanding why the interests of powerful countries, and their attitudes toward ISDS, have shifted. They could result from their own processes of reckoning with the costs of ISDS disputes as receivers of foreign investment. Or they could be a defensive move against growing dissatisfaction from states lower on the economic structure. Since multinational firms headquartered in the Global North are frequent users of this system, wealthy countries could be trying to ‘save’ the regime for its firms through limited reforms.⁷ Whatever reasons economic powers might have for adopting new treaty policies, arguments centered on power would say, these become the new reference point for less affluent countries. Simply put, developed countries are rule-makers and developing states are rule-takers in international investment law (Alschner and Skougarevskiy, 2016b).

The observable implications of power-based arguments depend on how power is conceptualized (Barnett and Duvall, 2004). To narrow down the universe of alternative explanations I consider those based on material, economic power and on the

⁷In fact, as of today, the top five most frequent homes countries in ISDS disputes are the US, The Netherlands, the UK, Germany and Canada. UNCTAD, Investment Policy Hub.

power of hegemonic ideas. Material power arguments would thus focus on the degree to which powerful countries can use coercion to make sure others do not deviate from the acceptable path of reform. A hard form of coercion uses conditionality to bring recalcitrant states to the fold. They withhold material incentives until states drop policies that are deemed unacceptable. There is also a softer form of coercion based on hegemonic ideas. According to Dobbin et al. (2007), “dominant ideas become rationalized, often with elegant theoretical justifications, and influence how policy-makers conceptualize their problems and order potential solutions” (p.456). Soft coercion might not even require a coercive intent on behalf of economic powers. What matters in these arguments is the degree to which larger countries have “go-it-alone-power” (Gruber, 2000), meaning their policy choices alter the status quo for others, giving the latter little choice but to follow suit. Thus, variation in policy reactions, according to a power-centered argument, results from emerging powers who prefer alternative policies and can resist the disciplining effects of coercion in its varied forms.

Power-based approaches provide many insights that I find useful. In fact, coercion by foreign investors and their home governments is an important explanatory factor in my argument. So is the varying strength of developing countries to resist coercive attempts and their relative gravitational pull when promoting alternative treaty policies. Yet, there is one gray area in power-based explanations that becomes significant when applied to international law. Weaker states are expected to not pursue alternative policies or to be severely punished for doing so. Those two outcomes are considered equivalent. But in international investment law, alternative policies imply terminating treaties or adopting fundamentally different ones. These are decisions with long lasting consequences and cannot be easily corrected after the costs of devi-

ating are felt. Thus, it is necessary to understand the motivations and strategies of weaker states for overcoming coercive pressures and the conditions under which they are successful.

2.1.5 Rational and bounded rational learning

The last set of existing explanations includes a variety of learning arguments. In the simplest terms, learning occurs when governments change preferences after exposure to new evidence and update their policies as a result (Levy, 1994). Although there are many approaches to learning in public policy (Dobbin et al., 2007), here I consider learning arguments that assume some form of rationality on behalf of decision-makers. I do so in order to engage with two of the most prominent accounts of how the international investment regime came about: the rational competition + rational design argument (Elkins et al., 2006; Koremenos et al., 2001) and the bounded rational argument (Poulsen, 2015). My interest, however, is not on understanding why states sign BITs but how states process the consequences of having done so and what effects does this have on their subsequent policy choices. Thus, I engage with learning arguments rooted in both the rational and bounded rational approaches. While increased available information and overcoming cognitive constraints as a consequence of ISDS shocks might be enough to predict that treaty policies will change, these variables alone cannot predict how much they will deviate from the status quo.

Rational learning

The rational explanation that I engage with comes from combining two prominent arguments: states are rational competitors and designers. Rational competition ex-

plains why states signed BITs in the first place. Rational states carefully consider the strategies of countries that they compete for capital with. If by signing BITs -which make economies more secure and hence more attractive- states are better able to compete for FDI, they start signing treaties when their competitors are doing so as well (Elkins et al., 2006). Because in this competitive environment the function of treaties is to make capital more secure, states as rational designers draft them in the most appropriate way to perform that function. According to the theory of rational design (Koremenos, 2016; Koremenos et al., 2001), states make decisions about institutional design based on two related factors. One is the particular problem standing in the way of cooperation, which actors are attempting to solve by setting up the institution. The other one is the environment in which designing takes place, specifically the level of available information.

In the ‘armchair’ rational design model, the design of international institutions reflects what rational states decide, based on the available information, is the most efficient way to solve the cooperation problem. In foreign investment, the problem underlying relations between governments and owners of foreign capital is a commitment one.⁸ That is, investment treaties fulfill the function of credible commitments and states tailor the design of these treaties to perform said function. For example, design choices like including arbitration as the enforcement mechanism and giving investors, rather than their home states, the ability to initiate arbitral claims are taken as evidence that BITs are rationally designed.

A rational learning account would explain policy reactions to ISDS experience as the outcome of Bayesian updating processes. As rational agents, states exposed to

⁸Because it is hard to guarantee investors their property would be safe from government taking relying only on contracts enforceable in domestic law, states boost those safeguards by adopting international treaties that regulate all investments to and from their signatories.

new information update their prior belief to a posterior belief. Policy-makers will not necessarily converge on the truth but will converge on the beliefs most consistent with the newly acquired evidence. For illustrative purposes, the argument would go as follows. In the past, states built a dense network of BITs under the prior belief that, by solving the commitment problem, they would attract FDI. Then, investors launched ISDS disputes under those treaties when they perceived states treated them unfairly. Through this process, states acquired new information about the overall value of those BITs, benefits *and* costs. For example, they learned that investors can bypass national courts if they have direct access to arbitration and this generates too many claims which, they also learned, are extremely expensive to litigate and can drag on for years. Or, they learned that vaguely worded clauses can be interpreted expansively to include protections states did not mean to provide. Their posterior belief is that poorly designed treaties come with high costs in the form of ISDS claims. As rational designers, this updated belief drives states to make different decisions about the design of the new treaties they sign onto.

Notwithstanding the significant contributions of rational approaches to the study of international investment law, these have a harder time trying to explain variation in policy reactions to ISDS experience. Most importantly, this framework cannot account for why the same newly acquired information about the problems of older treaties leads to different types of responses. That is, what will these inputs of information lead states to do? Get rid of their old, and now palpably costly, treaties? Should they draft treaties differently from then on? Or should they avoid signing them completely? If one wanted to open-up the decision-making process behind policy updates -that is, the process through which newly available information leads

to discovering new solutions to commitment problems- a pure rationalist approach provides few clues as to which actors within the state to emphasize and what factors into their assessments of each alternative's costs and benefits.

Bounded rational learning

Bounded rationality does not dispute that states compete for capital or that they draft their treaties with a goal in mind. The difference with the full rational approach is that it accounts for the cognitive constraints of the policy-makers in charge of those tasks. In his widely acclaimed book, Poulsen (2015) explained BIT adoption by developing states as a bounded rational process. Unlike the full rationality approach, Lauge Poulsen sees decision-makers as constrained not just by the informational environment but also “by limitations to their own problem-solving capabilities” (p. 26). For example, when considering signing a BIT, bounded rational competitors do not seek out evidence on whether treaties actually work in attracting FDI. They rather rely on particularly salient information, for example, cues provided by developed country governments, lawyers or international organizations. Similarly, bounded rational designers do not continuously seek to improve the content of their treaties; they rather anchor excessively on previous BIT templates. These cognitive constraints led developing states to overestimate the benefits and underestimate the costs of signing BITs. Even if policy-makers believed that they were acting rationally in the pursuit of their preferences, Poulsen argues, they engaged in irrational behaviour when they tied themselves to ‘bad’ treaties.

A learning account born from the bounded rational approach would thus focus on cognitive limitations. The most important one is salience bias. This means that

state officials do not update their behavior until the costs of the status quo become sufficiently “vivid.” That is, until they found themselves on the receiving end of ISDS claims. States are narcissistic learners. Even then, the extent of that revision depends on the salience of the disputes for the individual state. Assuming that policy-makers also have a strong preference for the status quo, arbitral claims with low salience might lead to small changes. States might simply become less willing to enter into BITs or they might make minor revisions to their treaty models. Only after claims have “high perceived impact” could bounded rational actors come to perceive BITs as dysfunctional and consider significant changes, including exiting the regime altogether (p. 42). Thus, unlike the full rational learning account, bounded rational learning does provide an explanation for variation in policy reactions that is based on the salience of the ISDS experience.

Yet perceiving their own ISDS disputes as very costly is not enough to explain different policy choices. For example, it would be hard to argue that Argentina, Colombia and Ecuador did not perceive their brushes with ISDS as costly. Yet they reacted to them in very different ways. For a long time Argentina refrained from signing new BITs; Colombia drafted a new model BIT in alignment with the preferences of developed states and went on a treaty making spree; and Ecuador terminated all of its existing BITs. As this suggests, there is more going into the way in which states process their ISDS experience than cognitive biases and Poulsen provides little insight to what makes an ISDS dispute have low or high perceived impact.

By focusing on how decision-makers react differently to new ISDS experiences, a bounded rational argument offers a more complex account than the pure rational learning approach. However, since Poulsen simply assumes cognitive limitations to

be a state-level attribute -developing states suffer from them, developed states do not- this argument is ultimately subject to the same limitations as the pure rational version. Absent a richer understanding of how policy-makers within the same state develop different policy preferences and how those differences are resolved, the theory cannot fully explain why states chose certain treaty policies over others. In my own argument I consider how policy-makers' ideas can incline them to think of ISDS claims differently -either as the costs of doing business or as an affront to national sovereignty- and how societal actors can promote alternative readings of the disputes. While firms stress how essential ISDS is for making capital feel secure and lawyers claim that direct access to international tribunals is a basic component of the global rule of law; civil society sees it as indicative of the extent to which state authority has been compromised in favor of corporations.

Furthermore, Poulsen is unclear on whether states become fully rational when the costs become sufficiently salient or whether they are doomed to permanently jump between under- and over-reaction. On the one hand, he claims that limitations to policy-makers' rationality depend on their levels of expertise and experience and that developing country officials were particularly susceptible to these biases (p. 44). This suggests that policy-makers could get rid of their cognitive limitations as they become more experienced and knowledgeable. Yet it is unclear how state officials are able to accumulate valuable experience or decide to develop expertise if they are constantly misreading their situation. The bottom line seems to be that either account, rational or bounded rational, assumes there is one rational equilibrium policy from which irrational deviations are established. The difference between these accounts is how easily states can know what that is.

In sum, a learning account -either in its rational or bounded rational variation- assumes that at t_0 states make policy choices they would otherwise not make if they had information about how those treaties are going to play out. At t_1 states find out from (vivid) experience, for example, that drafting vague and open-ended treaties and including certain dangerous provisions allow investors to challenge all sorts of regulations and arbitrators to interpret the treaties expansively. At this point, states possess more information than in the past; they have learned a lesson (even if not the right lesson) and are expected to do things differently. Thus, if states change their policies through either form of learning process I should observe variation in policy preferences over time -that is, between a consensus around one (perceived) rational response before the claims hit and another one after- but not within the same political moment. Furthermore, I should see political actors making policy decisions based purely on what insights from recent experience indicate is the best strategy for alleviating political risk and thus be better able to compete for FDI. For the rest of this Chapter, I refer to learning accounts assuming some form of rationality in decision-makers as (bounded) rational learning arguments. When needed, I appropriately distinguish between the two.

My intention was not to dismiss all the alternative arguments considered but rather to highlight limitations in their ability to provide complete answers to my specific research questions: why do states pursue different policies after negative experiences with ISDS tribunals? and why are they implemented more successfully in some states rather than others? These explanations shed light on some important factors that I incorporate in my explanation -like the mobilization of firms, coercion by

powerful states and the capacity of states to resist those pressures. While these explain why it is difficult for governments to follow through with policies that challenge the status quo, they are silent on why preferences for revisionist policies do not emerge in all places where the costs of BITs are felt. In the case of learning arguments, most they can tell us is that after the claims hit (sufficiently) states will change their policies. But they do little to determine, within a set of plausible policy reactions, which ones are adopted. To understand the choices of states in the aftermath of ISDS disputes it is necessary to consider the political context in which the decisions of these tribunals are received, which includes more than firms and either rational, bounded rational or autonomous policy-makers.

2.2 The politics of ISDS experience

My argument starts from the same premise of learning accounts: exposure to investment arbitration leads states to rethink their treaty policies. However, I seek to explain not just the decision to seek a change in policy but also the type of policy that is adopted as a result. The decision-making process behind these policy choices is a lot more disputed than what (bounded) rational learning accounts suggest. Variants of rational choice arguments portray states as having fixed interest and policy choices varying only according to the available information -and/or the capacity to process such information- for making the ‘right’ decision about how to attain those interests. That is, governments would arrive at the same decisions as long as they are exposed to the same information, independently of who the individual policy-makers making decisions are and where they are located.

Differently, I argue that who policy-makers are matters in two main ways. First,

their pre-existing ideas about the role of the state in the economy and about international legal constraints on states' sovereignty can lead to alternative conclusions about the desirability of investment treaties after ISDS disputes. Second, policy-maker's ideological position can provide information to interested societal actors interested about which policy-makers would be good allies in working for the desired change in policy (Hall and Deardorff, 2006). Where policy-makers are matters as well. Depending on the domestic and international environment, governments face different assemblages of domestic and foreign actors interested in either preserving the status quo or inducing radical changes to investment treaty policies. In this section I present a theoretical framework that incorporates both of these dimensions that (bounded) rational learning arguments ignore. In doing so, I draw insights from some of the alternative arguments presented before, particularly those centered on firms and power. However, their explanatory value for the research question at hand is enhanced in combination with two elements the literature on investment treaties generally overlooks: policy-makers' ideas and civil society mobilization.

In the previous Chapter I discussed four categories of policy reactions to ISDS that represent varying degrees of policy change. Caution policies preserve existing treaties but put a moratorium on signing new ones. Alternatively, states can decide to Exit, a policy in which they not only refrain from signing BITs but also terminate all their existing ones. States can also adopt Reformist or Revisionist policies. In both cases states remain willing to sign new treaties. The difference is the models they develop to that end. Reformist templates do not deviate greatly from their predecessors, most representative of this change is a retooled model that preserve investors' direct access to ISDS but introduce provisions aimed at reducing their potential abuse. Revisionist

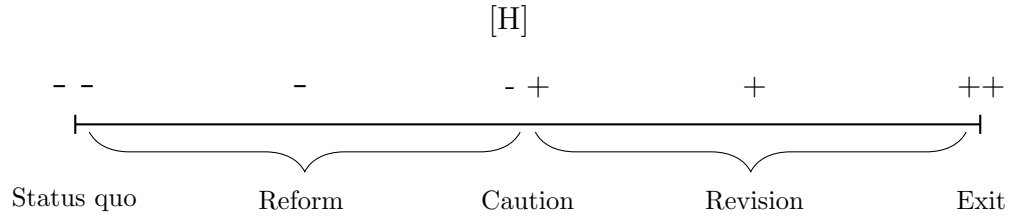


Figure 2.1: Change in international legal autonomy as a result of policy reactions

models scale down the rights and protections provided to investors to a much greater extent. Most illustrative is a new model that eliminates direct access to international tribunals. Revisionist states are also much more assertive in rebuilding their BIT network according to the new model and thus terminate their treaties to this end.

This categorization allowed me to engage systematically with the complex empirical landscape of investment treaty policies. It showed that, to fully understand the current state of the international investment regime, it is not enough to explain why states change their policies in reaction to ISDS exposure. We must also be able to explain the extent of the change that states decide to adopt. With this goal, I consider policies in terms of their overall effect on a country's international legal autonomy to regulate foreign investment. By international legal autonomy I meant the degree of legal constraints that investment treaties place on a given state in relation to its treatment of foreign investors in its territory (Figure Figure 2.1).

My initial assumption is that states who face multiple or highly controversial ISDS claims will reflect on the extent to which their international legal autonomy has been compromised under their current participation in the international investment regime. Arbitral disputes bring to the fore that compromising one's autonomy for the sake of offering protection to foreign investors can impose great financial and reputational costs. As a result, policy-makers will choose to change their current

policy geared at reducing the likelihood of more costly disputes in the future. Thus, I assume that after ISDS disputes, policy-makers will never choose to remain within the status quo and will always seek to change policies, albeit to different extents. That is, the outcome of interest is not whether states change their policies or not, but to what extent.⁹ The rest of this section proceeds as follows. I first consider each component of the argument separately -namely ideas, domestic firms, civil society, foreign investors and their home governments. I develop expectations for their effect on changes to a country's international legal autonomy and explain the mechanisms through which they exert that influence.

2.2.1 The importance of ideas

My theoretical starting point for explaining why countries pursue alternative policies in the aftermath of ISDS experiences are the ideas -worldviews and principled and causal beliefs- that government actors hold. As put by Goldstein and Keohane, "individuals rely on beliefs and expectations when they select from a range of viable outcomes" (1993, 17). Unlike (bounded) rational learning arguments, I do not assume decision-makers within a state to be a homogeneous group. Neither do I see disagreements about treaty policies as a temporary state which, with enough time and open conversations, will resolve on the 'right' amount of investor protection that international law should provide. Even when they share the goal of promoting FDI inflows, I allow for political actors to have different, even incompatible, ideas about international economic institutions and for these ideas to inform their preferences about how to operate within the international investment regime in the aftermath

⁹Because this is a strong assumption, I test it in Chapter 3 using an original measure of international legal autonomy.

of ISDS disputes. Not much attention is paid in studies of international economic institutions to the role of political ideas in informing state interests. This is more prominent in other issue areas, e.g. human rights, where policy preferences are generally seen as tied to non-material factors like principled beliefs and identities (Risse, 2000; Risse-Kappen et al., 1999).

I treat ideas as a lens through which political actors filter their experiences with investment arbitration, diagnose what went wrong and develop plans for avoiding similar setbacks in the future. To have explanatory power on their own, ideas need to be independent of experiences. Extending the analogy, a lens has to be in place before the light passes through it. Various ideational frameworks can inform the way in which state actors perceive their arbitral experiences.

Within a leftist worldview, investment treaties and ISDS can be seen as instrumental to the interests of large corporations from core capitalist countries. Thus, international law should not empower transnational capital to challenge public policies and regulations adopted in the public interest. This attitude is not simply a matter of principle. A left-wing economic agenda strives to increase the role of the state in the economy, either as an economic actor or a regulator. Being tied to investment agreements that limit the ability of governments to do so is another reason for changing treaty policy. On the contrary, right-wing causal beliefs about free market as the most efficient way to allocate wealth can foster the view that, even with problems, ISDS is still a desirable mechanism. In comparison to the alternatives (i.e. domestic courts or a state-to-state mechanism) ISDS provides an impartial and depoliticized system for settling disputes (Vandeveld, 1993).

Nationalism is another framework of ideas that can influence the lessons state

officials derive from their brushes with ISDS. Nationalism includes, among other ideational elements, principled beliefs about what is desirable. A nationalist aspiration is “to mitigate the degree of foreign influence and exercise control over the members and perceived territory of a nation” (Woodwell, 2007, 16). Nationalists are not necessarily hostile to trade or foreign investment; rather they value autonomy and sovereignty. “Nationalists will be most concerned not about the economic influence of other nations on theirs...but the inability of their nation to take low-cost actions to mitigate this effect” (Shulman, 2000, 370) Thus, nationalists are distrustful of embedding the country within a system of treaties that transfers the authority to rule national policies unlawful to international arbitral tribunals. When states get hit with investment disputes, and states cannot simply renege the rights they had granted to foreign investors, a nationalist mindset might be inclined to disassociate from the regime. On the contrary, internationalist ideas value cooperation and consensus. Internationalist policy-makers, even recognizing that international institutions have flaws, prefer to honor their commitments and work within the current system.

It should be noted, as important as the presence of particular views and beliefs is, so too is their distribution. That is, the degree of consensus around them. And when there is plurality of views -across individual policy-makers or state agencies- the ideas of those in key positions of authority are most important. Thus, the framework of ideas held by policy-makers informs preferences and puts governments on a policy path to recover greater or lesser amounts of international legal autonomy. All else equal, two expectations can be derived about the impact of specific ideational frameworks:

E1.a: Leftist and/or nationalist policy-makers will pursue policies that allow them to recover greater amounts of legal autonomy in response to ISDS disputes.

E1.b: Pro-market and/or internationalist policy-makers will pursue policies that allow them to recover smaller amounts of legal autonomy in response to ISDS disputes.

That said, whatever ideationally-informed preferences policy-makers develop, the implementation of policies born from those preferences takes place within particular international and domestic environments. Certain elements from these environments impose constraints on policy-makers to act on those preferences while others provide them with support. The different variables explained in the next section pull governments into opposite directions, either towards the status quo (greater losses of legal autonomy) or towards radical changes (greater recoveries of legal autonomy). The interaction of these factors explains whether governments are able to implement their original policy preferences or whether they scale them down towards more moderate changes, or scale them up towards more significant ones.

2.2.2 Domestic variables

Governments face two interested domestic constituencies: the private sector and the civil society sector. In the study of BITs, most scholarly attention has been placed on the political behavior of firms. While they are crucial for understanding investment treaty policies, to view policies as the sole product of economic actors' varying degrees of influence is too narrow. Investment treaties and ISDS disputes also affect a broad

and diverse ensemble of local civil society groups like environmental, development and consumer protection organizations. Both of these constituencies have ideal policy preferences for their home governments. Put simply, firms prefer current policies to remain in place while civil society actors want to see the maximum amount of legal autonomy recovered.

The private sector: varieties of firms

Following insights from New-New Trade Theory, I consider two types of domestic firms: multinational firms and exporting firms. Here, the category of ‘domestic’ refers to the location of the firm’s ownership and not the scope of its operations. Thus, a multinational firm is a domestic firm that owns at least one foreign subsidiary.¹⁰ Exporting firms also have domestic ownership but do not own any investments abroad, they simply trade their products internationally.¹¹

I make the assumption that domestic multinational firms demand strong investment treaties because they consider them valuable sources of protection in their foreign ventures. The FDI literature has emphasized the role of institutional constraints and property rights as mitigators of political risk (Jensen, 2003; Li and Resnick, 2003). However, international institutional constraints have been relatively overlooked. They are either absent from scholarly work or explicitly minimized as insignificant factors (Wellhausen, 2014). Given the lack of scholarly consensus about the effect of international investment treaties on FDI inflows, an often-made assumption is that investors are not aware, or simply do not care, about the availability of international investment

¹⁰These are the firms that, at the same time, are the foreign investors in the countries where their subsidiaries are. Because I consider foreign investors an external factor, I will address them in the next section.

¹¹Firm-level scholars have developed wider typologies of firms. See, for example (Kim et al., 2019). I consider these two types to be the most salient for my research question.

treaties when evaluating potential sites for investment.¹²

Yet recent findings suggest that firms are not completely absent-minded about the provisions of investment treaties when making location decisions (Betz et al., 2018). New-New Trade Theory scholars have started to pay more attention to the preferences of different types of firms regarding international investment rules. Kim et al. (2019) argue that multinational firms have come to see investment protection as their primordial policy concern, even over tariffs and subsidies. Because their entire production process requires the coordination of investments made along multiple locations, “investment protection will be the most salient issue because a disruption at any point in the production network is likely to affect the profitability and even survival of the many firms involved” (Kim et al., 2019, 156).

I do not argue that available treaty protections are the *most* prominent factor motivating investors. As put by an arbitration lawyer, “tax structuring is always more important; tax impacts the investment from day one.” However, in the same way that states acquire new information about the consequences of the treaties they signed, multinational firms also become increasingly aware of BITs as sources of protection. In the words of this same lawyer, “by and large corporates don’t care about them until they find out they need them or they find out they apply.”¹³ For example, the American Petroleum Institute’s (API) argument for keeping NAFTA’s investment protection chapter intact was based on how well it had worked for energy firms. “Since 1996, 19 of the 64 cases of natural gas and oil expropriation globally involved API member companies...For those 19 cases, ISDS was afforded by nine

¹²Surprisingly, little to no academic work has been done that asks foreign investors themselves whether they take these treaties into account when deciding where, and how, to invest. Exceptions are (Sofres, 2000; Yackee, 2009)

¹³Interview XXIV.

different free trade agreements or bilateral investment treaties, including NAFTA. Eleven of those 19 cases were settled or decided in favor of the investor.” They argue, strong treaty protection “enhances the bargaining and deal-making power of U.S. businesses, as well as their overall competitiveness in the world” (Green, 2017).

Differently, domestic exporting firms produce locally and primarily care about access for their products in foreign markets. Exporters are concerned with changes in the policies of their export destinations that could reduce the volume and profitability of their trade. For example, governments can impose import quotas or bans, they can withdraw trade benefits they had granted for political reasons, or they can change laws or regulations about product quality or characteristics. Regarding the FDI preferences of domestic exporters, the extant literature would suggest that firms that produce locally fear foreign companies will drive them out of business. If foreign-owned competitors raise the cost of labor or are able to produce at lower costs, the products of domestic firms can become less competitive in foreign markets (Pinto, 2013; Pandya, 2014). Thus, it could be assumed that domestic exporters would welcome policy changes that might drive foreign investors away. However, it has been shown that governments can appease recalcitrant domestic industries by selectively restricting foreign ownership in key sectors (Pandya, 2014). Moreover, when those restrictions require foreign investors to enter into partnerships with national firms through joint ventures, investment treaties become valuable for domestic capital as well because they grant them, through their foreign partner, access to an extra layer of protection not available to purely domestically-owned firms. That said, the most important way in which domestic exporters come to care about the fate of investment treaties in their country are threats of reduced market access. As I explain later in

the section on external factors, developed foreign governments have a very effective 'stick' at hand for keeping revisionist states in line. Trade threats mobilize domestic exporting firms on an issue they might not necessarily care about.

In addition to having preferences on the matter, I assume domestic firms mobilize in order to obtain and -most importantly for my research questions- preserve investment treaties that provide ample protections and unrestricted access to ISDS (Kim, 2017; Kim et al., 2019; Blanchard and Matschke, 2015). They do so individually and they also coordinate political efforts. For example, the United States Council for International Business -representing some of largest American multinationals- makes recurrent appearances in Chapter 4 as the American government debated changes to the US model BIT.¹⁴ Similarly, Chapter 5 shows several associations of Ecuadorian exporters arguing against the termination of the BITs due to concerns with trade access. Given these political efforts, I expect their preferences to be highly salient during the making of investment treaty policies in their home states. Thus, all else equal, I have two expectations regarding the influence of domestic firms:

E2.a: Countries that are home to greater numbers of multinational firms will pursue policies that allow them to recover lesser amounts of legal autonomy in response to ISDS disputes.

E2.b: Countries that are home to greater numbers of domestic exporting firms will pursue policies that allow them to recover lesser amounts of legal autonomy in response to ISDS disputes.

¹⁴In accordance with NNTT assumptions, these firms come from a variety of sectors and industries. The Council's Board of Directors lists executives from firms as varied as Nestle, Chevron, JP Morgan and Microsoft.

Domestic civil society

Another domestic sector that has strong preferences regarding BITs is civil society (Calvert, 2018). With the exception of a few prominent think tanks specifically dedicated to the issue of international investment, most groups opposed to investment treaties and arbitration have other thematic agendas and work, primarily, on issues of environmental and consumer protection, social justice, human rights and public health (Mann, 2004). At the heart of their opposition is the belief that investment treaties allow firms to use international tribunals to challenge laws and policies that civil society actors fought hard to win through democratic political processes at home. Thus, my second assumption is that civil society actors oppose providing strong investor protections through BITs, especially by giving investors access to ISDS, and mobilize to stop their governments from signing more of these treaties in the future and to get them to drop the ones they had signed in the past. Ideally, civil society actors would like governments to recover regulatory autonomy from international institutions they see as favoring corporate interests.

I analyze the role of civil society actors through the theoretical lens of the contentious politics framework (Tilly and Tarrow, 2015). Most importantly, I draw on the distinction between social movements and interest groups. Tilly and Tarrow define social movement as a “sustained campaign of claim making, using repeated performances that advertise the claim, based on organizations, networks, traditions, and solidarities that sustain these activities” (p. 11). Social movements combine sustained campaigning and public performances that display unity and numbers. Interest groups, while emerging from social movements, achieve a higher degree of institutionalization; switching from “streets and campuses to direct mailings, educa-

tional campaigns, and lobbying” (p. 54). I use the term civil society organization (CSO) to refer to units of social movements that turned into interest groups, meaning their contentious claim-making becomes more conventional and integrated into established systems of government. In this sense, their tactics might look more like those employed by firms but they have common grievances with social movements. Also, CSOs are more professionalized; manned by permanent staff who are experts on the issue of interest, in this case international investment law.

Differences between CSOs and social movements matter for my outcome of interest insofar as it captures meaningful variation in the degree of institutionalization and types of resources available to these groups. Social movements and CSOs have different resources to mobilize (McCarthy and Zald, 1977). Social movements have the gift of numbers. They can carry on disruptive actions in public. CSOs have the gift of technical expertise on both the subject matter and lobbying and advocacy strategies. For civil society to intervene in the making of treaty policies, technical expertise in international investment law is crucial. For example, when a government announces public consultations over a new treaty model, it is not evident for non-specialists how to translate their concerns into legal provisions. For the most part, neither CSOs nor social movements emerge from international investment law agendas. Rather, they develop awareness of this issue when regulations in their areas -i.e. environmental, public health or consumer protection- become at risk of corporate challenges through ISDS. Yet while CSOs have enough human and financial resources to develop legal expertise, social movements rarely make the leap from their core agenda to more abstract and complex issues of international investment law. This allows CSOs to engage with the policy-making process more thoroughly; making specific demands

about technical aspects of treaty policies as well as calling out governments when proposed changes fall short from those demands.

This is not to say civil society is powerless unless it is organized as an interest group but power is relative to the task at hand. Social movements have strength in numbers and thus the capacity to mount disruptive actions demanding a change in policy. But if those actions succeed in generating momentum for change, they lack the capacity to monitor the subsequent policy-making process. Successful mobilization by civil society requires that networks of interested groups, CSOs and social movements, engage in both. Thus, following the social movement literature suggesting that, with time and resources, civil society groups evolve from social movements to CSOs (McCarthy and Zald, 1977), I assume that the existence of CSOs presupposes an already dense population of social movements. This leads me to expect that, all else equal,

E3.a: Countries with larger numbers of CSOs will pursue policies that allow them to recover greater amounts of legal autonomy in response to ISDS disputes.

2.2.3 External factors

In the same way that firms and CSOs have effects at home, they can also have them in foreign countries. Multinational corporations are domestic firms in their home country but they are foreign firms in the countries they invest in. As such, they prefer the status quo. Similarly, some CSOs are international. They have physical presence in more than one country and, more importantly, have an interest in promoting their goals globally (Wong, 2012; Stroup, 2012). Their goal, much like their domestic

peers, is to see the end of an international legal regime that protects multinational corporations at the expense of local populations. I also consider how the diplomatic environment can either dissuade or encourage states to recover greater levels of legal autonomy.

The foreign private sector: foreign investors and the arbitration industry

Per the discussion of multinational firms in the previous section, I assume that foreign investors have an interest in preserving strong international legal protections, including direct access to ISDS, and that they will mobilize in defense of the status quo. When their host governments start considering changes to their treaty policies, foreign firms can exert pressure in multiple ways. Firstly, they can do it directly. Foreign investors can withhold further investments or other benefits that host states might want, like technology transfers or worker benefits. In the same way that domestic firms organize to lobby their home government, there are associations that represent the interests of their member companies before host governments. For example, the European Union Chamber of Commerce and Industry of Southern Africa represents all European investors in the region, that is, around 2,000 companies which are mostly present in South Africa. As a ‘chamber of chambers’, it coordinates all South African-based bilateral chambers of commerce of EU member states. When the South African government announced its plans to withdraw from its existing treaties and fall back on purely domestic protections, the Chamber was vocal in its opposition and provided input through the public consultation process and through direct discussions with the Department of Trade and Industry.¹⁵

¹⁵Submission by the EU Chamber of Commerce and Industry in Southern Africa on the Promotion and Protection of Investment Bill, as presented to the Portfolio Committee on Trade & Industry,

Second, they can enlist the support of their home governments (Wellhausen, 2014). Foreign governments that fear a particular policy would be detrimental to their multinational companies can coerce host governments into adopting more moderate changes instead. Long before investment treaties, disputes between host states and foreign investors often had dangerous ramifications, leading in some occasions to the use of force by the home country of the affected investor (Miles, 2013; Maurer, 2013). The inclusion of ISDS in investment treaties was justified on reasons that it would avoid such outcomes by removing the home state from the equation. Private access to international dispute settlement meant that disputes between foreign investors and host governments were relegated to legal procedures between commercial lawyers, rather than heated quarrels between diplomats (Shihata, 1986). Yet a recent analysis of leaked diplomatic cables by Gertz et al. (2018) shows that even when an existing BIT provides investors with access to ISDS, the US government still intervenes on behalf of its home companies.

Given the evidence of diplomatic intervention regarding specific investor-state disputes, I assume that home state governments will also intervene when what is at stake is not just the outcome of one dispute with one company but the entire system of international legal protections for all national companies present in a given country. As mentioned before, trade offers the most effective 'stick' in the coercion tool-box of home states. Withdrawing existing preferential treatment or making satisfactory BIT policies a condition for new trade agreements can link investment treaties with trade access issues that domestic exporting firms care about. Furthermore, according to Rachel Wellhausen (2014), foreign firms of the same nationality tend to form

Parliament, September 15 2015. Available at: <https://www.politicsweb.co.za/documents/this-bill-wont-protect-or-promote-investment-eu-c>.

a common front and find it easier to apply pressure to their host governments by diverting new investments or lobbying their home governments for help. Thus, I expect that, all else equal,

E5.a: Countries with more nationally cohesive and better organized foreign investor communities will pursue policies that allow them to recover lesser amounts of legal autonomy in response to ISDS disputes.

E5.b: When trade access is on the line countries will pursue policies that allow them to recover lesser amounts of legal autonomy in response to ISDS disputes.

In addition to manipulating material benefits, a softer form of coercion can take place through the influence of hegemonic ideas. Countries with bad ISDS records who want to avoid more setbacks in the future might look to capital exporters for cues on how to rekindle their treaties. Beyond being preferred by powerful actors -FDI exporters and foreign investors- an important mechanism for the diffusion of hegemonic ideas is that they are also promoted by epistemic communities (Haas, 1990; Slobodian, 2018). The community of international commercial lawyers -who benefit from serving as arbitrators and counsel in ISDS disputes- resemble some of the characteristics of epistemic communities (Dezalay and Garth, 1996; Langford et al., 2017; Sornarajah, 2015). At the same time, international commercial lawyers and their legal firms are economic actors; they have a financial interest in being hired to serve as arbitrators and/or counsel. Members of this ‘club’ have reasons to fear the current backlash against investment treaties if more and more states decide to do

away with ISDS mechanisms.¹⁶ Dozens of publications, international conferences and blogs hosted on legal firms' websites provide commentary on states' treaty policies. Through these outlets, governments can see how their actions are being perceived by the community of lawyers that will eventually counsel foreign investors on the status of legal security in the country. All else equal,

E5.c: Countries with larger concentrations of legal firms will pursue policies that allow them to recover lesser amounts of legal autonomy in response to ISDS disputes.

International civil society

In the same way that the community of arbitration lawyers can support hegemonic ideas about the value of investment treaties and ISDS, policy entrepreneurs can help discredit those same ideas. A few resourceful international CSOs have a clear policy goal of fundamentally transforming the investment regime.¹⁷ While domestic CSOs can take part in transnational networks and coordinate campaigns and actions with counterparts in other countries, the focus of their work is on advancing a cause at home. Differently, international CSOs have an interest in promoting their goals globally.

International CSOs can influence policy decisions in two main ways. One is by linking directly with policy-makers. In this sense, CSOs are not just passive producers

¹⁶Arbitration lawyers from the private sector typically charge several hundred dollars per hour; at top law firms the hourly fees can be up to US\$1,000 (OECD, 2012, 19).

¹⁷Attending various events on investment treaties and arbitration, I immediately noticed how many of the participants in one conference I had seen at previous ones. At one event organized by the International Institute for Sustainable Development in Geneva, after a member of the audience identified himself before asking a question, the panelist first noted how pleased she was to finally 'put a face to the name'. This anecdote simply illustrates that individuals within these networks know each other and/or read each others work.

of information hoping state officials will come across it in their Google searches. They actively engage with interested governments to provide them with technical expertise and with opportunities to coordinate with other governments. For example, Southern African Development Community (SADC) adopted a Model BIT in 2012 after a 18 month process of consultations and drafting among government representatives¹⁸ This process received technical support from one of the largest international CSOs in the field of investment, the International Institute for Sustainable Development (IISD) and Howard Mann, a senior IISD officer, was lead counsel during this process (SADC, 2012).

Another way in which international CSOs can affect the incentives facing governments is by linking with local civil society. This is particularly important when domestic civil society is relatively less organized around the issue of international investment treaties. Per the previous distinction between CSOs and social movements, when civil society actors resemble social movements -working with less sources of funding and technical expertise- it is harder to translate efforts into clear policy outcomes (Watkins et al., 2012). By teaming-up with international CSOs, local social movements acquire some of the expertise that is required to intervene in the policy-making process successfully. They can make specific demands about treaty provisions and they can monitor their implementation. Thus, all else equal, I expect that:

E6: Countries with larger presence of international CSOs will pursue policies that allow them to recover greater amounts of legal autonomy.

¹⁸SADC members include Malawi, Mauritius, Namibia, South-Africa and Zimbabwe. Representatives from Angola, Botswana, Mozambique and the Seychelles also participated in the final drafting committee meeting of May 2012.

Diplomatic support

Before I discussed how the home governments of foreign investors can raise the costs of implementing radical policies for host states. Here I consider how foreign governments can have the opposite effect. Instead of discouraging large policy changes, other countries can be a source of support when policy-makers are hesitant to take actions that might earn them criticism from powerful constituents or from moderate sectors within their own governments. There are two main ways in which this can happen.

In terms of material support, it is unlikely that like-minded states could cover the potential losses of FDI and trade that foreign investors and their home governments warn about. Thus, backing from like-minded states is more symbolic and it is geared towards a domestic audience. Given that discontent with the investment regime has emerged in multiple parts of the world, policy coordination can convince reluctant actors at home that other countries have similar concerns and they would not be the only ones breaking away. Thus, it helps if revisionist governments coordinate policies with prestigious countries and other big players in global investment rather than with small countries or ones that are seen as ‘too ideological.’

However, this creates a problem for policy-makers trying to enlist like-minded governments that, at the same time, are more palatable to moderate sectors. As discussed before, government ideology -as a set of worldviews and beliefs- can put policy-makers onto a revisionist or exit policy path. It is likely that states interested in adopting similar policies are also ideologically motivated to a certain extent and reluctant domestic actors might be wary of appearing too close. As I discuss in Chapter 5, this was an important issue behind Ecuador’s initiative to bring Argentina into ongoing talks with Venezuela and Bolivia.

Another way in which the actions of other governments can enable riskier policies is through demonstration effects. For example, if other countries had successfully exited the system or adopted alternative models and have not been severely punished for it, then this weakens the belief that foreign companies will not invest without BITs. In this sense, revisionist policy-makers often make references to Brazil to justify taking more radical approaches; a country that did not ratify any treaty with ISDS and still is one of the largest destinations for FDI. Thus, all else equal, I have the following expectations regarding the diplomatic environment:

E7: Countries will pursue policies that allow them to recover greater amounts of legal autonomy when other countries are doing it as well.

2.2.4 Ideas, societal interests and access points

So far I have argued that governments will react to ISDS experiences by trying to reassert their legal autonomy *vis a vis* international investment treaties. Doing so requires a change in treaty policy and what is involved in changing policies can vary. A policy change can mean that, relative to the current level of involvement in the investment regime, states will be more careful with how much legal autonomy they sacrifice in future agreements (Reform). It could also mean that they will stop signing BITs and thus will preserve their current level of legal autonomy (Caution). Or it could involve moves towards recovering it, partially (Revision) or completely (Exit). The resulting treaty policy choice, and thus the extent to which it deviates from the status quo, is shaped by a variety of factors. The most elemental one is the government actors' own understanding of the country's experience with ISDS; what went wrong and how to fix it. This, I argue, is heavily influenced by the dominant

ideas of policy-makers. Strong nationalist and/or leftist inclinations lead them to to reclaim the country's legal autonomy from a system they see as inherently flawed. Alternatively, governments with pro-market and/or internationalist convictions will be less sanguinary in their assessment and thus will honor their existing commitments and, in the future, be more careful with how much autonomy they compromise. That is, they will refrain from binding themselves to new treaties or they will introduce targeted reforms.

That said, government actors -whatever their initial inclinations might be- make decisions in a particular political environment. This environment is populated by domestic and external actors with their own interests in terms of how much they want the status quo to change. While some would prefer continuity in treaty policies, others would like to see changes that allow states to recover as much autonomy from the regime as possible. The discussion so far has revolved around the varying presence of specific interests: domestic multinational firms, domestic exporting firms, civil society, foreign investors. However, the presence of particular interests does not automatically translates to policy influence. A vast lobbying literature has developed within IPE that theorizes the conditions under which interest groups are more likely to lobby successfully. The contentious politics literature has asked similar questions. A generally accepted idea is that, while the mobilization of resources is important, social movements' capacity to generate policy changes comes from favorable political opportunity structures; that is, specific characteristics of either the domestic or international political and institutional environment that facilitate or inhibit social mobilization (Tilly and Tarrow, 2015).

Here I engage with Ehrlich (2011)'s concept of access points to the policy-making

process. Any policy-maker who can provide access to interest groups is an access point but not every policy-maker is an access point. Two conditions are most salient for my research questions. First, policy-makers must have power in the policy area that interest groups are trying to influence. Which policy-makers are *relevant* for a specific policy varies across countries but also within the same country. One single policy consists of multiple decisions -for example, adopting a new treaty model requires a decision to revise the current template, to draft it in a certain way, to make revisions or not to a draft, and to allow or not deviations from it in subsequent negotiations- and these can fall on different agencies that provide more or less access points to interested groups. Second, policy-makers need to be *susceptible* to lobbying. In Ehrlich's theory, policy-makers that are not elected are not susceptible because they have no incentive to be lobbied. That is, they have no need for campaign contributions. However, since lobbying can provide a variety of goods that policy-makers might want, I have a different understanding of susceptibility to lobbying. Non-elected policy makers, i.e career bureaucrats in executive agencies, have incentives to obtain some of the goods that interest groups provide, especially information and expertise, if they see them as instrumental to their policy goals. They might be trying to curry favor with their superiors or develop a reputation within the bureaucracy but -and this could be the case with elected policy-makers as well- they can also be invested in successfully implementing specific policies due to personal convictions and ideological inclinations.

There is another way in which ideas, i.e. principles beliefs, come in. Societal interests will lobby relevant and susceptible policy-makers, but susceptibility is also a function of policy-makers' views and attitudes. That is, access points are not necessarily 'up for grabs.' A policy-maker that shares civil society's concerns with

how ISDS tribunals constrains the state's ability to regulate is an access point for CSOs but not for multinational firms. This view of lobbying is closer to Hall and Deardorff (2006)'s. While their theory was developed to explain policy outcomes in the US Congress, it provides a clear understanding of the relationship between policy-maker's own ideas about policy issues and the interests of societal actors. Lobbyists' goal "is not to change legislators minds but to assist natural allies in achieving their own, coincident objectives" (p. 69). A central assumption is that legislators care about some issues more than others. Ideally, they would want to shape policy in all those issues they care about, but having influence on policy takes a lot of work (serving on committees, authoring bills, proposing amendments, etc.) and they have scarce resources to devote to that work. Interest groups -which unlike legislators are experts on the issue at hand- provide valuable information that decreases the cost of working for (or against) a certain policy. Both elements -legislators' motivations and interest groups assistance- are necessary for successful lobbying to take place. Without legislator's initial preferences, there would be no interest in the lobbyists' services. Without lobbyists' services, legislators could not afford to attempt changing policy. In sum, considering the alternative interests of societal actors explained in the previous sections together with the notion of access points as relevant and sympathetic policy-makers, I expect that, all else equal:

E8.a: When the policy-making process provides more access points for domestic and/or international CSOs, policies in response to ISDS disputes will allow states to recover greater amounts of legal autonomy.

E8.b: When the policy-making process provides more access points for multinational firms, exporting firms, foreign investors and their govern-

ments, policies in response to ISDS disputes will allow states to recover lesser amounts of legal autonomy.

2.3 Research design

The last section of this Chapter presents the research design for putting the previous argument to the test. I employ a mixed methods research design that combines quantitative statistical analysis and qualitative case studies. This choice of design was aimed at maximizing both the internal and external validity of my arguments. Through regression analysis of four different cross-national datasets -including an original measure of International Legal Autonomy (ILA)- I provide quantitative evidence in support of my expectations above. I show that the rise of ISDS disputes is associated with a reclaiming of states' legal autonomy to regulate foreign investment in international law. Furthermore, the likelihood of states making varying choices about treaty content, treaty signature, and treaty termination is not uniform across states with the same level of ISDS experience. I provide detailed descriptions of the methods and data used in the statistical analysis in Chapter 3.

Through qualitative case studies I trace the casual processes behind these correlations, providing insights into actors' understandings of their motives and assumptions. The case studies give a richer sense of the political context that generated the discrete data points that went into the quantitative analysis. Solely relying on statistical methods would have made it difficult to uncover the mechanisms at work, especially when a theory is geared towards explaining not just policy outcomes but also policy initiatives that emerged but did not prosper.

The argument developed here makes claims about causal mechanisms, which spec-

ify the different steps leading to policy outcomes. To test claims about causal mechanisms I employ process tracing methods that connect stages of the policy-making process, enabling me to identify the reasons for the emergence of a particular decision through the dynamic of events (George and McKeown, 1985). Through process tracing, I should be able to show that the impact of ISDS disputes was perceived differently by government actors holding different worldviews and beliefs. Whatever the idea's prior cause, a claim of ideational causation necessarily implies that decision-makers' beliefs or goals are not fully determined by the material parameters of the policy choice being explained. I should also be able to connect these ideas to alternative policy initiatives regarding investment treaties and establish that only the theorized domestic and external factors were the main sources of constraints and support during the implementation of those policies.

2.3.1 Case selection

As my argument involves the operation of multiple variables at different levels of analysis, it is unfeasible to examine as many cases as needed to observe how each individual variable relates to the outcome of interest while all others are controlled for. Thus, striving to obtain as much useful variation in the dimensions of interest as possible with a manageable number of cases, I selected cases in terms of economic development. I do not argue that policy choices are a direct consequence of wealth. Rather, different levels of economic development make alternative configurations of the explanatory variables more likely.

First of all, economic development is closely related to a central distinction in the literature on investment treaties and FDI, that between capital importers and

capital exporters. Theoretically, capital importers relate to investment treaties and ISDS from the perspective of the host state that will be sued by foreign investors, whereas capital exporters are home to the companies suing those states. This is a logical distinction for theoretical reasons and it actually applies to many bilateral relationships in which FDI flows only in one direction. But considered as a whole, states that send out large amounts of FDI also receive substantial foreign capital. There are many economies -the bulk of the developing world- which can be referred to as capital importers. However, capital exporters are better thought of as dual-role states. Developed countries fit this label. In 2017, 64% of the world's FDI inwards stock was located in the developed world and 76% of the world's outward stock came from the developed world (UNCTAD, 2018b).

This particular position structures political reactions to ISDS differently in developed states than in developing countries by shifting the significance of some explanatory variables relative to others. Regarding domestic firms, developed countries as dual-role states are home to multinational firms seeking to preserve the international investment treaties that provide them with protection. Similarly, the 20 busiest investment arbitration law firms are all based in the global North (Eberhardt and Olivet, 2012). For the most part, developing countries do not have a comparable indigenous multinational sector. Thus, it is their domestic exporting firms which become involved in the policy-making process after foreign investors and their home governments warn about potential economic losses that would come from pursuing radical policies.

Selecting cases at different levels of economic development also allows me to observe significant variation in terms of domestic civil society. In developed states,

civil society is relatively more institutionalized and better funded than in developing countries (Salamon, 2010). In terms of the distinction between CSOs and social movements, the proportion of civil society actors that resemble CSOs instead of social movements is larger in wealthy countries. In developing states, it is the opposite. With less sources of funding and technical expertise and working with limited technologies and weak infrastructures, it may be harder to translate their efforts into clear policy outcomes (Watkins et al., 2012). Thus, Northern CSOs do two things that can heighten their influence. Because of their common grievances and links to social movements, they engage in grassroots mobilization and other unconventional activities. Yet they also have come to resemble political insiders. Organizations such as the Sierra Club or Public Citizen in the US or the members of the Seattle to Brussels Network in Europe have become a significant and visible presence in Washington and Brussels politics.¹⁹

Differences in economic development also lead to varying exposure to external pressures. In relation to international investment, state power is related to the scarce productive factor that all states want to attract. That is, capital. Thus, developed countries as the sources of most FDI outflows are at the top of the international hierarchy. External forces should be relatively weaker in affecting policy-making in powerful states than in less affluent ones. Therefore, in developed states I can observe the interaction of mostly domestic factors -namely policy-makers' ideas and the relative influence of domestic firms and CSOs. In developing countries, I can

¹⁹According to an official from the Dutch chapter of a large environmental CSO, they engaged in lobbying activities against the free trade agenda and “specifically the ISDS part precisely because of the fear that companies could sue environmental regulations.” But the organization also worked to mobilize people and train local activists. “We organized three big marches...the first march was only like a hundred people...the last two ones were already seven thousand people. For The Netherlands that was quite a lot.” Interview XIV.

observe how the external environment -foreign investors and their home governments, international CSOs and like-minded states- shapes treaty policies in the aftermath of ISDS disputes.

2.3.2 Case-specific expectations

Thus, with the goal of capturing variation in dimensions of interest, I base my findings on three case studies of policy reactions to ISDS experience in Ecuador, India and the United States. In all three cases, negative experiences with ISDS disputes should provoke some form of reaction among policy-makers; that is, discussion should ensue about what changes will be adopted and how much will retooled policies deviate from current ones. Policy-makers should propose larger changes when they hold nationalist and/or leftist ideas and smaller when they hold market-friendly and internationalist ideas. However, the three cases should vary in terms of the political environment in which policy-makers implement their desired policies; an environment populated by interested actors with more or less access points to the policy-making process.

In the case of the United States, being the world' top FDI sender and the most frequently claimed nationality by firms in ISDS disputes²⁰, I should observe American multinational firms mobilizing to limit the scope of the proposed changes so that their level of protection abroad is not diminished. Also, given that fifteen of the twenty busiest firms in investment arbitration are American, I should observe legal firms involved in international commercial arbitration to mobilize for the same goal as well. The US is also the world's largest receiver of FDI. Because American civil society is one of the largest and better organized -the proportion of economically

²⁰Foreign direct investment, net outflows (BoP, current US\$). The World Bank; UNCTAD Investment Policy Hub.

active Americans that work in the non-profit sector is one of the largest in the world (Salamon, 2010)- CSOs in the US should have developed both an interest on ISDS issues as well as technical expertise on matters related to international investment law and should mobilize to promote as much policy change as possible. Given the prominent position of the US at the top of the international structure, policy-making in the US should be mostly a domestic process with little involvement of external factors. That is, foreign investors in the US and international CSOs should not have a prominent role. Because foreign investors will not be involved, they will not enlist the help of their home governments and thus American exporting firms will have no incentive to mobilize on this issue. Similarly, foreign countries' policy reactions to their own ISDS experience should have no bearing on how much legal autonomy the US attempts to reclaim for itself. Thus, at different stages of the policy-making process, domestic multinational firms' and CSOs' ability to promote larger or smaller policy changes should be defined by their relative availability of access points, a condition that should vary depending on institutional characteristics as well as the ideological distribution of relevant policy-makers.

The second case-study is of Ecuador. Regarding FDI flows, Ecuador is a capital importer with only minor FDI outflows. At the same time, exports represent a larger share of Ecuador's GDP than of the other two cases.²¹ This means that interested economic actors in Ecuador will be foreign firms with investments in the country and domestic exporting firms while considerations of Ecuador's interests as an FDI exporter should be nonexistent. Thus, foreign investors should be observed mobilizing against drastic policy changes and their home governments putting diplomatic pressure on the host state. As a result, domestic firms also mobilize under threats

²¹Exports of goods and services (% of GDP). The World Bank.

of reduced market access. In terms of domestic civil society, according to the latest CIVICUS report on Ecuador, Ecuadorian civil society is rather weak, with internal organization being the weakest dimension (Heinrich, 2007). Under these conditions, domestic civil society groups should not have developed strong interest and technical expertise on investment treaties. Thus, local social movements should not mobilize in relation to the country's treaty policies in comparable ways to the CSOs in the American case -as providers of information for like-minded policy-makers. At the same time, scholars of Ecuadorian politics consider the indigenous rights movement to be fairly powerful, mostly because of its ability to paralyze the country through political uprisings (Becker, 2010; Mijeski and Beck, 2011). The indigenous movement should thus be likely to mobilize forcefully against foreign firm's when their operations affect issues on their agenda. However when domestic civil society establishes linkages with international CSOs, their ability to influence the policy-making process should be enhanced. Moreover, occupying a lower position in the international hierarchy, the policies of like-minded countries should figure prominently among Ecuadorian policy-makers who should take advantage of opportunities to coordinate policies with them.

The last case study is on India. In terms of economic development India is closer to Ecuador. Thus, India's civil society, albeit much larger in size than the Ecuadorian, has comparable low levels of organization. Due to its population size, the civil society sector in India is immense. According to reports from 2009, around the middle point of the time period I examine, about 1.5 million civil society groups worked in India. Yet most groups in India are small and dependent on volunteers; 73.4% of these have one or no paid staff (Asian Development Bank, 2009). As a result, I

should not expect high levels of expertise on the subject matter from Indian civil society and thus, they should not be prominent actors in India's rethinking of its BIT policy, unless they are able to form coalitions with international CSOs. At the same time, in overall economic size, India is much closer to the US. India's economic size matters for two reasons. First, recent years have seen an increase of outgoing FDI. Thus, unlike in Ecuador, the interests of home multinational firms should be a part of the government's consideration. However, India is, for the most part, still an importer of capital. As a consequence, domestic multinational firms should not yield as much influence as in the US. Second, India's government should be better able than Ecuador, but not as much as the US, to implement its desired policies in the face of external constraints and without enlisting the support of like-minded countries. Thus, like in Ecuador, I should be able to observe foreign investors mobilizing against big changes to Indian BITs and enlisting the help of their home governments but these pressures should not have comparable constraining effects. Similarly, the actions of other countries considering similar policies should have less salience in the calculations of Indian policy-makers than in the Ecuadorian's.

The evidence for the qualitative case studies comes from field research, elite interviews, news archives, official documents and legislative records. I attended conferences on international investment agreements in Geneva and New York organized by international organizations and think tanks which provided me with access to states, CSOs and firms' official positions on the issue of investment treaty and ISDS reform. I also recruited most of my interviewees at these events. I conducted interviews with state officials and diplomats, officials from international organizations, representatives of firms and firms' associations and civil society activists. There are potential

biases that come with relying on personal testimonies. Individuals' accounts of past events might be affected by how they eventually unfolded. Policy-makers might feel inclined to describe unsuccessful policy initiatives in ways that exaggerate the influence of factors beyond their control. Similarly, activists might overstate their role in particularly important policy outcomes. Whenever possible, attempts were made to corroborate narratives with alternative sources from the time, such as news records and official documents.

In sum, this Chapter presented the theoretical framework used in this dissertation to explain variation in treaty policies in reaction to states' experiences with investment disputes. I consider treaty policies to vary in terms of how much international legal autonomy states recover as a result of their implementation. Assuming states will always implement changes in their treaty policies after experiencing costly arbitral disputes, my argument focuses on the factors leading governments to recover more or less legal autonomy as a result of those changes. I argue that absent a consideration of how policy-makers' ideas inform policy preferences it is not possible to fully explain variation in treaty policies. The views and beliefs of policy-makers in strategic positions put them on different policy paths to recover more or less of the legal autonomy once lost to BITs. A series of contextual variables can help governments to remain in that path or deviate from it. While I incorporate important insights from alternative arguments -namely firm-level interests and mobilization and deployments of material and soft power- to understand how these variables have independent effects, I also consider the conditions under which civil society actors -often overlooked in the study of international economic law- can foster greater changes in states' treaty policies.

Chapter 3

Quantitative evidence

This Chapter provides systematic evidence of the empirical trends introduced in Chapter 1 and explores some of the theoretical expectations emerging from Chapter 2. In section Section 3.1, I present an original country-level measure of international legal autonomy regarding foreign investment (ILA) and show how ISDS experience is correlated with smaller negative changes and with positive changes between yearly ILA scores. The rest of the Chapter explains specific policy choices in the aftermath of ISDS disputes that affect a country's level of legal autonomy. I consider two future-oriented actions aimed at managing how much ILA states are willing to compromise in the future. The first one is their willingness to sign BITs (section Section 3.2) and the second one are choices about the treaties they sign (Section 3.3). I also consider one past-oriented choice leading to the recovery of legal autonomy. That is, the likelihood of treaties being terminated (section Section 3.4). I do so by analyzing three original datasets of treaty signatures, content of signed treaties and treaty terminations with the goal of capturing the degree to which ISDS disputes relate to these alternative policies and under what conditions is each outcome more likely.

This Chapter does not test all expectations born out from Chapter 2. More specifically, I do not test any expectations regarding the role of ideas. It is debat-

able whether valid indicators of ideational variables exist, especially ones that would capture nuances within ideological orientations.¹ Moreover, my argument focuses on the interaction of ISDS experiences with ideational and various contextual variables. Statistical results with higher-order interactions can be hard to interpret. Thus, my goals for this Chapter are modest. First, I test my underlying assumption that ISDS experience leads states to either recover their legal autonomy or to compromise smaller amounts of it. Second, I seek to uncover general patterns that are suggestive of more complex processes than a direct relationship between of ISDS experience and alternative policy choices that affect states legal autonomy.

I find that the probability of signing and terminating treaties as well as the content of treaties that do get signed -which can preserve more or less regulatory autonomy for host governments- are all correlated with ISDS experience. Yet these relationships are more nuanced, since arbitral disputes appear to have varying effects across distinct groups; that is, developed and developing countries. In terms of treaty signature, I find that, as ISDS disputes accumulate, developing countries become less likely to sign BITs while developed countries continue to expand their treaty networks. However, I do not find that developed countries come out of their own ISDS proceedings unscathed. From the analysis of the content of treaties that do get signed emerges that developed states, as their ISDS experience increases, tend to sign agreements that better protect their ability to regulate foreign investment without violating the treaty. Conversely, variation in the number of arbitral disputes against developing states does not appear to be associated with variation at the level of treaty content. Lastly, patterns of treaty termination also reflect the relationship between negative

¹For example, the most widely used indicator of government ideology, the Database of Political Institutions (Cruz et al., 2016), codes the US under Democratic presidents and Cuba as equally leftist.

arbitral experiences and policy decisions is not uniform across states. While they are extremely rare events -and as such, hard to predict- the analysis of recorded instances of treaty termination suggests that larger numbers of investment disputes against developed states does not make their treaties more likely to be terminated. However, ISDS experience does have that effect on the likelihood of termination when it comes to treaties signed by larger developing states. In each respective section I elaborate on the implications of these findings for my theoretical expectations.

3.1 ISDS experience and international legal autonomy

Available scholarly literature on international investment treaties paints different pictures of the international investment regime. On the one hand, New-New Trade Theory (NNTT) scholars suggest the regime is expanding (Kim et al., 2019, 2018). As more, and denser, global value chains emerge linking economic activities in different parts of the world, the international investment regime grows in significance. Recent survey research finds the primary concern of multinational firms to be the stability of their investments along these production chains (Kim et al., 2019). Thus, global economic governance -once tasked primarily with maintaining open markets and allowing free flows of goods- is expected to also assist in furthering the globalization of production by facilitating capital's access to productive sectors anywhere and mitigating the associated political risk. Evidence of this expansion is found not just on states' continuing interest in signing investment treaties, albeit at a lower rate, but also on the increasingly common inclusion of investment provisions within free trade

agreements (FTAs) and the emergence of larger economic agreements -such as the CTPP or CETA- that encompass both trade and investment (Kim et al., 2018).

Much differently, scholars that study the enforcement of investment agreements through arbitration see the investment regime as undergoing a period of unprecedented contestation and reform (Pelc, 2017; Broude et al., 2019; Hindelang and Krajewski, 2016; Aisbett et al., 2018; Morosini and Badin, 2017; De Mestral, 2017). This diagnose is based on two noticeable trends in reaction to the rise of arbitral disputes. First, investor protection provisions, especially ISDS, has become one the most hotly debated issues in contemporary international economic negotiations.² Second, states have pursued different courses of action in reaction to their costly experiences with investment arbitration. After the claims hit, scholars have recently found, states are less likely to sign new BITs (Poulsen and Aisbett, 2013), more likely to renegotiate them Haftel and Thompson (2018) and replace them with less pro-investors ones(Broude et al., 2019), and more likely to increase precision in subsequent BITs (Manger and Peinhardt, 2017).

These two assessments are at odds with each other and yet they are both grounded on systematic analysis of empirical evidence. The reason for these contrasting views is that scholars have tended to look at state actions in isolation. For example, adding an investment chapter to an FTA has a different legal and political meaning if that treaty is more deferential of states' regulatory autonomy than a previous BIT between the same countries which the FTA is supposed to replace (Broude et al., 2017). Conversely, a seemingly radical decision to terminate a series of BITs under which investors have initiated arbitral disputes would be tempered if, at the same time,

²ISDS: The most toxic acronym in Europe. (17 September, 2015). Politico. See also (Buonanno, 2017)

states remain willing to enter into new agreements that, although they might be called something different, they have nonetheless similar protection standards and enforcement provisions. Moreover, if states engage in multiple of these endeavours at the same time, it becomes important who they chose each one in relation to. That is, a state might be willing to terminate a BIT with a small country from which it receives little to none FDI yet, with its largest capital suppliers, the choice might be to maintain the old BIT. In sum, if states are constantly adopting new international legal commitments and getting rid of old ones, what can be made of the current status of the international law of foreign investment?

In order to consider the effects of all these alternative actions, I developed an original country-level measure of states' international legal autonomy (ILA) in relation to foreign investment. This measure represents the degree of international legal constraints placed on a given state over its treatment of foreign investors, with low scores signaling low autonomy (or high constraints) and high scores signaling high autonomy (or low constraints). I calculate this measure by first giving a score that ranges from 0 to 1 to each relationship between the observation country and all other countries in the world in a given year. The value of each bilateral score depends on whether there is a treaty in force between them or not. The absence of a treaty can be due to multiple circumstances: either they never signed one, or they failed to ratify it, or they terminated it. If there is a treaty in force in a given year, the score depends on the content of the treaty and how it balances investment protection and states' regulatory autonomy. I calculate this property for each treaty using Broude et al. (2019)'s coding scheme which determines, across a range of provisions, whether a treaty provides for more or less "state regulatory space", understood as the ability

of a state to freely adopt policies and regulations that might affect foreign investors (I explain this indicator in detail in Section 3.3).

Each bilateral score is then weighted by the proportion of world GDP the partner represents in a given year and then aggregated in a single country-year ILA score.³ The reason for weighting by world GDP proportion is that for any given country, full legal autonomy in relation to, for example, the US is more meaningful than in relation to, for example, Suriname.⁴ A detailed explanation of how I constructed this measure is available in Appendix A.1.1.

This measure improves on available indicators and contributes to the literature in three main ways. First, it provides a score at the country level. Available work leveraging empirical variation across treaties to study concepts of interest has produced measures of treaty-level attributes, namely precision (Manger and Peinhardt, 2017), enforceability (Allee and Peinhardt, 2011, 2014), or freedom to regulate (Broude et al., 2018, 2017; Blake, 2013). Differently, ILA is an attribute of the state. Second, it is a composite measure in the sense that it captures the effects on the country's overall exposure to the international investment regime of alternative actions that so far have been considered in isolation. And third, the measure incorporates the significance of not signing a treaty with a particular partner. With most of the scholarly attention paid to what makes countries sign treaties and, once they do, how do they manage the consequences of their past decisions to commit themselves, there is little attention paid to the decision to remain unbound by investment treaties with certain countries.

³The GDP proportion is calculated by adding all individual GDPs except the observation country's.

⁴Ideally, I would have access the yearly data on the national origin of each country's entire FDI stock. However, such data does not exist, thus I use world GDP proportion as a proxy, assuming larger countries send more FDI than smaller ones.

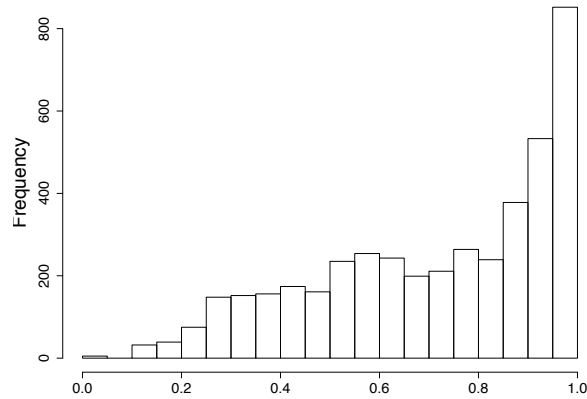


Figure 3.1: Histogram of ILA scores

The measure is available for 154 countries and it covers the period from 1989 to 2016.⁵ Following Jandhyala et al. (2011), 1989 represents the beginning of the largest expansion period of BITs. From then on, investment treaties became “a global standard or norm about the treatment of FDI by host countries” (p. 1049). However, the measure still reflects the effects of decisions made before the cut-off year. That is, a country’s score in 1989 is based on the status of its treaty network in that year, independently of when the valid treaties were signed. This results in a total of 4,350 observations. Figure 3.1 shows the frequency of each score in the dataset. The mean ILA value is .71 and while higher values are more common, there is still considerable variation. For the most part, higher values correspond to earlier years when countries were starting to sign treaties. Figure A.1 in Appendix A.2 shows how the distribution of scores becomes more even as time goes by.

⁵Countries with populations less than 500,000 were excluded.

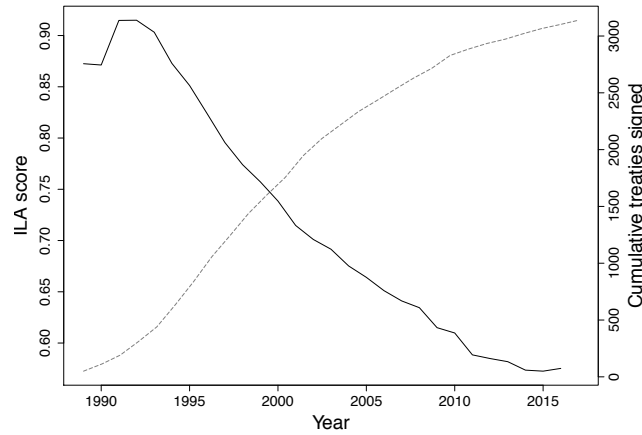


Figure 3.2: Average ILA score by year

Countries' levels of legal autonomy have experienced an overall downward trend. Figure 3.2 shows the average ILA score, represented by the solid line and the left Y axis, together with the cumulative number of treaties signed over the years, represented by the dashed line and the right Y axis. This reflects the expansion of the international investment regime and how this evolution is inversely related to the average value of international legal autonomy for all countries. The more treaties that have been signed, the more constraints placed on states' legal ability to regulate FDI. This downward trend seems to support the assessment from NNTT scholars that the globalization of production is met with increasing commitments to protect foreign investments. However, looking at aggregate trends hides a substantial amount of variation taking place at the individual level.

Looking at ILA scores over time for individual countries reveals different trajectories. The top plots in Figure 3.3 show ILA scores over the considered period for the United States and Canada. Their scores are, for the most part, above the mean.

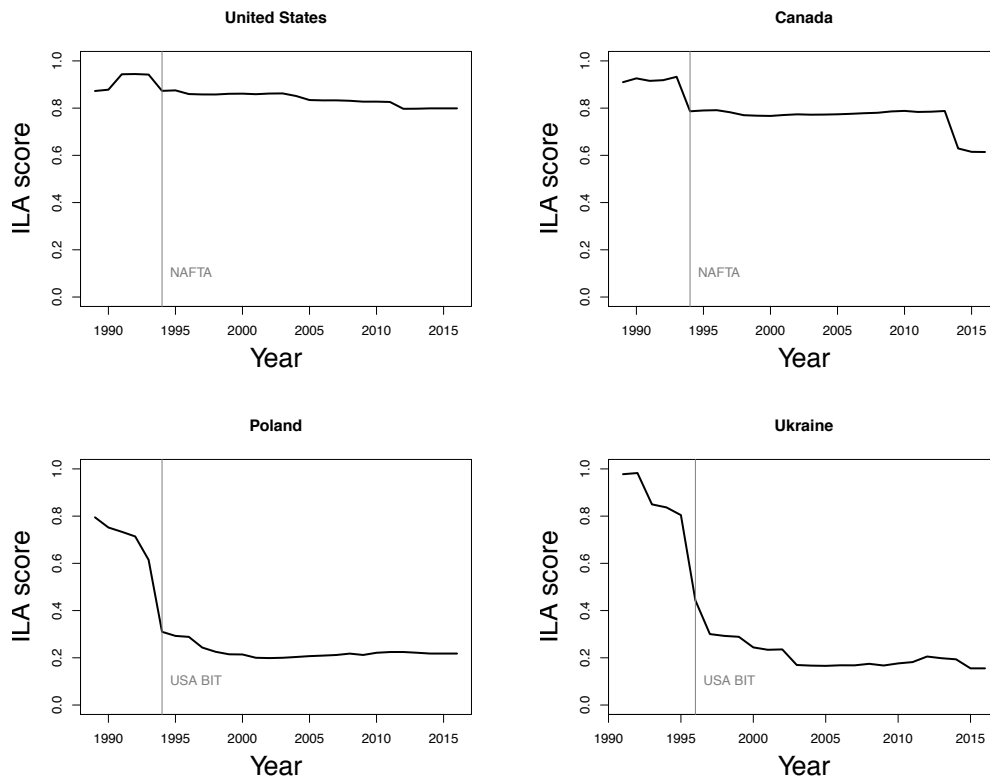


Figure 3.3: Selected country scores

This reflects the fact that wealthy states have historically entered into binding investor protection agreements with developing states but have not been equally prone to do so with other developed economies. That said, the few instances in which they have done so are reflected in their scores. The vertical line in both plots represents the entry into force of NAFTA and while the legal autonomy decreases for both, the dip is larger for Canada because of the relatively larger size of the US economy. Canada reflects another big dip in 2014 with the entry into force of its BIT with China. Because the measure is available until 2016, it does not yet reflect the entry into force in December 2018 of the CPTPP, which includes large economies like Australia, Japan and Singapore. Another large dip is looming for Canada when CETA -the EU-Canada Comprehensive Economic and Trade Agreement- signed in 2016 becomes fully binding. The US would have reflected a similar pattern if TTIP -the Transatlantic Trade and Investment Partnership with the EU- had prospered. Similarly, all things equal, an eventual replacement of NAFTA with the USMCA -the United StatesMexicoCanada Agreement- signed in November 2018 and which drops ISDS between Canada and the US should increase both countries' scores, although not as much as if NAFTA would have been terminated without a replacement. The bottom plots in Figure Figure 3.3 show the other side of this story. For example, Poland and Ukraine went on BIT signing sprees while liberalizing their economies in the early 1990s. Between 1990 and 1995, 44 BITs entered into force for Poland, including its BIT with the US. For Ukraine, the most pronounced dip came in 1996 when its bilateral treaty with the United States became binding.

What I have shown so far is still consistent with a view of the international investment regime aiding the globalization of production and the expansion of capital

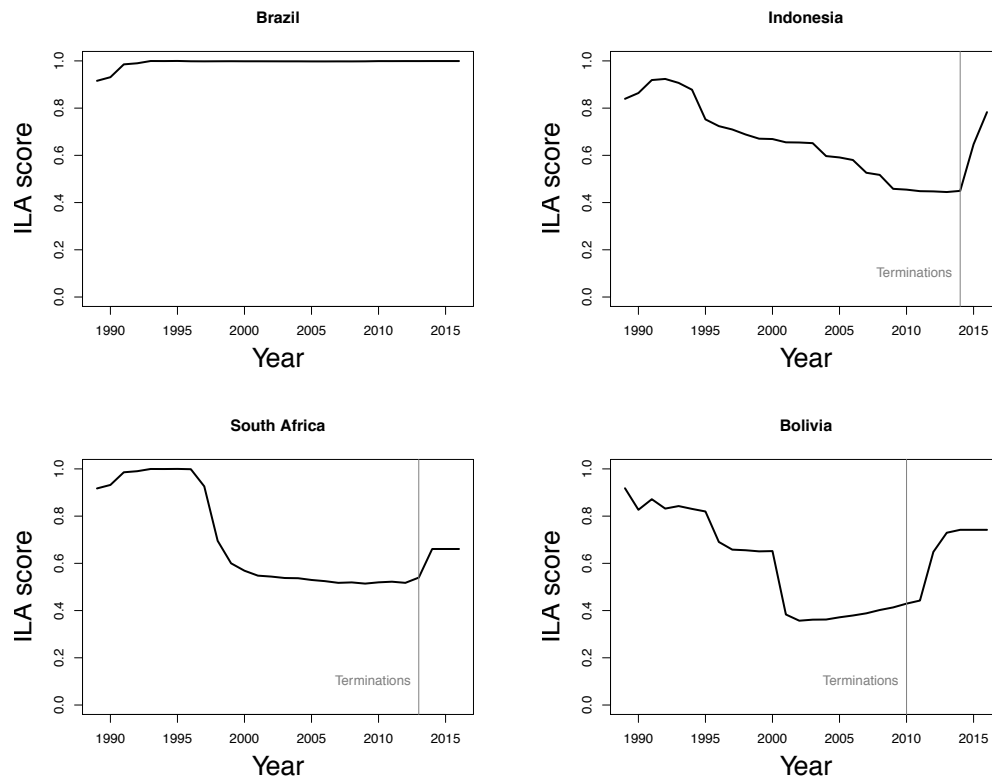


Figure 3.4: Selected country scores

into the developing world. Yet the countries displayed in Figure 3.4 paint a different picture. Brazil has traditionally remained an outsider to the regime. Having signed several BITs in the 1990s, including with large capital exporters like Germany, France and the Netherlands, the Brazilian Congress failed to ratify them due to concerns with the enforcement provisions included in the treaties (Campello and Lemos, 2015). After adopting a new model in 2013, Brazil started to sign new agreements. Yet so far these have only been signed with small African nations -like Malawi and Ethiopia- or regional partners -like Chile and Colombia- and, as of today, only the BIT with Angola has entered into force in 2017. Thus, these are not likely to make a dent in Brazilian scores. If current negotiations for a BIT with India prosper, that would bring its score down in a noticeable amount. However, given that both countries have adopted markedly pro-state treaty templates, these countries would not be sacrificing as much autonomy as if they had kept negotiating over the basis of their old, pro-investor models.

The other three plots are of countries who took steps to terminate large numbers of their BITs. Indonesia announced in 2014 -denoted with the vertical line- it would discontinue of all its existing treaties. This policy, which is still being implemented, has so far led to the termination of 29 BITs, including those with wealthy capital exporters like the Netherlands, Germany and Switzerland. This brought Indonesia's score up in the following years. Similarly, South Africa announced it would start to terminate its treaties in 2012 and rely on domestic legal protections from then on. So far it has gotten rid of its BITs with countries like the UK, Germany and Netherlands. However, it remains tied to its commitments with large partners, like Italy and China. After several setbacks in international arbitration, Bolivia's 2009 consti-



Figure 3.5: Selected country scores

tutional changes outlawed BITs and gave the government a year to start denouncing the treaties. The steep upwards turn is a result of discarding its BIT with the US in 2012. In coming years Bolivia's ILA score should keep rising as its denunciation of the treaties with the UK and Switzerland becomes effective.⁶

Figure 3.5 shows the ILA scores over time for India and Ecuador, the two case studies in the dissertation in addition to the US. Both countries follow the typical trajectory of developing countries. Ecuador's scores decrease abruptly after the entry into force of its BIT with the US in 1997 while India's downward trend is more gradual.

⁶The capacity of the parties to terminate a treaty at a given time is subject to each treaty's own termination provisions. See section Section 3.4 for more details on how treaties can be terminated.

Since India never signed a BIT with the US, there is not a comparably sharp decline until its BIT with China becomes binding in 2007. In terms of the policy reactions, Ecuador is a case of exit and India a case of revision. Either of these are not evident in these plots. The reason for this is that the measure is available until 2016 while the most assertive policies these countries put in place to recover their legal autonomy from the investment regime did not materialize until later. As I explain in detail in Chapter 5, the 2008 Ecuadorian Constitution included a ban on treaties with ISDS. Quickly after Ecuador discarded a first batch of treaties but these were BITs with small economies like Cuba or El Salvador -countries from which little investment had gone into Ecuador- and thus these result only in a very subtle upward movement in the country's ILA score. The more meaningful terminations in terms of the economic size of the partners -namely the US, France and China- did not come until 2017. In the case of India, the government announced it would terminate all its treaties after adopting a new model BIT in 2015, yet only the first one -that of its BIT with the Netherlands- is reflected in the plot. Since then, India has terminated 60 more BITs. In sum, as more data on the content of new treaties becomes available, I will be able to extend the time period covered by the measure and recent years should reflect the latest steps that Ecuador and India have taken to get rid of their old agreements.

3.1.1 Expectations and data

In Chapter 2, I argued that after facing ISDS disputes, states will attempt to protect their capacity to regulate foreign investors and I provided an explanation for variation in the policies that states put in place in pursuance of that goal. In this section, I start by testing the initial assumption that states react to ISDS experi-

ence in this expected way. That is, that investors' invoking international investment treaties through arbitration prompts states to recover some of the sovereignty they had lost to the investment regime. Yet, the foreign investors initiating these claims are not stateless entities. Rather, they have preferences over the investment treaty policies of their home governments and they mobilize to influence it (Kim, 2017; Kim et al., 2019). Thus, I also expect that countries that are home to multinational firms initiating ISDS claims against their host states will not scale back their participation in the regime and rather will deepen it. Thus, the main testable hypotheses derived so far are:

H1: States that have been involved in more investment disputes as respondents, all else equal, are more likely to recover their international legal autonomy.

H2: States that have been involved in more investment disputes as home of claimants, all else equal, are less likely to recover their international legal autonomy.

I am interested in states' attempts to *reassert* their legal autonomy. For this reason, I do not seek to explain a states' ILA score in a given year. Rather, I focus on the change in yearly ILA scores as ISDS experience varies. To capture this specific variation, I use two alternative dependent variables. First, I created a continuous variable from the difference between a country's ILA score in a given year and its score in the previous year. That is, $ILAdif_{t1} = ILA_{t1} - ILA_{t0}$. In the analysis of this variable I employ ordinary least squares (OLS) estimation with robust standard errors. The range of values for this variable goes from -0.36 to 0.2 with a mean value

of -0.01. A negative mean value suggests that, throughout the considered period, states have compromised more sovereignty than what they have recovered. My second dependent variable, *ILA dif. sign*, is a dichotomous indicator that takes a value of 1 if *ILA dif.* is positive and 0 if it is zero or negative. That is, this variable captures all instances of states recovering a degree of international legal autonomy. 64 percent of the observations are 0s and 36 percent are 1s. Being a binary indicator, for this variable I perform the same analysis using logistic regression models.

These two variables capture related, yet different phenomena. After facing costly ISDS claims, states might still be willing to sign new treaties and thus sacrifice some of their legal autonomy. Yet they might be more careful about what kinds of treaties they sign are who they sign them with. In this sense, states overall ILA score will still decrease yet not as much as it has in the past or in comparison to countries that have not experienced ISDS directly and are thus more prone to enter into binding legal commitments. *ILA dif* is able capture these nuanced shifts in a country's level of involvement in the investment regime. At the same time, this variable cannot distinguish between states that sacrifice less legal autonomy from those that actually recover it. To capture this specific variation I rely on *ILA dif sign* as the dependent variable.

In terms of independent variables, I use four indicators of state involvement in ISDS disputes.⁷ The first one is the cumulative sum of known ISDS disputes initiated against the country (*ISDS resp t-5*). This quantity is lagged five years because ISDS

⁷In terms of ISDS experience, I recognize that the way these experiences are perceived is subjective and context-specific. One dispute, because it challenges a particular policy or regulation a state and its population care about, can feel like much more of an affront than a series of lower profile disputes. An alternative indicator of severity could be the amount of money claimed by investors or the size of the monetary compensation. However, this information is only available for a reduced number of known disputes. I return to this issue during the qualitative analysis when necessary but otherwise the number of disputes appears to be an appropriate indicator.

claims can stretch over multiple years and thus their impact might start to be felt once governments start confronting the financial and reputational costs of litigation. The rationale for looking at claims initiated instead of claims lost is that scholars have found that states are not hurt as much by arbitrators' final decisions but by the onset of disputes, especially frivolous ones (Pelc, 2017; Gaukrodger and Gordon, 2012; Allee and Peinhardt, 2011). The second independent variable is the cumulative sum of known ISDS disputes in which the country is listed as the nationality of the claimant (*ISDS claim t-5*). This indicator is also lagged five years.⁸

The third independent variable (*Pro-Inv sum t-1*) is the cumulative sum of disputes that have been decided in favor of investors up to the observation year. That is, the number of arbitral claims the state has lost. In this case, since the award marks the end of a dispute that has been ongoing for several years, I only lag this quantity one year. The last independent variable is the difference between the cumulative sum of ISDS disputes initiated against the country and the cumulative sum of ISDS disputes in which the country was the home of the claimant (*ISDS.diff t-5 = ISDS resp t-5 - ISDS claim t-5*). This indicator captures the overall exposure of a given country to ISDS, negative values indicate the country is mainly participating in this system as home to claimants; while positive values indicate that the country is mostly exposed to ISDS as the target of arbitral claims. I also included three standard control variables. The economic size of the country as measured by real gross domestic product (*GDP t-1*), the level of democracy (*Polity2 t-1*) and the size of the population.⁹

⁸It should be noted that given the possibility of "treaty shopping" (when a firm uses a subsidiary in a country with a more favorable treaty to file a claim) the true home state of a claimant cannot always be identified. This is most notable in the case of The Netherlands since Dutch is the second most common nationality claimed by investors in ISDS disputes.

⁹I omitted two important control variables for testing hypothesis related to investment treaties. The models are missing indicators of both inward and outward FDI stocks. I omitted these variables

3.1.2 Results and discussion

Table 3.1, Table 3.2 and Table 3.3 show results for six models with both country and year fixed effects. Country fixed-effect estimators are the workhorse of cross-country analysis because they significantly reduce the influence of omitted time-invariant country characteristics. Year fixed effects capture the influence of aggregate trends. Results for OLS models using *ILA dif.* as the dependent variable are displayed on the left columns and results for logistic models using the binary *ILA dif. sign* can be found on the right columns. Model 1 suggests that the cumulative number of arbitral disputes against the country is positively related to the change in yearly ILA scores. This lends support to hypothesis 1. As states accumulate more experience as respondents, they seek to recover greater (or give up lesser) amounts of their legal autonomy. The model suggests that, all else equal, an increment in *ISDS resp t-5* by one dispute is associated with an increment of .002 in the difference between one year's score to the next one's. This might seem a small effect but it should be remembered the observed values in the dependent variable range from -0.36 to 0.2 and that the maximum observed value of claims against a country is 54.

The results also suggest that the cumulative sum of claims initiated by domestic firms is negatively related to the difference in scores. This supports hypothesis 2. All else equal, states that are home to firms filing larger amounts of ISDS claims against other states will sacrifice more regulatory autonomy to the investment regime. The substantive effect of one additional dispute as home state is smaller than for disputes

for three main reasons. First, data is often missing (adding these variables raises the number of deleted observations from 134 to 940). Second, both variables are highly correlated with each other. Third, and most importantly, it could be the case that decisions to reclaim or to further sacrifice legal autonomy make a given country less or more attractive as an FDI destination. If that is the case, including FDI might introduce endogeneity bias. That said, I estimated the same models including these variables and the results remained unchanged. See Table A.1 in Appendix A.4.1.

as host country yet the range of observed values is larger, with a maximum of 118 disputes. Model 2 also supports hypothesis 1. In logistic regression models, the sign of a coefficient can be interpreted directly. A positive coefficient suggests that as the ISDS record of a state grows, so does the probability of the change in ILA score being positive. Knowing the magnitude of that change requires calculating odds ratios by exponentiating the coefficients. The odds ratio for *ISDS resp t-5* is 1.038, meaning one unit increase in the number of disputes increases the odds of the dependent variable taking a value of 1 by 3.8%. Unlike in the previous Model, the sum of claims lodged by national firms is not related to the sign of the change in score in a statistically significant way. This could suggest that home firms are not able to determine whether their home country keeps compromising its legal autonomy or starts recovering it, yet they might be able to have a say in the magnitude of that change.

Table 3.2 shows results for the models using the cumulative sum of lost arbitral disputes as the main predictor for ISDS experience. In model 3, the coefficient has the expected sign and it is statistically significant. In substantive terms, the results can be interpreted as an increment of .005 in the difference between yearly ILA scores per each additional arbitral loss. In model 4, the sign and magnitude of the coefficient indicates the odds of the change in ILA score being positive increases by 6.4% with each additional dispute lost. At the same time, the cumulative sum of disputes initiated by home firms, however, does not reach conventional levels of statistical significance when the number of lost claims is added to either model. This suggests that firms benefiting from these legal protections can still get their home governments to continue deepening their ties to the investment regime, even in the face of large numbers of disputes initiated against the state. Yet once arbitrators decide in favor of

Table 3.1: Results - Models 1 and 2

	<i>Dependent variable:</i>	
	ILA dif.	ILA dif. sign
	<i>OLS</i>	<i>logistic</i>
	(1)	(2)
ISDS resp t-5	0.002*** (0.0004)	0.038** (0.018)
ISDS claim t-5	-0.0003*** (0.0001)	0.008 (0.011)
GDP t-1	-0.005* (0.003)	-0.372** (0.178)
Polity2 t-1	0.0002 (0.0002)	0.054*** (0.017)
Population t-1	-0.00001 (0.00005)	-0.001 (0.003)
Observations	4,020	4,020
R ²	0.10	0.33
AIC		3864.6

Note: *p<0.1; **p<0.05; ***p<0.01

investors, the effects of these losses override other considerations. Anecdotal evidence suggests that, especially for large countries that can sustain expensive litigation efforts, a negative ruling can have a strong impact. Judge Abner Mikva, a retired DC circuit court judge that served as one of the arbitrators in the first ISDS case against the US¹⁰, recalls a meeting with officials from the US Department of Justice (DOJ) soon after his appointment in which the DOJ officials warned him about the future of NAFTA if the US were to lose this case.¹¹

The last two models, shown in Table 3.3, use the difference between the sum of claims initiated against the country and the sum of claims initiated by home firms against other states as a measure of overall exposure to ISDS, with positive values indicating overall exposure from the side of the respondent and negative values indicating exposure from the side of the claimant. In model 5, exposure to ISDS is positively correlated with a change in ILA score. One unit change in the predictor -either by one more claim against the county or one less claim initiated by home firms- results in an increase of .001 in the difference between yearly ILA scores. Considering the range of observed values in this predictor goes from -104 to 54, the size of the effect can reach substantially significant magnitudes. Model 6, however, does not produce a statistically significant coefficient for the main predictor. This is consistent with the results produced by the two other logit models. Neither models 2 or 4 found a significant correlation between claims initiated by home firms and the direction of the change in ILA scores. There, variation is better explained by the predictors focusing

¹⁰Loewen Group, Inc. and Raymond L. Loewen v. United States, ICSID (NAFTA) Case No. ARB (AF)/98/3, Award on Merits (June 26, 2003), IIC 254 (2003).

¹¹“You know, judge,” he was told by the DOJ officials, “if we lose this case we could lose NAFTA.” “Well, if you want to put pressure on me,” Judge Mikva replied, “then that does it.” Audiotape: Symposium on Environmental Law and the Judiciary, Pace Law School (December 6-8, 2004). The narrative provided on this audiotape is more fully recounted in Schneiderman (2010).

Table 3.2: Results - Models 3 and 4

	<i>Dependent variable:</i>	
	ILA dif. <i>OLS</i> (3)	ILA dif. sign <i>logistic</i> (4)
Pro-Inv sum t-1	0.005*** (0.001)	0.108* (0.062)
ISDS claim t-5	-0.0002 (0.0001)	0.012 (0.011)
GDP t-1	-0.004 (0.003)	-0.366** (0.178)
Polity2 t-1	0.0002 (0.0002)	0.053*** (0.017)
Population t-1	0.00001 (0.00005)	-0.001 (0.003)
Constant	0.015 (0.027)	0.062 (1.760)
Observations		4,020

Note: *p<0.1; **p<0.05; ***p<0.01

in costs for the country, not benefits for the country's firms. Thus, it makes sense that looking at the difference between claims would not be able to explain instances of positive changes in levels of legal autonomy, because this variable cannot distinguish between situations in which, for example, states have not faced any disputes against them from those in which they have but they cancel out with those initiated by their home firms.

In terms of the control variables, for the most part, economic size as measured by GDP is negatively related to the change in ILA score. This suggests that, as economies get bigger they become more interested in diversifying their potential FDI sources and destinations -thus they want more treaty partners- and they also become more attractive to others as both sources and destinations for FDI -thus more partners want to sign treaties with them. Differently, the democratic quality of the regime as measured by Polity2 scores, was consistently positive and statistically significant in the logit models explaining the direction of the change in ILA scores. This relates to theories of international investment treaties as credible commitments. More specifically, to arguments that see authoritarian regimes as benefiting the most from investment treaties, since there is a greater institutional deficit in autocracies for supranational institutions -in this case BITs- to compensate (Arias et al., 2017). This does not explain why democracies would be more likely to undo some of these commitments but it suggests that, if particular reasons to do so emerge, they will be less constrained by the idea that strong international commitments are necessary to reassure foreign investors.

In this section I presented a novel measure of state international legal autonomy to regulate foreign investment and found support for two fundamental assumptions of my

Table 3.3: Results - Models 5 and 6

	<i>Dependent variable:</i>	
	ILA dif. <i>OLS</i> (5)	ILA dif. sign <i>logistic</i> (6)
ISDS.diff t-5	0.001*** (0.0002)	0.005 (0.011)
GDP t-1	-0.006** (0.003)	-0.410** (0.177)
Polity2 t-1	0.0001 (0.0002)	0.051*** (0.017)
Population t-1	0.00002 (0.00005)	-0.00002 (0.003)
Constant	0.027 (0.026)	0.445 (1.750)
Observations		4,020

Note: *p<0.1; **p<0.05; ***p<0.01

theory. First, that states exposed to the costliest aspect of international investment treaties, ISDS disputes, will attempt to recover some amount of their legal autonomy or will try to sacrifice lesser amounts of it. Second, that focusing on ISDS purely from the receiving end of the claims, as most of the existing literature does, is only a part of the story. The firms behind these legal disputes are some of the largest multinational enterprises in the world and they often pressure their home governments to pursue treaty policies that suit their interests. In the next sections, I individually analyze each of the state actions that can affect a country's legal autonomy regarding FDI -signing, designing, and terminating treaties- and test a series of expectations about how ISDS experience affects these policies across states.

3.2 ISDS experience and treaty signature

So far I have shown that exposure to ISDS leads states to recover -or to become stingier with- their autonomy to regulate foreign investment under international law. This section explains one way in which states can affect their overall level of legal autonomy, and perhaps the most fundamental one, which is their willingness to keep signing BITs. Refusing to sign more treaties will not increase a states' legal autonomy unless it is paired up with more active measures like terminating or replacing old treaties but it stop it from decreasing further.¹²

As Figure 3.6 shows, the number of new treaties signed each year has slowed down considerably since the 2000s. A straightforward explanation for this decreasing

¹²Given that the dyadic scores that inform the final ILA scores are weighted by the economic size of each partner, the only scenario in which not signing more treaties could increase a country's ILA score is if another state with whom the observation country has yet to sign a treaty experiences substantial economic growth over time and thus pulls the overall score upwards.

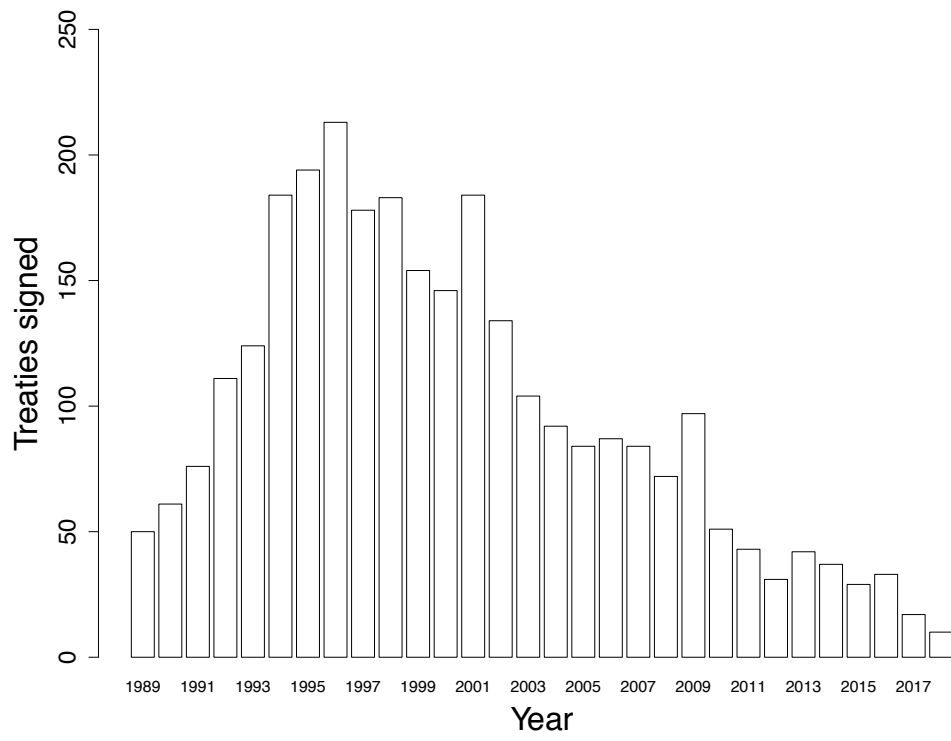


Figure 3.6: Number of treaties signed by year

signature rate is that states have already entered into all the treaties they had an interest in signing (Saban et al., 2010). That is, the network of investment treaties is saturated and thus states have no more partners to sign meaningful treaties with. However, there are political reasons for not wanting to sign a treaty that are unrelated to the economic significance of the relationship. For example, the United States never signed a BIT with large recipients of American FDI like Brazil, India or South Africa. Moreover, as I show in Chapter 6, American companies repeatedly expressed their preference for an investment treaty with India. Thus, I argue the particular evolution of ISDS adds another layer of political considerations regarding the desirability of more investment treaties.

3.2.1 Expectations and data

This section explores how has the rise of investment treaty arbitration affected governments' decisions to participate in investment treaties. States can reach two conclusions from their involvement in ISDS disputes, depending on the nature of that involvement. Most attention has been paid to the consequences of states finding themselves on the responding side of claims, losing millions of dollars in awards and legal fees. From this side, one logical response from states that want to avoid more setbacks in the future is to stop signing them. Poulsen and Aisbett (2013) have found that developing country governments tend to sign lower numbers of treaties after facing their first ISDS dispute. However, in the same way that host states learn about the costs of the treaties, investors also learn how these treaties bolster their ability to impose costs on their host states when faced with policies that hurt them. Thus, they prefer their home countries keep enlarging the system of international agreements

that protects them as they expand their own production networks. I expect states to be exposed to these incentives differently. Developing states are mostly recipients of FDI, thus ISDS experience will matter mostly from the perspective of the respondent. Developed countries are both senders and recipients of FDI, thus I expect negative ISDS experiences as host states to not dissuade them from signing more treaties. As I examine in the next sections, developed states are more likely to respond to their own ISDS disputes as hosts in different ways. The following hypotheses reflect my expectations about how the different effects of ISDS affect states' willingness to sign investment treaties:

H3.a: The effects of ISDS experience on the probability of treaty signature varies for developed and developing countries.

H3.b: In developing countries, as the number of ISDS cases against a state increases, the probability of signing an investment treaty decreases. In developed states, the number of ISDS disputes against the state has no effect on the probability of the country signing an investment treaty.

H3.c: In developed countries, as the number of ISDS cases initiated by domestic firms increases, also does the probability of signing an investment treaty.

I test these expectations against a dataset consisting of country-year observations of all states with populations over half a million that have signed at least a total of five treaties during the period 1989 to 2018.¹³ This results in 4,192 observations. I

¹³The rationale for excluding countries that have signed fewer than 5 treaties during the considered period is that, for idiosyncratic reasons, these might be countries that were already unlikely to sign BITs in the first place. This decision only resulted in dropping 14 countries from the original dataset, leaving a total 139 unique countries.

also estimate the same models against two subsamples of developed and developing countries as represented by their status as OECD members or non-members. Based on UNCTAD's data base of international investment agreements, my main dependent variable is a binary indicator that takes a 1 if a country signed at least one investment treaty in a given year and a 0 otherwise. 49% of the observations are 1s. An alternative indicator of treaty signature is the count of treaties signed each year. I chose to use a dummy variable because 40% of the observations for which the dummy variable gets a 1 correspond to years in which the country signed only one treaty. Moreover, focusing on the willingness to keep signing treaties independently of the amount, rather than the total number of treaties signed, is a stricter test of the argument. Large numbers of treaties per year were common during the initial expansion of the investment regime (see Figure 3.6). As the number of possible partners decreases, it would have been unlikely for governments to keep signing treaties by the dozen, independently of the growth in ISDS disputes. Thus, I assume states were already going to sign less treaties as time goes by (Saban et al., 2010) but they would still face opportunities for entering into new agreements. Because my dependent variable is a binary indicator, I use a logistic regression as the estimator. Appendix A.4.2 shows results for additional models replacing the dependent variable with a binary indicator that takes a 1 if the country ratified at least a treaty on a given year and 0 otherwise.

My independent variables are the lagged cumulative count of ISDS disputes against the state (*ISDS resp t-5*) and the lagged count of ISDS disputes initiated by domestic firms (*ISDS claim t-5*). Regarding control variables, I included economic size proxied by the log of the previous year's gross domestic product (*GDP t-1*). All else equal, I expect larger economies to sign more treaties. They are, at the same time,

more attractive locations to FDI and more interested in diversifying destinations for their own outward investment. To control for saturation in the global network of investment treaties, I include the cumulative sum of treaties signed by all countries in the dataset up to the previous year (*World treaties t-1*). Additionally, I include the cumulative number of treaties in force for the country up to the previous year (*Country treaties t-1*). I expect both of these variable to be negatively related to the probability of signature. I also control for a country's FDI inflows (*Inward FDI t-1*) and the democratic character of the regime as indicated by the country's Polity2 score (*Polity2 t-1*).

3.2.2 Results and discussion

Table 3.4 shows results for three logistic models with country fixed effects. Model 1 is estimated against the entire dataset while models 2 and 3 use the OECD and non-OECD subsamples respectively. Results support hypotheses 3a and 3b. When the entire dataset is considered, the record of disputes against the state is negatively related to the probability of signature in a statistically significant way. Transformed to the odds ratio, the coefficient indicates that each additional dispute against the country decreases the odds of signature by 6.4%. In the developing states subsample, model 3, the record of ISDS disputes against the state is also negatively related to the probability of treaty signature and the impact is more sizable than in model 1. Each additional dispute initiated against a developing country decreases the odds of a developing country signing a BIT by 12.6%. The developed country sub-sample, model 2, shows no significant effect on the likelihood of signature for the number of ISDS disputes against the country.

Table 3.4: Results - Models 1, 2 and 3

	<i>Dependent variable:</i>		
	Treaty signature		
	(1)	(2)	(3)
	Full dataset	OECD	Non-OECD
ISDS resp t-5	-0.067*** (0.021)	0.066 (0.041)	-0.135*** (0.035)
ISDS claim t-5	-0.049*** (0.016)	-0.059*** (0.017)	-0.026 (0.101)
GDP t-1	-0.058 (0.141)	-4.070*** (1.317)	-0.025 (0.147)
World treaties t-1	0.0002*** (0.0001)	0.001** (0.0004)	0.0002** (0.0001)
Country treaties t-1	-0.071*** (0.006)	-0.075*** (0.015)	-0.064*** (0.008)
Inward FDI t-1	0.00003 (0.00003)	0.0002* (0.0001)	0.00001 (0.00003)
Polity2 t-1	0.040** (0.017)	0.174 (0.166)	0.033* (0.017)
Constant	2.241* (1.333)	52.700*** (17.206)	1.890 (1.366)
Observations	3,649	724	2,925

Note:

*p<0.1; **p<0.05; ***p<0.01

At the same time, results do not support hypothesis 3c. Models 1 and 2 produce unexpected results for the record of disputes initiated by home firms as these appear to be negatively related to the probability signing treaties in a statistically significant way. Since this variable does not seem to have statistically significant effects in model 3, it could be assumed most of the effect registered in model 1 is a product of the developed states in the dataset. The sign and significance of ISDS disputes by home firms could be reflecting the fact that countries with high values for this variable are

likely to have multiple treaties in place, which are needed for firms to invoke them often. That is, this coefficient could be picking up saturation effects. However, the number of disputes against the country would not be reflecting saturation effects in the same way since developed countries have been sued, for the most part, under a few agreements, most notably NAFTA and the Energy Charter. For example, investors brought all disputes but one against Canada under NAFTA. Yet Canadian investors brought disputes against other states under eighteen different BITs. That said, as I come back to in the concluding section, it is likely that the particular effects of ISDS experience from the side of the claimant and its effects from the side of the respondent are difficult to isolate through statistical techniques when they occur simultaneously. Qualitative analysis of the US experience under NAFTA in Chapter 4 sheds light on the policy-making process in this particular context.

Many considerations go into deciding to negotiate and sign an investment treaty. At a fundamental level, considerations are economic. That is, what will be the resulting increase in FDI inflows between the parties and what new sectors will capital be able to reach. Yet there are also political considerations in terms of how much sovereignty the parties are willing to give away (Blake, 2013). While states have always been mindful of sovereignty costs when joining international agreements, findings from this section suggest direct experience with lengthy and costly arbitral disputes adds to concerns about state autonomy under international investment treaties. Yet these heightened sovereignty concerns are not equally powerful across states. Developing countries think twice before committing to binding and enforceable treaties that proved costly. Differently, developed states do not become BIT-shy in the aftermath of ISDS disputes. Investment treaties are still attractive instruments of protection

for their multinational firms.

3.3 ISDS experience and treaty content

The previous section analyzed how the rise of investment treaty arbitration has affected governments' decisions to participate in investment treaties and suggested that not all states are equally likely to sign BITs after experiencing costly ISDS disputes. Developed states, the previous results suggest, are not less likely to sign investment treaties as claims against them accumulate. This, however, does not mean their treaty policies go unchanged. In this section I look at how ISDS experience leads states to change the content of the treaties they sign and I find that, as exposure to ISDS grows, wealthy countries tend to sign treaties that better protect their ability to regulate.

3.3.1 Expectations and data

Understood as hand-tying devices, investment treaties allow states to make credible commitments to foreign investors that they will treat them fairly and predictably. The theory of rational design of international institutions sees the content of these agreements as reflecting this basic function (Koremenos, 2016). For example, the reason why most treaties give investors direct access to arbitration -instead of, for example, making disputes a state-to-state matter as in the WTO- is that this particular type of enforcement mechanism is necessary to give risk-averse investors a guarantee that their investments would be secure. Yet even governments interested in attracting, and specially retaining, foreign capital might at points face political and economic

incentives to infringe on investor's rights (Wellhausen, 2014). Investment treaties, as any other instrument of international law, involve a trade-off. Hand-tying can make states more attractive to FDI but it also compromises their ability to adopt policies that might hurt investors' profits. As mentioned in the previous section, this trade-off is essential to the decision to enter into a BIT. But, as I show in this section, protection v. autonomy considerations do not end once states decide to commit. They are also central to decisions about *what* to commit to. That is, they are central to treaty design choices.

Because of its focus on varieties of cooperation problems, rational design emphasizes similarities among investment treaties -aimed at resolving a specific cooperation problem- and their differences with treaties in other areas -where problems in the way of cooperation are different. Yet there is substantial variation among BITs themselves in ways that can affect foreign investors' ability to stand up to harmful government actions by portraying them as violations of international law (Allee and Peinhardt, 2014; Blake, 2013). The US government, in particular, has been mindful of this in its treaty choices. US negotiators are aware of the ways in which the content of investment treaties can encroach on states' regulatory autonomy and sees themselves as leaders in the development of regulation-friendly provisions. According to the US Trade Representative in 2014, "the United States wouldn't negotiate away its right to regulate." Provisions included in the treaties signed by the US:

"are different - and stronger - than the provisions in many other investment agreements in which the United States is not a participant. It's important to understand how U.S. agreements differ from other agree-

ments that do not meet the same standards.”¹⁴

In sum, variation in the design of international investment treaties is neither random nor insignificant. Drafting choices reflect the preferences of the negotiating parties about the extent of rights provided to foreign investors, the scope of investment to be covered by the treaty, and the exposure of host states to an independent enforcement mechanism. Different explanations for this variation are available. For example, Blake (2013) argues that BITs’ flexibility is a product of time horizons. Governments with long time horizons expect to govern in the future, anticipate that conditions may shift over time, and therefore seek institutional designs that will afford them greater freedom to modify policies in response to changing economic and political conditions. Differently, Allee and Peinhardt (2014) explain differences in the degree of enforceability across treaties through a mix of rational design and power politics. They argue that when developed countries sign BITs -that is, countries who are home to numerous MNEs- those tend to be more favorable to investors than those signed by developing states. That is, understanding how the design of the treaty can make it more or less constraining of host states’ regulatory powers, capital exporters look for treaties that will suit the interests of their firms. I argue, more specifically, that when their own ISDS experience is accounted for, the relationship is reversed and developed countries start signing treaties that are relatively less favorable to investors.

Broude et al. (2019) analyzed the relationship between ISDS experience and treaty content from a learning perspective. They argue that being involved in arbitration disputes informs governments’ assessments of the costs and benefits of their legal

¹⁴United States Trade Representative, *The Facts on Investor-State Dispute Settlement* (March 2014).

commitments and prompts a search for greater autonomy. They show this by analyzing a sample of replaced BITs and comparing their content with the content of their replacements.¹⁵ In line with my expectations, Broude et. al. find that experience with ISDS leads to greater regulatory autonomy in renegotiated treaties. However, their analysis considers ISDS experience as the total amount of disputes between both parties and does not differentiate between them in any meaningful way. Differently, I do not expect ISDS experiences to have homogeneous effects across groups of countries.

For historical reasons, developed states are rarely considered in their role as hosts to FDI in the investment treaty literature. Treaties were originally North-South devices, part of an effort to reduce political risk beyond the developed world and thus facilitate the expansion of capital in that direction. Yet, developed states are better described as dual states; capital importers and exporters. Thus, dual states are caught between two competing interests when it comes to BITs. From the position of FDI receivers, they have incentives to ditch treaty provisions that can be used to challenge domestic regulations. From the position of being home to multinational firms, they also face demands from these powerful constituents who prefer ample and enforceable protections they can invoke to challenge regulations that hurt their own investments abroad. Thus, I expect that once developed states get hit with arbitral claims, rather than stop signing BITs -as shown in the previous section- or terminating their BITs -as shown in the next section- they innovate in their treaty drafting. They produce treaty texts that better protect their regulatory space, even if this means that their own national investors will be hurt by the increased expansion of their treaty partners' ability to regulate. The following hypothesis follows:

¹⁵They also consider instances in which treaties were terminated with no replacement. In that case, the balance between investor protection and policy autonomy changes to maximum autonomy.

H4.a: As the number of ISDS disputes initiated against developed states increases, they will sign treaties that better protect their regulatory powers than those signed by developing states.

H4.b: The record of ISDS disputes against developing states has no bearing on the content of the treaties they sign.

Existing work by Manger and Peinhardt (2017) has found evidence in support of this hypothesis. Capital-exporting states tend to include more elaborate and less ambiguous language in their treaties after their involvement with ISDS tribunals as respondents. In their view, this is due to the fact that figuring out how to increase precision requires substantial state capacity -i.e. technical expertise and coordination between multiple state agencies- in order to carefully draft each provision in the light of past tribunal decisions. While relative abundance of technical resources might be important for states to act on their incentives to review their treaty models; an account purely based on the availability of expertise misses much of the political contestation that ISDS disputes generate within developed states. The most vigorous opposition to international investment treaties and ISDS are civil society organizations (CSOs). For CSOs working on environmental, social justice, consumer protection and public health issues, investment treaties allow firms to use international tribunals to challenge laws they fought hard to win through democratic political processes at home. Thus, I expect the size of the organized civil society in a country to have some impact on the policy-making process. However, I expect this relation to be conditional on ISDS experience. CSOs are better able to have an influence when the country itself has been directly hit with ISDS claims than when they warn about potential legal consequences that have not yet materialized.

H5: As ISDS experience increases, states with larger number of CSOs will sign treaties that better protect their regulatory powers.

I perform the analysis on a dataset of 2,288 bilateral investment treaties signed between 1989 and 2016 by 170 unique countries. Each row in the dataset is a treaty and each column provides information either about the treaty's content, the parties or the dyad. Data on the content of each treaty comes from UNCTAD's Investment Division Mapping Project.¹⁶

3.3.2 Dependent variable

To capture variation in treaty content regarding the degree of regulatory autonomy reserved for host states, I leverage differences in the content of investment treaties. I consider differences that affect the degree of protection offered to foreign investors as well as the ability of investors to challenge actions by their hosts states that hurt their profits. Appendix A.3 provides a more detailed description of each set of provisions, their function within treaties and how they relate to host state regulatory autonomy.

Recent years have seen an increase in scholarly interest on variation in investment treaty content. Scholars have looked at different aspects of treaties, like delegation, enforceability, precision, and concern with state regulatory space. ? create a measure of delegation by looking at whether the treaty indicates none, one, or more arbitration venues. In their 2014 paper, they expand this analysis to include two more provisions: whether the treaty includes ISDS and whether blanket consent to arbitration

¹⁶This project involved the coding of over 2,500 international investment treaties signed between 1959 to 2016. Treaties are coded by Law students and professors from forty-five universities around the world following common guidelines. UNCTAD's Mapping Project Description & Methodology. Available at: <http://investmentpolicyhub.unctad.org/Upload/Documents/Mapping%20Project%20Description-%20and%20Methodology.pdf>.

is already provided in the treaty. They then create a measure, based off the coding of these three provisions, of how enforceable treaties are. While these studies exhibit important things about drafting choices, I am interested in how a much larger number of provisions relate to one another. For example, states can consent to arbitration for all disputes arising with investors covered by a given treaty. This blanket consent is an important indicator of how much a state is willing to let investors challenge its policies through ISDS. However, the states can also include provisions qualifying the scope of that consent, like excluding certain policy areas from ISDS, as Australia pushed for during TPP negotiations regarding anti-smoking regulations.

Manger and Peinhardt (2017) consider a large number of provisions, but are only concerned with their presence or absence as this indicates varying levels of precision. They use text-matching tools to count how many provisions are present in each treaty and find that precision has increased over time -which they argue- is a result of learning from experience ISDS disputes. This assumes that more precision means states are more concerned with limiting arbitrators' ability to make expansive interpretations that provide investors with greater rights than what was intended by the signatories. This means their measure of precision may be reflecting a changing concern with preserving policy space. While I agree with this proposition, I do not consider all provisions to be equally significant in relaying information regarding policy space.

Treaties are collections of individual provisions. A treaty might have some provisions that are deferential to host states and at the same time include others that are more protective of foreign investors. For this reason, I use a measure that allows me to capture the degree to which the treaty as a whole restricts or safeguards states' regulatory space, understood as the ability to freely legislate and implement

regulations in given public policy domains under the given treaty. In order to produce such measure, I calculate a policy space score for each treaty in my dataset applying Broude et al. (2018)'s coding guidelines.¹⁷ The guidelines include forty-two indicators which can obtain different values between zero (0) and one (1) with lower values representing less deference to states' regulatory space and higher values representing more. The value of each indicator is determined by the absence, presence or specific combinations of different provisions that any investment treaty could have.¹⁸ Each treaty's score is calculated by adding values for all individual indicators and then re-scaling the resulting number so that the lowest observed value equals 0 and the highest observed values equals 1, with a mean observed value of .28. Figure 3.7 shows the relative frequency of observed regulatory space values. Being a continuous dependent variable, I use ordinary least squares regression as the estimator, with the added advantage of making for a straightforward interpretation of the coefficients.

3.3.3 Independent and control variables

The previous hypotheses establish relationships between attributes of states -economic development, ISDS experience and CSO presence- and the content of the treaties they sign. Because each treaty considered has two parties, there are two of each state-level indicators. Thus, I make distinction between the parties by calculating which of the

¹⁷The authors developed these guidelines to compare renegotiated treaties with the ones they replaced. I applied the guidelines to all bilateral investment treaties and some FTA investment chapters included in UNCTAD's content database.

¹⁸The inclusion of the different provisions is not valued equally. For example, including in the preamble a reference to environmental protection (worth .25) does not carry the same legal weight as an exception for policies adopted for the protection of the environment (worth .5). Thus, including either of these provisions does not contribute to the treaty's final score in the same way. For the complete coding guidelines see section Appendix A.3.4 in Appendix A.3

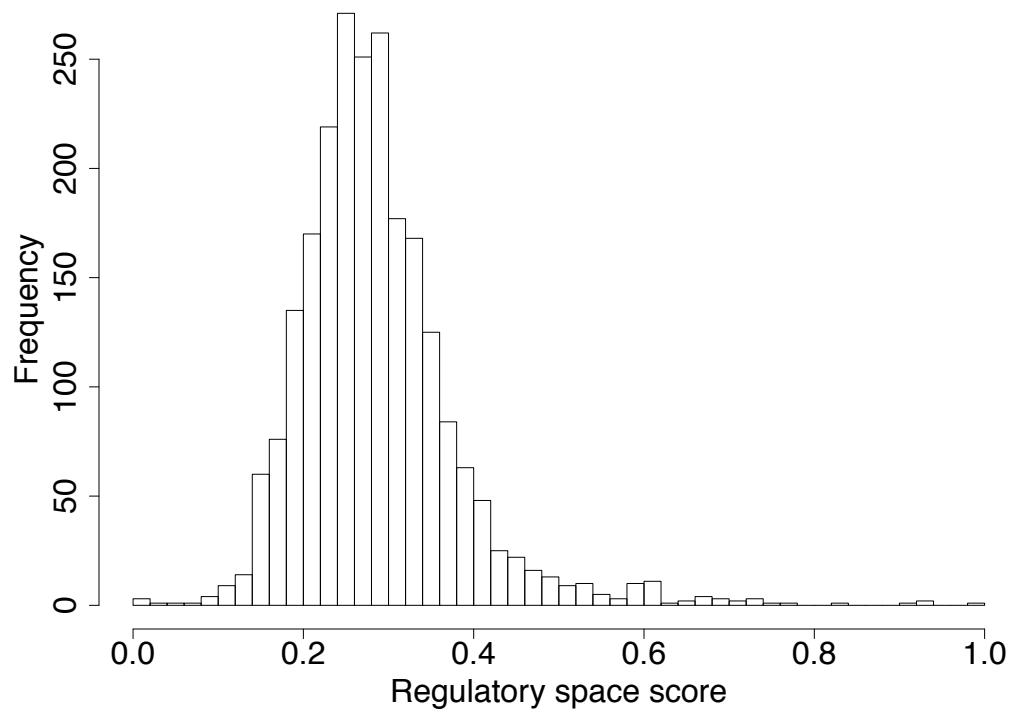


Figure 3.7: Histogram of observed regulatory space values

parties would be the host and home state in that particular FDI relationship.¹⁹ This distinction, however, fails to capture nuances in the relative level of development of the treaty partners. For example, Venezuela is coded as a home state in relation to Bolivia in the same way the United States is. To account for these differences, in addition to using the full sample of treaties I also I conduct the analysis against two sub-samples of treaties. The first one includes only North-South treaties, that is treaties in which the party identified as the home state belongs to the OECD and the second one includes only South-South treaties in which none of the parties belongs to the OECD. Following hypothesis 4, I expect the ISDS experience of the home state in the North-South sub-sample to be a better predictor of more policy-space minded BITs than the ISDS experience of home states in the South-South sample.

As in the models shown before, I use two indicators of each treaty partner's ISDS experience. The lagged cumulative sum of ISDS disputes against the country (*ISDS resp t-5*) and the lagged cumulative sum of ISDS disputes initiated by home firms against other countries (*ISDS claim t-5*). In Appendix A.4.3 I include models using the cumulative sums of ISDS disputes lost by each treaty partner and the combined number of ISDS disputes initiated against both treaty partners. For an indicator of CSO presence I use a count of organizations focusing only on environmental issues. The count is calculated from data gathered by the Yearbook of International Organizations.²⁰ Even in countries with well organized civil societies, not all CSOs are equally likely to mobilize around investment treaties and ISDS and, more importantly,

¹⁹The identification of home and host states follows guidelines used by Allee and Peinhardt (2014). The country with the highest GDP is coded as the home except when the country with the lowest GDP is an OECD member and the partner country is not and when the GDP per capita of the country with the lowest GDP is more than three times that of the partner country.

²⁰These data are available from The Yearbook of International Organizations, at <http://www.uia.org/ybio>. For other articles that use this measure see (Hafner-Burton and Tsutsui, 2005).

not all have equal expertise on international investment law. For example, Argentina's civil society organizations have been highly influential for the adoption of progressive human rights laws but there is not a comparable organized movement in the area of foreign investment disputes. While CSOs with anti-ISDS platforms have wider interests than environmental issues, qualitative evidence of CSO mobilization shows that environmental organizations have been among the earliest to mobilize against ISDS during international negotiations. A common fear among ISDS detractors is that MNEs will invoke investment treaties to portray environmental regulations that hurt their profits as unfair and discriminatory acts.

As control variables I include, for each party, the log of the GDP as an indicator of economic size (GDP_{t-1}) and a measure of FDI inflows ($Inward\ FDI_{t-1}$). It is important to control for the potential effect of these variables since, otherwise, ISDS disputes could simply be reflecting the fact that states with larger economies and more FDI are more likely to be sued because they host larger numbers of foreign firms. I also control for the level of democracy from Polity ($Polity2_{t-1}$). Also, Latin American countries like Ecuador and Bolivia were some of the earliest to criticize the investment regime and the United States and Canada have been prominent advocates for reform since their experience under NAFTA. To control for the influence of regional trends I add a dummy variable that scores 1 if at least one treaty party is from the Americas, and 0 otherwise ($Americas$). All models include year fixed effects. However, to account temporal trends and the diffusion of relatively state-friendly treaties (Hindelang and Krajewski, 2016), in Appendix A.4.3 I include a model without year fixed effects and with a moving average of the policy space score of all treaties signed the year before.

3.3.4 Results and discussion

Table 3.5 shows results for three models with year fixed effects and robust standard errors.²¹ The models vary in terms of the sample used which is identified at the top of each model column. According to hypotheses 4a and 4b, ISDS experience is not equally received across levels of economic development. It is developed states who react to being hit with claims by foreign investors by drafting more host state-friendly treaties. Considering the models together lends support to expectations that negative ISDS experience by itself is not enough explanation for variation in treaty content. As expected, the model using the full sample (model 1) does not produce statistically significant coefficients for the number of disputes against either the home or host state in each treaty. This reflects the fact that, when all observations are considered, the countries identified as home states are not necessarily developed countries. However, when the same model is estimated using a sub-sample of only North-South treaties in which home countries are developed states (model 2), the coefficient for the sum of disputes against the home state becomes positive and statistically significant but the same indicator for the host state does not.

In substantive terms, the magnitude of the change in the treaty's regulatory space value for each additional arbitral dispute is .009. Given the concentration of observed values along a small range (Figure 3.7), as disputes accumulate the effects can become sizable. Furthermore, the model using the sub-sample of South-South treaties (model 3) does not produce statistically significant coefficients for ISDS ex-

²¹To keep tables clear, I did not report the year dummies. However, I should note the results suggest the presence of temporal trends, with coefficients for years 1993 to 2004 being negative and statistically significant -although not in the South-South sub-sample- and the coefficients for the years 2015 and 2016 being positive and statistically significant. In a similar vein, models reported in Appendix A.4.3, Table A.3 include the average policy space score of treaties signed in the year before instead of year fixed effects. This variable is also positive and statistically significant.

perience as a respondent for either party in the treaty. Additional models reported in Appendix A.4.3 Table A.4 use the sum of lost ISDS cases as the main independent variable. These models produce similar results; only the count of disputes that ended with a pro-investor ruling for the home state in the North-South sub-sample obtain a positive coefficient that is statistically significant at conventional levels. Similarly, models reported in Table A.5 look at the effects of the combined ISDS experience of both parties on treaty content. The total number of arbitral disputes for both parties is positive and statistically significant only when North-South treaties are considered.

Table 3.5: Results - Models 1 to 3

	<i>Dependent variable:</i>		
	Policy space score		
	(1)	(2)	(3)
	(Full sample)	(North-South)	(South-South)
ISDS resp t-5 home	0.003 (0.003)	0.009*** (0.003)	-0.001 (0.002)
ISDS resp t-5 host	0.003 (0.004)	-0.004 (0.005)	0.015 (0.014)
ISDS claim t-5 home	0.006*** (0.001)	0.004*** (0.002)	-0.016* (0.009)
ISDS claim t-5 host	-0.004 (0.004)	-0.014 (0.025)	-0.016 (0.020)
GDP t-1 home	0.002 (0.002)	0.001 (0.004)	0.005 (0.003)
GDP t-1 host	0.007*** (0.002)	0.010*** (0.002)	0.003 (0.003)
Inward FDI t-1 home	-0.00000* (0.00000)	-0.00001*** (0.00000)	0.00000 (0.00000)
Inward FDI t-1 host	0.00000 (0.00000)	-0.00001* (0.00001)	0.00001* (0.00001)
CSO t-1 home	-0.001*** (0.0001)	-0.0004*** (0.0001)	0.001 (0.001)
CSO t-1 host	-0.003*** (0.001)	-0.002* (0.001)	-0.004 (0.002)
Polity2 t-1 home	-0.002*** (0.0003)	0.006 (0.004)	-0.001 (0.0005)
Polity2 t-1 host	0.00000 (0.0003)	0.0004 (0.0005)	0.0001 (0.0004)
Americas	0.046*** (0.006)	0.038*** (0.007)	0.036*** (0.008)
Constant	0.226*** (0.031)	0.124 (0.082)	0.272*** (0.080)
Observations	1,777	933	789
Adjusted R ²	0.312	0.417	0.233

Note:

*p<0.1; **p<0.05; ***p<0.01

The positive and statistically significant effect of *ISDS claim t-5 home* in models 1 and 2 is surprising, yet it is consistent with findings from Broude et al. (2019). Their analysis of renegotiated treaties indicates that, when parties decide to discard an old treaty, countries with higher numbers of ISDS disputes by home firms tend to replace those BITs with instruments that provide them more policy space. I find that states whose investors are avid users of ISDS tend to sign treaties with less investor-friendly content in general, not only when they are replacing older BITs. Broude et al. assume this is a product of demands from these states' partners. For example, that any country re-negotiating a BIT with the US, whose investors had filed more arbitral disputes than any other country, might require more safeguards against potential claims by American investors than when negotiating with countries with less litigation-prone firms. While this is a logical proposition, I argue this is not simply a defensive move by countries negotiating with developed states but rather a product of their own reckoning with the consequences of ISDS, both as home to claimants and as respondents themselves. For example, as I show in Chapter 4, American CSOs started campaigning against the possibility of including ISDS in a multilateral investment treaty before the US faced its first dispute, using the 1997 *Ethyl v. Canada* NAFTA case -which was initiated by an American company- as a cautionary tale.

Regarding control variables, *GDP t-1 host* is positively related to treaties' regulatory space value in a statistically significant way when either all or just the North-South treaties are considered. The GDP of the host indicates how unequal both treaty parties are and these results suggests that, all else equal, wealthy countries are able to impose more pro-investor treaty terms to smaller partners. Additionally, there is

evidence of regional trends since at least one treaty partner being from the Americas results, in average across the three models, in a .04 increase in the dependent variable.

Turning to Hypothesis 5 and the effect of CSOs, models in table ?? show that, by themselves, the presence of civil society organizations does not lead to more policy space-minded treaties. In fact, the coefficients for both CSO terms are negative. This, most likely, is driven by observations from the earlier years of the analyzed period, before the rise of ISDS. 73% of the treaties in the dataset were signed before 2003. States with dense civil society sectors also tend to be the home of large numbers of multinational firms, thus before ISDS disputes start accumulating, the main interest of these governments is to provide their firms with the strongest protections available. Table 3.6 shows the interactive effects of ISDS disputes and the number of CSOs in the country for the sub-sample of North-South treaties. Model 4 focuses on the interaction between ISDS experience and CSOs in the home country -which in this sub-sample are developed countries- and shows that, as expected, the positive effect of CSO presence on treaties' policy space scores is conditional on ISDS experience. In terms of marginal effects, Figure 3.8 represents effect of a one unit increase in *ISDS resp t-5 home* on the coefficient of *CSO t-1 home*. What is most interesting about this plot is how, at very low levels of disputes, the effects of CSOs is negative. This represents the conditions under which domestic multinational firms are most powerful and unrivalled in their influence on their government's economic diplomacy. Yet, as experience with arbitral disputes accumulates, the effect of CSOs becomes positive, suggesting that CSOs are better able to obtain policy changes when they can make credible arguments about the threat of ISDS.

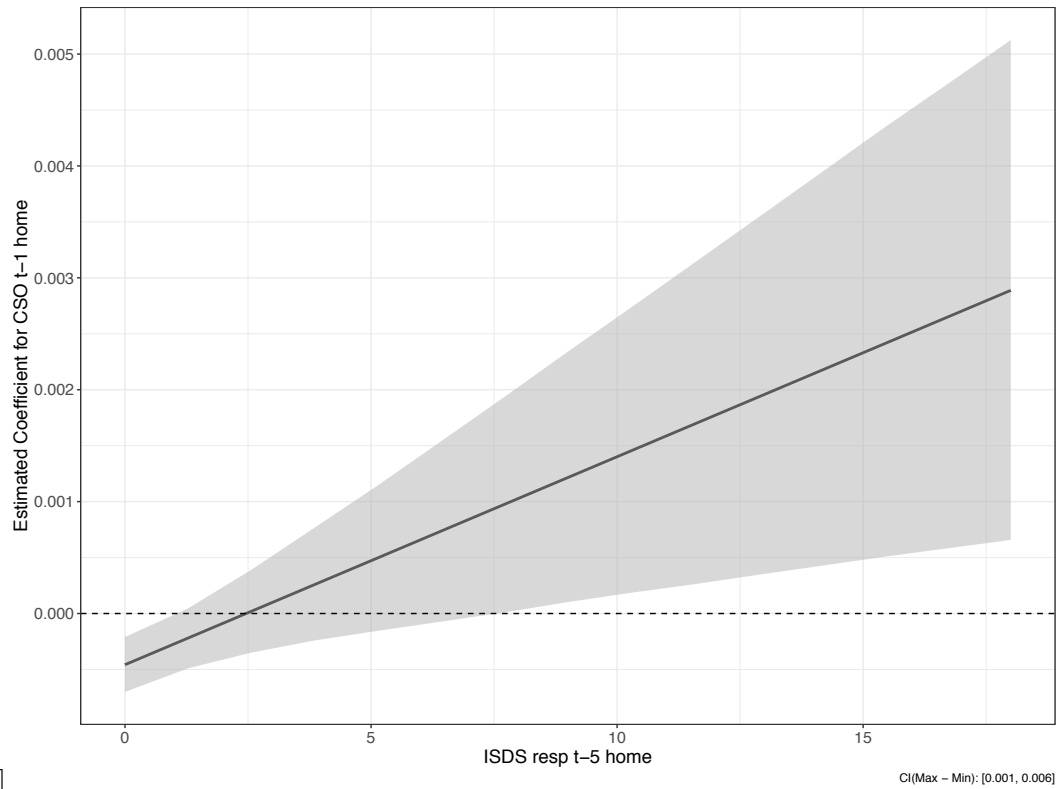
This section examined variation in the content of signed treaties to illuminate the

Table 3.6: Results - Models 4 and 5

	<i>Dependent variable:</i>	
	Policy space score	
	(4)	(5)
	(North-South)	(North-South)
ISDS resp t-5 home	0.009*** (0.003)	0.012*** (0.003)
ISDS resp t-5 host	0.003 (0.004)	0.005 (0.004)
CSO t-1 home	-0.001*** (0.0001)	
CSO t-1 host		-0.003** (0.001)
ISDS resp t-5 home*CSO t-1 home	0.0002*** (0.0001)	
ISDS resp t-5 host*CSO t-1 host		-0.0004 (0.0005)
ISDS claim t-5 home	0.0001 (0.002)	0.002 (0.002)
ISDS claim t-5 host	-0.010*** (0.003)	-0.004 (0.004)
GDP t-1 home	0.004 (0.003)	-0.004* (0.002)
GDP t-1 host	0.005*** (0.001)	0.009*** (0.002)
Inward FDI t-1 home	-0.00000 (0.00000)	-0.00001* (0.00000)
Inward FDI t-1 host	-0.00002*** (0.00001)	-0.00001** (0.00001)
Polity2 t-1 home	-0.002*** (0.001)	-0.002*** (0.001)
Polity2 t-1 host	-0.0004 (0.0004)	0.0001 (0.0004)
Americas	0.049*** (0.007)	0.042*** (0.007)
Constant	0.190*** (0.046)	0.246*** (0.040)

Note:

*p<0.1; **p<0.05; ***p<0.01



[H]

Figure 3.8: Marginal effect of CSO presence conditional on ISDS experience

relationship between ISDS disputes and states' choices regarding the inevitable trade-off between investor protection and regulatory autonomy in their BITs. Using newly available data on the degree of state regulatory space in about 2,200 agreements, I find that developed states tend to sign treaties that preserve more regulatory autonomy as they acquire more experience with ISDS disputes, a correlation that is not observed for developing countries alike. Regarding the mechanisms propelling legal innovation, in Chapter 2 I argued the mobilization of progressive CSOs against the constraining effect of BITs on public regulation is behind the incentives that governments face to update their treaty models after negative ISDS experiences. This section tested this argument and finds that as the record of ISDS disputes increases so does the impact of CSOs on treaty content.

After foreign investors started to sue developed country governments in investment arbitration, BITs became the target of heavy criticism by organized civil society fearing ISDS disputes would deter regulations in the public interest. At the same time, BITs remain important sources of protection for multinational firms. Unable to ignore the negative aspects of these treaties and adopt a 'BITs as usual' approach, developed states choose the course of option that is most favorable to their home firms. In sum, investors will be hurt less by progressive BITs than by no more BITs, or worst, no BITs at all. The next section examines the latter; states' decisions to get rid of their existing treaties in the aftermath of ISDS disputes.

3.4 ISDS experience and treaty termination

The two policy options considered in the previous sections -not signing more BITs or signing less constraining treaties- are forward-looking and, as such, they do not have

effects on the treaties that made arbitral disputes possible in the first place. For this reason, terminating existing BITs is the most radical course of action available for states seeking to shield themselves from more disputes. The termination of a treaty eliminates the rights owed to investors and the obligations assumed by states under that particular instrument of international law. Thus, it is the most feared course of action by foreign investors.

Terminations are also extremely rare. According to UNCTAD's treaty data, of the 2,611 bilateral investment treaties that have entered into force, only 265 have been terminated. When terminations do happen, however, they are politically salient. Simply manifesting the intention to put an end to a BIT sends arbitration lawyers running to publish short pieces in specialized outlets going over the implications of such measures and the options still available for investors.²² In this section I examine the relationship between exposure to investment arbitration and the probability of a treaty being terminated.

3.4.1 Expectations and data

My hypotheses about treaty signature and ISDS experience in Section 3.2 and about ISDS experience and treaty content in Section 3.3 proposed that exposure to arbitration has different effects across developed and developing countries. My hypotheses regarding ISDS experience and treaty termination fit within this larger set of expectations. For example, I argued that negative ISDS experiences do not dissuade developed countries from signing more treaties -who thus continue expanding the net-

²²Termination of BITs and Sunset Clauses - What Can Investors in Poland Expect? (29 February, 2017). Kluwer Arbitration Blog; Indonesia's BIT terminations: not the end of the story. (1 November 2017). Global Arbitration Review; Opciones ante las denuncias de los TBI/Options available upon the termination of BITs. (5 October, 2017). LALIVE.law.

work of protections available to their home multinational firms- yet they do lead them to adjust the content of the treaties they sign. Along this line of argument, developed states should be less likely to terminate their treaties. These agreements provide their investors with valuable protections, even when firms from other countries have used those treaties against them. Much differently, developing states, who tend to receive considerably more FDI than what they send out, have strong incentives to get rid of treaties that have hurt them.

Yet treaty terminations are costly political decisions. Foreign firms and their home governments generally mobilize to express their dissatisfaction when terminations are announced and threaten to withhold further investment and trade benefits if recalcitrant states were to follow through. In this context, the relative economic power of developing countries affects their ability to resist these pressures and carry on with treaty terminations. For example, emerging economies are relatively more attractive to foreign investors than smaller developing economies, thus they might feel confident to call foreign firms' bluffs of withholding further investments. They might also possess stronger institutions than less affluent countries so they might be able to offer strong domestic protections in lieu of BITs. Thus, I expect that wealthy countries will be more successful at keeping smaller economies engaged in their treaties than relatively larger ones. Three testable hypotheses emerge from this discussion,

H.6.a: When treaties do not include developed countries as signatories, the likelihood of terminations increases with the number of ISDS disputes initiated against the parties.

H.6.b: Larger numbers of ISDS disputes against developed countries do not make their treaties more likely to be terminated.

H.7: The likelihood of a treaty being terminated is inversely related to the difference in economic size between the parties.

I test these hypotheses against a dataset of 1,829 bilateral investment treaties with the observation being the treaty-year. The earliest year considered is 1989 and treaties enter the dataset once they become ‘eligible’ for termination. This means that, first, they have to enter into force. Second, they need to be past their initial duration period. Duration provisions establish the length of time during which the treaty shall remain in force and cannot be unilaterally denounced. Most treaties -78% of the treaties in the dataset- have initial duration periods of ten years after the treaty enters into force. The treaties leave the dataset the year after they are terminated.

The dependent variable is a binary indicator that takes a 1 if the treaty was terminated in a given year. Of the 1,829 treaties in the dataset, 202 have been terminated. Treaties can come to an end in different ways (Helfer, 2005). They can be terminated when the parties replace them with a new treaty. In this case, the date in which the new treaty enters into force marks the termination date for the older BIT. They can also be terminated without a replacement with the mutual consent of the parties. Or they can be terminated unilaterally by one of the signatories. Most of the terminated BITs in the dataset (60%) were unilaterally terminated. The rest were replaced with a new treaty (33%) and terminated by consent (7%).²³ The appropriate estimator for a binary dependent variable is logistic regression. Yet in this case, positive outcomes are extremely rare thus I employ rare events logistic regression

²³A fourth way for a treaty to come to an end is the expiration of its initial duration period. I do not include these treaties in my dataset because expiration is unrelated to the willingness of either or both of the parties to terminate the treaty. Moreover expiration is extremely rare (only 3 treaties in UNCTAD’s database have terminated in this manner) because most agreements have renewal clauses built-in to them.

(King and Zeng, 2001). This estimates the same model as standard logistic regression but corrects for the bias that occurs when the number of observed events is small in relation to the size of the sample.²⁴

In terms of independent variables, I use the lagged cumulative sum of ISDS disputes against each treaty party (*ISDS resp t-5*) as an indicator of ISDS experience. As in the previous section, treaty parties are identified as the home and the host state in each particular relation. Furthermore, to aid in the interpretation of this distinction, I include the difference in economic size between the home and the host state, calculated by subtracting the GDP of the host from the GDP of the home country (*GDP t-1 diff.*). The higher the difference, the more unequal the relationship between the parties. This variable can even take negative values. For example, in the 1997 India - Switzerland BIT, Switzerland is coded as the home state in spite of India's larger economic size. Additionally, I estimate the models using the full sample as well as sub-samples of North-South and South-South treaties.

As control variables, I include the lagged cumulative sum of disputes initiated by domestic firms against other countries for each treaty party (*ISDS claim t-5*). I expect these variables to be negatively related to the probability of the treaty being terminated. I also include two dummy variables. *EU* takes a 1 when at least one party is a EU member. Countries acceding to the EU had to replace some of their older BITs to bring them in line with EU guidelines. *Latam* is an indicator of at least one treaty party being a Latin American country. Because a few leftist Latin American governments terminated several of their treaties and the problems

²⁴A different way to approach these questions is through survival analysis. Cox proportional hazards regression models could estimate how different factors affect the time until termination. One assumption of survival analysis is that all units will eventually experience the outcome of interest but will take different amounts of time to get there. This characterization, however, does not fit BIT terminations.

of investment arbitration were regularly discussed in regional forums, I control for the possibility of treaty termination being mostly a Latin American response to their own ISDS troubles. Additionally, I control for the age of the treaty, represented by the number of years that have passed since the treaty entered into force (*Treaty age*). I expect states will be more likely to terminate older treaties if they the conditions under which the treaty was signed changed or if the parties want to update the treaty to their latest models. Lastly, I control for temporal trends by including the number of treaties terminated in the previous year (*Yearly terms. t-1*). Assuming states would prefer to take costly actions when others have done so as well, I expect these variable to also be positively related to the probability of a treaty being terminated. In models shown in Appendix A.4.4, I employ alternative indicators of ISDS experience. I use the sum of lost arbitral disputes for each treaty partner and the total number of arbitral claims initiated under the observation treaty only.

3.4.2 Results and discussion

Table 3.7 shows results for three rare events logistic regression models. Model 1 uses the entire sample while models 2 and 3 use the North-South and the South-South sub-samples respectively. Results offer support for the expectation, captured in hypotheses 6.a and 6.b, that experience with investment disputes is more likely to be associated with treaty termination in developing than developed states. When the entire sample is considered, both coefficients for ISDS experience as a respondent are positively related to the probability of termination at a statistically significant level. However, these models cannot pick up the hypothesized nuances in this relationship unless the same models are estimated using the two sub-samples. Model 2 shows the

number of ISDS disputes against either party has no effect on the probability of a treaty being terminated when the party identified as the home is a developed country. Differently, the termination of South-South treaties becomes more likely as the parties accumulate more arbitral disputes. Considered as odds ratios, results from model 3 can be interpreted as the odds of the treaty being terminated on a given year increase by 3.4% and 4.6% respectively per each additional dispute.

Table 3.7: Results - Models 1, 2 and 3

	<i>Dependent variable:</i>		
	Treaty termination		
	(1)	(2)	(3)
	(Full sample)	(North-South)	(South-South)
ISDS resp t-5 home	0.021*** (0.008)	-0.019 (0.035)	0.034*** (0.010)
ISDS resp t-5 host	0.021** (0.008)	0.010 (0.013)	0.045*** (0.012)
GDP t-1 diff.	-0.148*** (0.039)	-0.316*** (0.051)	0.071 (0.063)
ISDS claim t-5 home	-0.002 (0.005)	0.016*** (0.006)	-0.029** (0.014)
ISDS claim t-5 host	-0.072 (0.057)	-0.288** (0.145)	-0.004 (0.049)
EU	-0.104 (0.155)	0.458* (0.269)	
Latam	-0.123 (0.228)	0.465 (0.310)	-0.751* (0.387)
Treaty age	0.026*** (0.009)	0.032*** (0.012)	0.017 (0.019)
Yearly terms. t-1	0.014** (0.006)	0.003 (0.010)	0.019** (0.008)
Constant	-4.925*** (0.217)	-5.206*** (0.354)	-5.343*** (0.361)
Observations	18,299	8,757	9,559
Log Likelihood	-1,036.177	-490.494	-526.640
Akaike Inf. Crit.	2,092.354	1,000.987	1,071.281

Note:

*p<0.1; **p<0.05; ***p<0.01

Turning to hypothesis 7, results also support the expectation that treaties with highly unequal partners are less likely to be terminated. The coefficient for the size of the economic difference between the parties is negatively related to the probability of

termination and reaches conventional levels of statistical significance in both models 1 and 2. This suggests developed treaty parties are better able to resist demands from weak partners to end or replace a BIT than from larger economies. Yet, as model 3 shows, differences in economic size do not matter when only South-South treaties are considered. Additional models reported in Appendix A.4.4 Table A.7 yield interesting results. For example, models using the count of ISDS disputes lost as an indicator of ISDS experience are, for the most part, not positively related to the likelihood of termination in a statistically significant way. This confirms arguments made elsewhere that the onset of disputes hurt respondent countries independently of the result (Pelc, 2017). Another interesting finding that emerges from the additional models is that the number of ISDS disputes emerged under each particular observation treaty is not related to the probability of that BIT being terminated at statistically significant levels. This suggests that, for the most part, governments that chose to terminate their treaties do so not because they perceive particular problems with a specific BIT or with a specific nationality of investors. Rather, they see problems with the substantive provisions and the enforcement mechanism that is common to most treaties, regardless of whether investors have had the chance to invoke them or not. Moreover, it could be assumed that the fewer the claims initiated under a treaty, the less significant that treaty is for foreign investors, thus reducing the marginal political cost of ending that agreement as well.

The control variables yield interesting results as well, especially comparing across models. That *Treaty age* is positively related to the probability of termination in the North-South sub-sample but not in the South-South one suggests that -per the analysis of treaty content in Section 3.3- developed countries might be more willing

to get rid of old treaties if they see this as an opportunity to bring those treaties inline with their more current treaty models. At the same time, the number of treaty terminations in the previous year is only positively related to the likelihood of a treaty being terminated when either the full or the South-South samples are used. This suggests that developing countries might prefer to take costly actions like terminating BITs when others are doing so as well yet treaties signed by developed states are not susceptible to these trends. Lastly, while the results lend support to the expectations contained in hypotheses 6 and 7, the predictive power of these models is low. In this case, the low number of positive outcomes is not a product of data collection. Treaty terminations are, in fact, extremely rare events which are hard to predict independently of modelling choices. This analysis, however, reveals interesting patterns regarding treaty terminations that I further explore in the qualitative case studies.

3.5 Conclusion

This Chapter examined a series of propositions that I introduced in the previous Chapters regarding the impact of ISDS experience on state policy. In doing so, I build on a burgeoning literature on the rise of investment arbitration and its consequences for both the investment regime as a whole and individual states' policies. Although scholars have found evidence of exposure to ISDS leading to lower amounts of treaties signed, higher precision in BITs, treaty renegotiation, and more state autonomy in replaced BITs (Manger and Peinhardt, 2017; Broude et al., 2019; Haftel and Thompson, 2018; Poulsen and Aisbett, 2013), little systematic evidence has been brought to bear on the question of what motivates states to pursue these alternative

policies.

Using an original measure of state international legal autonomy to regulate foreign investment I find support for the motivating assumption of this dissertation. States that have contracted out their legal autonomy by entering into investment treaties and have been brought before arbitral tribunals for alleged violations of those treaties will become more cautious with their legal autonomy. Governments will compromise lower amounts of legal autonomy after ISDS claims hit or even will actively recover it. Yet this is only the beginning of the story. In the aftermath of ISDS, states can implement alternative policies that end up affecting their overall participation in the international investment regime. Through three datasets created for this dissertation, I uncover nuances in the relationship between ISDS experience and the different policy options facing dissatisfied states. With the extant literature, I find exposure to investment arbitration correlates with lower probabilities of signing BITs, with treaties that are more deferential to states' regulatory autonomy, and with treaty terminations. However these findings are not uniform across groups of countries.

Developing countries become less likely to sign BITs as their ISDS record grows larger because they perceive these agreements to be more costly than when they first signed them. While wealthy governments are also exposed to this new information after facing their own disputes, multinational firms headquartered in their countries continue to demand the protection these treaties provide as they expand their operations abroad. Leaving capital to the fate of domestic legal protections in new destinations is not a viable option for advanced economies. At the same time, to continue entering into the same treaties that gave rise to controversial disputes is equally difficult. Well-organized civil society sectors in developed countries demand

treaty policies that do not compromise the ability of governments' to adopt regulations in the protection of, for example, the environment or public health. The solution to these competing demands is to continue signing treaties but draft them so that the balance between investor protection and regulatory autonomy is struck relatively closer to the latter. For the same reasons that developed countries do not become BIT-shy after the claims hit, they are less likely to terminate their treaties. However, treaty termination is not equally available to all developing countries as a strategy. Being a politically costly move, results suggest, larger developing economies are more likely to overcome pressures by foreign investors and their home states and get rid of their old BITs.

In the following Chapters I evaluate these findings against the backdrop of three case studies of one developed state (the US), one developing state (Ecuador) and an emerging economy that straddles the distinction between those two (India).

Chapter 4

United States

In 1992, former American chief BIT negotiator Jose Alvarez, opened a panel on the development of the investment regime with the following remarks:

“Let us suppose that the NIEO (New International Economic Order) effort is dead and that the North won the battle. Capitalism reigns supreme and international law regarding investment is now free to grease the wheels of capitalism. If this is so, those looking for the text that has replaced the General Assembly’s 1974 Charter of Economic Rights and Duties of States need look no further than today’s bilateral investment treaties (BITs), especially the current [1984] U.S. model draft” (1992, 532).

Twenty years later, his view of the 2004 American model BIT, which introduced a series of provisions aimed at protecting states’ regulatory sovereignty, led him to conclude that “if the United States led the charge in favor of investor protections, it now appears to be leading the drive in the opposite direction” (2011, 231). As Alvarez noted, in 2004 the US switched to a model that, in relation to its predecessor, was more deferential to state’s regulatory autonomy. In terms of policy types, the US put in place a ‘Reformist’ policy. Its new treaty template, among other features,

emphasized states' rights to protect health, safety, and the environment; narrowed the definition of investment; and included a more expansive "essential security" exception. The American approach, at the same time, continued to rely on ISDS as the preferred dispute settlement mechanism. Moreover, the US did not seek to terminate or renegotiate its existing BITs to bring them inline with the new model.

I explain this shift by examining the consequences of the American experience with ISDS disputes under the North American Free Trade Agreement (NAFTA). After Canadian firms started to sue the US for alleged violations of NAFTA, policy-makers concurred that the American approach to investment treaties needed some tweaking. However, the American experience with ISDS in NAFTA developed in parallel to their own investors' experience suing foreign countries. As NAFTA's arbitration docket grew, so did the number of ISDS disputes around the globe, the majority of which were initiated by American firms against developing states. In fact, as of today, the US is the most common nationality of ISDS claimants. Given this competing incentives, my goal in this Chapter is to understand why and how objections to investment arbitration emerged and eventually informed American treaty policy along the way. More importantly, I explain why government actors made particular policy choices when alternatives that would have reasserted American autonomy *vis a vis* BITs to either a lesser or greater extent were also being considered.

4.1 The argument

The politics of ISDS in the United States are structured by its dual status as both a substantial sender *and* receiver of FDI. Dual-role states have competing incentives. In abstract terms, in the aftermath of ISDS disputes, a state that is an absolute capital

exporter does not have incentives to deviate from the status quo; it should keep its existing treaties in place and keep drafting future ones in the same way. Since it will only be involved in ISDS as home to a claimant, the only legal autonomy compromised under those treaties would be the partner's. A net capital importer, however, does face strong incentives to change its current approach for policies that better protect its autonomy to regulate foreign investment without being dragged into expensive litigation. Thus, the relative salience of these competing incentives will give way to alternative policies that deviate more or less from the status quo. The question is, then, what affects this balance.

Per my argument, policy-makers have initial inclinations to act on either of these incentives based on their own worldviews and beliefs. For example, leftists should be inclined to emphasize the perspective of the capital importer because they understand ISDS as a tool of corporate influence at home; while right-wingers would emphasize the perspective of the capital exporter because protecting national firms from abuse by foreign governments is a more salient goal. In this particular case, I make an initial simplifying assumption that Democrats and Republicans policy-makers have, as a group, different views on a fundamental issue that ISDS disputes bring to the forefront: the role of government as a regulator of the economy.¹ How do these inclinations matter? In Chapter 2 I used a metaphor of ideas as lenses through which ISDS experience is filtered. When a foreign firm sued the US before an arbitral tribunals alleging an environmental law was violation of NAFTA's rules against expropriation, the views and priorities of Democrats and Republicans would predispose them to have

¹Ideological homogeneity is a strong assumption, specially for the Democratic party (Grossmann and Hopkins, 2016). Thus, within groups, some individuals might have stronger views than others on this matter. Similarly, the more moderate policy-makers within each group should stake positions that are indistinguishable from each other, even though they identify formally as Republicans and Democrats.

different reactions to this dispute. While Democrats should go up in arms about this affront to the government's ability to protect the environment; Republicans should shrug, and assume that for one lawsuit against the US, American investors initiate ten against foreign governments.

But policy-makers have limited energy, resources and time to influence policy on all the issues they could go up in arms about. This is where the second part of my argument comes in: firms and CSOs. Policy-makers do not make decisions in a vacuum. Rather, they operate in an environment filled with groups that mobilize so that one of these competing incentives gains salience. In the case of the US, as a wealthy, dual-role state, I should expect two domestic actors to become politically active on this issue: American multinational firms and domestic civil society. Domestic firms with overseas investments will emphasize that from the perspective of the home state, existing treaties have been beneficial in allowing firms to sue their host governments. Thus they should be kept in place, untouched. That corporations have power to influence most aspects of policy-making in US is a known reality for political scientists (Schlozman et al., 2012; Lavergne, 2014; Baldwin, 1989). Thus, one possibility is that neither policy-makers' ideas nor CSOs mobilization matter for explaining government decisions regarding BITs and ISDS in this period. Rather, the content of treaty policies is predetermined by the interests of multinational firms who have vast resources to spend in lobbying activities. If this is the case, once they mobilize, firms should be able to revert any policy proposal that does not fit their interests. While I do expect them to become politically active with the goal of stopping any changes to American BITs in the direction of greater regulatory autonomy for states, I don't expect their influence to be purely determined by their own behavior. Dif-

ferently, I show that policy choices were defined through political contests between interested firms and civil society. Moreover, mobilization around BITs will likely trigger counter-mobilization from actors with opposing interests. Investment treaties regulate protections for domestic firms abroad and foreign firms at home. Thus actors on both sides have strong interests to become politically active. International investment treaties are a hard case for arguments about the role of non-economic actors. For this reason, I devote more attention in the empirical analysis to actions of CSOs than firms. Furthermore, since I analyze *changes* to the American approach to BITs, CSOs require more attention because they are the ones challenging the status quo. Conversely, firms' mobilization enters the equation insofar they become defensive of existing policies.

Civil society will emphasize that from the position of the US as host state to foreign firms, existing treaties are costly because they can use them to challenge domestic regulations. As such, they should be abandoned and/or substantially altered. Civil society in the US, relative to the other two cases, is populated by a large number of highly organized and well funded organizations that are regularly involved in the policy-making process. Thus, given that they have the resources and expertise, I should expect their policy influence to be a factor mostly of access points and not of a failure to mobilize in the first place. CSOs are valuable to like-minded policy-makers as experts. This is particularly important in Congress where the same legislator works in multiple issues at the same time. Here I also examine other instances where policy-makers are members of the executive, e.g. the US State Department and the US Trade Representative (USTR). Relative to legislators, executive agencies care about a smaller number of issues. Their agenda is set by their mandates. For this

reason, relative to legislators, executive agencies have more expertise at hand. This would reduce the need for interest groups' expertise and thus decrease their ability to influence policy. Yet there is still room for interest groups to influence the work of federal agencies (Furlong and Kerwin, 2004). Federal agencies are required to solicit and take into account the views of interested citizens before promulgating rules and investment treaty policy is no exception. The State Department and the USTR subject aspects of treaty policy, like subsequent iterations of the US Model BIT, to inter-agency review, public notice and comment, and expert consultation processes (Johnson, 2012). Thus, much like in the legislative arena, expert information is a primary currency for lobbying policy-making in the executive branch (Nelson and Yackee, 2012).

One important aspect that varies when either firms or CSOs attempt to influence policy in the legislative and executive branches is the existence of access points. As a reminder, in Chapter 2 I explained that a policy-maker counts as an access point for a particular group not just by having authority in a given policy area. Receptivity to the group's goals is also necessary. Congress, relative to the executive, provides more access points. Interest groups can choose which legislators to work with based on the existence of common goals. Federal agencies do not offer that option. They are controlled by the executive, whose preferences set limits for the possible policy outcomes. That is, while CSOs were able to appeal to like-minded Democratic Senators during the passing of the Trade Act, the subsequent drafting of the 2004 Model BIT by federal agencies from the Bush administration limited their influence and enhanced the capacity of firms to revert some of the changes required by the Trade Act.

The main candidate for an alternative explanation comes from (bounded) rational learning arguments, as derived from the theory of Rational Design and Poulsen's bounded rationality theory (Koremenos et al., 2001; Poulsen, 2015). According to Poulsen argument, cognitive biases constrained policy-makers from developing states, not from developed countries. Thus, both the rational and bounded rational learning arguments would explain policy changes in the US solely as a result of variation in the information environment. That, assuming states' underlying interest has not changed -they remain interested in solving a commitment problem- ISDS experience generates changes by providing new information about the costs and benefits of maintaining the status quo *vis a vis* alternative policies. In the US case, I should observe variation in policy preferences across time -that is, between a consensus around one (perceived) rational response before disputes emerge under NAFTA and another one after. I should not observe variation of preferences across political actors within the same strategic context. To test this alternative explanation, I pay attention to differences in how state officials talk about the way BITs and ISDS have worked for the US; what -if any- is the problem and what should be done about it.

The time period covered -1995 to 2004- also allows me to reject alternative explanations that would view this reassertion of state autonomy in international investment law simply as part of system-wide trends. While arguments against the free flow of capital will appear later in core capitalist states, with the onset of the 2008 global financial crisis (Andenas and Chiu, 2013), such ideas are not observed during the period examined here.

The rest of the Chapter proceeds as follows. In Section 4.2, I explain the failed negotiation of the Multilateral Agreement on Investment (MAI) within the OECD. After

NAFTA, this marked the first instance in which developed states negotiated a treaty including ISDS and served as a key moment triggering CSO mobilization against international investment treaties. Also, at this point the US had not experienced any ISDS disputes. In Section 4.3, I cover the issuance of a series of interpretative notes by the three NAFTA members aimed at countering expansive arbitral decisions. This is the first reaction from NAFTA countries to ISDS involving changes to an existing treaty, albeit a tame one. Section 4.4 shows how anti-ISDS concerns made their way into the US Senate during the negotiation of the 2002 Trade Act and how they ended up affecting the drafting of the 2004 model BIT. Lastly, Section 4.5 compares the negotiation and outcomes of the US-Uruguay BIT and the Australia-US FTA, the first two agreements modeled after the 2004 model BIT. Taking the perspective of Uruguay and Australia during these negotiations, I demonstrate that the factors influencing policy-making in relation to ISDS in the US and Canada were also present in the case of Australia, where civil society mobilized strongly about ISDS, but not in the case of Uruguay. In each section, I show how the three components of my argument -civil society mobilization, opportunity structure and receptiveness of state actors- interacted to produce the considered outcome.

4.2 'Who are these guys?' Civil society and the failure of the Multilateral Agreement on Investment

A *Financial Times* article published in May 1998 opened with a reference to a famous scene in *Butch Cassidy and the Sundance Kid* in which the main characters come un-

der fire by a posse of men on horseback. "After failing to shake off their mysterious pursuers, one of the hunted men asks despairingly: 'Who are these guys?'"² 'These guys' were civil society groups and their target was the Multilateral Investment Agreement (MAI) being negotiated at the OECD. The anti-MAI campaigns mark the first time that civil society organizations mobilized against investment treaty provisions. These groups, based mostly in the Global North, developed an interest in investment treaty disputes that has informed their subsequent activism. While civil society mobilization did not kill MAI on its own - shifts to the left in governments of major European states, particularly France and Germany, dealt the final blow - negotiating parties readily acknowledged that it transformed the conditions in which economic diplomacy takes place.

That Northern CSOs became interested in investment treaties and ISDS was almost accidental. For the most part, developed country governments had conceived BITs as tools to regulate fairly unidirectional flows of capital to the developing South (Vandeveldt, 1993). Historically, developed countries did not find it necessary to adopt binding international rules for the protection of foreign investment between themselves (Kinnear and Hansen, 2005). One exception to this pattern was NAFTA. The US and Canada had signed a treaty on trade and investment liberalization in 1987 that - unlike what both countries were signing with developing countries at the time - did not give investors direct access to arbitration. When Mexico was brought into this scheme with the creation of NAFTA, however, the parties considered it necessary to provide for ISDS given Mexico's history of expropriation (Heindl, 2006). That is, the US and Canada decided to include ISDS because of their interests as home countries to investors in Mexico. Yet this also meant that, as hosts to Cana-

²"Network Guerrillas." *Financial Times*. 30 Apr. 1998: 20.

dian and American investors, they themselves could now be brought before arbitral tribunals. Canadian civil society started to pay attention to investment treaties after an American company Ethyl Corporation sued Canada over a ban to a gasoline additive.³

In this section I trace the origins, negotiations and failure of the MAI. It was the first attempt by developed states since NAFTA to bound themselves to each other through a treaty with the same characteristics of older BITs, particularly the inclusion of ISDS. The fact that this was a treaty negotiated between developed states structured interests differently than in the case of North-South BITs. States paid more attention to the implications of the treaty as capital importers. Civil society's arguments resonated better in this North-North setting, in which every party is both host and home to foreign investors. At the same time, negotiations took place before the US experienced its first ever ISDS disputes under NAFTA. American negotiators did not start talks with plans to deviate from the dispute settlement system they had included in NAFTA. The case of MAI represents, most importantly, the emergence of an "unprecedented coalition of antiglobalists" (Mavroidis, 2011, 98). Anti-MAI mobilization has not received as much scholarly attention as other instances of anti-globalization activism, namely the 1999 Seattle protests during the WTO Ministerial Conference. Yet one of the main factors mobilizing opposition in Seattle was the perception held by many CSOs that the investment agenda that failed to take hold in the OECD would be transferred to the WTO (Walter, 2001).

³Ethyl Corporation v. The Government of Canada, UNCITRAL.

4.2.1 The origins of MAI

In May of 1995 and without much fanfare, the Council of Ministers of the OECD held its annual meeting in Paris. As usual, attendees received a series of documents to discuss. One of them was a joint report from two sections within the OECD; the Committee on International Investment (CIME) and the Committee on Capital Movements and Invisible Transactions (CMIT). The document was entitled *A Multilateral Agreement on Investment* and it noted in its opening paragraph that the time was ripe for adopting a multilateral investment treaty. The report affirmed “the foundations have now been laid for the successful negotiation of such an agreement building on OECD’s existing instruments and expertise.”⁴ The Council of Ministers agreed and gave a mandate to both the CIME and CMIT to set up the negotiation process.

MAI was a first attempt to establish multilateral binding rules that would regulate both the liberalization and protection of foreign investment, including a dispute settlement mechanism. FDI was growing at a faster rate than trade in goods and services⁵ and yet investment lacked a multilateral framework of rules like what the GATT and the WTO provided for trade. MAI was, however, building on a dense network of bilateral investment treaties. By the end of 1994, 988 BITs had been signed. Regional and multilateral investment agreements of a smaller scale, were also in place, most notably NAFTA and the Energy Charter Treaty (ECT), both of which had succeeded in establishing the type of standards that MAI was pursuing. Additionally,

⁴OECD, *A Multilateral Agreement on Investment: Report by the Committee on International Investment and Multinational Enterprises (CIME) and the Committee on Capital Movements and Invisible Transactions (CMIT)*, Paris, 1995.

⁵From 1973 to 1995, FDI outflows multiplied more than 12 times, while the volume of exported merchandise multiplied 8.5 times (WTO, Annual Report 1996, p. 46)

the international trade regime had produced some rules touching on investment; particularly the 1994 Agreement on Trade-Related Investment Measures (TRIMs) that was concluded under the GATT. Originally, the US goal was to include the issues that MAI would regulate within TRIMs, as the US agenda for the TRIMS negotiation was much larger than the resulting text (Devereaux et al., 2006, 145).⁶ In 1995, the General Agreement on Trade in Services (GATS) entered into force within the framework of the WTO. GATS included rules touching on investment that takes the form of international services transactions but it failed to fully address the concerns of investors.⁷

Having failed to include a much larger set of investment issues within the framework of the GATT and the WTO, the US insisted on developing MAI within the OECD. Negotiating at the WTO meant bargaining with over a hundred member states. At the OECD, drafting a text within a smaller group of like-minded states (i.e. large capital exporters) would avoid watering-down the agreement for the sake of consensus. At this point, most horizontal restrictions to foreign investment had disappeared within OECD member (Geiger, 1998, 468). But one aspect that was missing in the available OECD instruments was a dispute settlement mechanism; either a state-to-state system like the one at the WTO or an ISDS scheme like the one provided for in BITs. More importantly, MAI was never meant to be for OECD members only. Rather, it would set high standards that would eventually be accepted by (or imposed on) developing states. As stated by a USTR official involved in MAI

⁶TRIMS ended up mostly establishing a prohibition on local content requirements. As indicated by its name, it applies solely to trade-related investment measures, therefore it precludes governments from adopting investment policies that would generate trade distortions.

⁷Most notably, performance requirements were not outlawed in GATS and the National Treatment standard applied to only the sectors included in the agreement, instead of being accepted as a general standard of treatment for all foreign investment, like in the case of most investment treaties.

negotiations, Joseph Papovich,

“Developing countries weren’t willing to agree to the kinds of investment protection that should be provided to investors. The United States suggested to the Europeans that it would be a good idea to try to reach an agreement of likeminded countries on investment that was at a very high level, similar to what we seek in our bilateral investment treaties, [that] might then be used as a model for negotiating a multilateral investment agreement with developing countries” (quoted in Devereaux et al., 2006, 151).

In fact, the International Chamber of Commerce, the largest transnational organization representing the interests of multinational firms, recognized that “most of the problems addressed under the agreement occur outside the OECD membership” and that it was “crucial that many non-OECD countries as possible accede to the agreement” (quoted in Beder, 2012, 179). While the negotiating parties were mostly dual-role developed economies; the prospect of extending it to developing states -with which OECD members would have unidirectional, outward capital flows- remained in the background.

4.2.2 Negotiations and contentious issues

MAI negotiations started in September 1995 with a deadline established for May 1997. Negotiators met in Paris every 6 weeks.⁸ There were several sources of contention. Some were grounded on disagreements between the parties while others resulted from

⁸Negotiations were attended by all OECD member states as well as a group of observing states: Argentina, Brazil, Chile, Estonia, Hong Kong, China, Latvia, Lithuania, and the Slovak Republic.

the many objections that civil society groups raised.

Contentious issues among states

Even though OECD members were already on the same page regarding many issues of investment liberalization and protection, problems emerged regarding the scope of the national treatment (NT) provision. Although this standard of treatment is generally included in international investment treaties, states nevertheless squabbled about its scope because MAI was supposed to regulate both pre- and post-establishment stages of foreign investment; that is, all aspects of the operation of an investment before and after its entry. Applying NT to pre-establishment matters could result in an unlimited right of entry and its application to the post-establishment stage could eliminate the capacity of governments to subsidize domestic firms.

The NT standard became a serious obstacle in the negotiations, especially because of its potential effects on cultural industries.⁹ This issue pitched Europe and Canada against the US and Japan and ended up becoming an essential reason for France's eventual decision to leave the negotiation process. In an attempt to bridge this gap, a solution emerged by which the treaty would include two lists of exceptions to NT, lists A and B. List A would include non-confirming measures, that is existing regulations and policies that would be in violation of the agreement but that states would like to keep in place.¹⁰ List B would include types of measures that would be exempted in

⁹Some delegations proposed from the onset that cultural industries should be excluded from the scope of the MAI. The treatment of cultural industries has been a difficult issue in practically any international economic negotiation involving states with strong film industries. European States, Canada and India, among others, argued that films and other audiovisual productions are part of a nation's cultural expression and should not be subjected to the same terms as tradable goods. The US, with Hollywood's best interest in mind, held the opposite view and denounced references to 'cultural expressions' as attempts to mask protectionism for local film and television industries (Footer and Graber, 2000).

¹⁰Furthermore, the draft agreement did not include obligations to eventually rollback those mea-

general, like those granting preferential treatment to minorities or to national cultural enterprises. This solution prompted states to enter numerous exceptions to List B both for prudential reasons, since the final text was still being negotiated, and for strategic purposes, since they could serve as bargaining chips in exchange for other concessions later on.

Contentious issues for civil society

Civil society organizations had two main problems with MAI. First, there was a substantive concern with the detrimental effect that it would have on states' ability to regulate and provide public goods, particularly because of ISDS. The second was a procedural problem rooted in the lack of transparency with which the negotiations were carried out. A rule of thumb for civil society groups is that if a process is secret, the outcome will be bad.

State parties and OECD officials had perceived the dispute settlement mechanism of the future MAI to be a relatively easy issue to deal with. After all, OECD members had been providing for ISDS in their BITs for decades (UNCTAD, 1999, 24). However, civil society groups were extremely concerned about the proposed mechanism. The draft mirrored the dispute settlement provisions included in most BITs and in NAFTA. Precisely because the MAI would include ISDS, provisions about indirect expropriation or regulatory takings provoked serious debate outside the negotiation room. Opponent groups were convinced that indirect expropriation clauses would be interpreted to mean that any regulation by a host state that had the effect of limiting the profit-making capacity of an investment could be challenged as an act of indirect expropriation and give way to an arbitral dispute. To make their case, American

sures, just an expressed intention to drop them during future rounds of liberalization negotiations.

and Canadian groups frequently invoked a 1997 NAFTA arbitral dispute in which the American firm Ethyl Corp. challenged the legality of a Canadian ban of a toxic gasoline additive.¹¹ The Canadian firm Appleton & Associates, who provided counsel for Ethyl during their arbitral dispute, was later on commissioned by Canada's largest watchdog group, the Council of Canadians, to provide a legal opinion on MAI. It's major partner reaffirmed the view of the CSOs by concluding that "the current wording of the MAI is problematic as it will unduly limit the ability of the government to take actions to protect a number of key governmental functions."¹² Similarly, a briefing from Public Citizen and Friends of the Earth, two major American organizations opposing MAI, asserted that Ethyl showed how international economic agreements, like NAFTA and the proposed MAI, are a threat to national sovereignty because they "replace the provisions of constitutional law with the authority of international panels established primarily to defend investors' "rights."¹³

Another major problem for CSOs was the secrecy of the negotiations. Secrecy only confirmed how detrimental MAI would end up being for their interests. The lack of transparency in both the negotiation of investment treaties and ISDS proceedings will be a recurrent objection raised by critics of investment arbitration. A January 1997 op-ed by the Preamble Center for Public Policy published in *The Nation* denounced that "few Americans have even heard of the agreement. Trade officials are treating [MAI] information like nuclear secrets, the mainstream media are oblivious."¹⁴ While OECD officials disagree that negotiations were conducted in secrecy (Geiger, 1998),

¹¹Ethyl Corporation v. The Government of Canada, UNCITRAL.

¹²Wording of MAI seriously flawed. (27 November 1997). *The Toronto Star*.

¹³Ethyl Briefing Paper, Ethyl Corporation v. Government of Canada: Now Investors Can Use NAFTA to Challenge Environmental. Retrieved from: <https://www.citizen.org/our-work/globalization-and-trade/ethyl-briefing-paper>.

¹⁴Nova, Scott, & Sforza-Roderick, Michelle. (1997). M.I.A. culpa. *The Nation*, 264(2), 5-6.

this idea was reinforced by the fact the first full draft of the agreement became public in January 1997 only after the Canadian delegation leaked a confidential copy to the Council of Canadians, who then distributed it among the network of CSOs.

Civil society groups mobilize against the MAI

Mobilization against MAI originated in the US and Canada. During the negotiation of NAFTA, labor, environmental and consumer groups had expressed concerns only in relation to trade issues and did not make much of ISDS provisions in Chapter 11. After NAFTA became a reality, these groups turned to MAI. However, they did not let go of their NAFTA concerns. Their campaigns constantly made the connection between the two agreements using terms like 'the next NAFTA' (Beinart, 1997) or 'NAFTA on steroids' (Graham, 2000). European groups also mobilized against MAI. It was the issue of protection for cultural industries that particularly troubled the French opposition. They campaigned against the agreement with the slogan "*L'AMI c'est l'ennemi*" (The friend/MAI is the enemy) given that in France MAI was referred to as AMI (textitAccord Multilatéral sur l'Investissement), the same word in French for friend. Although with varying degrees of intensity, there was mobilization across all members of the OECD.

This network of opposition groups counted around six hundred environmental, development, labor, consumer, church and women's organizations from at least sixty-seven countries. It included large groups like Friends of the Earth, the Third World Network, Oxfam, Amnesty International, the Sierra Club, and Public Citizen but also hundreds of much smaller and localized organizations like the Kansai NGO Council from Japan, the Christian Ecology Link from the UK and the Minnesota Fair Trade

Coalition from the US. Labor unions were also part of the coalition, like in the case of the Canadian Labour Congress, as well as the Green parties from various countries, including Austria, Germany, and the UK.¹⁵

The level of coordination these groups demonstrated was unprecedented and the scale of their mobilization took state and OECD officials by surprise. Many stories on mainstream newspapers and magazines pointed to anti-MAI campaigns as signs of the relevance of the internet for political and social mobilization; something that is now taken for granted. For the *Financial Times*, they evidenced how interest groups were changing the nature of international economic negotiations through the internet.¹⁶ The *Chicago Tribune* described them in the following manner:

“They operate from cluttered offices and the conference rooms of airport hotels. The Internet is their weapon, and indignation often is their fuel. Few people have ever heard of them, but they are beginning to reshape the rule-making for the global economy.”¹⁷

Campaigners themselves recognized the internet was essential for forming a coalition. Being the late 1990s, the internet was functional not so much as a platform for disseminating information to the wider public, which is something they did mostly off-line, but to communicate with other groups. Communication was crucial for the coordination of street actions, like the ones that took place during the ‘International Week of Action’ in February 1998. On this particular week, activists took the streets

¹⁵“The following non-governmental organizations endorse the NGO Joint Statement on the MAI”. Public Citizen. Retrieved from: <https://www.citizen.org/article/following-non-governmental-organizations-endorse-ngo-joint-statement-mai>.

¹⁶“Network Guerrillas.” *Financial Times*. 30 Apr. 1998: 20.

¹⁷ACTIVISTS ON INTERNET RESHAPING RULES FOR GLOBAL ECONOMY. 7 Jul. 1999. *Chicago Tribune*.

with full force (Kobrin, 1998; Bonanno and Constance, 2008). For example, in Washington DC, demonstrators gave handcuffs to members of Congress as a symbol of the restrictions MAI would impose on their regulatory capacity. Michigan Representative David Bonior, second-ranking Democrat in the House, gave a speech at the rally.¹⁸ Dutch activists occupied the entrance to the office of the Dutch official serving as Chairperson for the MAI negotiating group. They also entered into the Ministry of Economic Affairs and built a factory of cardboard boxes in the building's main hallway. Spectacular actions took place elsewhere as well.¹⁹

However, campaigners have recognized that the internet, and the instant communication it allowed for, was also instrumental in their lobbying efforts against MAI because it provided information about what negotiators from their country were telling, or being told by, other parties. As Lori Wallach from Public Citizen recognized "it's really hard for anyone...to go almost any place in the world that we don't have a friend."²⁰ Similarly, Mark Weisbrot of the Preamble Center recalls "[w]e had a joint MAI listserv, with 2,000 people on it. If there was a discussion over dinner in Geneva, there would be something on the listserv the next morning."²¹ Wallach offered a clear illustration of how instrumental was this ability to know almost in real time what state officials were saying:

"so that when the U.S. negotiator has said, "Don't worry, Congress; I

¹⁸"OECD Governments Launch "MAI Charm-Offensive." May 1998. Public Citizen. Retrieved from: <https://www.citizen.org/article/oecd-governments-launch-mai-charm-offensive-0>.

¹⁹Martin Khor. "NGOs Mount Protests Against MAI." Global Policy Forum. Retrieved from: <https://www.globalpolicy.org/component/content/article/209-bwi-wto/43217.html>.

²⁰Wallach's Road to Activism: Trade Agreements and Consumer Protection. No date available. PBS. Retrieved from: http://www.pbs.org/wgbh/commandingheights/shared/minitext/int_oriwallach.html.

²¹ACTIVISTS ON INTERNET RESHAPING RULES FOR GLOBAL ECONOMY. 7 Jul. 1999. Chicago Tribune.

would never go for an investment agreement”...and meanwhile [the negotiator] goes off to Japan, which wants this agreement ... before that person has even walked out of the agriculture minister’s office in Tokyo, there’s an e-mail across here...it’s translated, and we send it off. And the member of Congress is calling that negotiator on a cell phone saying, “Hey, I understand you had something to say different than what you’re saying for domestic consumption.” So now there’s that kind of accountability going towards negotiations.”

Beyond coordinating and exchanging information on-line, civil society campaigns had a large off-line public information component. The Preamble Center, with funding from the Ford Foundation, held debates in twenty American cities between proponents and detractors of MAI.²² The publication of the leaked draft by the Council of Canadians was effective for increasing media coverage of the negotiations (Beder, 2012). For the vice president of the United States Council for International Business (USCIB), representing around three hundred of America’s largest multinational firms, this was something to be regretted, “the media often become the unwitting tool of activists determined to stop these negotiations in their tracks.”²³

MAI in the US Congress

The main way for civil society groups to affect negotiations was through the US Congress. This institutional setting provided more openings for lobbying groups to persuade legislators than to influence USTR or State Department negotiators. “We got commitments from members of Congress, who then got commitments from the

²²Building a global economy. (11 January 1998). In *These Times*.

²³Investment e-paranoia. (7 January 1998). *The Journal of Commerce*.

negotiators,” said Lori Wallach from Public Citizen.²⁴ Civil society groups were successful in getting the attention of Congress particularly by alerting legislators about what was being negotiated in Paris. Showing their crucial role as suppliers of information, some Congress members first heard about MAI from the CSOs (Hoedeman et al., 1998). Having been left in the dark by the executive did not sit well with Congress. In November 1997, a bipartisan group of House Representatives sent President Clinton a letter asking how it was possible that the President had almost wrapped up MAI without any consultations with Congress.²⁵ The MAI issue crept into Congressional debates that had little to do with this particular agreement. For example, on 26 September 1997 the House passed an amendment to an appropriations bill introduced by Democrat Representative from Vermont Bernie Sanders that would allocate 1 million dollars to the USTR office to investigate and report to Congress the implications for laws adopted by American states of decisions by WTO panels. In their discussion of how WTO disputes had challenged American legislation, Democratic Representatives Peter DeFazio from Oregon and George Miller from California linked this problem to MAI. “Now let me point to the latest, and perhaps most egregious, example of how our laws can be held hostage by foreign-owned corporations,” said Miller, “a little-known item called the Multilateral Agreement on Investment.” These off-topic proclamations would have been unlikely without civil society organizations blowing the whistle on MAI.²⁶

As MAI became more salient, Congress got more interested. On 5 March 1998 the

²⁴Wallach’s Road to Activism: Trade Agreements and Consumer Protection. No date available. PBS. Retrieved from: http://www.pbs.org/wgbh/commandingheights/shared/minitext/int_oriwallach.html.

²⁵‘Fast Track’ a NAFTA replay Clinton in tough trade fights again, but outcome may differ this time. (7 November 1997). Pittsburgh Post-Gazette.

²⁶AMENDMENT PROCESS FOR H.R. 1127, NATIONAL MONUMENT FAIRNESS ACT OF 1997. House of Representatives - September 25, 1997. Pages H7873-H7879.

Subcommittee on International Economic Policy of the Committee on International Relations of the House of Representatives held a hearing on the status of MAI. The witnesses to the hearing were Alan Larson (US State Department) from the executive, Lori Wallach (Public Citizen) and Scott Nova (Preamble Center) from civil society and Willard Berry (European-American Business Council) and Stephen Canner (US-CIB) from the business side. The hearing dealt with the ISDS issue directly and the positions of civil society groups and multinational firms crystallized as expected. According to Larson, the dangers of investment arbitration were being blown out of proportion. "No arbitration cases have ever been brought against the United States under our BITs or under the NAFTA investment chapter."²⁷ At this point, the US had not been sued before arbitral tribunals.

CSOs disputed the analogy highlighting that BITs were signed with developing states with which the US had unidirectional FDI flows. Instead they used NAFTA claims against Canada as a more appropriate picture of what could happen under MAI. The business representatives stressed the implications of strict investment protection rules for the US as a capital exporter; "this is an agreement about inwards and outwards investment, and the door swings both ways," they said.²⁸ At the end of the hearing, Republican Representative Lindsey Graham from South Carolina adopted a conciliatory tone; much more conciliatory than the two Democrats discussing the Sanders amendment. Graham told private sector representatives "you want to go do business with the least political constraint as possible...But, this is a big step for the country to take, and some of the arguments raised here today need to be thought

²⁷Multilateral Agreement on Investment, win, lose or draw for the U.S.?: hearing before the Subcommittee on International Economic Policy and Trade of the Committee on International Relations, House of Representatives, One Hundred Fifth Congress, second session, March 5, 1998, p. 5.

²⁸Ibid. p. 26.

of.”²⁹ Congress made things extremely difficult for the executive regarding MAI. When Clinton requested fast-track authority to negotiate trade agreements, Congress not only ended up voting against it; it had also amended the bill to say that the trade authority delegated to the President would not apply to the negotiation of MAI.³⁰ Without fast-track, the MAI would have not made it through Congress intact.

Negotiators take notice

Negotiators and OECD officials repeatedly called CSOs concerns an overstatement. A few years later, USTR official and MAI negotiator for the US, Joseph Papovich, opined that activists “were grossly exaggerating or even distorting the situation” (quoted in Devereaux et al., 2006, 165). In a letter published in *The London Guardian* in response to a critical article by the paper’s Economics Editor, the British Minister of Trade and Industry, Lord Clinton-Davis, expressed “I can assure your readers that your assertions are nonsense. The MAI will weaken neither environmental regulation nor worker protection.”³¹ In a more conciliatory tone, the Canadian Minister of International Trade, Sergio Marchi, lamented that “[t]he mai has become a shopping cart into which people are dropping all their anxieties.”³² Some time after negotiations concluded, various OECD officials published their own accounts of the process. Rainer Geiger, former Director for Fiscal, Financial and Enterprise Affairs, denies that negotiations were secret (1998) and David Henderson, former Head of the Eco-

²⁹Ibid. p. 33.

³⁰RECIPROCAL TRADE AGREEMENT AUTHORITIES ACT OF 1997. House of Representatives - September 25, 1998. P. H8781. Fast-track gives authority to the executive to negotiate free trade agreements that Congress can either vote up or down but cannot amend or filibuster.

³¹Cited in a subsequent Guardian article. Retrieved from: <http://www.monbiot.com/1998/01/01/secrets-or-lies/>.

³²THAT SINKING FEELING The proposed Multilateral Agreement on Investment may be dead on arrival, thanks to political bungling and a growing backlash against globalization. The Globe and Mail (Canada). (April 24, 1998).

nomics and Statistics Department, maintains that “some leading arguments brought against the agreement were worthless or highly debatable” (1999, 26). Voices from within business were not gentle; the *Financial Times* called civil society activists “a horde of vigilantes”³³ and the USCIB referred to them as “Flat Earth Society meets the black helicopter crowd.”³⁴

That negotiators considered accusations by civil society organizations unmerited but still had to address them is evidence of the latter’s effectiveness. The initial response from state and OECD officials was to tackle the secrecy issue by opening the MAI process to civil society groups. In May 1997, which was the initial target date for the MAI, states decided to extend it for another year and gave special instructions to the negotiating group to consult civil society; a decision lamented by businesses.³⁵ In October 1997, the OECD held informal consultations with representatives of about fifty organizations. Public Citizen, however, saw these measures as part of a “MAI charm offensive,” aimed at appeasing the agreement’s critics by offering them “seats near the table.”³⁶

In relation to more substantive objections, negotiators started to consider a series of reformist elements. That is, ways to safeguard some regulatory autonomy but without fundamentally altering the treaty’s design. For example, they developed a proposal to include provisions on not lowering labor and environmental standards.³⁷ The business lobbyists, who had expressed their support for the earlier draft, op-

³³Network Guerrillas. *Financial Times* [London, England] 30 Apr. 1998.

³⁴Investment e-paranoia. *The Journal of Commerce*. 7 January 1998. Guest opinion

³⁵World business calls globalization a powerful force for economic progress. *Business Wire*. 18 June 1997.

³⁶OECD Governments Launch “MAI Charm-Offensive.” May 1998. Public Citizen. Retrieved from: <https://www.citizen.org/article/oecd-governments-launch-mai-charm-offensive-0>.

³⁷Pushed by the United States, Austria, and Britain, labor and the environment became major issues by the end of 1997. Opponents to incorporating these matters into the MAI included Australia and New Zealand as well as South Korea and Mexico (Devereaux et al., 2006, 170).

posed the inclusion of these provisions.³⁸ In a letter to USTR Charlene Barshefsky, the President of the USCIB warned against turning “this agreement into a vehicle for achieving environmental and labor objectives.”³⁹ Similarly, the President of the International Chamber of Commerce and CEO of Nestlé argued that “MAI is not the right place in which to set specific levels of environmental protection” (quoted in Beder, 2012, 182).

In terms of dispute settlement provisions, there were proposals to grant third parties, which would include CSOs, the right to intervene before an arbitral tribunal, either personally or in written form. There was also discussion about the possibility of including an appeals procedure, something that is not provided for in BITs, although there was little discussion about the form said procedure would take. In the end, concessions to civil society groups were not sufficient, given that a specific demand was to eliminate ISDS altogether.⁴⁰ In an email from Public Citizen’s campaigner, Chantell Taylor, to the wider coalition she communicates that unless their demands are met in full, “we will each return to our home countries and launch massive campaigns to kill the MAI.”⁴¹

4.2.3 The end of MAI and its implications

Obstacles in the way of successful negotiations ended up being insurmountable. In February 1998 USTR official Charlene Barshefsky called the MAI “unbalanced” and

³⁸USCIB Issues Statement on Administration’s Fast Track Proposal. Business Wire , 1:18 PM GMT, 19 September 1997.

³⁹Building a global economy. In *These Times*. January 11, 1998.

⁴⁰Joint NGO Statement: 600 International Organizations Oppose the Multilateral Agreement on Investment (MAI). Public Citizen. 27 October, 1997.

⁴¹Email communication from Chantell Taylor. Published by Ngaa Kaiwhakanekeneke. New Zealand. Retrieved from: <http://sisis.nativeweb.org/global/nov12mai.html>.

“prejudicial”, saying it would require “very substantial work to make it something the US will sign.”⁴² At the same time, OECD Secretary-General Donald Johnston appeared to be in denial: “I’m sure these rather small, parochial issues that are on the table will be worked out.”⁴³ A few months later he was confronted with the reality of the situation. On 14 October, a week before talks were scheduled to resume, Prime Minister Jospin announced that France would not be returning to the negotiating table following the recommendations of the Lalumiere Report.⁴⁴ Following France, other European states withdrew their support and without them, there was no MAI. On 3 December, the OECD officially communicated that negotiations on the MAI were longer taking place.⁴⁵ Civil society groups, while celebratory, remained vigilant of any attempts to move MAI talks to the WTO.⁴⁶

A change in the make-up of governing coalitions in many of the negotiating parties contributed to bringing about MAI’s demise. Halfway through the negotiations, a left-wing coalition came to power in France and two of its members, the French Communist Party and the Green party were particularly vocal against MAI. In Germany, the Social Democratic Party in coalition with the Greens won the 1998 Bundestag elections. The German Greens were listed as signatories on the multiple petitions

⁴²US shies away from accord on investment. Nancy Dunne. Financial Times. 14 February 1998.

⁴³Global Investment Accord Put on Hold; France, Worried About Perceived Threat to Its Culture, Seeks ‘Pause’ in OECD Talks. Anne Swardson. The Washington Post. 29 April 1998.

⁴⁴In May 1998, Jospin appointed a special commission headed by Catherine Lalumiere, Member of the European Parliament and affiliated to the Radical Left Party, and Jean-Pierre Landau, Inspector general of Finances, to conduct an examination of the MAI and provide recommendations. The commission concluded that France should only continue negotiations if a series of conditions were met, including that “the dispute settlement provisions be confined to interstate disputes.” (Muchlinski, 2000, 1049).

⁴⁵Official OECD Statement, Informal Consultations on International Investment, OECD, Paris, 3 December 1998. Retrieved from: <https://www.citizen.org/our-work/globalization-and-trade/mai-deep-freeze-oecd>.

⁴⁶Call to Reject Any Proposal for Moving the MAI or an Investment Agreement to the WTO, Public Citizen, 20 November 1998. Retrieved from: <https://www.citizen.org/our-work/globalization-and-trade/call-reject-any-proposal-moving-mai-or-investment>.

circulated by CSOs. Also, in strong federal states like the US and Canada, some subnational units were opposed to MAI as well. Three Canadian provinces said they would not recognize the agreement if signed by the federal government.

The goal of this section is not to argue that civil society on its own was responsible for the failure of the treaty. Disagreements between states were equally, or perhaps more, challenging. From the outset there were marked differences regarding the liberalization of certain industries and the extent to which government would be able to subsidize them. These might have proved insurmountable independently of civil society mobilization. What civil society accomplished, however, was to raise the profile of investor protections and ISDS issues within the MAI, something OECD governments did not have original disagreements about.

Moreover, this first instance of civil society mobilization against investment treaties, and ISDS in particular, will have consequences for future attempts by these same governments to establish new international rules in the domain of foreign investment. According to a trade diplomat quoted in the *Financial Times*, “[t]his episode is a turning point.”⁴⁷ For civil society groups, fighting MAI was necessary not just because of the particular implications of the provisions in the text of the agreement but because they saw it as “the next battleground in an intensifying campaign to institutionalize corporate dominance.”⁴⁸ As I show next, for the CSOs, this will be a battle to be fought on multiple fronts.

⁴⁷Network Guerrillas. *Financial Times* [London, England] 30 Apr. 1998: 20. *Financial Times*.

⁴⁸Nova, Scott, and Michelle Sforza-Roderick. M.I.A. culpa. *The Nation*, 13 Jan. 1997.

4.3 Early reformist signs: reinterpreting NAFTA

MAI was dead, but NAFTA was still alive and kicking. Kicking in the form of a few but highly controversial ISDS disputes. In comparison to MAI, NAFTA posed a much greater challenge for ISDS opponents. Success in the case of MAI meant blocking its adoption altogether. In the case of NAFTA, it was the status quo that was the problem. I examine how the US government had its first reformist moment in the recognition that there was a problem with ISDS in NAFTA. The NAFTA parties adopted a series of interpretative statements aimed at reducing arbitral discretion in the interpretation of the Fair and Equitable Treatment (FET) standard and increasing transparency in arbitral proceedings. NAFTA highlights how patterns of FDI flows structure interests differently for states parties. The interests of the US regarding the desired level of investment protection are different in its relations with Canada than with Mexico. FDI flows between Mexico and the US are mostly unidirectional, reproducing the North-South model found in early BITs, but between Canada and the US FDI flows are much more even and this provokes a tension between each state's interest as importers and exporters of FDI in relation to ISDS.⁴⁹

This section coincides with the beginning of *Methanex v. United States*. While this was the second dispute lodged against the US, it was much more controversial because it involved a Canadian firm challenging a environmental state law. This should propel government actors, on their own initiative, to start considering changes to treaty policy. However, policy-maker's own inclinations will inform the scope of those intended changes. With the transition from the Clinton to the Bush administration,

⁴⁹In 2015, the stock of American FDI in Mexico was 5.6 times bigger than Mexican FDI in the US. This contrasts with the American FDI in Canada, which is only 1.3 times bigger than Canadian FDI in the US. USTR Resource Center. Retrieved from: <https://ustr.gov/countries-regions/americas/>.

I should observe more moderate proposals emerging from the executive. In fact, the interpretative statements fell considerably short of what CSOs demanded. In terms of civil society strategies, this section shows anti-ISDS groups from the two wealthier parties focusing solely on their domestic lobbying efforts and foregoing transnational mobilization. Logically, the location of decision-making processes dictates the mobilization strategies of civil society groups.

4.3.1 Fair and Equitable Treatment

The obligation to provide FET to foreign investors is one of the most common standards of treatment in international investment law and ISDS claimants invoke breaches of FET standards more than any other breach in their suits. The frequency with which FET has been invoked required tribunals to repeatedly weigh in on the meaning of the standard and states have been unhappy with the result, claiming that some interpretations have gone beyond the intentions of the drafters. UNCTAD recognized this as problematic in its 2012 report (2012b, 139). FET provisions have thus become the most controversial standard of treatment in investment arbitration. The controversy revolves around whether FET is limited to customary international law or whether it has an autonomous meaning that can be influenced by the decisions of arbitral tribunals.⁵⁰ It is assumed that linking FET to customary international law results in a more limited scope of protection and one that is more deferential to state legal autonomy to regulate investors.

As I show in this section, the now commonplace idea that expansive arbitral

⁵⁰For example, the tribunal in the *Occidental v. Ecuador* case decided that Ecuador violated the investor's right to a stable and predictable legal environment and this was an "essential element" of FET. Final Award, paras. 180-92 (July 1, 2004).

interpretations of the FET standard are dangerous and need to be checked is not new. Ten years before the recognition of this issue by UNCTAD, the parties to NAFTA were dealing with the same problem. In an op-ed published in a Canadian newspaper, International Trade Minister Pierre S. Pettigrew recognized that “several recent NAFTA tribunals have made errors when dealing with certain Chapter 11 cases, often overstepping their authority and taking unusually broad interpretations.” He also warned that “these misinterpretations, if not corrected, could be used to thwart important public policy objectives.”⁵¹ Of the three NAFTA member states, Canada was the most interested one in addressing this issue and had lobbied for it for three years.⁵² At that point, Canada had faced three Chapter 11 cases: it had lost one, settled another before it reached the hearing stage and won the third one. Canadian civil society organizations had been very active regarding these disputes. On the other end was Mexico, who was opposed to introducing any changes. Somewhere in the middle was the US.

The US position, however, changed after *Methanex v. United States*.⁵³ This case garnered strong interest from environmental groups which saw it as “the latest attempt to use NAFTA as a tool for rewriting domestic environmental laws” and as evidence that “[s]omething is seriously wrong with the way the NAFTA investment

⁵¹We need to ‘clarify’ NAFTA to fix tribunal ‘errors’: Controversy is building around the Chapter 11 investment section of NAFTA. National Post, 23 March 2001, Pierre S. Pettigrew.

⁵²Prime Minister contradicts Trade on Chapter 11: Clause ‘working well’: Provision allows companies to sue governments. National Post, 24 April 2001.

⁵³Methanex was a Canadian producer of methanol which is a component of MTBE (methyl tertiary butyl ether), an additive to gasoline. In March 1999, California banned the use of MTBE on health and environmental grounds after MTBE was found in water supplies. According to Methanex, that regulation was tantamount to expropriation of the investment and therefore a violation of NAFTA. Methanex also charged that the motive behind the ban was to favor ADM, an agribusiness giant that produces ethanol (a rival additive to methanol), who contributed to the governor’s election campaign. In July 1999 Methanex notified the US about the arbitration. The case advanced to the merits stage where the tribunals ruled in favor of the US in 2005.

chapter is working.”⁵⁴ State-level politicians also took notice. Republican California State Senator Dick Mountjoy was astounded; “[i]t is incredible Nafta gives an international tribunal the authority to interfere in a decision made by California’s governor and California’s legislature.”⁵⁵ Within the Clinton administration the issue of Chapter 11 generated divisions between agencies. An EPA official John Audley is quoted describing this situation in a way that contradicts the expectation of rational policy-makers as rational updaters who coalesce around a new consensus in light of new information:

“Inside the government, the divisions were clear and painful...Some agencies were saying, ‘We got it wrong in NAFTA and we have to change it.’ The others were saying, ‘No, we don’t accept that interpretation. In fact, we like Chapter 11 so much, let’s negotiate it again.’ The substantive differences were pounded out through horrible meetings and fifty-, seventy-five-page documents. We simply couldn’t work it out.”⁵⁶

Heated debates within the Clinton administration reflect the ideological heterogeneity of its cabinet. Divisions within the US government diminished with the arrival of the more ideologically homogeneous Republican administration of George W. Bush in 2001 (Bertelli and Grose, 2011). Given the pro-business stance of the administration, ISDS was not a critical issue. However, there was concern that the CSO-fostered

⁵⁴David Schorr, director of the World Wildlife Fund’s, quoted in *Enviros claim NAFTA needs a rewrite: Groups latch on to Methanex lawsuit to voice concerns*. National Post , 23 June 1999; and in *Billion Dollar NAFTA Challenge to California Drinking Water Protection Goes to Trial*. Ascribe News , 12 September 2000.

⁵⁵Canadian Firm’s Suit On Gas Additive MTBE Raises Questions On Nafta. Dow Jones Business News , 9:48 PM GMT, 14 September 1999.

⁵⁶The Right and US Trade Law: Invalidating the 20th Century – INVESTOR PROTECTIONS IN NAFTA ARE ONE MANIFESTATION OF A BROAD, BACKDOOR...The Nation, 15 October 2001

backlash against Chapter 11 could get in the way of obtaining fast-track authority from Congress to negotiate new trade deals. Thus, one way to appease domestic NAFTA critics was to give in to Canada's insistence (and disregard Mexico's unwillingness) and issue a binding and immediately effective interpretation of Article 1105. This is the article through which NAFTA grants FET as a minimum standard of treatment. The meeting of the Free Trade Commission of 31 July 2001 issued a note establishing that Article 1105 must be interpreted according to customary international law and it also stated that the breach of another provision of NAFTA does not in and of itself constitute a breach of FET.⁵⁷ This was the first time the NAFTA parties attempted to rein in some of the authority delegated to arbitral tribunals under Chapter 11, yet it was a much more timid response than renegotiation or even an amendment.

4.3.2 Transparency

The second issue that the NAFTA parties decided to address in relation to ISDS was the question of transparency in arbitral proceedings. Differently from the MAI talks, during NAFTA negotiations there was no consideration of whether documents and proceedings from Chapter 11 should be public, therefore tribunals followed the prevalent norm in international arbitration of keeping them private. CSOs, the main beneficiaries of those stipulations, had not brought that issue up before ISDS disputes became a reality. Once they became interested in the issue they realized how opaque the system was by design. The tribunal in *Loewen*, the first case against the US,

⁵⁷Notes of Interpretation of Certain Chapter 11 Provisions. NAFTA Free Trade Commission. July 31, 2001. Retrieved from: http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp.

denied a request to disclose the case filings.

Similar to the issue of FET, Canada was the first and most interested party in addressing the lack of transparency. As early as 1998, right after its first dispute, the Canadian government issued a unilateral note interpreting Chapter 11 as permitting both greater transparency and the disclosure of information related to claims. However, being a one-sided act, this action did not have much of an effect on the practice of subsequent tribunals (De Mestral and Vanhonnaeker, 2017). After *Methanex*, the US also developed an interest in enhancing transparency. This issue became much more pressing during *Methanex* due to the mobilization of environmental groups. The Earthjustice Legal Defense Fund was only able to follow the proceedings through the filing of periodic freedom of information requests that forced the US to release the documents.⁵⁸ These groups not only wanted permanent access to the disputes but also the ability to intervene. Consequently, the US government told the tribunal that CSOs should be permitted to submit amicus briefs and be able to observe the hearings but the claimant disagreed. In the end, the tribunal decided in favor of accepting amicus briefs but based that decision on the subject matter of the dispute itself, an environmental regulation, and not on a judgment on how Chapter 11 proceedings should be conducted in general. The *Methanex* tribunal, however, did not grant access to the hearings to third parties.⁵⁹

Officials from both Canada and the US saw increasing transparency as a defensive strategy; it could help improve the declining reputation of arbitral tribunals. The interpretative note from July 2001, besides dealing with the FET problem, recognized

⁵⁸Nafta's Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say. The New York Times. 11 March 2001.

⁵⁹*Methanex Corporation v. United States of America*, UNCITRAL. Decision on Authority to Accept Amicus Submissions. 25 January 2001.

that “nothing in NAFTA imposes a general duty of confidentiality on the disputing parties.”⁶⁰ On this occasion, the parties also committed to make all documents public, including the claimants’. Subsequent pronouncements from the parties addressed pending question in relation to transparency. In October 2004, Canada and the US issued a statement during NAFTA’s tenth anniversary on the issue of amicus briefs. While it did not order Chapter 11 tribunals to generally accept amicus briefs, it recommended procedures for determining when to accept them.⁶¹ Finally, in July 2004 the three parties allowed hearings to be open to the public.⁶² Given that civil society organizations are the entities directly benefiting from enhanced transparency, these changes to NAFTA cannot be understood without their mobilization. In the context of NAFTA, CSOs were able to make the implications of ISDS for the US as a recipient of FDI in relation to Canada to gain salience, even over a highly asymmetrical relationship with Mexico.

At the same time, that changes stopped short from addressing larger issues speaks to the importance of having receptive actors in positions of power. The Republican administration allowed for the interests of firms to become effective backstops against the changes demanded by ISDS opponents. Noting the salience of the issue and the problems it could bring for obtaining fast-track authority from Congress, an interpretative note was intended to be seen mindful of the objections raised by ISDS opponents yet without disrupting protections for multinational firms. Civil society organizations, naturally, were not content. Groups like the International Institute for Sustainable Development (IISD) and Friends of the Earth warned that there was

⁶⁰Notes of Interpretation of Certain Chapter 11 Provisions. NAFTA Free Trade Commission. July 31, 2001. Retrieved from: http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp.

⁶¹NAFTA Free Trade Commission, Joint Statement, Celebrating NAFTA at ten, October 7 2003.

⁶²Statement of the NAFTA parties. July 16, 2004.

still much to be done since transparency and FET were not the most problematic aspects of NAFTA.⁶³ Democratic legislators sympathetic to their cause, now on the side of the opposition, brought their grievances into Congress during the negotiations of the 2002 Trade Act.

4.4 Consolidating changes: the 2002 Trade Act and the 2004 model BIT

4.4.1 The 2002 Trade Act

While MAI negotiations ended before any agreements reached Congress and NAFTA reinterpretations were managed by the executive, the Trade Act was an exclusively legislative matter. The Bush administration's first objective in the area of economic diplomacy was to obtain Congressional approval of the 2002 Trade Act. The Act would give the President authority to negotiate a Free Trade of the Americas Agreement, a NAFTA for the whole hemisphere, which was the most ambitious of the administration's trade goals. Acts granting fast-track can also include a set of guidelines for the USTR to follow in future negotiations. The specific issue of investment treaty negotiation guidelines was discussed in the Senate. Thus, relative to the previous two instances, CSOs interested in seeing drastic changes to the US negotiation guidelines had more access points in Congress, where they could lobby receptive policy-makers. At the same time, because these guidelines would affect all future treaties, any changes would enhance the autonomy of the US government to regu-

⁶³Note on NAFTA Commission's July 31, 2001, Initiative to Clarify Chapter 11 Investment Provisions. IISD. Retrieved from: http://www.iisd.org/pdf/2001/trade_nafta_aug2001.pdf; Pressure eased on Nafta governments over investor protection. Financial Times, 2 August 2001.

late foreign investors as much as the autonomy of foreign government to regulate American investors in their territory. For this reason, domestic multinational firms have strong incentive to counter-mobilize. Debates within the US Congress about the 2002 Trade Act show the tension between the interests of the US as a capital importer and exporter. Legislators adopting one position or the other come to very different conclusions about ISDS.

Republicans introduced a bill to the House first as an extension of Andean Trade Act, where it passed by one vote. During its consideration by the Senate the Act changed substantially. It was now a broader trade legislation package including fast-track authority as well as negotiating guidelines for the USTR in the implementation of that authority. The American experience with NAFTA's Chapter 11 made Senators deal with issues that had not been addressed before in discussions about economic agreements. Supporting my assumption that exposure to ISDS leads policy-makers to introduce policy changes in the direction of greater legal autonomy, there was consensus among Senators on the need to add specific guidelines about investors' ability to challenge domestic laws. However, legislators were not on the same page about how much should the guidelines deviate from current treaty practice.

The negotiating guidelines with respect to foreign investment resulted from an amendment introduced by Democratic Senator from Montana Max Baucus and co-sponsored by Republican Senator from Iowa Chuck Grassley, referred to as the Baucus-Grassley amendment. It dealt mostly with dispute settlement provisions; or according to Senator Baucus, "the 'chapter 11 question' as it has come to be called."⁶⁴ Baucus recognized concerns about the impact of ISDS on states' right to regulate. "International agreements," he argued, "must not become a back door for expanded protec-

⁶⁴Congressional record, Senate. May 13, 2002. S4267.

tion of foreign investors at the expense of protection of our environment, health, and safety.”⁶⁵ He also noted that this was a concern expressed at different levels of government and by civil society organizations. In his remarks, Baucus cited a resolution from the National Association of Attorneys as well as communiques by the US Conference of Mayors and the National Association of Counties. He also quoted a letter to the Senate from a coalition of environmental organizations, including Friends of the Earth and the Sierra Club, as well as a letter to US Trade Representative Zoellick from the National Wildlife Federation. In their letters, these organizations expressed concern with ISDS and requested Congress to address this issue in the Trade Act so that new treaties negotiated by the US would not generate the same problems that emerged from Chapter 11.

The adoption of Baucus-Grassley meant that in future negotiations the US would improve ISDS by finding mechanisms to eliminate and deter frivolous complaints and establish a single appellate body that would review arbitral decisions and provide interpretative consistence. However, this was a mere suggestion and not a mandatory requirement. The amendment also included several provisions relating to transparency. All proceedings, submissions, findings, decisions and hearings would be made public and amicus submissions from businesses, unions, and CSOs would be accepted.⁶⁶ On 14 May 2002, the Senate approved the amendment unanimously. American firms with interests abroad seemed satisfied as well. “We think Baucus-Grassley gets it about right,” said an executive from Procter Gamble.⁶⁷

While nobody opposed the amendment, some legislators were of the view that Congress should impose further restrictions on the President’s ability to negotiate

⁶⁵Ibid.

⁶⁶Congressional Record, May 10, 2002. S4230.

⁶⁷The Trade Bill’s ‘Huge Can Of Worms’. (21 March 2002). CongressDaily/A.M..

treaties with ISDS. The main voice within this group was Democratic Senator from Massachusetts John Kerry. He introduced an amendment with two very innovative elements. First, it would limit expropriation provisions by establishing that minor loss of profits resulting from regulatory acts of the state would not be compensated.⁶⁸ Second, and even more drastically, the Kerry amendment would make investors' access to arbitration dependent on the consent of their home state.⁶⁹ While Kerry presented this wording as a mere replication of mechanisms in place domestically, as a provision within investment agreements this would have meant a radical departure from established practice and a return to the bygone practice of diplomatic protection.

For Baucus, Kerry's proposal was going too far. While both Kerry and Baucus are Democrats, Kerry is much further to the left than Baucus (Lewis et al., 2019). These two positions showcase the fundamental source of tension for the US and other developed states regarding investor protections and ISDS. Whether to adopt the perspective of a capital-exporting state or a capital-importing one leads to different conclusions about how much power should be granted to investors to challenge host state regulatory measures. In Kerry's narrative, it is the US government that will suffer from foreign firms using arbitration, or threatening to use it, to fight back against regulations they dislike. According to Kerry, ISDS cases "create expensive litigation. Just the threat of the litigation is, in and of itself, a chilling effect."⁷⁰ The 'chilling' terminology undoubtedly came from the CSOs. He also made multiple references to *Methanex* and to Philip Morris threatening Canada with a Chapter 11

⁶⁸The amendment would limit the propensity of firms to sue "by ensuring that payment of compensation is not required for regulatory measures that cause a mere diminution in the value of private property." CONGRESSIONAL RECORD SENATE. May 17, 2002. S4529.

⁶⁹"a claim by an investor under the agreement may not be brought directly unless the investor first submits the claim to an appropriate competent authority in the investor's country." Ibid.

⁷⁰Congressional record. Senate. May 21, 2002. P. S4595.

dispute if they decided to move forward with an anti-smoking regulation. In his view, Baucus-Grassley was not doing enough to avoid this happening in the future because it did not establish a mechanism to weed out frivolous claims.

Baucus considered ISDS from the point of view of American investors abroad. His concern was that restricting access to arbitration for foreign firms operating in the US meant that future treaties would do the same for American investors abroad:

“if we create that almost impossible burden for foreign investors in the United States, other countries can do the same. This means that other countries, under the guise of public health and safety and environmental protection, could discriminate against the United States in a very subtle way.”⁷¹

Opponents to the Kerry amendment not only thought it went too far; it was also unnecessary to do so since the US had been signing BITs with ISDS for decades without any problems. As Republican Senator from Texas Phil Gramm noted, Kerry “fails to point out that never, ever, have we lost a case since these 45 treaties have been in effect. But every day these same treaties protect American investments in Central and South America, in Africa, in Asia, in the developing world.”⁷² Republican Senator from Virginia George Allen made the same point and reminded other Senate members that American firms want ISDS: “Many U.S. companies and major trade associations tell us that these provisions are extremely important to protecting Americans against abuses in other countries.”⁷³ Gramm went so far as to note that ISDS was actually a civilizing force in the developing world. “Through the Cold War, where we did not

⁷¹Congressional record. Senate. May 21, 2002. P. S4602.

⁷²Congressional record. Senate. May 21, 2002. P. S4596.

⁷³Ibid. P. S4597.

have these agreements in place, American businesses had no choice but to pay off corrupt local governments,” he noted, “[w]e negotiated these agreements to put an end to those problems and instill the rule of law worldwide.”⁷⁴

To be noted, Baucus, Allen and Gramm were not advocating for the status quo, that is, for a replication of NAFTA’s Chapter 11 in future deals. In fact, Allen cited demands from environmental groups and, in reference to the interpretative statement adopted by the three NAFTA parties in July 2001, he praised the Bush administration for “working with all interested parties in an effort to address these concerns for NAFTA and future investment agreements.”⁷⁵ At this point, the reality of ISDS claims against the US had shifted the terms of the conversation. The adoption of Baucus-Grassley had successfully introduced language regarding ISDS into the Trade Act. The disagreement in the Senate was about how far to take it. For Kerry it was indeed appropriate to include an affirmation in the Trade Act of the notion that foreign investors should not be afforded greater protections than domestic investors, as done by Baucus-Grassley, but the problem was that “it is preamble language...It has no teeth.”⁷⁶ In the end, a motion by Baucus to table the Kerry amendment was approved by 55 votes to 41, a vote that followed party-lines almost perfectly. On 23 May 2002, the Senate approved the Trade Act.

In sum, while defeated, the fact that Kerry had introduced such a radical amendment, the way he defended it and that it received substantial support from other Democrats speaks to the receptiveness of these legislators to the arguments of civil society groups. Finally, as expected by the argument, a Republican controlled Senate was relatively more aligned with the preferences of firms, who did not want their right

⁷⁴Ibid.

⁷⁵Ibid. P. S4599.

⁷⁶Congressional record. Senate. May 21, 2002. Page 8302.

to use ISDS to be diminished by the Kerry amendment, and ended up rejecting it in favor of more moderate changes.

4.4.2 The 2004 model BIT

There was yet more debate to come. The 2002 Trade Act issued directives for the negotiation of future BITs and investment chapters in free trade agreements (FTAs). The FTAs with Singapore and Chile, signed respectively on 6 May and 6 June 2003, reflected many of these guidelines in their investment chapters, especially in terms of transparency requirements for ISDS procedures. Throughout 2003 and 2004 the State Department and the USTR -under Republican control- conducted a review of the 1994 US model BIT with the goal of updating the instrument to conform to the requirements of the Trade Act and to reflect the changes introduced to the investment chapters of the latest round of FTAs. Nonetheless, the review process also included new consultations with the private sector and civil society organizations.

In 2003, the Advisory Committee on International Economic Policy to the State Department⁷⁷ convened a stakeholder meeting to discuss a draft of the new model.⁷⁸ In this meeting, the expected division emerged between representatives of firms on one side and environmental, consumer and development organizations on the other. While firms wanted protection against unreasonable measures that would diminish the value of their investments abroad, civil society groups wanted reassurances that

⁷⁷The State Department's Advisory Committee on International Economic Policy (ACIEP) serves the US Government in an advisory capacity by providing a forum for discussion of issues in international economic policy. Committee membership consists of representatives of US organizations and institutions, including from business, organized labor, environment, state and local government, academia, legal consultancies, and non-governmental organizations.

⁷⁸Subcommittee on Investment of the U.S. Dep't of State Advisory Comm. on International Economic Policy (ACIEP), Report Regarding the Draft Model Bilateral Investment Treaty 2-3 (Jan. 30, 2004)

foreign investors in the US would not be able to resist legitimate regulations under the guise of investment protection. These disagreements, however, were larger than the differences expressed by Baucus and Kerry during their debates in the Senate. Representatives of firms at the consultations expressed that, in their view, there was no need to update the 1994 model at all. That is, they saw this consultation process as an opportunity to prevent even the more moderate changes ordered by Congress under Baucus-Grassley. Because the recent FTAs with Singapore and Chile already reflected these guidelines, representatives on investors argued that “adapting the model BIT to the investment chapters of recent FTAs serves only to perpetuate a downward trend in protection for U.S. investors.”⁷⁹

CSOs thought the draft model was not good enough either, although for the opposite reasons, and pressed for further changes. To intervene in this discussion CSOs need to be able to evaluate how each provision in the model advances, or falls short from advancing, their goals and to propose workable alternatives. This requires a high level of technical expertise that not all civil society groups have. CSOs, as experts in the subject matter, are in a better position to participate in this process relative to less resourceful social movements. Among other issues, there was bickering about the definition of investment, which for CSOs and labor should exclude portfolio investment while for representatives of the financial sector it should include even additional forms of financial assets. There was also disagreement about the NT standard. CSOs warned that, as it stood in the draft, there were not enough safeguards against tribunals interpreting it as a prohibition of regulatory acts that result in *de facto* discrimination, even in the absence of intentional discrimination. They wanted explicit language limiting claims of NT violations to be limited to measures enacted

⁷⁹Ibid. p. 2.

for a primarily discriminatory purpose. The representatives of firms, differently, argued that requiring claimants to prove that discrimination was a primary purpose of a given measure would render the national treatment obligation worthless.⁸⁰ Similarly, the FET provision included in the draft was at the same time too open-ended for labor and CSOs and too restricting for firms. In relation to ISDS, labor and CSOs wanted, among other things, provisions allowing state parties to block arbitral claims involving health, public safety, the environment, and workers' rights; a requirement for investors to exhaust local remedies before reaching arbitration; and the creation of an appellate mechanism. The firms' representatives, naturally, opposed all of these proposals.⁸¹ In the conclusion section, where the report gathered the areas of consensus, there was not much more than a recognition that it is a good idea for the US to have a model BIT.⁸²

The final model did not change much from the draft discussed during these consultations. In relation to ISDS, labor and CSOs did not obtain what they wanted because investors retained the ability to initiate disputes on their own. There was no exhaustion of local remedies requirement either. Also, treaties negotiated according to this model would not create an appellate mechanism but would only include a reference to a future appellate body that might or might not be set up by the parties.⁸³ However, the objections of firms were not fully accommodated either. This is evidenced by the fact that, in the view of the business community, there was no need to change standing negotiating practice in the first place. While the resulting model stopped short from much of what civil society groups wanted, the changes introduced

⁸⁰Ibid. p. 8.

⁸¹Ibid. p. 17.

⁸²Ibid. p. 19.

⁸³2004 US Model BIT. Retrieved from: <https://www.state.gov/documents/organization/117601.pdf>

departed substantially from NAFTA's Chapter 11 and other negotiated BITs to this date. "There is no greater evidence of the changing dynamics and shifting ideologies of some investment treaties over time than the changes to the U.S. Model," said Jose Alvarez, chief negotiator of US BITs from 1984 to 1987, about the 2004 model (2010, 8). Less favorably, former ICJ judge, regular investment arbitrator and legal eminence Stephen M. Schwebel, wrote that "the 2004 Model was an exercise in the regressive development of international law." In relation to the FET provisions, he made a similar argument than what firms expressed during the consultations, "providing for such a minimalist meaning...leads to the question of why that provision in a bilateral investment treaty is found at all" (2009, 519520). Considering that FET breaches are the most frequently claimed and found violations of international investment treaties by ISDS tribunals, modifications to this standard are not insignificant.

The key point to take away from this process is that, while civil society groups were in the end unable to impose their preferences completely, the changes introduced into the 2004 US model BIT cannot be explained without their continuous mobilization.

"reflect at least a decade of pressure by numerous NGOs, some of which were involved in the successful effort to unravel the negotiations for the OECDs [MAI]," and more importantly, "who remain convinced, rightly or wrongly, that the network of BITs and other investment agreements threatens the rights of federal, state, or provincial governments to regulate in the public interest" (2010, 9).

At the same time, the model BIT was being drafted by a Republican State Department and USTR. The pro-business stance of the Bush administration was a major reason why the interests of firms prevailed in many other regards.

4.5 The 2004 model in action: the US-Uruguay

BIT and the Australia-US FTA

So far I have traced the emergence of civil society's interest in investment treaties, and ISDS in particular, to the combination of two factors in the mid 1990s. First, a series of early NAFTA cases against Canada raised awareness of this otherwise unknown dispute settlement mechanism and cemented the view that firms were not just using ISDS to get justice for the taking of their property by dictators in faraway countries. They were using ISDS to counter sensitive regulations at home. A second factor helped make the ISDS danger more real. The launching of negotiations for a NAFTA-like multilateral agreement on investment (MAI) among OECD members meant that most foreign firms within each of these countries would eventually have access to ISDS. NAFTA showed ISDS was dangerous, MAI showed the danger was pressing. MAI eventually failed and CSOs achieved their goal. But it was only the first battle in their war against corporate rule. Not only the MAI agenda moved to the WTO, but also the same provisions they fought in MAI were already present in thousands of BITs around the world and countries kept adopting them in new treaties. Thus, as opportunities to influence their governments' treaty policies opened up, either during domestic processes (like in the US Trade Act) or during treaty negotiations, CSOs kept pushing their anti-treaty and anti-ISDS goals. Moreover, anti-MAI efforts resulted in a dense network of like-minded CSOs. These connections proved valuable when Australia began FTA negotiations with the US. While Australia had not experienced ISDS cases directly, Australian CSOs were already well attuned with its potential implications.

I also showed that -as expected due to the dual position of the US as a host and home state- there was not consensus about the form this rethinking should take. Policy-makers emphasizing the perspective of the US as a home state suggested much smaller changes than those proposed by policy-makers stressing risks for the US as a host. While rational learning arguments predicts rational actors in the same information environment will arrive at the same solution for the commitment problems they face, the processes examined so far suggests policy-maker's views about the severity of the problem vary substantially depending on which of those two perspectives becomes more salient. This, in turn, is a function of their ideological positions. The first move of the pro-business Bush administration was an interpretative note of NAFTA. As a matter exclusively managed by the executive, the note did not introduce radical changes. Yet as opportunities for influence opened up, CSOs mobilized to obtain as much of a change as possible while firms counter-mobilized to limit those changes. One such opportunity was the passage of the 2002 Trade Act leading to the drafting of the 2004 US model BIT. Being this a legislative issue, there was space for alternative views and arguments as well as multiple points of access for lobbying groups. As expected, Democrats, more in line with the interests of CSOs, pushed for a fairly radical changes in US treaties. Most notably, making investors' access to ISDS dependent on the consent of their home state. Republicans, generally more attuned to the perspective of US firms, opted for more limited changes like preserve direct access to ISDS but increasing transparency and precision. While still resisted by firms, the outcome of this rethinking during a unified Republican government was a moderate reform that left the fundamental principles of the regime untouched. The 2004 US model BIT reasserted the legal autonomy of host states in a considerably

less significant way than of the Kerry amendment would have been adopted.

The last empirical section compares two negotiations the US undertook after adopting its 2004 model. The first one was for a bilateral investment treaty with Uruguay and the second one was a free trade agreement with Australia, which included a chapter on investment. Uruguayan and Australian treaty policies would be, at this time, outside the scope of my argument because neither country had yet faced any ISDS disputes directly. That said, my intention with this brief comparison is to examine at to what point can civil society mobilization raise awareness among allies in government of the dangers of ISDS, even before direct exposure. For this reason, during the empirical narrative I take mostly the perspective of Uruguay and Australia. Consistent with the brand new US model, both negotiations started with ISDS on the table. But only Australia demanded that it was taken off.

For many reasons, resistance to ISDS provisions and the overall impact of the treaty on the state's ability to regulate should have emerged in Uruguay more than in Australia. First, in relation to the US, Uruguay was exclusively in the position of the host state. Differently, the relationship between Australia and the US was more equal, albeit still in favor of the US. By 2002 figures, US FDI in Australia was \$36.3 billion and Australian investment in the US was \$24.5 billion.⁸⁴ Second, while neither country had been subjected to an ISDS dispute directly, Uruguay was neighbors with an Argentina that at the time had been sued forty times (and mostly by American firms). Third, while the Uruguayan BIT was negotiated by a center-right government, the government that had to decide whether to send it to Congress for ratification was a leftist coalition. In Australia, it was the Liberal party who was

⁸⁴Summary of the U.S.-Australia Free Trade Agreement. February 2004. Office of the United States Trade Representative. Retrieved from: <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/archives/2004/february/summary-us-australia-free-trade-agreement>

in power. Thus, because of these three reasons one could expect that of both US partners, it would have been Uruguay who would have raised concerns with ISDS in its treaty. However, the main difference between both was the dense network of civil society groups that was present in Australia that had links with their American counterparts forged during the anti-MAI campaigns. This mobilization raised the salience of the negative aspects of ISDS for opposition MPs from the Labour party. The Uruguayan leftist coalition -while it exhibited some of the traditional ideological traits of the Latin American left- did not take issue with the treaty's potential impact on Uruguay's ability to regulate.

4.5.1 Negotiating with Uruguay

The 'Treaty between the United States of America and the Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment' (US-Uruguay BIT) was the first agreement negotiated after the adoption of the 2004 American model BIT. On the Uruguayan side, the treaty was negotiated during the center-right government of Jorge Battle and signed on 25 October 2005, a week before presidential elections. With the victory of a leftist coalition headed by Socialist Tabaré Vázquez, it was unclear whether the new administration would send the new BIT to Congress for ratification. "We don't know the content of that treaty, we don't know what is in it," said Vázquez during his campaign, avoiding making any promises about the fate of the treaty that could alienate both his leftist base or foreign capital.⁸⁵

The Uruguayan administration was internally divided. Moderates occupied the Ministry of Economy while the hard-liners inhabited Foreign Affairs, which was con-

⁸⁵"No conocemos el texto de ese tratado, no sabemos lo que contiene." Eventual gobierno de izquierda propondría referéndum sobre aborto en Uruguay. Agence France Presse, 29 October 2004.

trolled by the Socialist Reinaldo Gargano. However, on 23 December 2004, and coincidentally while having lunch with the board members of the Uruguay-United States Chamber of Commerce, the incoming Minister of Economy Danilo Astori announced the President would ask Congress for the ratification of the US-Uruguay BIT.⁸⁶ Divisions emerged also in Congress. Curiously, the most contentious issue proved not to be ISDS or the risk of regulatory chill; even at a time when neighboring Argentina was being swamped with ISDS claims. It was the Denial of Benefits (DoB) clause included in Article 17. The DoB clause is a common element in international investment treaties and it relates to the issue of complex ownership structures of many multinational enterprises. The DoB clause establishes that a party to the treaty can deny its benefits to an enterprise from the other party if it is ultimately controlled by nationals of a non-party state with which the denying party has no diplomatic relations. For some members of the Uruguayan left, this was a problem because of a long-standing tradition of Uruguayan support for Cuba. There were concerns that entering into a treaty with the US including a DoB clause would imply a tacit approval of the Cuban blockade. The Communist Party, also a member of the ruling coalition but holding only one seat in the Senate, was the only one to bring up concerns about ISDS. Interestingly, the statement in which the Communist Party rejected the treaty traced the roots of the “asymmetric and anti-democratic essence” of the treaty to the “failed Multilateral Agreement on Investment.”⁸⁷

The further-left members of the governing coalition stalled the ratification of the BIT. With the goal of breaking the stalemate in Congress, President Vázquez re-

⁸⁶Gobierno electo de Uruguay mantendrá tratado de inversiones con EEUU. Agence France Presse, 23 December 2004.

⁸⁷Partido Comunista del Uruguay rechaza tratado de inversiones con Estados Unidos. La Republica, 9 December 2005, Noticias Financieras.

quested the American government to renegotiate three problematic aspects of the treaty during a trip to the US in September 2005, to which they agreed. According to the President, he managed to “introduced variations that...have improved the bilateral agreement substantially.”⁸⁸ However, the government was trying to make these concessions appear much bigger than what they actually were. In terms of the DoB clause, the change was the introduction of reciprocity. In the earlier BIT, it was the US who retained the right to deny benefits to certain enterprises while the renegotiated version granted these right to both parties. This change, however, did nothing for the concern over its implications for Cuba. Uruguay also included an interpretative declaration to stipulate that the MFN treatment would not apply to Uruguay’s commitments as a part of the Common Southern Market with Argentina, Brazil and Paraguay.⁸⁹ This caveat was already included in Annex I of the original BIT. And lastly, the revisited treaty introduced a change in the designation of arbitrators for the case of financial disputes. Following standard practice, ISDS tribunals are composed of three arbitrators, one appointed by each party and the third appointed by agreement. But the newer BIT stipulated that, in the case of disputes over financial services, if the parties do not agree to the constitution of the tribunal, the remaining appointments will be made by ICSID’s Secretary General. These were hardly substantial changes. It is likely that, if this process would have been scrutinized by CSOs with technical expertise on international investment law, they would have been able to call on the government and explain to legislators how meaningless these changes were.

⁸⁸“hemos podido introducir variantes que nos parece que han mejorado sustancialmente este acuerdo bilateral.” Vázquez: “en poco tiempo” se firmará nuevo tratado con EE.UU. *El Pais*, 27 October 2005.

⁸⁹Comparando tratados. *El Pais*, 21 November 2005.

However, they appeared to have worked to break the impasse. Both chambers of the Uruguayan Congress approved the treaty by the end of December 2005 amid mobilization from groups associated with the Communist Party, who, reasonably, deemed the modifications to the treaty insufficient. These concerns only emanated from the fringes of the governing coalition and proved too little and too late to counterweight positive views of the treaty based on the expectation of increased American FDI flows. For ISDS to become a salient issue for Uruguayan politicians, it will have to wait until Philip Morris launches a case against Uruguay for its anti-tobacco policies. Uruguay will then start putting a lot more thought into the drafting of its treaties.

In the United States Congress, the approval of this BIT was uncontroversial. With a unidirectional flow of capital between both states, there was no concern among policy-makers for the potential impact of the treaty on the US capacity to regulate. The interest was solely on its implications for American firms. At a hearing of the Foreign Relations Committee of the Senate, the State Department Assistant Secretary for Economic and Business Affairs was only questioned about the reception of the treaty in the private sector. Moreover, the institutional framework of this negotiation did not provide access for CSOs to raise complaints. The Assistant Secretary explained that, while the BIT is based on the 2004 model and this resulted from a consultation involving both the private and civil society sectors, when it comes about particular negotiations with a potential treaty partner, consultations only involve the input of firms through the Industry Trade Advisory Committee.⁹⁰ If the other party requests to depart from the US model text, the Committee would be consulted.⁹¹ The

⁹⁰Business associations like the National Association of Manufacturers and the U.S. Council for International Business are part of the Industry Trade Advisory Committee.

⁹¹109th Congress 2d Session. January 3-December 9, 2006. Senate Executive Reports. Nos. 9-19.

treatment that the BIT with Uruguay received in the US Congress shows how -when flows of investment are purely unidirectional- there is little space for ISDS opponents to push the problems of investment arbitration into the debate by emphasizing its negative consequences on host countries.

4.5.2 Negotiating with Australia

Differently, the investment chapter of the Australia-United States Free Trade Agreement (AUSFTA) signed on 18 May 2004 departed from the US model BIT in a very substantial way: it excluded ISDS. This section shows how civil society mobilization can raise the salience of the potential impact of ISDS on the host state's right to regulate during treaty negotiations, even when the country has not faced ISDS disputes directly and before the issue of treaty reform became a global concern.

Initially, the US insisted that ISDS be adopted under the AUSFTA. However, opposition emerged from both sides. On the US side, seven Democrat legislators sent a letter to US Trade Representative Zoellick opposing the inclusion of ISDS from the onset.⁹² However, there was no interest from the USTR in deviating from the new model. On the other side, there was a negotiating partner very different from Uruguay. Australian labor and CSOs had mobilized considerably against the participation of Australia in MAI negotiations at the OECD (Capling and Nossal, 2001). When the Liberal government of John Howard began negotiating an FTA with the United States, the same issues reemerged. There was concern about the potential impact of AUSFTA on Australia's capacity to retain content regulations for audio-visual

P. 17.

⁹²US support over trade hitch. The Australian Financial Review. By Allesandra Fabro. 15 January 2004.

media and price controls for pharmaceuticals. The question of whether the agreement would include the same ISDS provisions from NAFTA and MAI also generated intense controversy. Australian unions and CSOs were making the same arguments their North American counterparts had been making about NAFTA's Chapter 11.⁹³ According to one organizer, "[f]ifty-nine prominent community organisations...called for the exclusion of an investor-state dispute process, arguing that it would be a dangerous weakening of governments' ability to regulate for social and environmental goals" (Ranald et al., 2006, 44). These groups coordinated positions through the Australian Fair Trade and Investment Network (AFTINET) and connected with their peers in the US to coordinate their lobbying activities (39). The largest union federations in both countries adopted a joint statement asserting that "[t]he U.S.-Australia FTA must reject [the NAFTA] model and preserve each country's authority to regulate foreign investment in the public interest."⁹⁴ Additionally, as it had also been the case in the US and Canada, governments of subnational units expressed concerns with the prospect of AUSFTA including ISDS (Capling and Nossal, 2006, 158).

After the fourth round of AUSFTA negotiations, Australia's chief negotiator Stephen Deady appeared before the Senate's Committee on Foreign Affairs. In his questioning, Labor's shadow trade minister Stephen Conroy brought up a 2000 NAFTA's Chapter 11 case in which UPS challenged subsidies provided to Canada Post.⁹⁵ He wondered, "would FedEx be able to take the Australian government or Australia Post to this independent dispute settling?" Deady's response suggests that

⁹³Free Trade Leads To Torrent Of Trouble. *The Age*, 23 August 2003, David Elias.

⁹⁴Joint Statement on the Proposed U.S.- Australia Free Trade Agreement. The Australian Council of Trade Unions (ACTU) and the American Confederation of Labour and Congress of Industrial Organisations (AFL-CIO) August 10, 2003. Retrieved from: https://www.citizenstrade.org/ctc/wp-content/uploads/2011/05/afl_aus_fta_joint_statement_may2004.pdf

⁹⁵United Parcel Service of America Inc. v. Government of Canada, ICSID Case No. UNCT/02/1.

Australian negotiators were, at this point, considering including ISDS. He replied that even if subsidies to Australia Post were in breach of the treaty's NT provisions, by including a reservation excluding postal services from the scope of the treaty, investors would have no case. Conroy countered with the fundamental objection ISDS detractors have: the propensity of arbitrators to interpret provisions expansively. "That is what you think the definition [of the reservation] would be but you would not be the final arbiter anymore."⁹⁶

On November 2003, the Australian Senate's Committee on Foreign Affairs published its report on AUSFTA.⁹⁷ The report mentions a submission by AFTINET to the Committee and particularly cites a passage warning that if ISDS is included in the agreement, "the almost inevitable outcome will be a reduction in the capacity of all levels of Australian government to regulate."⁹⁸ Furthermore, it notes that the US proposals looked a lot like "the ill-fated OECD Multilateral Agreement on Investment that drew broad, hostile and effective community criticism during the late 1990s."⁹⁹ Finally, the report recommends that "no investor-state provisions be included in the Australia-US Free Trade Agreement" (p. 135).

The final round of negotiations took place in January 2004. Australia finally communicated to the US that it could not accept ISDS and argued that such a mechanism will not be necessary because the legal traditions regarding investment were very similar in both states and there was no danger of unfair treatment of

⁹⁶Parliament of Australia. Senate Estimates. Budget supplementary estimates 2003-2004 (November 2003). p. 139.

⁹⁷Voting on Trade: The General Agreement on Trade in Services and an Australia-U.S. Free Trade Agreement. Canberra, November 2003.

⁹⁸Ibid. p. 132.

⁹⁹Ibid. p. 135

foreign investors in Australian courts.¹⁰⁰ Although American firms were not happy,¹⁰¹ the US accepted Australia's position and AUSFTA ended up not including ISDS. This counters my expectation that, if American treaties were to exhibit revisionist traits, these would come from domestic processes rather than from demands from its partners. This was, however, the only negotiation during this period in which the US deviated from its model to such an extent.

That Australia -who had not been sued once by foreign investors at this point- adopted a radical position by demanding the absence of ISDS in AUSFTA goes against a central expectations from my argument, namely that states will become more mindful of their international legal autonomy *after* negative ISDS experiences. However, Australia's radical position did not extend beyond this specific negotiation with the US. Two months after signing AUSFTA, Australia concluded another FTA with Thailand whose investment chapter did include access to ISDS. Without a treaty model, Australia approached negotiations on a case-by-case basis. In talks with the US, the perspective of the host state was much more salient than in negotiations with Thailand. Thus, the Australian case suggests that direct experience with investment arbitration might not be the only conduit for awareness about the constraining effects of ISDS. However, even in these cases, direct experience with investment disputes still has its own effects on treaty policy and the extent of these changes is also related to the ideological inclinations of those in power. After a controversial 2011 ISDS claim that Philip Morris initiated for a anti-smoking regulation, the leftist coalition government of the Labor and the Greens took an even more radical position and decided

¹⁰⁰Congressional Research Service Report RL32375 The U.S.-Australia Free Trade Agreement: Provisions and Implications. January 12, 2005. William H. Cooper. Specialist in International Trade and Finance Foreign Affairs, Defense, and Trade Division.

¹⁰¹Ibid.

that Australia would not include ISDS in any of its future agreements (Trakman, 2012). After the Liberals went back to power in 2013, the Center-Right government reverted course and decided that in future negotiations, the inclusion of ISDS would be decided on a case-by-case basis.

4.6 Conclusion

The American model BIT changed substantially after Canadian investors started to bring the US before international ISDS tribunals for alleged breaches of NAFTA's investment rules. The 2004 version of the model was much more precise in its definitions, included several exception for public policies and increased the overall transparency of arbitral proceedings. Yet the US remained a staunch supporter of investors' right to sue sovereign governments directly in international tribunals. Thus, its reaction to its first ISDS disputes falls within the reformist policy zone. The US became more cautious about the way in which its future treaties will constrain its legal autonomy but did not try to actively recover it from its existing treaties by terminating or renegotiating NAFTA. In this Chapter I linked this outcome to the mobilization of civil society organizations and the counter-mobilization of firms as well as to the ideological disposition of policy-makers that made them more receptive to the arguments of either group.

While this Chapter focused on how the American, and to certain extent Canadian, experience with NAFTA triggered a rethinking of its approach to investment treaties; similar processes have eventually taken place elsewhere, particularly within Europe. The 1994 Energy Charter Treaty was born out of investment opportunities in the energy sectors of former soviet countries and provided similar protections as NAFTA

and most BITs, including ISDS (Hobér, 2010). Much like the US and Canada in NAFTA, Western European countries adopted these protections as home states to the firms that were going to invest in Post-Communist Europe, yet in doing so they provided the same guarantees to other Western European investors in their territory. A few controversial claims had profound effects, even though Western European firms had been using ISDS provisions in BITs much more often against foreign governments. European environmental organizations were enraged after a Swedish energy company brought a claim against Germany for its decision to phase out nuclear power in 2012.¹⁰² The social mobilization against ISDS that followed made it impossible for the EU to keep providing direct access to international arbitration in its investment treaties.

Moreover, although I finish my analysis in 2005, the issue of ISDS in US treaty policy was far from settled. During the drafting of the 2012 model BIT and in TPP and TTIP negotiations, CSOs kept asking for the complete elimination of ISDS and multinational firms kept trying to limit the scope of the changes implemented at this stage. Much like in the MAI negotiations, the issue of ISDS was particularly salient during TPP and TTIP talks because many of the countries involved were capital exporters as well. At this point, it was the Obama administration who was in charge of the negotiations and -highlighting the role of policy-makers own ideas- the most fervent opposition to investment arbitration provisions came from the Left of his own party; from progressive Democrats like Senators Bernie Sanders and Elizabeth Warren, who much like the CSOs view ISDS as a tool of corporate rule.¹⁰³

The importance of ideas held by policy-makers, however, is never more clear than

¹⁰²Vattenfall AB and others v. Federal Republic of Germany (II).(ICSID Case No. ARB/12/12)

¹⁰³Democrats urge officials to leave out investor-state dispute provisions in major trade deals. (18 December 2014). The Hill.

in the renegotiation of NAFTA. The most revisionist decision ever taken by the US regarding ISDS came from the Trump administration, especially US Trade Representative Robert Lighthizer. NAFTA 2.0, officially known as USMCA, will not include ISDS between the US and Canada and severely restricted between the US and Mexico. Unlike Warren and Sander's, however, Lighthizer's critiques of ISDS come from a nationalist point of view.¹⁰⁴ In the concluding Chapter I revisit the recent renegotiation of NAFTA in light of the dissertation's findings.

¹⁰⁴USTR Robert Lighthizer's testimony before the Ways and Means Committee of the House of Representatives. 22 June, 2017. Available at: <https://www.c-span.org/video/?430344-1/us-trade-representative-robert-lighthizer-testifies-trump-administration-agendastart=2595>.

Chapter 5

Ecuador

By the end of his presidency in 2017, Rafael Correa had severed all ties with the international investment regime. That is, Ecuador adopted an Exit policy aimed at recovering its full legal autonomy from investment treaties. Exits are extremely rare. Not only are governments seldom inclined to break away from international regimes; even when they are, the costs of doing so can be large. By dissecting the process culminating in the termination of Ecuadorian BITs it is possible to observe how ideationally motivated actors pursue their policy preferences while facing a variety of constraints and opportunities, both domestic and international. Furthermore, it becomes clear why exiting the regime is such a rare event. The limiting factors keeping Ecuador in check for ten years are observable in full force and this highlights the importance of strong ideological commitments for governments to tolerate the costs of walking out from their treaties.

5.1 The argument

In Chapter 2 I argued that states who face multiple or highly controversial ISDS claims will attempt to reclaim a degree of the legal autonomy to regulate foreign investment

they had lost to the international investment regime. I also argued that the form in which this reclaiming takes place -thus the amount of autonomy recovered as a result- is affected by a multiplicity of variables. In this Chapter, I examine the case of Ecuador, a developing country with marginal outwards FDI, during the 1999 to 2017 period. Foreign investors started to sue Ecuador before ISDS tribunals in 2002. Based on the argument, the first element to consider in explaining treaty policies throughout this period is policy-makers' ideas. In this regard, the considered period allows for a 'within-case' comparison between the pro-market consensus of the ruling coalition until 2007 and the ensuing leftist-developmental government of Rafael Correa. Thus, given the ideological configuration of the ruling coalition, I should expect radical policies to emerge from Ecuadorian policy-makers after 2007, but not before.

In light of this expectation it could be assumed that Correa's Ecuador was an easy case for a full Exit. It was, at that point, one of the most heavily sued countries for alleged violations of investment treaties and the ideological make up of the government was prime for taking a radical approach (Conaghan, 2011). Central to the political economy of the government was a re-assertion of state property over natural resource extraction and this would set Correa on a collision course with the foreign firms in extractive industries (Rosales, 2013). In fact, as a presidential candidate he had already been vocal about the problems of the investment regime. Yet it took the government of Ecuador (GoE) ten years to exit; two full presidential mandates. Opening up Ecuador's withdrawal shows a much more drawn-out process than what Correa's combative rhetoric might have suggested. A process that at multiple times risked stalling indefinitely or even rolling back.

I argue this lag is not the consequence of slow bureaucracies; it is theoretically significant. As I show, the GoE could have terminated all the treaties as soon as it came to power and before the enactment of the new constitution that required legislative approval to terminate a treaty. In fact, eight treaties -all with small economies- were terminated at that point. They delay in terminating the more politically salient BITs responds to other reasons. Governments do not make policies in a societal vacuum. Different domestic and external actors have incentives to mobilize when policy-makers start discussing policies that can affect their interests. The most fundamental difference in terms of the United States and Ecuador cases relates to the influence of societal actors. For a variety of reasons, the external context -as a source of constraints and opportunities- should be more relevant for explaining policy-making in Ecuador than in the US. This brings into consideration three variables that were absent in the previous Chapter: foreign investors, international CSOs, and diplomatic coordination.

As explained in Chapter 2, foreign investors' threats to withhold investment and treaty partners' threats to reduce market access for domestic exporting firms can check radical policies. This is another important difference between the US and Ecuador. As a net capital importer, the relevant domestic firms in Ecuador are not multinational firms but domestic exporting firms who have incentives to mobilize when their exports are on the line. Thus, at points where the process of withdrawing from the regime stalled or veered towards more moderate approaches in line with Revisionist or Reformist policies, I should observe foreign firms and their home governments engaging in this type of coercion and, as a result, I should also observe domestic exporting firms raising concerns about the fate of BITs.

In the previous Chapter I showed how domestic CSOs mobilized in favor of radical policy changes in the US. American CSOs became interested on investment treaties after NAFTA claims started to hit and developed technical expertise on the matter. As interested experts, they mobilized when favorable opportunity structures provided openings, mostly in terms of access points and availability of allies. In Ecuador, the landscape of civil society is different. Per the discussion in Chapter 2, Ecuadorian civil society actors are closer to social movements than CSOs. The indigenous and environmental movements, while capable of disruptive actions, lacked expertise in the subject matter. Thus, I have two expectations for Ecuadorian domestic civil society. (1) They should be more likely to mobilize around issues that affect them directly -like the environmental and social impact of firms' operations- than around investment treaty policy. (2) When they mobilize, they should be better able to mount disruptive actions than to intervene in the policy-making process. Thus, in this case, considerations of opportunity structures become secondary to civil society's ability to take advantage of them. I test these expectations through a within-case comparison of civil society's role in two important policy decisions. The first one was the expelling of the American oil firm Occidental. The second one was the decision to terminate all of Ecuador's investment treaties. While indigenous and popular movements were determinant for the former, their organic interest in the latter was marginal.

In Chapter 2 I argued that international CSOs can compensate for the lack of technical expertise found in domestic civil society and thus lend support to policy-makers with radical agendas. I should expect that once Ecuador starts to show signs of dissatisfaction with how costly its BITs turned out to be, large Northern CSOs will become involved in this process as suppliers of expertise. This, in turn,

should strengthen the position of radical policy-makers *vis a vis* moderate actors. I also argued that, for relatively less powerful states, the diplomatic environment can make governments more or less likely to pursue radical policies, for example through demonstration effects or policy coordination. This leads me to expect developments in the diplomatic front to correlate with moments in which the process of withdrawing from the regime cleared obstacles and moved forward.

While I argue the international dimension is crucial for explaining the GoE's policies, I do not make a 'second-image reversed' argument in which domestic politics are determined by international forces (Gourevitch, 1978). Without the ideological commitment of the government, foreign pressures would have not emerged and Ecuadorian officials would have not attempted to coordinate policies with other states. More importantly, external factors' influence depends on the availability of domestic allies. A group of radical government officials had a clear vision of Ecuador getting rid of its treaties but they faced resistance from both the opposition parties as well as moderate sectors within the GoE itself. Depending on the balance of influence between those two sectors within the GoE, the Ecuador appears closer to the reformist policies of developed states or to the radical approaches of countries like Bolivia, Brazil and South Africa.

Lastly, I should note the Ecuadorian political system differs from the US system of the previous Chapter in ways that might have aided the GoE in the implementation of its desired policies. Authority is much more centralized in Ecuador as a result of being a unitary country with a single legislative chamber. In terms of access points, this presents those interested in reverting those policies with a smaller number of potential allies.¹ Furthermore, the traditional political parties of Ecuador,

¹Although the constitutional reform of 2008 increased access points relative to the previous system

which could have acted as veto players, became more marginalized as a result of the various political crisis in the years prior to Correa's victory. Economic conditions also favored the ability of the president to concentrate power, especially rents from natural resources (Mazzuca, 2013). Exceptionally high oil prices funded a massive explosion of public expenditure -from 26.3 percent of GDP in 2006 to 40.8 percent by 2012- on cash transfer programs, public sector jobs as well as health care, education, and infrastructure (Sanchez-Sibony, 2017).²

Regarding alternative explanations, Ecuadorian resilience sheds light onto a gray area in the expectations of power-based theories. According to these arguments, weak countries either do not seek to challenge norms sanctioned by more powerful states or they are heavily sanctioned for doing so. In the realm of international law, these two outcomes are not equivalent. Terminating a treaty is a rare event and one with lasting consequences. It is thus necessary to understand the reasons why states persist in their defiance of an international legal regime in the face of sanctions.

Focusing only on the outcome, pure rational learning arguments derived from Rational Design seem to find support. After all, Ecuador drastically altered its policies after enforcement of its BITs provoked an influx of new information about the treaties' costs and benefits. Furthermore, this case also appears to support the bounded rational learning argument advanced by Poulsen (2015). Due to cognitive constraints, during the 1990s Ecuador entered into very unfavorable BITs without much consideration of potential costs, especially in terms of eventual ISDS claims. Later on, a number of early arbitrations in the oil sector that had high perceived impact led the GoE to rethink its stance. While increased available information and overcoming

by requiring congress approval for terminating international treaties, this advantage has little effect once the ruling party obtains a majority.

²The price of oil increased by 81% from the time he came to office to the year 2013.

cognitive constraints as a consequence of ISDS experience might be enough to predict that treaty policies will change, they cannot predict how much they will deviate from the status quo.

Differently, I find the reasons for Ecuador's initial radical stance to be ideological. The country's own experience with investment arbitration was filtered through policy-maker's ideational lenses and the resulting perception gave way to a specific set of policy preferences. This can be observed during one of the first acts from the GoE: a constitutional ban on treaties with ISDS. The debate on this constitutional provision shows legislators from different parties expressing alternative understandings of Ecuador's recent ISDS experience and of what should the country do to shield itself from more setbacks.

This Chapter is divided in three parts, each addressing a specific question. Part A explains the origins of Ecuador's radical stance by opening up domestic politics before and during its first ISDS disputes. Before and after the arrival of Correa, the GoE was not equally inclined to revise its treaty network. Part A also shows the ruling coalition was not ideologically homogeneous. While radical sectors were initially dominant within the Correa government, moderates within the GoE became more influential as the radical stance of Ecuador started generating strong reactions from foreign investors and their governments. Part B explains the role of external factors in this shifting balance of influence between radicals and moderates within the GoE and how this resulted in the complete stalling of the treaties' cancellation. Part C explains why Ecuador ultimately was able to follow through with the termination processes by looking at two factors: (a) domestic public support for radical policies -which radical sectors within the GoE fostered through public campaigns- and (b) an

enabling international environment -defined as the perception within the GoE that similar questionings of the regime were taking place elsewhere.

PART A: the origins of Ecuador's radicalism

The first part of this Chapter explains why Ecuador developed radical preferences under the Correa government. I focus on the interaction between the country's recent experience with ISDS disputes and the ideological make-up of the ruling coalition. Part A starts with an overview of the events leading up to the arbitral between Ecuador and the American oil firm Occidental. Understanding how this dispute came about is important for two reasons. First, it provides an opportunity to contrast the degree of mobilization of indigenous movements when it came to fighting firms on the ground with their mobilization on the issue of BIT termination. As I show in Section 5.2 and Section 5.3, their specific demands were for the oil firm to leave Ecuador and for the GoE not to sign an FTA with the US. Indigenous and popular movements were not demanding that Ecuador foregoes its BITs, if they have had a more precise understanding of the links between treaty protections and the limited ability of governments to regulate them, they would have demanded Ecuador foregoes its BITs as well.

Second, this controversial case led to a rethinking of Ecuador's place with the investment regime. Yet there was no agreement between political actors on how to avoid similar setbacks in the future. This highlights the blind spot of the alternative learning arguments. Once they disputes impose vivid costs, I should observe longitudinal variation in policy preferences, that is, between a consensus around one response before the ISDS disputes and a revised one after. Section 5.4 and Section 5.5

provide evidence against these two alternative arguments by analyzing disagreements within the GoE regarding BIT policy and between assembly members during debates around a ban on treaties providing for ISDS in the 2008 constitution.

As my arguments predicts, Part A also shows foreign firms threatening to withhold more investment and foreign governments warning about limiting market access. Every time there was gesturing towards a decision the US would not like, Ecuadorian firms made it clear this could affect their exports. Furthermore, the Ministry of Foreign Affairs and the trade negotiators, which were in direct contact with the American government thus worked as transmission belts of information about the American preferences, were the agencies pushing for an outcome that would please the US.

5.1 Background

In 1985 Ecuador opened up oil exploration and production activities to foreign companies. The motivating factor for this change was a worrisome forecast that Ecuador -a member of the Organization of Petroleum Exporting Countries (OPEC) with 70% of its export earnings coming from oil sales- would have run out of reserves by the end of the decade.³ One of the firms that went into Ecuador's oil fields was Occidental, an American company, also known as Oxy because of its ticker symbol. Being an economic activity so tied to the land, the GoE constantly faced demands from indigenous groups over land ownership, environmental preservation and profit distribution (Kimerling, 2001). By the end of 1992, Sixto Duran Ballén -from the Right-wing Social Christian Party -assumed the presidency of Ecuador. As many of his regional

³Oil Companies Return To Ecuador. (1985, January 30). Financial Times.

colleagues at the time, he implemented a series of market-oriented reforms -fiscal austerity, open markets, foreign investment liberalization, land reform- with the goal of modernizing the Ecuadorian economy (Hey and Klak, 1999). During his presidency, Ecuador became a member of the World Trade Organization and signed more than half of Ecuador's international investment treaties. In June 1994 the President signed a new Agrarian Reform Law that made it harder for peasants to obtain legal ownership over unoccupied and unproductive land. An Indian uprising followed which, among other things, blocked access to oil fields. The executive declared a state of emergency and deployed soldiers to ensure the oil activities were not affected.⁴ This uprising was a sign of a dormant conflict in Ecuadorian politics, one that will emerge much more forcefully in the coming years.

In 1999, Occidental signed a contract with the state-owned company Petroecuador to develop and operate two fields. Alleged violations of this contract will lead to Occidental's exit of Ecuador and then to the controversial ISDS dispute that sits at the heart of Ecuador's exit from the investment regime. In 2000, the Canadian firm Alberta Energy Corporation (AEC) acquired 40% economic interest in Oxy's fields.⁵ Although the deal was reported in the specialized press and neither the GoE nor Petroecuador expressed concerns, a crucial part of this operation was that Occidental never notified the Ministry of Energy about the transaction. A few years later the government would contend the lack of notification amounted to a violation of the contract.⁶

⁴Ecuador uprising eases; oil operations normal. (1994, June 27). Platt's Oilgram News.

⁵Occidental Petroleum Corporation v The Republic of Ecuador, Award, ICSID Case No. ARB/06/11 (Oct. 5, 2012) [hereinafter Occidental v. Ecuador].

⁶Article 16.1 of the contract establishes: "Transfer of this Participation Contract or assignment to third parties of the rights under the Participation Contract, must have the authorization of the Corresponding Ministry." Occidental v. Ecuador.

In sum, Ecuador was heavily dependent on oil exports and, since the 1980s, it became heavily dependent on FDI for oil exploration and production. Successive governments welcomed foreign capital into extractive industries and entered into a series of bilateral investment treaties that offered protection for such investments. This commitment to an extractivist economy, however, generated several clashes with the indigenous movement. The biggest one was yet to come.

5.2 The turning point: Ecuador v. Occidental

With the goal of promoting exports, a 1999 Tax Law offered companies a refund on the 12% value-added taxes (VAT) paid for purchasing or importing goods used in manufacturing export products. Because Occidental exported oil produced in Ecuador, it decided to apply for the VAT refund. The *Servicio de Rentas Internas* (Internal Revenue Service) (SRI) granted the first refund that Oxy -as well as other oil firms- had claimed. But when the company applied for the refund in the next tax period, the SRI denied it. The SRI denied all further reimbursements to oil firms and required that previously granted refunds were returned to the state.⁷ With the goal of getting the GoE to intervene in its favor, Oxy warned a planned \$808 million investment deal would not see the light of day as long as the issue was not resolved. “Legal protections to invest in Ecuador,” said the head of Oxy, “would determine whether Occidental’s planned investments will ultimately materialize.” Oil firms also took the issue to local courts hoping to recover around \$150 million. Oxy’s

⁷Occidental Exploration and Production Company v. Republic of Ecuador, Award, LCIA Case No. UN3467.

legal options went beyond the national courts of Ecuador⁸ as it announced it was considering initiating an ISDS dispute under the 1993 Ecuador-United States bilateral investment treaty.⁹

The US government intervened on behalf of Occidental and other American firms claiming VAT refunds. Officials from the Embassy in Ecuador reportedly met with the head of the SRI and the US Assistant Secretary in the Department of Commerce visited Ecuador looking for a resolution to the dispute. “Last fall I was told this issue would be resolved,” he said, “[a]nd we’re disappointed it’s not yet been resolved.” The US government did not just express its concerns, it also attempted to hold back trade benefits for Ecuador under the Andean Trade Preferences Act (ATPA) and this prompted Ecuadorian companies to get involved.¹⁰ As the VAT issue was ongoing, the deadline was approaching for the US to make a decision about Ecuador’s eligibility for these benefits. Fearing restricted market access for their products, the president of the Chamber of Commerce of Quito demanded the government paid the VAT refund to the firms. In the end, the US renewed trade benefits for all the countries but Ecuador. Similarly, Canada -who had started talks with Andean countries for a potential free trade agreement- warned that a deal was not possible without a resolution to the VAT matter.¹¹

In October 2002, Occidental formally informed Ecuador that unless the dispute

⁸The head of Occidental in Ecuador, Paul MacInnes, described the actions the SRI as “illegal, arbitrary and discriminatory;” all heavy words in international investment law. Dispute a threat to oil investment. (2002, September 12). Financial Times.

⁹Ecuador Tax Dispute With Oil Cos Threatens Trade Benefits.(2002, September 3). Dow Jones Global Equities.

¹⁰The Andean Trade Preferences Act granted Bolivia, Colombia, Ecuador and Peru duty-free access to the American market in exchange for cooperation in the war on drugs. ATPA was later expanded and names the Andean Trade Promotion and Drug Eradication Act (ATPDEA).

¹¹Ecuador Tax Dispute With Oil Cos Threatens Trade Benefits. (3 September 2002). Dow Jones Global Equities News; Andean Nations May Lose ATPA Tariff Relief,US Offl Warns. (6 September 2002). Dow Jones Global Equities News.

was resolved immediately they would pursue international arbitration under the Ecuador-US BIT. This would have not been the first ISDS claim filed against Ecuador;¹² but at this point the government had no experience with arbitration proceedings. In a nod to the exporting sectors, it was nevertheless assured a decision would be made on the matter before the upcoming talks for the Free Trade Area of the Americas in 1 November.¹³ The Ministry of Foreign Affairs sent a letter to Robert Zoellick, the US Trade Representative, outlining how Ecuador was planning to resolve the dispute, including a willingness to submit the issue to arbitration.

In 11 November 2002, Oxy formally started arbitration proceedings against Ecuador. The chosen venue was the London Court of International Arbitration. Different parts of the GoE were sending contradictory messages about the dispute. On 12 December, the office of the AG concluded that submitting the VAT dispute to arbitration was not legally viable. The Deputy Attorney General justified it as a matter of scope, arguing that the Ecuador-US BIT did not apply to tax matters: “tax issues aren’t a reason for arbitration. The agreement isn’t applicable because it talks about investment, this isn’t about investment.”¹⁴ Yet ultimately, the decision about the legal viability of an ISDS dispute was not up to Ecuador but to the arbitrators in their ruling about jurisdiction and admissibility. The next day Oxy sent a letter to the AG giving Ecuador time until 22 December to designate its pick for one of the tribunal members.¹⁵ The day after the ultimatum, the outgoing Attorney General announced

¹²Ecuador first ISDS dispute involved the American company IBM. IBM lodged the claim on 6 September 2002 but the first session of the tribunal was not held until June 2003. This dispute involved a much smaller amount of money -\$4.7 million claimed- than what was being requested by oil companies as a VAT refund.

¹³Ecuador Atty Genl To Study Intl Arbitration In Tax Dispute. (23 October 2002). Dow Jones Global Equities News.

¹⁴Ecuador rejects tax arbitration bid by Occidental. (12 December 2002). Reuters News.

¹⁵In ISDS proceedings, each party selects one arbitrator and those together select the third which serves as tribunal’s president. Occidental Insists In Intl Arbitration In Ecuador Tax Dispute. (17

the government had changed its mind and now wanted to participate in the proceedings to fight Oxy's allegations. The move was presented as the best way to defend Ecuador's interests: "we can sustain our objections before the tribunal, once it is formed," Jimenez said.¹⁶ That is, the GoE was willing to work within the existing institutions. Although the arbitral dispute would proceed, Oxy continued its work and found two new oil fields in Ecuador.¹⁷

The lack of a decisive position from the executive was also related to the fact that Ecuador was in the middle of presidential elections. On 24 November, Lucio Gutiérrez defeated Alvaro Noboa in a runoff with 54.7% of the votes. The new government took power in January and soon started to feel pressures from the US government and from Oxy itself. In April Gutiérrez received a visit from the US Secretary of the Treasury, John Snow. In his remarks, Snow singled out the VAT dispute as an obstacle to foreign investment in the oil sector.¹⁸ At the same time, Occidental indicated it was withholding further investment in Ecuador until the issue was settled. "There is only so much exposure that we would want to accept," Oxy's spokesman reckoned, "until there is some indication that this issue will be resolved in some way that's fair."¹⁹ By April 2004, Ecuador was set to start talks for a bilateral free trade agreement with the US and the VAT dispute loomed large. The lead negotiator for Ecuador met with members of the Ecuadorian Supreme Court and requested moving the lawsuits through more quickly.²⁰

December 2002). Dow Jones Global Equities News.

¹⁶Ecuador agrees to arbitration in Occidental dispute. (2002, December 23). Reuters News.

¹⁷Oxy discovers two fields in Ecuador's Block 15 (20 February 2003). Platts Oilgram News.

¹⁸Ecuador - US Treasury Secretary Sees Oil Tax Dispute Discouraging American Companies. (25 April 2003). WMRC Daily Analysis.

¹⁹Sales tax dispute clouds Oxy bidding plans. (2003, April 28). Business News Americas

²⁰Ecuador trade negotiator asks courts to resolve oil tax dispute. (12 February 2004). Platts Commodity News.

The ISDS dispute was slow but ongoing; during this time Ecuador appointed three different arbiters.²¹ Legal disputes were also following their course in domestic courts. In addition to Oxy's, there were fifty other legal cases against the SRI arising from denied VAT refunds. In July 2004, the arbitral tribunal issued its final decision on the case in favor of Occidental, awarding the claimant \$75 million in compensation for denied VAT refunds.²² The GoE announced it would appeal the decision. That is, its first reaction was to question the result but not the legitimacy of the process.²³ According to the rules governing this particular arbitration, awards could potentially be set aside by domestic courts at the seat of arbitration, in this case, the United Kingdom.²⁴ As the first ruling came out, the Supreme Court of Ecuador arrived at a decision on Occidental's domestic lawsuit and awarded it \$360,000 in compensation, a sum that amounted to little in comparison to the \$75 million that arbitrators had granted.²⁵

With a negative arbitral ruling on its shoulders, the GoE needed leverage. The state-owned company Petroecuador informed Oxy that it was considering terminating its contract based on a violation from 2000 when Occidental sold a portion of its interest to the Canadian firm. Petroecuador gave Oxy thirty days to present evidence to the contrary.²⁶ Petroecuador would issue a report on the question and in charge of assessing the evidence was the Energy Minister, who would determine whether the

²¹Govt. appoints new arbiter in Oxy case. (8 July 2003). Business News Americas.

²²Occidental Exploration Production Co. v. Republic of Ecuador. Final Award. London Court of International Arbitration Administered Case No. UN 3467. For an analysis of the award see Franck (2005).

²³Ecuador Plans To Appeal Arbitration Loss To Occidental. (13 July 2004). Dow Jones International News; Ecuador says won't heed Occidental arbitral ruling. (20 July 2004). Reuters News.

²⁴For further details on why are some arbitral decisions reviewable, see Part B Section 5.1.

²⁵Ecuador court rules Occidental gets partial rebate. (20 July 2004). Reuters News.

²⁶El Estado pide a la Occidental justificar faltas a su contrato. (17 September 2004) El Universo. Retrieved from: www.eluniverso.com

contract should be revoked. Yet, the final report would not be made public until the London Court decided whether to allow the \$75 million award to be revisited in a UK court.²⁷ The specialized media doubted the government would follow through with the termination. This was seen mostly as a bluff, using the threat of termination to get oil companies to drop domestic lawsuits and arbitration proceedings over the VAT rebates. Pronouncements by government officials matched this assessment. “In a lawsuit or administrative process, it is always possible that the parties withdraw an action, and that this occurs as part of a negotiation,” said Attorney General José María Borja, who also announced he was looking into contracts with other energy companies and asserted that most of them had violated their terms.²⁸ There were already signs that parts of the Ecuadorian government were questioning not just this particular ISDS dispute but the larger system of treaties that made it possible. According to the AG, “I am studying whether it is convenient for this treaty [the Ecuador-US BIT] to exist because if a poor country like ours is going to be constantly subjected to arbitration, we don’t have enough money to defend ourselves.”²⁹ Just an isolated announcement of this potential outcome prompted five Ecuadorian business chambers to publish a joint statement warning that terminating the treaty could result in Ecuador losing preferential trade status in the US.³⁰

To sum up the situation at this point, Occidental had two judicial decisions in its favor, one by an international arbitral tribunal for \$75 million and another by

²⁷Ecuador Pres:Govt Aims To Revise Contract With Occidental. (9 March 2005). Dow Jones International News.

²⁸Ecuador could negotiate solution to Oxy dispute. (17 September 2004). Reuters News; Ecuador’s Procurator-General Says Most Oil Companies Violated Contracts. (22 September 2004). WMRC Daily Analysis.

²⁹Ecuador unhappy with US investment treaty. (2004, September 17). Reuters News.

³⁰Ecuador Business Chambers Say Govt Should Respect The Law. (22 September 2004). Dow Jones International News.

the Supreme Court of Ecuador for \$360,000. In response, Ecuador had requested a British court to set aside the arbitral award, passed a law denying future VAT rebates to oil companies, and started to consider terminating Oxy's contract. Foreign oil firms threatened to withhold further investments and the American government intervened on behalf of its company by making market access conditional on a satisfactory resolution of the dispute. At this point, the United States had launched joint free trade talks with Colombia, Peru and Ecuador. This move prompted sectors within the GoE to press for a resolution that would please the US. Ecuador's top trade negotiator announced the country was close from being left out of the negotiations if "Ecuadorean authorities fail to take actions to respect international agreements and to resolve the conflicts."³¹ Similarly, the Foreign Affairs Minister called for a negotiated solution rather than the unilateral termination of the contract. "The drastic application of patriotism, or the law, or aspirations or whatever appears to be, on both sides, doesn't tend to end well," he claimed.³² Ecuadorian business expressed concerns about the effect that terminating the contract could have on FTA negotiations with the US. "Just the possibility that [Occidental] could be forced out has generated an unfavorable environment in Washington" expressed the president of the main business association of Ecuador, "[w]e businessmen in Ecuador have asked...to seek a resolution to the conflict with Occidental."³³

³¹Ecuador Official: Disputes With US Cos Threaten Trade Ties. (30 September 2004). Dow Jones International News.

³²Ecuador Anticipates Sealing US-FTA by February 2005. (1 October 2004). IHS Global Insight Daily Analysis.

³³Ecuador: Salida Occidental Afectaría Pacto Comercio EEUU. (5 August 2005). Dow Jones en Español.

5.3 *Fuera Oxy!*: social unrest and the end of Oxy's contract

By 2 May 2005, the London Court of International Arbitration accepted Ecuador request to revisit the decision, a task that fell on a commercial court of the Queen's Bench Division of the High Court of Justice. The main argument of Ecuador was that the arbitrators had exceeded their jurisdiction by allowing a dispute over tax issues to go forward while Article 10 of the BIT says that tax matters are outside the scope of the treaty unless they fall within three areas: expropriation, transfers of funds abroad, or the observance and enforcement of terms of an investment agreement or authorization.³⁴ While for Ecuador the VAT issue did not fall into any of these three areas; the arbitrators had considered it did. On March 3, British judge Sir Richard Aikens rejected Ecuador's challenge of the arbitral award and concluded the tribunal did not exceed its powers by accepting to hear this particular tax dispute.³⁵ Ecuador would appeal one more time before a British court of appeal but its second request to set aside the award would be again rejected in July 2007.³⁶

With his popularity plummeting and amid accusations of corruption, the Ecuadorian Congress removed Lucio Gutiérrez from office on 21 April 2005 and named his vice president, Alfredo Palacio, as the new President. Waiting for Aiken's decision, the new government was making moves. From the AG's office came out a proposal for Occidental to drop the ISDS claim in exchange for \$49 million. Oxy's general manager in Ecuador reckoned they "could withdraw the complaint in London" but

³⁴Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment. Article 10.

³⁵Challenge to Arbitral Award, [2006] EWHC 345 (Comm), dated 2 March 2006.

³⁶Challenge to Arbitral Award (Appeal Court), [2007] EWCA Civ 656 dated 4 July 2007.

only if they could “find a way that benefits both sides.”³⁷

The government was negotiating with Occidental to avoid terminating the contract against the backdrop of general strikes and protests in oil producing provinces.³⁸ By 25 August Congress had lifted the state of emergency and the executive had reached an agreement with the political and social leaders of the two affected provinces. The deal included giving back to the provinces a percentage of the taxes paid by the oil companies; building 160 miles of roads in the area; and hiring more local workforce in the oil industry.³⁹ But these concessions were not enough. Protests and demonstrations were also taking place in Quito and in November the national association of indigenous groups, CONAIE, called for a new wave of popular mobilization and it specifically announced the goal of these actions was to get the government to do three things: walk away from an FTA with the US; reject participating in Plan Colombia; and expel Occidental from the country.⁴⁰ Meanwhile, the US kept pressuring through its Embassy in Quito and Oxy threatened to take Ecuador before ISDS for a second time if it revoked its contract.⁴¹

In February 2006, the government declared the state of emergency in the provinces of Orellana and Sucumbios. Representatives from these provinces travelled to the capital -where they were joined by other social movements- to make their demands to the President: “we will not allow a negotiation with Oxy; a company that violated

³⁷Occidental Open To Negotiated Deal With Ecuador Government. (5 May 2005). Dow Jones International News.

³⁸Gobierno negocia 13 parámetros a OXY para no declarar caducidad de contrato.(2005, August 17). Ecuador Inmediato. Retrieved from: <http://www.ecuadorinmediato.com>.

³⁹Se acabó el paro en Sucumbíos y Orellana. (2005, August 25). Ecuador Inmediato. Retrieved from: <http://www.ecuadorinmediato.com>.

⁴⁰CONAIE exige al Gobierno No al TLC y presenta Amparo Constitucional. (2005, November 17). Ecuador Inmediato. Retrieved from: <http://www.ecuadorinmediato.com>.

⁴¹Ecuador warned clash with oil firm threatens U.S. trade deal EFE News Service, 16 December 2005; Petrolera de Ecuador suspende renegociacion de contrato con Oxy. (2005, December 23). Ecuador Inmediato. Retrieved from: <http://www.ecuadorinmediato.com>.

thirty state regulations when they sold in 2001 (sic) 40 percent of their shares to the Canadian firm Encana without giving notice to the government.”⁴² The following days saw similar demands from FETRAPEC, the union of oil workers, and the professional association of oil engineers.⁴³ By mid-March indigenous movements declared strikes in the provinces of Cotopaxi and Tungurahua, blocking major roads and paralyzing economic activity. Their demands were the rejection of the FTA with the US and the termination of Oxy's contract but there were no references to international investment treaties in their pronouncements.⁴⁴

Occidental was trying to avoid being forced out of Ecuador and, in order to persuade the government, it proposed further investments which would include setting up a fund for health, work and education projects in the Ecuadorean Amazon.⁴⁵ Yet the government rejected the proposal.⁴⁶ The Ecuadorian government was in a complex position given the linkages between the FTA and Oxy's contract. The government knew the US would not approve a trade agreement without a satisfying conclusion to the Occidental conflict and export-oriented sectors were demanding better access to the US market. But few in the government were willing to stick their necks out for a US company while mass protests were happening throughout the country. The fate of Oxy's contract had become an emblematic cause for popular sectors in Ecuador.

⁴²Marcha amazónica reclamó salida de petrolera de Ecuador. (7 February 2006). Ecuador Inmediato. Retrieved from: <http://www.ecuadorinmediato.com>.

⁴³Trabajadores petroleros exigen caducidad de contrato con OXY. (8 February 2006). Ecuador Inmediato; Colegio de ingenieros: Será fácil demostrar delito de la OXY. (10 February 2006). Ecuador Inmediato. Retrieved from: <http://www.ecuadorinmediato.com>.

⁴⁴Provincias anuncian radicalización de protestas desde mañana. (13 March 2006). Ecuador Inmediato. Retrieved from: <http://www.ecuadorinmediato.com>.

⁴⁵U.S. Oxy Proposes Investments to Ecuador Govt To Avoid Contract Cancellation. (2006, March 17). Latin America News Digest; Ecuador: Oxy makes suggestions to end face-off with Ecuadorean government. (2006, March 17). El Universo.

⁴⁶Petroecuador rejects Oxy proposal to end legal dispute. (2006, March 20). Business News Americas.

The effect of Ecuador's actions was already evident on the diplomatic front. In May, the US Trade Representative declined an informal request from Ecuador to continue negotiations for an FTA insisting Ecuador should first resolve the pending investment disputes.⁴⁷ An opportunity to do so opened up when Occidental approached the government with a new proposal to give Ecuador half of its windfall profits and suspend lawsuits against Ecuador.⁴⁸ The main obstacle for the government to accept this offer was the position of indigenous and social movements as well as some leftist political parties whose position was set on terminating the contract and Occidental leaving the country. However, the government was making overtures in the direction of accepting a renegotiation.⁴⁹ Fearing a negotiated outcome, an array of civil society groups threatened to start a general uprising against Occidental. Rafael Correa -who in February had announced he would run for president in the coming October elections- supported the action and called the entire citizenry to "stop this huge insult [the renegotiation of the contract] to national sovereignty."⁵² On 9 May, 5,000 Ecuadorians marched against Occidental. A week later, on 15 May, Ecuador terminated the contract with Oxy and its assets were now owned by the state. Celebrations erupted in the Ecuadorian Amazon.⁵³

⁴⁷U.S. REBUFFS ECUADOR ON RESUMING FTA TALKS OVER INVESTMENT DISPUTES. (28 April 2006). Inside U.S. Trade.

⁴⁸Ecuador seeking fair compensation from Occidental. (5 May 2006). Reuters News; When economic conditions allow firms to experience above-average profits.

⁴⁹Attorney General Jose Maria Borja backed the renegotiation of the firm's contract.⁵⁰ Borja's pronouncement was met with anger on behalf of various civil society groups who gathered around the building of the AG office chanting "*¡Caducidad es dignidad!*" (termination is dignity) and "*¡Renegociación es corrupción!*" (renegotiation is corruption) and called for a mobilization from the Amazonian provinces to the capital on 9 May.⁵¹

⁵²Rafael Correa llama a la resistencia civil para impedir negociación con OXY. (15 May 2006). Ecuador Inmediato. Retrieved from: <http://www.ecuadorinmediato.com>

⁵³Gobierno declara caducidad del contrato con petrolera estadounidense Occidental. (2006, May 16). El Comercio; Manifestaciones de alegría en amazona por salida de Oxy. (16 May 2006). Ecuador Inmediato. Retrieved from: <http://www.ecuadorinmediato.com>

The US government -in a meeting between US Under Secretary of Hemispheric Affairs Charles Shapiro and Ecuadorian Foreign Affairs Minister Francisco Carrión and through a phone call from the US Ambassador the President refused to pick up- expressed its objections to the decision and called the termination an act of expropriation and a violation of the bilateral investment treaty.⁵⁴ The US also told Ecuador that FTA negotiations could only continue if Oxy's contract was reinstated.⁵⁵ For this reason, the termination infuriated export-oriented sectors -the Chamber of Commerce of Guayaquil, the Industrial Business Coalition and the Association of Flower Exporters expressed their discontent- because the prospects of a trade pact were now dim. "The FTA with the US is buried," lamented the head of the Ecuadorian Business Committee.⁵⁶

What emerges from the politics surrounding the termination of the contract is that indigenous and social movements in Ecuador had clout. As the multiple attempts to find a negotiated solution suggest, the GoE did not want an adversarial outcome. Yet indigenous movements and popular sectors -as they intensified their mobilization- left little room for a negotiated settlement. The anti-Oxy movement had started in Amazonian provinces where the firm operated but it eventually became a nation-wide issue. Indigenous and environmental groups tapped into general dissatisfaction with neoliberal reforms -the same dissatisfaction that had removed Gutiérrez from office- through their portrayal of Occidental's activities. Their target, however, had generally been individual multinational firms and not the system of

⁵⁴EEUU pide explicación a Ecuador por caída del contrato con petrolera Occidental. (17 May 2006). El Comercio.

⁵⁵Interview with Ecuadorian official II.

⁵⁶Empresarios lamentan negativa de Petroecuador a negociar con OXY. (15 May 2006). Ecuador Inmediato; Empresarios se lamentan por caducidad de la OXY. (16 May 2006). Ecuador Inmediato. Retrieved from: <http://www.ecuadorinmediato.com>; Ecuador accuses US of 'blackmail' as trade, oil dispute worsens. (17 May 2006). Agence France Presse.

investment treaties that protects them. That BITs were not mentioned by activists, even when Oxy had already sued Ecuador and was threatening to do it again if the contract was terminated, indicates that Ecuadorian civil society groups failed to consider how treaty protections could affect their ability to capture a larger portion of FDI's benefits from firms.

Oxy wasted no time and on 17 May filed another arbitral claim against Ecuador for violations of the US-Ecuador BIT, this time it chose the International Centre for Settlement of Investment Disputes (ICSID) as the venue and was asking for \$1 billion in compensation. The President's spokesman minimized the lawsuit. As the government saw it, the claim had no "basis because Ecuador has applied the law."⁵⁷ The GoE will again learn that was not a decision to be made by Ecuadorian officials in Quito but by international arbitrators in Washington DC.

5.4 Between radicals and moderates: The Correa government and the investment regime

Simultaneous legislative and presidential elections took place on 15 October 2006. The right-wing candidate Álvaro Noboa came in first place with 27% of votes. Correa came in second with 22%. The runoff took place on 24 November and Correa won with 57% of the vote. He assumed the presidency on 15 January 2007. It was no secret that Rafael Correa was critical of the international investment regime. In fact, he had already pronounced himself on the issue during his campaign.⁵⁸ However, there

⁵⁷Ecuador shrugs off challenge to \$1bn oil seizure. (18 May 2006). Financial Times.

⁵⁸The end of the campaigns coincided with the deadline for Ecuador to designate an arbitrator in the newest ISDS dispute against Oxy. Correa heavily criticized the outgoing government for considering naming an arbitrator; doing so would legitimize the proceedings. Correa retom]ó tema

were diverging views inside the administration on how to protect Ecuador from more investment disputes. For the moderates, Ecuador should work within the system and with its partners in replacing its old treaties for ‘better’ ones. For the radicals, attempting to work within the regime was pointless. The parameters of treaty reform that developed countries were promoting were not enough of a change to accommodate their policy goals. That is, a treaty that would satisfy the radicals within the GoE would most likely not find any takers among capital exporters. In this section, I link these diverging positions within the GoE to two factors: the diverse ideological make up of the ruling coalition and the differential exposure of government agencies to pressures from foreign firms and governments.

Within the ruling party -Alianza PAIS- coexisted forces from the center-right - closer to export sectors and domestic manufacturing- and a variety of leftist organizations, including the traditional leftist parties as well as environmentalists, indigenous movements, unions, and rights groups. Correa was the unifying force, yet he did not emerge from any these sectors. He was a technocrat and within his close associates was a strong developmentalist sentiment. The economic model that emerged from the Secretariat of Strategic Planning and Development (SENPLADES) had a vision for lifting Ecuador out of its dependency on oil exports through targeted import substitution, ecotourism, and ‘responsible’ mineral and oil extraction. It was a state-centric model. The state would not only direct private investment to these strategic sectors but it would also lead the way with heavy public investment. In order to finance

‘Oxy’ en su campaña. (11 September 2006). El Universo. Because not naming an arbitrator would not stop the proceedings -it would be ICSID who would appoint her instead- the outgoing government considered it was better to comply with this deadline and thus be better prepared to present a defense against Oxy’s accusations. “Is it right to stand with a megaphone and a group of friends and yell ICSID has no competence!?” wondered the head of Petroecuador, “I don’t think so...these matters I have to discuss at ICSID.” Presidente de Petroecuador desea un árbitro. (23 September 2006). El Comercio.

public investment, the model was, at least in the short to medium term, highly dependent on revenues from extractive industries. This would bring problems for the GoE from both the left and from the right of its own coalition (Conaghan, 2011). On the right, Correa would have to convince capital, foreign and domestic, that it was safe to invest in a state-centric development model. To appeal to the left and the popular movements, Correa would increase funding for social programs, mainly education and health and the funding for such programs would come from extractive revenue. This created a tension. While social reforms would benefit indigenous peoples and other marginalized groups, extractive projects might at the same time threaten territorial and ethnic rights championed by the indigenous movement (Albuja and Dávalos, 2013). The relationship between Correa and indigenous and environmentalist movements would eventually deteriorate due to disagreements regarding the exploitation of natural resources (Becker, 2013).

The GoE's ideological diversity crystallized at multiple points during the rethinking of Ecuador's relationship with the international investment regime, sometimes taking more radical stances and sometimes becoming more cautious. As I show in the rest of this Chapter, Ecuador's policy was heavily disputed from within. The radical camp included a combination of leftists and developmentalists figures within the GoE. The left was very critical of an ISDS system that worked in favor of foreign capital, and more specifically, that protected foreign companies while they profited at the expense of the local population and the environment. Developmentalists within the GoE were not so much motivated by an anti-capitalist attitude but were nonetheless interested in recovering the governments' autonomy to regulate foreign investment. In this sense, they opposed BITs and ISDS because they would allow foreign investors

to challenge their new economic policies. According to a close collaborator of Correa,

“The terms of the BITs were not convenient for us from the standpoint of our project. What was in mind was a widespread nationalist policy in all domains, not just oil...we knew that as we advance in our development plan, those policies could fall due to the arbitrations. Thus the decision was not just to make a political signal but we were seriously worried about the impact this could have on our development strategy.”⁵⁹

The radical camp had its home mostly at SENPLADES. While they advocated for a strong role of the state in the economy, they were by no means against private, foreign investment. Their position was specifically against treaties, insofar they could render that role meaningless. According to a SENPLADES official, BITs “are blank checks that only generate rights for one party and obligations for the other one.”⁶⁰ They were willing to provide foreign companies with access to arbitration but only under the terms of contracts, not treaties. Unlike BITs, contracts establish obligations for both parties, the firms and the state, and *both* parties could eventually enforce those obligations through arbitration. Moreover, the applicable law for arbitral disputes under these contracts would be Ecuadorian law, not treaty provisions. Much differently, sectors within the ruling coalition that were linked to capital and domestic manufacturing had a more moderate view of the treaties’ impact.⁶¹ They were particularly interested in securing investment and market access for Ecuadorian products through FTAs and thus were against adopting any policies regarding BITs that might jeopardize negotiations with foreign firms or with the US and the EU.

⁵⁹Interview XIX.

⁶⁰Interview XIX.

⁶¹Interview XXI

The strength of radical ideas at the beginning of the new government can be observed in one of Correa's first moves. Still as president elect he notified the Attorney General -the office handling the arbitral dispute with Oxy- that Ecuador would not designate an arbiter because ICSID had no jurisdiction over the dispute.⁶² This was a legal consideration as much as a political move; in Correa's view, appointing an arbitrator amounted to recognizing the legitimacy of the arbitration system. However, the balance of influence in favor of the radicals at this stage is most clearly observed in the drafting of the new constitution.

5.5 Investment arbitration in the 2008 constitution

As a presidential candidate, Rafael Correa had promised a constitutional assembly. The 2008 Montecristi constitution was not a direct reaction to Ecuador's treaty problems; it was a part of a larger scheme of changes envisioned by the new government. But for the radicals, this presented an opportunity to lock-in their desired outcome. If treaties providing for ISDS were made unconstitutional, there would be no choice for the GoE but to terminate them. This section explains the aspects of the new constitution that were central to Ecuador's exit from the investment regime.

Correa's party had not presented legislative candidates in elections of 2006. However, he planned to reform the constitution and this would require elections for a new government. In 2007 called for a referendum on the creation of a constitutional assembly, in which the 'yes' won with 81%. Months later, another election determined the

⁶²Presidente electo cree que no cabe arbitraje por demanda de petrolera Occidental. (15 December 2006). El Comercio.

composition of the Assembly. PAIS won 70% of the seats. The institutional details of the transition between constitutions is important because the executive's control of the legislature varied through this process. The new constitution entered into force in October 2008. From then until new presidential, provincial and legislative authorities elected in April 2009 take power, executive functions would continue to be performed by those in power and legislative functions would be performed by a Legislative Commission, also known as *Congresillo* ('little congress') due to its reduced size. The interim legislature had 76 members, chosen by the constitutional assembly itself in proportion to its membership. Of those, 46 were members of the ruling party. That is, for this short period of time, Correa had legislative majority. Nonetheless, he lost in the 2009 election, where he won the presidency comfortably but failed to reach a majority in the unicameral congress. This lack of legislative majority will impose limitations on the GoE's ability to advance the termination process since it increased access points for foreign investors and representatives of foreign governments seeking to avoid Ecuador from following through with its radical policies.

Two new features of the Montecristi Constitution will become central for the fate of Ecuador's treaties. The first one was article 422, establishing that Ecuador will not enter into treaties or international instruments through which the state transfers jurisdiction to international arbitral tribunals to resolve controversies arising from contracts or commercial issues.⁶³ Not all political forces thought this constitutional restriction was as a logical response to Ecuador's encounters with ISDS.

Both the developmentalists and the leftist members of the ruling coalition supported the ban. For the former, the ban was rooted in the particular economic and development model of the new government. According to a GoE official, for the

⁶³Constitución de la República del Ecuador. Art. 422.

Constitution “to be compatible with the Ecuadorian development project we could not have international instruments with international investment arbitration.”⁶⁴ For the latter, there are fundamental biases in investment arbitration that work against developing countries. According to one Assemblyman from a far-left party in alliance with Correa’s party, the spirit of article 422 was to

“not put the state, and therefore the people of Ecuador, in a defenseless position against the power of these institutions, created precisely within the World Bank, and in conditions in which, we already now beforehand, it is not the interests of the majorities, of the impoverished, which will prevail.”⁶⁵

The debates from the floor of the constitutional assembly also reflect the existence of strong dissident voices among the opposition parties who did not agree that the lesson to be learned from the ISDS disputes is to forego arbitration altogether. One opposition Assemblywoman argued the problem is that “we do not know how to defend ourselves in an international arbitration and we do not always hire the best lawyers, that is why we suffer the consequences, the arbitral clause it not bad per se, it is bad how we have been applying it in Ecuador.”⁶⁶ Another Assembly member challenged the notion of a bias within arbitration. Noting that the first ISDS dispute with Oxy involved rulings from arbitral tribunals but also from British Courts as well, he claimed “one cannot honestly pretend all these places...are sold in favor of multinational companies. We lost because we did things wrong, but be forget when we win.”⁶⁷ Others made arguments against the constitutional ban based on the need for

⁶⁴Interview XIX.

⁶⁵Asamblea Constituyente, Acta 038, 22 April 2008. p. 146. On file.

⁶⁶Ibid. p. 139.

⁶⁷Ibid. p. 144.

arbitration to attract investment - “what...businessman will sign a contract...without the guarantee of international arbitration?”⁶⁸ See Appendix B.1 for excerpts from all interventions in relation to investment arbitration.

Before the vote on Article 422, the drafters included an important exception for treaties that allow for arbitration in regional arbitral institutions. Radicals were not completely against investment arbitration. They were against keeping Ecuador within the existing ISDS system, which they saw as controlled by Northern commercial legal firms and had proved to be biased against their interests. According to an official from this group, “our vision was not so much juridical, but more political in the sense that having [investment arbitration] in a regional setting, with arbitrators working in international public law rather than commercial law and of South American nationality...that for us was enough to change the correlation of forces.”⁶⁹ While such an institution did not exist at the time, Ecuador would invest substantial diplomatic energy in setting it up within the framework of the Union of South American Nations (UNASUR).

The second significant change was article 419. With the goal of constraining future governments from denouncing potential treaties that the new government could enter into, article 419 established that both the ratification *and* termination of certain treaties -for example those transferring competences from the internal juridical order to international institutions- would require the approval of the National Assembly. Under the previous constitution, termination could be carried out solely by the executive. This provision ended up being crucial since the multiplication of access points provided foreign firms and their home governments with more opportunities to drag

⁶⁸Ibid. p. 133.

⁶⁹Interview XIX.

out the process. Moreover, the ruling party only had legislative majority in the ‘little congress’ that lasted from the enactment of the new constitution in October 2008 to the inauguration of the new legislature in July 2009. Correa’s party would not have a two-thirds majority in congress until 2013.

Part A explained the origins of Ecuador’s radical stance regarding investment treaties and arbitration. Like rational and bounded rational arguments, I recognize the role of particular experiences with ISDS as catalysts of review processes during which states reassess their place within the international investment regime. Yet unlike those two alternative arguments, I stress the importance of the ideological lenses through which government actors filter those experiences. In Ecuador, ideological differences, both between ruling and opposition parties as well as within the ruling coalition, align with different policy preferences regarding the future of Ecuador’s BITs. I also showed that while indigenous and social movements were powerful in Ecuador -powerful enough to force the GoE to terminate the contract with Oxy- the agenda of these groups did not include specific demands in relation to investment treaties. This aligns with my expectations about the differential role of civil society at varying degrees of organizational capacity and technical expertise, as typified by the categorization of civil society actors as either CSOs or social movements. CSOs, while pursuing the same agendas as social movements (environmental, public health, consumer protection, etc.), once they learn how investment treaties affect those agendas have more resources to invest in developing expertise in international investment law. That expertise was not present in Ecuadorian civil society, thus the impetus for a change in treaty policies came mostly from ideologically motivated government

actors.

Coming out of the constitutional assembly, the balance of influence was in favor of the radical position. The next step in their plan involved acting on the new constitutional mandate and removing Ecuador from all international treaties that provided for investment arbitration. Part B shows the systemic pressures trying to keep Ecuador from carrying out this radical agenda and how these change the balance of influence between radicals and moderates within the government.

PART B: implementing a radical agenda

Part B of this Chapter explains why, if radicals were initially in the driver seat, it took the GoE ten years to exit both the ICSID convention and the existing BITs. This delay is not the product of overworked bureaucracies. In fact, from Correa's inauguration in January 2007 to the enactment of the new constitution in October 2008, the GoE could have terminated all the treaties with just an executive decision. I show how external forces -pressures by foreign firms and their home governments- kept Ecuador from executing radical policies for a long time. These forces were effective in two ways: (a) by mobilizing the opposition legislators in congress when the ruling party did not have a majority and (b) by shifting the balance of influence within the GoE in favor of the moderates. The treaty policy-making process was an iterative one, in which each subsequent decision feeds-off the effects of the previous one. The differential exposure of parts of the GoE to the reactions of firms and foreign governments intensified the existing disagreements about policy and gave more weight to the moderates. Since most warnings and threats from foreign governments came from diplomatic channels, the foreign service of professional diplomats generally

pushed for negotiated outcomes. While the position of Minister of Foreign Affairs Ministry during the Correa government was generally entrusted to individuals with strong opposition to the investment regime, the permanent body of diplomats tended to emphasize the need for consensus with treaty partners, especially in the face of possible retaliations by the US and the EU.⁷⁰ Similarly, when policy decisions required the approval of congress, legislators became the focus of foreign pressures and this increased the resistance to the terminations in the National Assembly. The ministries of Production and Strategic Sectors were the ones dealing with foreign firms, thus they were hearing first hand from those companies that unless the treaties remained in place, they would not go through with the investments.

The evidence that emerges from opening up the termination process also counters alternative explanations. According to a rationalist argument, if actors explore a course of action but decide not to pursue it, the reason should be that recently available information points in a different direction. That is, I should observe government officials arguing for and against new policies by making references to how insights acquired from recent experience point towards more appropriate ways to solve commitment problems and I should not observe them dismissing certain policies for fear of retaliation. Moreover, government officials -as (bounded) rational actors furnished with high levels of information post-ISDS experience- should exhibit a degree of consensus around a final, and hence rational, course of action.

While Part B focuses on external factors, I do not argue the domestic political process is determined by international forces. The domestic politics of Ecuador are not irrelevant for explaining the observed policy outcomes. Foreign firms and their home governments would have never applied this level of coercion if the GoE would

⁷⁰Interview XVIII.

have never been inclined towards a radical approach in the first place. External factors affect policy outcomes by putting pressure in specific domestic political actors and thus tilting the balance of influence between radicals and moderates in favor of the later. Part B is divided in 2 sections. Section 1 covers Ecuador's exit from the ICSID convention. Section 2 traces the first stage of the termination process after which only the 'easy' BITs were terminated.

5.1 Leaving ICSID

The International Centre for Settlement of Investment Disputes (ICSID), an organ of the World Bank, is one of the many venues in which legal disputes between investors and their host states can be resolved but it is the most frequently chosen by investors. As of June 2019, of the 942 known ISDS cases, 594 were litigated at the Centre. The administering institution has no direct influence on who serves as arbitrator in each case,⁷¹ but certain institutional features of ICSID could make it more favorable for investors. In the case a non-ICSID tribunal renders an award of poor quality, this could potentially be set aside by the domestic courts of the country where the dispute took place, as Ecuador sought to do in the first Oxy dispute over the VAT rebate. This adds an additional level of scrutiny.⁷² ICSID tribunals operate under a self-contained regime that does not allow for awards to be set aside by state courts. They can only be annulled on a limited number of grounds by an ad hoc committee appointed by the Chairman of ICSID's Administrative Council.⁷³ Another difference that might

⁷¹Unless one of the parties fails to designate an arbiter.

⁷²This review process could considerably extend the lengths of ISDS disputes as the parties appeal each decision. In *BG Group PLC v. Argentina* the case reached the US Supreme Court.

⁷³As of today, only 99 of the known 594 ICSID disputes have had a form of follow-on proceeding. In 39 of those, the initial decision was upheld.

make ICSID more favorable for investors is the enforcement of the awards. While ICSID awards are to be treated as final judgments of the court of their member states, non-ICSID awards may still be refused recognition and enforcement under certain grounds.

After Occidental chose ICSID as the venue for its second dispute against Ecuador, the government adopted a markedly anti-ICSID -and not necessarily anti ISDS- discourse. Yet the GoE did not criticize ICSID because of its institutional design. The criticism was about political biases. Correa's first Minister of Foreign Affairs backed his decision not to designate an arbitrator for the dispute noting it was pointless; US investors win the majority of the cases. "You lost the fight from the start. You go to defend your rights in a dispute settlement system where you don't have any possibility of winning."⁷⁴ On a similar note, according to one of Correa's foreign policy advisers, "underlying ICSID is a clear intentionality of protecting investors above national and international public law."⁷⁵ Rhetoric aside, the GoE was divided on what to do about ICSID. The initial approach of the GoE was to remain in ICSID but exclude from the Centre's jurisdiction disputes over investments in natural resources. Only after the ICSID system showed that was not a viable strategy by accepting new disputes of this kind is that the GoE denounced the convention as a whole.

In any case, any measure taken regarding ICSID would not affect the seven disputes that had already been lodged before the Centre. But the GoE had a forward-looking motivation for limiting their exposure. In October 2007 the GoE issued decree 662 increasing the state's share of oil windfall profits from 50% to 99%.⁷⁶ This change

⁷⁴Ecuador es pesimista en arbitraje con Oxy. (19 May 2007). El Universo.

⁷⁵Un nuevo acto de soberanía: Ecuador denuncia al CIADI. (9 July 2009) Decio Machado [blog essay].

⁷⁶PRESIDENTE DECRETA QUE EL 99% DE LAS GANANCIAS EXTRAORDINARIAS DEL PETRÓLEO VAYAN PARA EL ESTADO (6 October 2007). Ecuador Inmediato.

annulled existing contracts and forced firms to renegotiate new ones. According to a state official, the reason for the decree was that “one of the major problems President Correa had proposed to solve was the distribution of oil profits.”⁷⁷ As expected, firms threatened to start arbitral proceedings against Ecuador.⁷⁸

5.1.1 Partial exit

There were disagreements within the GoE regarding the best way to avoid more ICSID arbitrations in the future. The radical camp preferred to leave the Centre altogether. In fact, on 29 April 2007 the ALBA group -in which Ecuador was participating as observer until it became a full member in 2009- had agreed to jointly withdraw from the ICSID convention. Moderates pushed for a partial exit. The foreign service insisted on working within the system through the adoption of exceptions and reservations to the Center’s jurisdiction. According to an official from the radical group, “there was a huge opposition from the internal bureaucracy, the foreign service did not agree with the exit”⁷⁹ The moderate approach prevailed at first and the GoE sought to take disputes arising from investments in the exploitation of natural resources, like gas, oil and minerals, outside ICSID’s jurisdiction. Thus, on 27 November 2007 Ecuador notified ICSID it will not consent to the Center’s jurisdiction over disputes regarding natural resources. Ecuador invoked article 25 (4) of ICSID’s convention that allows a state party to notify the Center which kinds of disputes will not fall under its jurisdic-

⁷⁷ “The oil contracts inherited from the previous regime established a distribution scheme under which the transnational [firms] took more than 70% of the benefits...one of the pillars for recovering social policies was to recover oil profits.” Interview XXI.

⁷⁸ Repsol buscará un arbitraje ante el Ciadi si no logra un acuerdo. (16 November 2007). El Comercio; Francesa Perenco recurriría al arbitraje si no logra renegociar su contrato. (10 December 2007). El Comercio.

⁷⁹ Interview XIX.

tion.⁸⁰ Ecuadorian officials expected the notification to shield them from new claims, although investment law scholars generally agree that article 25(4) notifications do not impose strict jurisdictional limits when consent to any eventual arbitration is still present in the applicable treaties (Schreuer, 2009; Cole, 2013, 342).

Another attempted strategy to shield Ecuador from future lawsuits was through contracts between foreign firms and the state. After Correa issued the decree changing the distribution of profits, the GoE invited the oil sector to renegotiate the contracts. Under the new terms, companies would waive their rights under the applicable treaties, including their right to initiate disputes before ICSID. “We are not convinced about ICSID, which is ideologically charged,” said the Minister of Mining and Oil, disputes should be resolved in “a space of larger neutrality.”⁸¹ Instead, the contracts would include their own dispute settlement provisions that allowed for disputes to be solved either in domestic courts or in regional arbitrations centers, most commonly the Center for Arbitration and Mediation in Santiago, Chile, and the applicable law would be Ecuadorian law. They would also exclude from arbitration issues arising from taxes and contract terminations by the government. These contracts were modeled after a series of contracts offered to foreign firms in the telecommunications sectors.⁸² Some oil firms accepted to renegotiate their contracts on this model but others rejected the proposal. According to a lawyer in one of the affected firms, “[w]e consider the contract unacceptable...The international arbitration clause is sort of a joke.” And regarding the two exclusions, “[t]hose are precisely the only grounds for arbitration that companies are interested in the most.” Moreover, critics were skep-

⁸⁰Letter from María Espinosa Garcís, Ecuador’s Foreign Ministry, to Ana Palacio, ICSID’s Secretary-General (cited in Cadena and Montañes, 2008).

⁸¹Ecuador renegocia contratos con petroleras privadas. (21 January 2008). Dow Jones en Español.

⁸²Interview XXIII.

tical of the proposed regional arbitration institution.⁸³ That said, the effectiveness of this strategy was also questionable as long as the old BITs remained in place. It was unlikely that ICSID arbitrators would decline jurisdiction over a dispute arising from such a contract when a treaty exists that still lists ICSID as a possible arbitration venue (Cadena and Montañes, 2008; Söderlund and Burova, 2018).

5.1.2 Full exit

ICSID would show the moderate approach was ineffective because by April 2008, Ecuador had been sued before ICSID by three different energy firms who preferred not to renegotiate their contracts over the new model. Instead, they alleged decree 662 violated Ecuador's BITs with the US and France. One state official sees the full exit as a result of ICSID tribunals giving course to these new disputes when the GoE thought that the partial exit would have blocked investors in the energy sector initiating disputes in ICSID: "what motivated the next step, the complete denunciation of the ICSID convention...was this response from the arbitrators, expanding the clauses and accepting new disputes. We did the partial denunciation in 2007 and in 2008 we now have cases over oil and mining."⁸⁴ During his 30 May 2009 *sabatina* -a weekly TV and radio address taking place on Saturdays- Correa announced Ecuador was leaving ICSID.⁸⁵

Thus, Correa requested the legislature to terminate Ecuador's membership and on 12 June it approved the request.⁸⁶ At this point in time, the new constitution

⁸³Ecuador's new service contracts 'unacceptable.' (3 September 2010). Global Arbitration Review.

⁸⁴Interview XXI.

⁸⁵Correa anuncia que Ecuador se retirará del Ciadi. (30 June 2009). TeleSUR.

⁸⁶Asamblea Nacional resolvió aceptar el pedido del Presidente de la República de salir del CIADI. (12 June 2009). Ecuador Inmediato.

was in place, meaning treaty terminations required legislative approval. However, the decision to leave ICSID took place at a favorable moment for the ruling party because it was during the short tenure of the transitional 'little congress' where the ruling party had a majority. A month later, the termination of ICSID might have not been possible under a divided government. On 2 July, Correa signed the execution of congress' decision and six months later -the period stipulated in the convention after which denunciations become effective- Ecuador was no longer a member of ICSID. US diplomatic cables offer a record of the immediate impact of this decision. For example, the French Commercial Attache is reported as "very concerned about this, and is afraid the GOE will subsequently pronounce the French BIT invalid and request that France negotiate a new BIT, based on a new Ecuadorian model." While the French forecast was ultimately accurate, it would take eight more years to materialize.

Ecuador sought to legitimize their departure by prompting other countries to do the same. At the 39th General Assembly of the Organization of American States, Foreign Minister Fander Falconí underscored the need for a general withdrawal from ICSID and noted that while "OAS has created instances to safeguard human rights, it has not instituted mechanisms to solve conflicts between international capital and states, which due to their social effects could affect human rights." The Minister also announced there was consensus within UNASUR for the creation of a regional advisory body for investment disputes which would be the first step in the creation of a judicial alternative to ICSID.⁸⁷ Yet coordination efforts did not yield any results beyond Bolivia and Venezuela, the only two regional neighbors who also terminated their ICSID membership.

In sum, Ecuador's exit from ICSID was not predetermined. As one official notes,

⁸⁷Ecuador pide que se sustituya al CIADI. (2 June 2009). Ecuador Inmediato.

“I am critical of positions that portray the Ecuadorian attitude as radical rupture...the truth is that Ecuadorian decisions interacted with the system.”⁸⁸ In reality, radical and moderate sectors within the GoE were divided on the issue from the start. It was the system’s response, by proving the partial exit ineffective, that gave sustenance to the radical position. “In the foreign service there was this attitude of ‘ok, let’s not leave ICSID, let’s rather say ‘no’ to energy issues or ‘no’ to tax issues’, trying to adopt reservations and exceptions that evidently did not work.”⁸⁹ However, leaving ICSID was less problematic for the moderates than the termination of the BITs. Investment treaties generally allow investors to choose the arbitration institution; even if they are no longer able to select ICSID, they can still pursue the cases elsewhere. “Thus what followed [from the moderates] was ‘ok, let’s leave ICSID, but not the BITs.”⁹⁰ The next section traces the disagreements between radicals and moderates regarding the termination of the existing treaties.

5.2 The termination of the BITs

The most crucial component of the radical agenda was the cancellation of Ecuadorian BITs. This section carefully examines the different stages of this process. I do so to show that deep disagreements about the need to terminate the treaties existed not only between government and opposition but also within the ruling coalition. I also highlight the different ways in which external actors put pressure on sectors of the GoE and how successful were they in bringing the process to a halt.

⁸⁸Interview XXI.

⁸⁹Interview XIX.

⁹⁰Ibid.

In 2008 the GoE carried out a review of Ecuador's investment treaties.⁹¹ An inter-ministerial group, including ministries of Foreign Affairs, Economic Policy and Production, considered each treaty in terms of existing investments in Ecuador and the prospects of new investments.⁹² When word got out that Ecuador was considering getting rid of its BITs, including the one with the US, there were immediate reactions. The US BIT was by far Ecuador's most dangerous one. The US was Ecuador's main source of FDI and eight of out of its ten ISDS disputes had been initiated by American firms. But the US was also the main destination for Ecuadorian exports and as soon as this was announced as a possibility, export-oriented sectors raised concerns. The President of the largest business association in Ecuador -Comité Empresarial Ecuatoriano- said the announcement "took them by surprise," warned that following through would "constitute a setback in efforts to renew preferential trade benefits."⁹³ On a similar tone, the President of Expoflores -the organization representing the interests of flower exporters, who send 40% of their exports to the US- expressed concerns with the implications of terminating the BIT on two fronts. The extension of preferential trade benefits with the US and the arrival of more foreign capital in the flower industry.⁹⁴

Table 5.1 below shows the different fates of each BIT. The shaded cells represent the stage at which each termination encountered obstacles. While most made it through the PAIS-controlled foreign affairs commission, only the first treaties debated

⁹¹Canciller: 'Ecuador no tiene ninguna posibilidad de ganar a OXY en el CIADI.' (18 May 2007). Ecuador Inmediato.

⁹²According to one of the participants, the analysis was not very rigorous. It involved looking at the national FDI statistics together with the BITs that Ecuador had signed in order to identify which countries were sources of significant amounts of investment. Interview XIX.

⁹³Empresarios ecuatorianos temen por fin de acuerdo con EEUU. (8 May 2007). AP Spanish Worldstream.

⁹⁴Acuerdo de protección de inversiones con EEUU tiene vigencia hasta el 2017. (8 May 2007). El Comercio.

in the plenary -except the one with China- were approved. Fearing more negative outcomes, the ruling party preferred to wait until the next legislative elections in 2013. Yet the slowdown was not simply a product of disagreements between government and opposition. As shown by the stalling of the four European BITs whose termination had received approval in Congress, the executive was equally sensitive to pressures from firms and treaty partners. The rest of this section explains why some treaties were easily cancelled while others took the GoE eight years to get rid of.

5.2.1 The ‘easy’ BITs

By January 2008, the review process had come to its first conclusions. Of the twenty-six treaties analyzed, it was determined that nine of those were not protecting significant levels of investment and thus could be terminated immediately. These were treaties with Cuba, the Dominican Republic, El Salvador, Guatemala, Honduras, Paraguay, Romania and Uruguay. Since no investment had come to Ecuador from these countries, there was no opposition to the terminations. Moreover, the decision to cancel these BITs happened before the new constitution was enacted thus the executive on its own was able denounce the treaties without the need for Congress approval. The termination of the ‘easy’ BITs highlights the contested quality of this course of action. If the GoE would have been unified in leaving the investment regime from the start, it would have taken advantage of the much favorable institutional requirements at this time. Rather, there was caution about the fallout of terminating the remaining sixteen BITs. These were the ones with developed states and larger regional economies. Among others, these included treaties with the US, Canada, Germany and Spain.

Table 5.1 – Progression of termination processes

BIT partner	Kick-off year	Decision of unconstitutionality	Commission approval	Congress approval	Execution
Cuba	2008	Not applicable	Not required		2008
Dominican Republic	2008	Not applicable	Not required		2008
El Salvador	2008	Not applicable	Not required		2008
Guatemala	2008	Not applicable	Not required		2008
Honduras	2008	Not applicable	Not required		2008
Paraguay	2008	Not applicable	Not required		2008
Romania	2008	Not applicable	Not required		2008
Uruguay	2008	Not applicable	Not required		2008
Germany	2009	2010	10 August 2010	14 September 2010	2017
United Kingdom	2009	2010	10 August 2010	14 September 2010	2017
China	2009	2010	1st: 14 October 2010 2nd: 27 July 2017	3 May 2017*	2017
Finland	2009	2010	18 October 2010	23 November 2010	2010
France	2009	2010	15 February 2011	15 March 2011	2017
Sweden	2009	2010	15 February 2011	15 March 2011	2017
The Netherlands	2009	2010	1st: 15 February 2011 2nd: 27 July 2017	3 May 2017*	2017
Chile	2009	2010	1st: 25 May 2011 2nd: 27 July 2017	3 May 2017*	2017

*Debated in plenary for a second time after failed to reach necessary votes

Table 5.1 – *Continued from previous page*

BIT partner	Kick-off year	Decision of unconstitutionality	Commission approval	Congress approval	Execution
Venezuela	2009	2010	1st:25 May 2011 2nd:27 July 2017	3 May 2017*	2017
Canada	2009	2010	22 June 2011	3 May 2017	2017
Switzerland	2009	2010	16 March 2012	3 May 2017	2017
Argentina	2009	2010	20 March 2013	3 May 2017	2017
United States	2009	2010	29 April 2013	3 May 2017	2017
Spain	2009	2010	4 February 2014	3 May 2017	2017
Bolivia	2009	2010	9 June 2014	3 May 2017	2017
Peru	2009	2010	9 June 2014	3 May 2017	2017
Italy	2009	2010	20 April 2017	3 May 2017	2017

**Debated in plenary for a second time after failed to reach necessary votes*

5.2.2 The ‘hard’ BITs

The termination of the remaining BITs, specially those with wealthy capital exporters, was a completely different process. There was a general consensus on the desirability of new and improved treaties but not on how to achieve that or at what cost. Moderates in the GoE wanted to keep the BITs in place and use the threat of termination to jump start negotiations. Moreover, the ministries with authority over extracting industries were concerned about losing potential investments over the BITs. For the radicals, first and foremost, the treaties needed to go. Only then Ecuador should try

to negotiate new agreements. They expected, however, that due to the constitutional ban on treaties with ISDS the differences with capital exporters would be too large for any future treaty to eventually be agreed upon.

The cancellation process was drawn-out and all three branches of government became involved at different points. Like the exit from ICSID, this was also not a predetermined outcome. At multiple points the process stalled and even appeared to begin to roll back. The rest of this section is divided according to the five stages of this process: (1) the President's termination request to the National Assembly, (2) the Constitutional Court's rulings on the constitutionality of the BITs, (3) the debate in the Foreign Affairs Commission in congress, (4) the debate in the plenary of the National Assembly and (5) the execution of the termination by the President. At each stage, I show how foreign firms and treaty partners attempted to influence the process and how susceptible both opposition legislators and moderates within the GoE were to these pressures.

The Presidential request

The process of terminating the remaining BITs started in late 2009. This time, the procedure would be governed by the new constitution. This meant two things. First, the decision to terminate treaties was no longer an executive prerogative and now required approval by the legislative commission on foreign affairs and then by the plenary of the National Assembly. This could work against the termination because, while the ruling party controlled the commission, it did not have majority in the plenary. But at the same time, due to the existence of article 422, the GoE could now denounce the treaties not just as unfair or costly but also as unconstitutional.

According to the Ecuadorian law on constitutional control, when the constitutional tribunal rules an already ratified treaty unconstitutional, the treaty has to either be terminated, renegotiated or amended.⁹⁵ Thus, the process kicked off on 29 September 2009 with Correa requesting Congress to terminate the remaining treaties on grounds that they were unconstitutional.

US diplomatic cables show how this initial termination request elicited strong negative reactions from the representatives of the treaty partners. They also show that government actors in these interactions were inclined to put on a more moderate face, presenting Ecuador as willing to stay within the regime and simply seeking to update its commitments to the new constitutional framework. For example, the Vice-Minister of Foreign Affairs, a senior career diplomat, called in the US Ambassador to inform her of what he portrayed as a “decision to replace all its existing BITs with a less formal “model” investment agreement that complies with Ecuador’s new constitution.”⁹⁶ Pozo was going to make similar announcements to other Embassies but wanted to deliver the message to her first because “the GoE did not want the U.S. to hear it first from the press.” Another career diplomat in charge of the North American Division of the Ministry was also present at the meeting and he later confided with the Ambassador that he had not heard about the termination until this meeting. The Ambassador raised her concerns. She said “it was ironic that other GoE officials were pressing her and the [US Government] to increase U.S. investment in Ecuador, while at the same time the GoE was pursuing a policy that would likely deter it.” She also noted that it was a rare event for a country to terminate its BIT

⁹⁵LEY ORGANICA DE GARANTIAS JURISDICCIONALES Y CONTROL CONSTITUCIONAL. Art 112.4.

⁹⁶ECUADOR’S PLANS TO TERMINATE ALL BILATERAL INVESTMENT TREATIES. Date:2009 October 27. Canonical ID:09QUITO905_a.

with the US because they are regarded as “seals of approval” that reassure investors of the operating environment. Lastly, she lamented the poor timing of the decision “given that [the US] Congress would soon be reviewing whether to renew or extend both ATPDEA and GSP trade preference programs.”⁹⁷ Shortly after, the Ambassador also met with the President of the National Assembly Fernando Cordero to raise her concerns about the prospect of a termination. Cordero called “the GOE’s decision inappropriate and [highlighted] the need for renegotiation before termination” and he also “promised he would discuss concerns over [the] termination of the BIT with President Correa the following week.”⁹⁸

Around the same time, Minister of Foreign Affairs Fander Falconí organized a meeting with the Embassy representatives of the affected countries. He was less sympathetic. He reminded them the new constitution “was forcing the government’s hand.” The representative of the EU challenged this view, and “[w]hile noting respect for Ecuador’s sovereignty, he opined that provisions of the Constitution represent internal issues and should not affect bilateral treaties.” Falconí “took pains to emphasize that foreign investment was protected in Ecuador” and that “arbitration was recognized as a valid mechanism for dispute resolution, as long as it was conducted in a national or regional forum.” He announced the GoE was preparing a new model BIT -which would allow for ISDS before regional arbitration forums- and that he expected negotiations would start in January 2010. However, Ecuador did not have an alternative model at this time and will not have one until 2012.⁹⁹ To

⁹⁷ECUADOR’S PLANS TO TERMINATE ALL BILATERAL INVESTMENT TREATIES. Date:2009 October 27. Canonical ID:09QUITO905_a.

⁹⁸NATIONAL ASSEMBLY PRESIDENT CORDERO’S MEETING WITH AMBASSADOR. 2009 November 12. DEPARTMENT PLEASE PASS USTR BENNETT HARMAN. E.O. 12958: DECL: 2019/11/12.

⁹⁹Interview XXIII.

this, the Canadian Ambassador “pointed out that it would be impossible to negotiate a new investment agreement calling for regional arbitration when these regional dispute settlement bodies do not yet even exist.” US diplomats were not optimistic yet they still noted that “[t]here may be a window of opportunity in which the [US Government] and like-minded countries can reason with the GoE regarding the negative repercussions that are likely should they follow through with their plan.”¹⁰⁰

5.2.3 Constitutional court

After Correa’s initial request, the Assembly replied that a ruling was due from the Constitutional Court confirming the unconstitutional character of the BITs.¹⁰¹ On 6 January 2010, the President requested the Constitutional Court to sanction the unconstitutionality of all the remaining treaties. This was not a necessary step; the executive could have simply requested the Assembly to terminate the treaty on other grounds and not have the judiciary involved. Yet an unconstitutionality ruling, which the executive knew it would get because “the Court had at that point ideological positions close to the left and the developmentalists,”¹⁰² would do two things for the GoE. First, it would tie the hands of the government and make the threat of termination much more believable to foreign audiences. Second, given PAIS did not have absolute majority, it would force opposition legislators to go along with the termination. Somewhat naively, the GoE expected it to be “almost a natural step

¹⁰⁰GOE “EXPLAINS” TERMINATION OF INVESTMENT TREATIES Date:2009 November 17. Canonical ID:09QUITO973.a.

¹⁰¹INFORME SOBRE EL PEDIDO DEL PRESIDENTE DE LA REPUBLICA, DE APROBAR LA DENUNCIA DE TRECE ACUERDOS BILATERALES DE PROTECCION RECIPROCA DE INVERSIONES, SUSCRITOS POR EL ECUADOR. COMISION ESPECIALIZADA PERMANENTE No. 5, DE SOBERANIA, INTEGRACION, RELACIONES INTERNACIONALES Y SEGURIDAD INTEGRAL. QUITO, DM, 4 DE DICIEMBRE DE 2009. Oficio No. 206 GV-AN.

¹⁰²Interview XXI.

that the Assembly would give way to the terminations.”¹⁰³

One by one, the Court analyzed how the different provisions included in these treaties related to the new constitution. As part of the constitutional control process, tribunals allowed citizens to make interventions defending or countering the constitutional character of each treaty. The Federation of Chambers of Commerce of Ecuador sent letters to the Court arguing ISDS was not unconstitutional and that President Correa was reading article 422 incorrectly. The Federation thus requested the tribunal to refrain from deciding on the constitutionality issue and instruct the GoE to renegotiate the treaties instead.¹⁰⁴ While some treaties fared worse than others in their constitutionality, they all included ISDS provisions. In the end, the Court granted the President’s request and decided all treaties were in conflict with article 422.

5.2.4 Congress I: the Foreign Affairs Commission

The process went back to Congress. The Foreign Affairs Commission would consider the termination request from the executive -now furnished with unconstitutionality rulings- and would either dismiss it or allow it to move to the plenary. While the ruling party did not have absolute majority in Congress, it did dominate the commission. Six of its ten members, including its President, were PAIS legislators. The treaties were considered on an individual basis and debates allowed presentations by interested parties. Officials from either the Ministry of Foreign Affairs or the Ministry of Production attended almost all sessions, except those for the treaties with Canada and the US. In these instances they requested the commission to approve the

¹⁰³Interview XIX.

¹⁰⁴Corte Constitutional. DICTAMEN N. 023-10-DTI-CC, CASO N. 0006-10-TI. p. 11-2.

termination and argued the newly adopted law of production was enough guarantee for foreign investors.

Representatives of firms and foreign governments also attended the sessions (see Table B.2 in Appendix B.2 for a record of all attendees). They urged the Commission to consider a renegotiation or partial amendment instead. The theme of these comments was that treaties and specifically ISDS provisions were not insignificant elements for investors and that Ecuador was hurting itself by unilaterally removing them. The Canadian Ambassador, for example, argued domestic protections were not enough, as they do not offer the same level of protection and do not necessarily remain in place after changes in government.¹⁰⁵ The representative of the German Chamber mentioned investors want access to international arbitration and that terminating the treaty would send “the worst signal to investors.” Similarly, according to the Dutch official, “companies that want to come to Ecuador from The Netherlands take into consideration these bilateral investment treaties.”¹⁰⁶ The few opposition legislators in the Commission raised similar concerns. In the discussion of the US BIT -whose report was twice as long as every other- they warned about potential effects of a unilateral termination on market access for Ecuadorian exports.¹⁰⁷ However, with a majority of legislators from the ruling party, the commission approved all termination

¹⁰⁵Informe de Comisión sobre el pedido de aprobación de la denuncia del ‘Convenio entre el Gobierno del Ecuador y el Gobierno de Canadá para el fomento y la protección recíproca de inversiones. 22 June 2011. N. 236-GV-AN. p.5

¹⁰⁶Informe de Comisión sobre el pedido de aprobación de la denuncia del ‘Convenio para la promoción y protección recíproca de inversiones entre la República del Ecuador y el Reino de los Países Bajos. 14 February 2011. N. 073-GV-AN. p. 7.

¹⁰⁷“The United States is the destination of a large percentage of Ecuadorian exports, from which thousands of families and Ecuadorian investors depend...rather than terminating this treaty, the Ecuadorian authorities should start a renegotiation with their American counterparts to harmonize this international instrument and the constitutional norms.” Informe de la Comisión referente a la denuncia del ‘Tratado entre la República del Ecuador y los Estados Unidos de América sobre promoción y protección recíproca de inversiones. 29 Abril 2013. N. 129-CSIRISI-FB-2013-GV-AN. p.3-4.

requests.¹⁰⁸

5.2.5 Congress II: the plenary of the National Assembly

The Commission approved the termination of sixteen treaties between 2009 -when Correa first requested the termination- and 2014. The next stage was a debate and vote in the plenary of the National Assembly. Only the first nine treaties approved by the Commission were debated by the entire legislature. After a few successful votes for the GoE, the Assembly stopped reaching the necessary votes to approve the terminations. Fearing more setbacks, the ruling party stopped sending the termination requests to the plenary. During the debates that did take place, the arguments made by the opposition mirrored what was discussed in the Commission. Legislators from opposition parties were concerned about the effects of the terminations on two fronts. First, access to trade benefits under the ATPDEA. There were reports that both the US Chamber of Commerce and Chevron -who was in the middle of an ISDS dispute with Ecuador- sent letters to the US Congress and the USTR encouraging them to take into account the termination of the treaties when evaluating whether to extend the trade benefits.¹⁰⁹ Second, the FTA negotiations with the EU. For example, according to Assemblymen Luis Almeida,

“The problem is the gesture. [Correa] will be travelling in November and what is he going to say...to the President of Germany? ‘I come here to negotiate with you as a sovereign and on equal footing’... And what are going to be the guarantees for deals they would want to conclude?”¹¹⁰

¹⁰⁸With the exception of the Italian BIT, which was not discussed in the Commission at this stage.

¹⁰⁹Ecuador politics: Renewal of US trade perks uncertain. (1 November 2010) Economist Intelligence Unit - ViewsWire; Mayor presión para revisar la Atpdea. (29 September 2010). El Comercio.

¹¹⁰SESIÓN 55 CONTINUACIÓN INTERVENCIÓN DEL ASAMBLEÍSTA

In addition, legislators had more personal concerns in mind, as the US Embassy threatened to remove the American visas of those who voted in favor of the termination of the US BIT.¹¹¹ As a result of these mounting pressures, the Assembly quickly lost its initial steam. Of the nine treaties that were debated in the plenary, congress only approved the termination of the BITs with Germany, the UK, Finland, France and Sweden but failed to reach the necessary votes to approve cancelling the treaties with China, The Netherlands, Chile and Venezuela. From then on, the GoE instructed its legislators to stop debating the terminations altogether.

5.2.6 Executive

While most of the seventeen treaties that Correa had requested congress to terminate were stuck at some stage in the legislature, five had made it through: Germany, UK, Finland, France and Sweden. If the termination of the BITs would have been predetermined simply by the ideological tenets of the Correa government, the executive should have terminated all of these five agreements at this point. However, it became clear that the GoE was not in agreement about the terminations. And it was not the case either that they were waiting to terminate all the treaties at once, because the President did cancel the BIT with Finland right away.

At first, the GoE's reason to delay the execution was that they were waiting for a new production law to take effect in late December 2010.¹¹² The law of production was central for the radicals. Their plan was for Ecuador not to sign any more treaties

LUIS ALMEIDA.flv. Retrieved from: <https://www.youtube.com/watch?v=K-7km8ZEVfclst=PL1FC951FEEB626328index=4>

¹¹¹Interview XIX.

¹¹²Código Orgánico de la Producción, Comercio e Inversiones. Registro Oficial Suplemento 351 de 29-dic.-2010.

and rather relate to foreign investors through individual contracts. The government could have a lot more control over the content of a contract than the content of a BIT and the 2010 law of production would establish the basic structure of those contracts. The drafting of the law, like all other issues, became a battleground for radicals and moderates. Radicals wanted the law to reproduce the model of the contracts used after the decree nationalizing 99% of oil profits. Most importantly, they wanted companies to resign to the protections offered by any applicable treaty and resort to the dispute settlement mechanisms provided for in the contract. They were willing to provide for international arbitration in a regional forum but the applicable law would be Ecuadorian law instead of what they saw as vague and expandable treaty provisions. Moreover, they saw a much better chance to impose obligations on investors via contracts than through treaties.¹¹³

The law ended up including a series of investor obligations, like complying with national labor, environmental, tax and social security laws. It also established a series of sanctions as a way to enforce those obligations. The dispute settlement mechanisms provided for in the law included some progressive traits, for example, arbitrators would apply Ecuadorian domestic law, tax issues could not be subject to arbitration and investors would have had to exhaust local remedies first. Yet - due to the insistence of the moderates mostly in the Ministry of Production- the dispute settlement provisions made important concessions for investors as well. The law allowed for international arbitration anywhere, not just in regional institutions. More importantly, instead of requiring that investors renounce to the protection of

¹¹³BITs are one-sided instruments that generally create rights to investors and obligations for states. CSOs and scholars consider investor obligations to be the most progressive treaty provisions for rebalancing investment treaties. For that reason, they are also the most heavily resisted by investors.

applicable treaties as the radicals wanted, article 27 included the words “according to valid treaties Ecuador is party of.”¹¹⁴ According to an official from the radical camp, the goal of this wording was to maximize the validity of the BITs as long as they remained in force and for the sunset periods after that. “We knew this was problematic,” said this official, “and I lobbied against it, I sent letters through my superiors at that moment but we did not win.”¹¹⁵

The new production law took effect in December 2010. Yet the executive still failed to terminate the four European treaties the Assembly had approved for termination. The moderates within the GoE had Correa’s ear because Ecuador had launched FTA negotiations with the EU. According to a witness account,

“the President was ready to sign them, in fact I saw the [termination] decrees. We had a meeting to discuss the issue and there [a high-level official from the Foreign Affairs Ministry]...tells him ‘look, our trip to Germany is next week. It would not be a good signal that we terminate the treaty with Germany before the trip’.”¹¹⁶

Because the treaty would only regulate mutual trade, Europe wanted the old network of BITs to continue governing investment flows.¹¹⁷ If Ecuador terminated the BITs, the EU would end the FTA talks and if the talks failed, Ecuador would lose preferential tariffs.¹¹⁸ Because of a few controversial ISDS cases against European countries, the EU was not completely unsympathetic. The plan was that the BITs

¹¹⁴Código Orgánico de la Producción, Comercio e Inversiones. Registro Oficial. Año II - Quito. 29 de Diciembre del 2010. N 351. Art. 27

¹¹⁵Interview XXIII.

¹¹⁶Redacted to preserve anonymity. Interview XIX.

¹¹⁷The EU negotiating mandate was from before the European Commission had acquired competences over investment.

¹¹⁸“without an FTA they would raise the tariffs on bananas, fish, shrimp...and there could be a national catastrophe” Ibid.

would remain in place until the signature of a new and improved investment agreement with the entire EU.¹¹⁹ However, with ongoing negotiations for TTIP with the US and CETA with Canada, an investment agreement with Ecuador was hardly a priority for the EU. The radicals saw this indefinite plan as the confirmation of why Ecuador needed to terminate old treaties first and negotiate new ones later. Insisting on renegotiation instead of termination would result in the continuation of the status quo.

Part B explained the reasons why, coming from a strong radical start with the constitutional ban and the subsequent rulings of unconstitutionality, Ecuador did not follow through with the terminations beyond a few ‘easy’ treaties with small economies. By tracing the progression of each individual BIT through the termination process, I showed at which institutional stage obstacles emerged. Most terminations faced opposition in congress where the ruling party did not have majority yet I also showed the executive was hesitant to conclude the termination of its BITs with European countries while trade negotiations with the EU were ongoing. The theorized external limiting factors -pressures from foreign firms and treaty partners- operated as expected. I showed how these pressures were effective on opposition legislators -who did not share the ideological inclinations of the government- and on the units within the GoE that managed relations with firms and foreign governments -mostly the Ministry of Production and diplomats- where moderate approaches prevailed. Moreover, developed treaty partners were able to mobilize domestic exporting sectors through the threat of limiting market access for Ecuadorian products. The last part of this

¹¹⁹Ecuador ofrece a la UE negociar un tratado de inversiones; UE ECUADOR. (22 March 2012). Agencia EFE.

Chapter, Part C, explains the final decision by the Ecuadorian government to follow through with the cancellations and exit the international investment regime. In doing so, I focus on both the weakening of some of the external limiting factors as well as the emergence of both domestic and international enabling factors.

PART C: cutting ties with the investment regime

The last part of this Chapter explains why and how, after eight years, Ecuador was able to overcome these limitations and conclude the termination processes. Part A shows the radicals in a strong position, obtaining a crucial constitutional provision and setting the terminations in motion. Much differently, Part B makes visible the shifting balance of influence within the government in favor of moderate voices, resulting in the termination processes coming to a halt. In Part C this balance shifts back in favor of the radicals and Ecuador finally exits the investment regime. To explain this final shift, I focus on both domestic and external factors. I show how radical actors within the GoE were proactively trying to produce an enabling domestic and diplomatic environment. In the same way that social mobilization forced the previous government into terminating the Oxy's contract, radicals attempted to regenerate similar public interest in the termination of the BITs by setting up a commission to conduct a public audit of Ecuador's investment treaties. A campaign against the firm Chevron, although not specifically geared towards promoting the terminations, also helped increasing the salience of the issue because Chevron had sued Ecuador through ISDS.

By focusing on the enabling function of the international environment, I also show how external forces are not exclusively limiting factors. Radicals within the GoE also

attempted to counter the influence of the moderates through policy coordination with like-minded countries. However, the most ambitious aspects of these radical initiatives got entangled in the disputes with the moderates who were prominent in the diplomatic service. While they failed at coordinating policies with states beyond other far-left South American governments, the perception that other countries were questioning the investment regime in similar ways was important for convincing Correa that he had to terminate the BITs before leaving office. Furthermore, radicals benefited from a wane in the external limiting factors. The successful conclusion of the FTA with the EU meant market access could no longer be used as a stick.

A purely external explanation would suggest states are passive recipients of international influences, be those limiting or enabling. I show radicals in the GoE were not looking for available policy examples from other countries but rather searching for partners to create policy alternatives with; I show them actively trying to foster similar policies in other like-minded countries.

Unlike what I argue is the case when civil society organizations have high levels of expertise and specific preferences regarding international investment law- I expect civil society in Ecuador to be less mobilized around this issue. As the events leading to the termination of Oxy's contract detailed in Part A of this Chapter show, civil society in Ecuador was not powerless. They had a strong presence in the oil-rich regions and they mobilized intensely against the specific firms that operated there but -unlike Northern CSOs- they did not have equivalent interest in treaties thus they lacked technical expertise on the matter.¹²⁰

Part C is divided in four sections. Section 5.1 and Section 5.2 examines two ini-

¹²⁰According to an Ecuadorian official's recollection of the level of civil society's mobilization around the terminations, "there were some remnants...some social groups still raised the issue of Oxy, but only a few; nothing comparable to 2006 [when Oxy left the country]." Interview XXIII.

tiatives from the GoE helped increasing the salience of BITs in the domestic political debate and public opinion as well as legitimizing the terminations before foreign audiences. The first was a public audit of investment treaties that was the brainchild of the radicals. The second was a campaign against the oil firm Chevron, which did not emerge from this group, but contributed to putting the issue on the agenda. Section 5.3 analyses the different diplomatic initiatives the GoE undertook during this period with the goal of coordinating treaty policies within and beyond the region. Lastly, Section 5.4 explains the the final decision to go through with the cancellations in light of two changes in the external front: the ratification of the EU FTA and the emergence of strong criticism against BITs and ISDS in the international system.

5.1 CAITISA: *auditoría ciudadana*

In 2013 the GoE tasked a commission of independent experts and public officials - known as CAITISA for its initials in Spanish¹²¹- with a review of Ecuador's investment treaties. It is common for states to put in place such review process after facing controversial ISDS disputes.¹²² In fact, the GoE had conducted a much less thorough review of the BITs before terminating the first batch of treaties in 2008. Yet what was unique about this process was its public character; it was meant to be a 'citizen audit' (*auditoría ciudadana*). It was conducted openly by nine independent experts and four government officials, rather than only bureaucrats behind closed doors, and the entire process was publicized, not just the outcome. As a public process, the audit had to primary audiences. First, CAITISA was meant to send a message

¹²¹Comisión para la Auditoría Integral Ciudadana de los Tratados de Protección Recíproca de Inversiones y del Sistema de Arbitraje en Materia de Inversiones.

¹²²See Chapter 6 for India's review process.

outwards, especially to Ecuador's BIT partners, that the terminations were grounded on fundamental problems of the investment regime. The report would show these problems were real, not ideological tendencies, and that similar questioning processes were taking place elsewhere. The second audience was domestic. The report would dig into the history of the BITs and uncover how they were signed. In this sense, CAITISA had a blame-assigning function.¹²³ The audit would connect something remote like these international legal instruments to more tangible consequences on the ground, be that on the form of environmental damage by the firms initiating the demands or the size of the awards and legal fees Ecuador had to affront.

The idea for the audit emerged from a radical stronghold, the Secretary of Strategic Planning and Development (SENPLADES). To their frustration with the slow pace of the cancellations added a sense that other parts of the GoE were making too large concessions to foreign investors. On 5 March 2012, the Minister of Natural Resources signed a large-scale mining contract with a Chinese firm.¹²⁴ The standard procedure after contracts were signed was that an interministerial Council of Production had to verify them. SENPLADES was part of that Council. When they got the text of the contract, they saw it included access to international arbitration as established by Ecuadorian BITs. That was, according to SENPLADES, in contradiction with the GoE's entire policy, especially at a time when the termination processes

¹²³According to one CAITISA member, "on the one hand it would promote public debate, this was part of the strategy, to explain society why that decision [to terminate] was being made. Second, [the goal was] to connect what was going on in Ecuador with what was going on in other countries." Interview XVII. One of the architect of the audit saw one of the goals as identifying "who where the ministers, presidents, legislators that approved these treaties...who were the Ecuadorian lawyers defending the corporations...how were the appropriate procedures skipped [to facilitate signing the treaties]" Interview XIX.

¹²⁴The 2008 constitutional assembly had issued a mining resolution terminating around 800 mining concessions that returned to the state. Some of those termination led to ISDS disputes.

were losing steam.¹²⁵ Thus, they objected the deal and took the issue to a Cabinet meeting where the Ministers decided to put the contract on hold. The radical camp understood their limited power to move the terminations along a Congress they did not control but they were outraged when it was other units of the executive who started to make decisions against the work that had been done in the previous years.

With the goal of swaying more cautious voices within the GoE, the radicals at SENPLADES organized a closed-door workshop on BITs and ISDS. The workshop was attended by the office of the attorney general, the legal secretary of the Presidency, SENPLADES and some legislators, including the president of the foreign affairs commission. The Vice President of Ecuador and the Minister of Strategic Sectors attended part of the workshop as well. The presence of strategic sectors was significant since their position was against terminating the treaties because they had been warned by specific firms that a valid treaty and access to arbitration was a condition for seeing some investment projects through. The subject matter of the workshop was vast. It went over the content of the existing BITs and the ISDS cases against Ecuador.¹²⁶ It also discussed the bigger picture; what are the international trends in investment treaty reform and what are the problems of the wider system of investment arbitration. To that end, the workshop organizers relied heavily on a report titled ‘Profiting from Injustice’ (2012) produced by a Dutch think-tank, the Transnational Institute (TNI).¹²⁷ The organizers realized the subject matter exceeded

¹²⁵According to a SENPLADES official, President Correa had not been aware about these specific contract provisions.

¹²⁶According to a workshop organizer, most of the day-to-day handling of the arbitral disputes was left in the hands of private law firms and there was little political supervision. Interview XIX.

¹²⁷“we used that report a lot to show that in our [ISDS] cases there were conflict of interests” Interview XIX. In fact, the official from SENPLADES that read the report contacted one of the authors directly and she ended up taking part in drafting the decree through which Correa established the auditing process and later became a member of the Commission. Interview XVII.

what could be properly analyzed in a single day workshop.¹²⁸ That is how the idea for a public audit came about. There was the precedent of the 2008 audit of the public debt.¹²⁹ A similar process for the BITs would show the wider public how widespread conflicts of interests are within investment arbitration, how treaty provisions threaten developmental policies, who had signed the BITs and why. Thus, the audit would provide greater legitimacy to the termination of the BITs in the same way that the public debt audit legitimized the decision to partially default on the debt.¹³⁰ The President agreed with this proposal and on May 2013 signed an executive decree creating the auditing commission.

The implications of the theorized differences between CSOs and social movements can be observed in the composition of CAITISA. First, one of the ministries that were invited to take part in the process was the Coordinating Ministry of Policy, which housed the Secretary for Peoples, Social Movements and Citizen Participation. This was meant to be the link between the audit and civil society and, according to one of CAITISA's ideologues, its inclusion had the goal of fostering social pressure around this issue.¹³¹ This contrasts with the previous Chapter's description of anti-MAI campaigns. There, it was the CSOs who organized public events to raise awareness and interest in the public about the legal implications of the agreement. Second, the guiding criteria for selecting members from Ecuadorian civil society and international experts was having a background on researching and campaigning against BITs and

¹²⁸“Our intention with this workshop was to make these issues visible but we saw that the subject matter was huge, impossible to cover in a workshops of 4 or 5 hours.” Interview XIX.

¹²⁹The audit commission for the public debts had included Ecuadorian and foreign economists, lawyers and representatives of civil society organizations. The final report concluded that a large proportion of the public debt was illegitimate. The GoE ended up defaulting on 70% of its debt. Within the GoE this audit was considered successful in legitimizing the default.

¹³⁰Interview XVII.

¹³¹Interview XXIII.

ISDS but specific expertise on investment treaties and arbitration was not widely available in Ecuador.¹³²

Moreover, the Commission's membership also responded to the radical's goal of coordinating policies with like-minded countries. The organizers wanted to include academics and political personalities from Latin America because they wanted the audit to be a replicable process in other countries facing similar problems.¹³³ For example, one of the members was Osvaldo Guglielmino, the former Attorney General that had managed the bulk of the investment arbitrations against Argentina. The chair of the Commission was entrusted to Carlos Gaviria, a prominent Colombian politician.

The Commission had two main tasks. The first one was to conduct the audit. To this end, the commissioners met regularly at SENPLADES to discuss three themes: (1) The content of all BITs signed by Ecuador and whether each of them would have passed a constitutional control at the time of signature; (2) the system of international investment arbitration and the specific cases against Ecuador, and (3) the relationship between BITs, FDI and development. That is, whether the treaties resulted in FDI flows, what types of investment were made by the firms suing Ecuador and what have been their social and environmental effects (CAITISA, 2017). Regarding this third theme, the head of SENPLADES emphasized that, given that one of the political aims of the GoE is to extend its ability to regulate, the Commission would evaluate whether and if so how could BITs limit that ability.¹³⁴ The second task was to ensure a

¹³²According to a Commissioner, "the only way to make this public and make it relevant internationally was to take it outside the sphere of being purely governmental exercise...they convened [international experts] mainly because the expertise was not there in Ecuador" Interview XVII.)

¹³³"We wanted to include people from countries that had been critical [of the investment regime]; people that could have good relations with the governments of those countries so that this experience could serve to spark political processes in those countries as well." Interview XIX.

¹³⁴CAITISA. Bulletin. Auditoría a TBI avanza en sus tres ejes de trabajo. 8 March 2014.



Figure 5.1: CAITISA illustration. Translation: ‘Let’s play in your court but I bring the referee, the ball and I tell you how we split ticket sales.’ -‘If you don’t like it we’ll find another team with a winning mindset.’ Source: Secretaría Nacional de Planificación y Desarrollo.

form of citizens’ participation in the process. To achieve this, the Commission would issue periodic reports and its members participated in ‘socialization and diffusion workshops,’ as they were officially termed, throughout Ecuador.¹³⁵ The Commission prepared illustrated materials to be used in these encounters (see Figures 5.1 to 5.6). “This is, sadly, a very ethereal subject, hard to communicate. We had to look for popular ways to bring this to the public,” said one of the audit’s organizers.¹³⁶ Government officials involved in the audit also promoted the initiative in international forums like UNCTAD’s International Investment Agreements conference in 2014 the Columbia Center on Sustainable Investment’s conference on investment treaties in 2015.



Figure 5.2: CAITISA illustration. Translation: -‘Let’s reach an agreement to guarantee investments in your country’ -‘Do I sign here?’ Source: Secretaría Nacional de Planificación y Desarrollo.



Figure 5.3: CAITISA illustration. Translation: -‘We have to warn people about the risks of tobacco’ -‘That’s fine, but if that hurts our profits we will sue you in ICSID.’ Source: Secretaría Nacional de Planificación y Desarrollo.



Figure 5.4: CAITISA illustration. Translation: ‘What about the laws of my country?’ Source: Secretaría Nacional de Planificación y Desarrollo.



Figure 5.5: CAITISA illustration. Translation: Countries like South Africa and Australia agree these agreements had made states more vulnerable. Source: Secretaría Nacional de Planificación y Desarrollo.

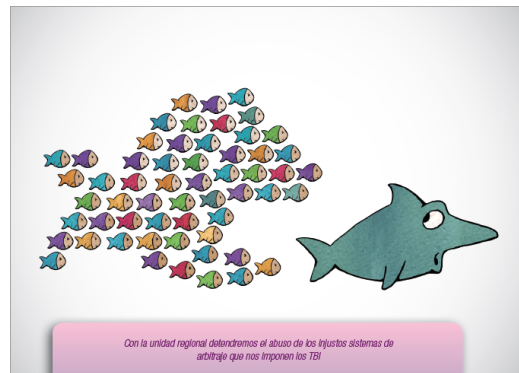


Figure 5.6: CAITISA illustration. Translation: With regional unity we will stop the abuse of unfair arbitration systems that BITs impose on us. Source: Secretaría Nacional de Planificación y Desarrollo.

The periodic reports, media appearances and presentations by Commission members anticipated the content of the final audit report. The main ideas that emerged

¹³⁵Interview XXIII.

¹³⁶Interview XXIII.

throughout the audit period were that BITs had not attracted investment and that investors had won in 67% of ISDS cases against Ecuador. Because of these disputes, Ecuador had already paid approximately \$1.5 billion, which amounted to 31% of the education budget, 62% of the health budget and housing for 239.000 families. Regarding the origin of the treaties, the audit found no trace of any discussion among negotiators of their content and that many BITs were not approved in accordance with the valid laws of the time. Finally, Commissioners recommended completing the termination processes and -if Ecuador decides to eventually sign new investment treaties- that these should be modeled after alternative texts that, among other elements, include investor obligations and exclude ISDS. CAITISA had a clear radical stance.

The Commission's findings stretched over seven hundred pages. The first full draft of the report was ready in June 2015 but the publication was delayed. As most initiatives related to BITs, CAITISA got immersed in the disputes between radicals and moderates. According to a participant, within moderate sectors "there was fear that the moment the report was made public, the President would run out of options because he would have to comply with what the report said."¹³⁷ But trade negotiations with the EU were ongoing. The frustrations within the Commission with the GoE's inaction led to the resignation of its Chair -Colombian politician Carlos Gaviria- in December 2014. In an open letter to President Correa, he grounded his departure on the government's reticence to terminate the pending BITs.¹³⁸ Furthermore, he

¹³⁷Interview XXIII.

¹³⁸The explicit reason given was: "The reticence, on behalf of the Government, to carry out the process of denunciation of several bilateral investment treaties, which is pending only of a political decision; even when the experience of the country with international arbitral tribunal has been not only costly but disastrous." Letter from Carlos Gaviria Díaz to Rafael Correa Delgado. 28 November 2014. Quito, Ecuador.

explicitly attributed this unwillingness to the ongoing negotiations with Europe. In Gaviria's words, the announcement of trade talks with the EU "was premonitory of our final report finding its destiny in the trash can."¹³⁹

A similarly frustrated Commissioner leaked the draft report to the press.¹⁴⁰ One of the largest legal firms in Ecuador -which is signaled out in the audit as one of the local firms that have aided foreign investors in fighting public regulations through ISDS (CAITISA, 2017, 59)- published a critical analysis of the Commission's findings. The firm's associates, who are regular contributors in international arbitration outlets, warned about the impact of the report on EU talks and predicted the final report would not likely see the light of day.¹⁴¹ They were not wrong. Although the work of the Commission was publicized broadly, the final presentation of the report -handed personally to Rafael Correa during a press conference on 8 May 2017- would have to wait until after the political decision to terminate the treaties was made.¹⁴²

The experience of the public audit has implications for (bounded) rationalist learning arguments. The audit could be seen as part of the process through which states acquire further information that leads them to alter their policies. It seems, however, that the ideational context in which this learning processes takes place will have a strong impact on its outcome. The policy-makers that launched this initiative had specific goals and those determined who was invited to join the Commission. What

¹³⁹Ibid.

¹⁴⁰Diagonal hace público los resultados de la auditoría sobre tratados de inversión en Ecuador. (24 January 2016). Diagonal.

¹⁴¹"[A]ny politicized report stating how evil foreign corporations are or how capital-exporting countries bully capital-importing countries could jeopardize the future of any trade agreement." (Bedoya, 2016); "the final report has purportedly been finished. However, it has not been published by any public entity and there are doubts that said publication will be circulated" (Jijón-Letort and Marchán, 2016).

¹⁴²Only a shortened version of the findings -of around 100 pages- was published. I have a confidential copy of the entire report on file.

kinds of lessons were going to be derived could have been predicted from its membership. The final report would have drawn very different lessons if, for example, the GoI would have invited experts from the arbitration community.

5.2 The Chevron campaign: *La mano sucia de Chevron*

In 2013, the GoE also launched a campaign called ‘The dirty hand of Chevron’ to raise national and international awareness of the environmental damage caused by the oil firm Texaco, later bought by Chevron. This campaign was a response to Chevron’s own actions against alleged interference by the GoE in the judiciary, which included launching an ISDS dispute. It was also related to a strong push by Ecuador within the UN Human Rights Council towards the creation of a legally binding human rights instrument to regulate the activities of transnational corporations.¹⁴³ Unlike the audit’s, the focus of the campaign was one specific foreign firm -Chevron- not the entirety of the international legal system that protected it. However, the natural overlapping between the two matters also raised the visibility of arguments against the BITs.

When Texaco ended its operations in 1992, it disposed of its waste by dumping crude oil into unlined waste pits and releasing oil-laced produced waters straight into streams and lakes. In 1995, the GoE signed an agreement with Texaco to remedy the situation and clean up the area. Through the agreement, Ecuador relinquished its right to bring further legal action once the cleanup was completed, which the gov-

¹⁴³See Ruggie (2014); Lopez and Ben (2016)

ernment certified to have happened in 1998. Indigenous organizations, who had been campaigning against Texaco's pollution, protested the agreement claiming their government had sold them out. In 1993, they brought their own lawsuit against Texaco in the Southern District of New York on behalf of 30 thousand affected individuals. In 2001, Chevron took over Texaco and two years later, the District Court dismissed the case on grounds of *forum non conveniens*, arguing the case should be heard in Ecuador, not in the US. Thus, in 2003, the legal battle continued in Ecuadorian courts. As proceedings appeared to veer against Chevron, the company sold all of its remaining assets in Ecuador. In the case of an eventual loss, this would have barred the claimants from collecting damages and would have forced them to start legal actions in other countries where the Chevron still had operations. Finally, in 2011, the local court ruled in favor of the affected population. After a series of appeals, the final decision from the Ecuadorian highest court was that Chevron had to pay them \$9.5 billion.

Chevron did not limit itself to putting up a judicial defence in Ecuadorian courts. After reports that its stock pricing was falling due to the pending dispute, it also launched a publicity campaign to counter the allegations of environmental damage. It ran large ads in print, on television, and online boasting about its social and environmental conscience. Additionally, in 2009 it launched ISDS proceedings against Ecuador in the Permanent Court of Arbitration in The Hague and under UNCITRAL rules. Chevron claimed the GoE had violated its BIT with the US by unduly influencing the judiciary and thereby compromising judicial independence.¹⁴⁴ In 2011,

¹⁴⁴The irony in this case is that since the opening of proceedings in the New York court, it had been Texaco who had fought to have the lawsuit tried in Ecuador. The plaintiffs preferred American courts because they feared corruption in the Ecuadorian judicial system but Texaco continuously argued Ecuadorian courts were independent and impartial (Erichson, 2012).

the arbitral tribunal issued an order in favor of Chevron ordering Ecuador to suspend enforcement of the domestic judgment and it awarded Chevron \$96 million in compensation. Following UNCITRAL rules, Ecuador challenged the award in Dutch courts.

The campaign was an attempt at improving Ecuador's chances in fighting the award by casting the Chevron arbitration as more than a legal dispute. "If it is only managed between experts and lawyers...it stays there and people do not realize how much is at stake. The idea was to raise the visibility of this dispute, take it from the legal sphere to the political, social and media spheres."¹⁴⁵ President Correa was personally involved in the campaign, which gave it high domestic visibility. On its external dimension, the campaign involved coordinating actions with environmental groups from all over the world¹⁴⁶ as well as enlisting regional and international public personalities and taking them in "toxi-tours" to the affected area where they were encouraged to stick their hands into the waste pits. As hands would come out covered in oil, the black hand became the symbol of the campaign. The campaign was well covered by the media and found out to be effective in raising awareness of the issue among the Ecuadorian public (Salas and Armendáriz, 2017). Given that one element in the Chevron saga were these arbitral decisions, the 'dirty hand' campaign contributed to linking a more concrete problem -like oil filled ponds- and its direct cause -multinational corporations- with the more abstract issue of international investment treaties.¹⁴⁷ Moreover, this was a dispute litigated at the Permanent Court

¹⁴⁵Interview XXIII.

¹⁴⁶CSOs, scholars and legislators created Solidarity Committees with Ecuador in multiple countries, for example, Belgium, France, Germany, Chile, Colombia, Costa Rica, Spain, United States, Uruguay and Venezuela.

¹⁴⁷"It helped give it visibility...The level of understating in the public of these concepts is pretty low; people understand there is injustice but they don't fully capture what is a BIT or who to get out of them." Interview XXIII.

of Arbitration in the Hague and this helped cement the idea that the problem of the international investment regime was larger than ICSID.

5.3 Diplomatic coordination

For the radicals, diplomatic coordination was essential, both globally and regionally. “It has always been clear that these types of actions are not strong enough to change the fundamental structure of the system unless they are taken in bloc.”¹⁴⁸ This section explains the diplomatic dimension of Ecuador’s radicalism. By considering both successful and failed initiatives, even some which have not been documented before, I show the true breadth of the radicals’ plans as well as the limitations encountered in their execution.

5.3.1 Global coordination

Ecuador was a frequent participant in UNCTAD’s investment conferences. Yet they were generally not featured as main speakers, a role that was generally reserved for South Africa, India or Brazil.¹⁴⁹ “For them it was risky to put us on the front page, they generally looked for actors closer to the mainstream,” reflected a government official,

“My goal [in those meetings] was to move the center [of the debate], because otherwise the center ended up being small reforms, like increasing transparency [in ISDS proceedings]; minimal things that don’t accomplish

¹⁴⁸Interview XIX.

¹⁴⁹Interview X.

anything. We played that role on purpose.”¹⁵⁰

Bilateralism held more promise for the radicals since discussions did not have to be watered down to the lowest common denominator. They found substantial common ground with South Africa. After a controversial ISDS dispute involving its black economic empowerment laws in the mining sector, the South African government had adopted a strong position against the international investment regime.¹⁵¹ Given their common critical stance, officials from Ecuador and South Africa coincided at multiple forums, like UNCTAD meetings in Geneva or the Forums of Developing Country Investment Negotiators of the IISD. During one event in Geneva in August 2013, an Ecuadorian official approached Xavier Carim from South Africa’s Department of Trade and Industry.

“we were coordinating the possibility of terminating the treaties simultaneously...I proposed the idea, I consulted with Quito, I got the ‘ok’, he got the ‘ok’ from Pretoria. This initially had the backing of President Correa and he directed the pertinent entities to move forward but it got stuck in the diplomacy...this would have been wonderful, it would have sent a strong message.”¹⁵²

The foreign service failed to follow through with this command -as mentioned before- due to concerns with the impact of the terminations of the FTA talks with the EU and South African ended up cancelling its treaties on its own.

¹⁵⁰Interview XIX.

¹⁵¹For an overview of South Africa’s own review process see Schlemmer (2015).

¹⁵²Interview XXIII.

5.3.2 Regional coordination

In regional forums Ecuador had more salience. It helped that some of the most highly sued countries in the world are South American nations. “At the regional level we had more influence and less stigma. We could sit down with Brazil, with Argentina or with Chile and have a serious debate.”¹⁵³ The ideological affinity between the Venezuela of Chavez and the Bolivia of Morales made them easy allies. Ecuador became a full member of ALBA in 2009 and within this forum is that Ecuador coordinated the exit from ICSID. However, they needed a wider group of allies if they wanted their arguments to be taken seriously and not dismissed as ideological pronouncements.

To this end, Ecuador attempted to bring Argentina into the ALBA forum. They saw Argentina as a natural ally; the most sued country in ISDS and, at the time, under a center-leftist administration. Argentina had similar concerns but instead of joining Ecuador in ALBA, they preferred to bring the issue of investment arbitration to the wider South American forum of UNASUR. According to an Ecuadorian official, “to get into UNASUR with this issue the key link was Argentina...and the [Workers’ Party] was in Brazil and Brazil was very much against arbitration. We saw that was a good direction.”¹⁵⁴ Ecuador took the lead within UNASUR and promoted the creation of an arbitration center. This project sat well with both radicals and moderates within the GoE. As mentioned earlier, radicals were not opposed to any form of international arbitration; their objections were not juridical but political. They could tolerate regional arbitration, conducted by South American lawyers applying domestic law. For the moderates, it would allow them to approach their interlocutors -foreign governments and firms- with a proposal that still gave investors access to

¹⁵³Interview XIX.

¹⁵⁴Interview XXIII.

ISDS, albeit only in a regional venue.

The problems of international investment arbitration had been discussed within UNASUR since 2008. There was an official Working Group that met nine times from March 2008 to January 2010, attendees were mid level diplomats. According to the report of the Group's first meeting, there were three working areas: (1) the creation of a legal advisory body for countries facing ISDS disputes. This topic was headed by Peru. (2) The development of a system of dispute resolution rules of UNASUR. These would be analogous to UNCITRAL rules and could be administered by different institutions. Bolivia took on this matter. (3) The most ambitious topic was the creation of UNASUR's own dispute resolution center. This one was taken up by Ecuador.¹⁵⁵ Reports of subsequent meetings show considerable more interest in developing the legal advisory body than either the dispute resolution rules or center. Member countries even agreed to invite officials from the WTO's Advisory Centre and from UNCTAD's investment division to consult on this matter.¹⁵⁶ Regarding the other items in the agenda, the reports generally say that work will continue. Even discussions for the least controversial of the three initiatives exhibit some disagreement, especially from Colombia who had a much less critical view of the system of investment arbitration than most other UNASUR countries. There were, for example, discussions about the scope of the membership of the advisory body; whether it should be open to just UNASUR members, to all Latin American and Caribbean countries, or as Colombia preferred, whether it should be open to any nation that wanted to join.¹⁵⁷

¹⁵⁵Report. I Meeting of the Working Group. 'Mecanismo de solución de controversias en materia de inversiones en el marco de UNASUR.' 12 March 2008.

¹⁵⁶Report. III Meeting of the Working Group. 'Mecanismo de solución de controversias en materia de inversiones en el marco de UNASUR.' 21-22 August 2008.

¹⁵⁷Report. VII Meeting of the Working Group. 'Mecanismo de solución de controversias en materia

The report of the last meeting of the Working Group shows that Ecuador had gone at great lengths trying to foster some type of consensus. At this meeting Ecuador was making a proposal for the advisory body that was based on a series of bilateral talks that Ecuador had sought out with Brazil, Colombia, Peru, Argentina and Chile. The attempt to please all the parties was evident. For example, in terms of the disputed issue of the membership, Ecuador proposed to expand the body's membership progressively. First it would be open just to UNASUR countries; at a second stage it would be open to countries from Latin America and the Caribbean; and then it would become universally open.¹⁵⁸

Even after this attempt to move things forward, the advisory body was still far from ready. The GoE was frustrated. The prospects for the regional arbitration center did not look promising if countries could not even agree on the design of a legal advisory body. During one of his November 2010 *Sabatinas*, Correa lamented it had been hard to make progress in UNASUR because middle rank officials kept raising obstacles. "The Presidents have the political will to go to these regional arbitration centers but the middle ranks stop it," Correa decried, because they adhere to a "third-world mentality."¹⁵⁹ That is, they "keep believing that our countries are not capable of instrumenting arbitration mechanisms that comply with world standards and can constitute a respectable alternative to those already established by developed countries."¹⁶⁰ The regional arbitration center was not simply a political aspiration for Ecuador. The GoE had promised its treaty partners and foreign firms that after the

de inversiones en el marco de UNASUR.' Lima, Peru. 14-15 April 2009.

¹⁵⁸Report. IX Meeting of the Working Group. 'Mecanismo de solución de controversias en materia de inversiones en el marco de UNASUR.' Quito, Ecuador. 27-28 January 2010.

¹⁵⁹Correa admite obstáculos para crear centro de arbitraje. (20 November 2010). AP Spanish Worldstream.

¹⁶⁰Correa pide a Unasur acelerar creación de centro de arbitraje internacional. (11 March 2011). Agence France Presse.

treaties were terminated they could still have access to international arbitration in a regional institution. Regional arbitration is even mentioned in the new Constitution. There had been considerable skepticism about the viability of the center, expressed in different occasions by foreign embassies¹⁶¹ and arbitration lawyers.¹⁶²

Frustrated with the lack of progress made by middle-ranking officials, Ecuador -who was at the time holding the chair of UNASUR- pushed for the creation of a new Working Group, this time its members would be experts designated by the Presidents directly.¹⁶³ The first meeting of the High Level Working Group took place in Quito in May 2011. Ecuador used the momentum of this new setting to shift the discussion from creating a legal advisory body to instituting a dispute settlement center. The GoE even presented a proposal for a statute. Disagreements emerged among the UNASUR countries. The most important contentious issue was the degree of judicialization of the Center. That is, would it be an arbitration or mediation institution? Or would it resemble more of a court? Would it have an appeals mechanism? Would it have a permanent ‘bench’ of arbitrators? Brazil has been historically opposed to investment arbitration thus they made clear they would not join the Center if it only offered arbitration services. Bolivia was also critical of ISDS and had recently left ICSID; their view was that another supranational arbitration institution was unnecessary and that foreign investors should resolve their disputes in domestic courts. Colombia, on the other hand, demanded binding arbitration.¹⁶⁴ Argentina -who had

¹⁶¹GOE “EXPLAINS” TERMINATION OF INVESTMENT TREATIES Date:2009 November 17. Canonical ID:09QUITO973_a.

¹⁶²“It is one thing to make political statements, it is a different thing to create a new legal regime that implements those statements.” Ecuador’s new service contracts ‘unacceptable.’ (3 September 2010). Global Arbitration Review.

¹⁶³Decision to Analyze an Investment Dispute Settlement System in UNASUR. Georgetown, Guyana. 26 November 2010.

¹⁶⁴An official recalls conversations with the Ecuadorian envoy to these meetings, “he would tell us there was a lot of trouble with Brazil on one hand, because they simply did not want anything,

issues with the limited annulment procedures available in ICSID- made a proposal that would have brought the Center closer to a permanent court by adding an appeals and annulment stage.¹⁶⁵ Ecuador worked hard to find consensus. “We were the most flexible ones regarding any type of rules with the aim of reaching an agreement.”¹⁶⁶ Eventually it was decided that the Center would offer both mediation and arbitration services and that states would opt in the type of mechanisms they would be willing to offer investors.¹⁶⁷ However, after the second meeting almost the entire text of the Center’s statute was still in brackets.¹⁶⁸

In 2013, the Ecuadorian Ministry of Foreign Affairs organized the first Ministerial Conference of Latin American States Affected by Transnational Interests in the city of Guayaquil. While it was organized in the framework of ALBA,¹⁶⁹ Ecuador invited other countries from the region with ISDS experience.¹⁷⁰ This was a personal initiative of the Minister of Foreign Affairs who wanted to foster a common Latin American position beyond what South American countries were discussing at UNASUR.¹⁷¹ The meeting’s final declaration insisted on the poor quality of arbitral decisions and attributed them to the economic power of firms and to deficiencies of the ISDS system. It also encouraged UNASUR to finalize negotiations for the cre-

and there were also problems with Bolivia because they did not believe that we should replace Washington [that is, ICSID] for [another] supranational entity.” Interview XXIII

¹⁶⁵Final Act. IX Meeting of High Level Experts on Investment Disputes Resolution of UNASUR. Quito, Ecuador. 10-13 June 2014.

¹⁶⁶Ibid.

¹⁶⁷“We were adapting...because Brazil said ‘no’ [to arbitration] then we made it a mediation center and because Colombia did ask for arbitration, then we made it mediation and arbitration.” Ibid.

¹⁶⁸Report. II Meeting of High Level Experts on Investment Disputes Resolution of UNASUR. Asuncion, Paraguay. 10-11 October 2011.

¹⁶⁹Bolivarian Alliance for the Peoples of Our America.

¹⁷⁰The conference was attended by ALBA members: Bolivia, Cuba, Ecuador, Nicaragua, Dominican Republic, Venezuela and Saint Vincent and the Grenadines. Invited countries were Argentina, Guatemala, El Salvador, Honduras and Mexico.

¹⁷¹Interview XXIII.

ation of a regional arbitration institution. The Conference created a state-funded international observatory that -among other things- would collect and disseminate information about ongoing disputes, study and promote reforms to ISDS and alternative mechanisms, and assist in policy coordination by providing technical and legal information.¹⁷² Ecuador had a heavy hand in making sure this initiative did not start and end in Guayaquil. Ecuador, the Dominican Republic and Venezuela would draft the proposal for the Observatory. Moreover, the Executive Committee of the Ministerial Conference would be headed by Ecuador. The Second Conference was going to take place in Venezuela yet the preparatory meetings were held in Quito and coordinated by Ecuadorian diplomats. The vision of the Ecuadorian Foreign Affairs Minister was ambitious; he expected member countries to foot the bill -expressly not developed countries- and used the Inter-American Human Rights Commission an example of what the observatory would look like.¹⁷³ However, the Second Conference was the last one to take place due to a lack of interest on behalf of the larger countries in this group.

In 2014, Ecuador made a push in UNASUR for a final agreement on a statute for the Regional Center that could be presented to the UNASUR Council. Five meetings were held in 2014, all in Quito. The report from the last of these meetings recognizes there were still a series of issues where agreement was pending and Ecuador was tasked with circulating a new draft of the Center's statute. The GoE, one more time, was openly frustrated. Correa was reported questioning the consensus-based

¹⁷²DECLARACIÓN DE LA I CONFERENCIA MINISTERIAL DE ESTADOS LATINOAMERICANOS AFECTADOS POR INTERESES TRANSNACIONALES. Guayaquil, Ecuador, 22 April 2013. Retrieved from: https://www.cancilleria.gob.ec/wp-content/uploads/2013/04/22abr_declaracion_transnacionales_sp.pdf.

¹⁷³Ecuador acoge reunipreparatoria sobre Estados afectados por trasnacionales. 6 May 2014. EL País.

system of UNASUR; “it is necessary to revise our statutes and for important matters establish not consensus, but qualified majorities.”¹⁷⁴ After this sprint of meetings through 2014, the group did not meet again until 2016. Two more meetings took place in Montevideo, revived by the infamous ISDS dispute between Philip Morris and Uruguay. The 14th meeting report states that “advances were made in the draft text” but also recognizes “differences still exist regarding fundamental issues.”¹⁷⁵ Moreover, political tendencies started to shift in South America. Argentina elected a center-right government and, with the removal of Dilma Rousseff, the government of the Workers’ Party in Brazil came to an end. This was the final blow to this process. “There were permanent doubts and when the turn happens in Brazil everything comes to an end, there was no possibility of making any progress.”¹⁷⁶

In sum, the diplomatic dimension of Ecuador’s investment treaty policies shows a country interested in fostering similar policies in other states, especially beyond the natural ideological allies of ALBA. Opening up the decision-making process behind these diplomatic initiatives, it becomes evident that Ecuador did not want to appear levying its criticism from the ideological fringes of the regime but voicing similar concerns to those of emerging powers like Brazil and South Africa. However, in multilateral forums, the Ecuadorian approach was considered too radical to be included in the menu of reform options. In regional multilateral forums there was more common ground and the Ecuadorian initiatives were discussed seriously. However, regional power disparities ended up being determinant. Without Brazil and Argentina’s support, a South American alternative to ICSID was unlikely. When Ecuador was able to

¹⁷⁴Correa propone cambiar estatuto de Unasur ante falta de consensos. (4 December 2014). Agence France Presse.

¹⁷⁵Report. XIV Meeting of High Level Experts on Investment Disputes Resolution of UNASUR. Montevideo, Uruguay. 29-31 March 2016.

¹⁷⁶Interview XXIII.

find like-minded states with enough coincidence of interests to coordinate radical policy actions, as in the case of South Africa, then obstacles emerged from the moderate actors within the government. In sum, to coordinate policy actions with countries that had a common vision, the GoE lacked cohesion. To accomplish initiatives in which the GoE was unified, it lacked willing partners.

5.4 The enabling factors

The domestic political conditions changed in favor of the ruling party when in the 2013 elections acquired a two-thirds majority in congress. Thus, with no real legislative opposition, the decision-making power was now concentrated in the executive and as such it depended on the balance on influence between moderates and radicals. In this final section, I show how that what ended tipping this balance back in favor of the radicals were external factors beyond Ecuador's control. Part B showed how the moderates in the GoE became more influential due to effective pressures by foreign firms and governments. In the previous sections I also showed how radicals were unable to counter those external pressures through a series of diplomatic initiatives. As a small developing country with limited international influence, the viability of those initiatives initially depended on the preexistence of a coincidence of interests with larger partners. When that was not the situation, Ecuador was unable to generate political will in its larger regional partners. Here I explain how radicalism finally took over after two conditions were satisfied: a waning of the limiting external factors and the emergence of an enabling international environment. Ecuador was unable to create an enabling international environment for itself. The radicals within the GoE had to wait for the threat of reduced market access to lose power and for similar

challenges to the investment regime to keep emerging elsewhere.

Even with a two-thirds legislative majority, there was still caution within the GoE about the potential effects of the terminations on the negotiations for the FTA with the EU. Even after the treaty had been signed, the moderates in the government did not want anything to jeopardize ratification. The European Parliament finally gave its consent for the agreement on December 2016. This neutralized the most important external limiting factor keeping the terminations at bay.¹⁷⁷ Domestic exporting sectors, with access for its products secured, now had no stake in the fate of the BITs. While the understanding was that the BITs would remain in place until an eventual Ecuador-EU investment agreement would replace the BITs with all the individual European countries, this was not a binding commitment.

What finished tipping Correa over the termination edge was what he perceived to be an international recognition of the qualms that Ecuador had with the investment regime. According to one of his collaborators, two factors were important to the President. The first one was that around the same time India sent termination notices to 58 BIT partners. The second one was the strong anti-ISDS climate that had emerged in Europe during negotiations with Canada and the US. These were perceived as a validation of reasons why Ecuador was seeking the terminations. For example, the French Parliament had expressed concerns over investment provisions in the Canadian deal and had requested the French Constitutional Court to block it. “We used that to justify the termination of the BIT with France, word by word their concerns were the same as our concerns.”¹⁷⁸ Furthermore, these criticisms were emerging at the center of the global economy, in one the of the largest senders of FDI and one of the

¹⁷⁷ “I have been insisting to the President and the ministers for three years. Once the agreement with the EU entered into force there were no more excuses.” (Interview XIX)

¹⁷⁸ Interview XIX.

largest recipients. After Correa made the decision to terminate, the process followed easily. The GoE not only had absolute majority but also the President of the National Assembly was from the group of radical policy-makers and she helped speeding up the process. On 17 May 2017 -amid very disappointed EU representatives¹⁷⁹- the President signed the decrees terminating the remaining treaties. After ten years, Ecuador had finally exited the international investment regime.

5.5 Conclusion

This Chapter examined the long, drawn out process of terminating Ecuador's investment treaties. Since no real attempts at renegotiating these treaties were made, Ecuador exited the investment regime. Consistent with my argument, this rare outcome was possible, in part, because a radical set of views and beliefs -namely that Ecuador did not need BITs to attract investment and that the existing ISDS system is biased against host states- was present in the GoE. These ideas mattered but also did the degree of consensus around them and the strength of policy-maker's commitment to the policies that derived from those convictions. When holding on to radical policies appeared costly, moderate sectors within the GoE tried to move the Ecuador's policies closer to the preferences of developed countries. When moderates succeeded, radicals attempted to regain policy influence by fostering popular and diplomatic support.

This case also shows that civil society actors played different roles across two important political decisions. The mass mobilization of social and indigenous move-

¹⁷⁹“There was a specific claim from the EU delegate for the Andean region that the previous agreement with them had been broken.” (Interview XXI)

ments was crucial for the GoE to expel the American firm Occidental but there was no comparable mobilization in favor of terminating the treaties. Since I treated civil society's interest in treaty policy as exogenous and assumed that CSOs develop such interest but social movements do not, an unexpected finding was the active role of government actors in fostering this interest. It was the radical sector within the GoE who intentionally tried to foster popular interest in investment treaties and arbitration through awareness campaigns. In contrast to the role of American activists described in the previous Chapter -where CSOs worked to capture the interest of receptive policy-makers- it was Ecuadorian officials who sought out civil society as a way to convince moderates within the GoE that terminating the treaties was not an ideologically-driven whim but a popular demand.

As a form of epilogue to this story, it is important to consider what happened after Correa finished his second term and Lenin Moreno was elected president. While he had been Correa's vice president during his first term and ran as the ruling party's candidate, once in power he veered towards more centrist policies. Regarding investment treaties, the radical group of policy-makers that had been pushing for the terminations had also left with Correa. Thus, the new GoE started to exhibit signs that the prevailing position would now be that of the moderates. For example, public remarks by the Ministry of Foreign Trade showed the strength of a conviction the radicals worked hard to erode, that "[i]n order to secure private direct investment, we must have BITs."¹⁸⁰ In early 2018, the GoE announced that it was sending renegotiation requests to the sixteen countries from the second wave of terminations, which includes the US and the EU countries.¹⁸¹ The government also announced a

¹⁸⁰Ecuador in treaty U-turn under new leader? (17 October 2017). Global Arbitration Review.

¹⁸¹Ecuador renegociará 16 tratados de inversión. (19 February 2018). El Telégrafo.

new model BIT was ready and shared with the embassies of the sixteen countries. Although its content remains confidential, the government stressed the template “balances the rights and obligations of the state and the investors” and is inscribed in the national legal framework.¹⁸² Even though, as of today, the GoE refuses to give details about specific provisions, the emphasis on the compatibility of the new model with Ecuadorian law seemed to suggest that it does not include traditional ISDS since this would be contrary to article 422 of the constitution.

These announcements triggered a debate in Ecuador’s political and legal circles, specially around the proper meaning of article 422. For those who want the treaties to come back, the ban does not apply to investment matters; for those who do not want a return to BITs, it does.¹⁸³ Even though the Constitutional Court ruled on these matters in 2009, there is room to make alternative arguments because the 2009 decisions were about the constitutional character of the specific BITs that Ecuador had signed. That is, it was not an analysis of what alternative types of dispute settlement mechanism could be allowed under article 422. Meanwhile, keeping with usual practice, Canada, South Korea and the US told Ecuador that trade talks would depend on the BITs being re-instated.¹⁸⁴ As the GoE started talks with its former treaty partners, the National Assembly requested the Constitutional Court to interpret article 422 to determine its scope.¹⁸⁵ Whatever comes out of this assessment, the radical officials from the Correa government succeeded, at least, in making it hard for Ecuador to return to BITs as usual.

¹⁸²Ecuador propone nuevos acuerdos de inversión que protegen al país y defienden los derechos humanos. (8 March 2018). Ministry of Foreign Relations and Human Mobility. Ecuador.

¹⁸³See for example an article by state officials from the Correa government (Arauz Galarza and Pino Garrido, 2018).

¹⁸⁴La agenda comercial del país depende de tratados de inversión. (28 June 2018). El Comercio.

¹⁸⁵La Corte Constitucional deberá interpretar si la prohibición de arbitrajes incluye a tratados bilaterales de inversión. (28 June 2018). National Assembly. Republic of Ecuador.

Chapter 6

India

Historically, India's approach to international investment law has been consistent with its policy towards foreign direct investment. From independence until the 1990s, the dominant economic model was based on self-reliance and industrialization *via* import substitution. While FDI was welcomed, it was heavily regulated. During this period, India did not enter into any bilateral investment treaties and, in multilateral forums, contested some of the fundamental principles of international investment law. The liberalization of the Indian economy in 1991 meant that, relative to its past, the government of India (GoI) would embrace FDI. Consistently, the GoI would also embrace BITs. In this period, India signed a large number of BITs and these were modeled after the developed countries' treaties. As such, these BITs provided ample, and readily enforceable, protections to foreign investors and showed little concern with states' regulatory autonomy.

This historical consistency between FDI and investment treaty policies came to an end with India's first ISDS loss in the *White Industries* case and the influx of arbitral disputes that followed. India remained open to FDI under Narendra Modi's government, but its BIT policy swung in the opposite direction. In the words of the foremost scholar on India's BITs, Prabhash Ranjan, "India's foreign investment

policy has become more liberal since 1991. However, India’s approach towards BITs and international investment law, from 2011 onwards, has become quite illiberal.” (2019, 355). After a review process that lasted multiple years, in 2015 the GoI adopted a revisionist approach aimed at recovering a large part of its international legal autonomy. It has, so far, unilaterally terminated 58 BITs and adopted a new model treaty that is markedly pro-state, offering limited rights to foreign investors. This Chapter explains these changes to India’s investment treaty policy through the argument put forward in Chapter 2.

6.1 The argument

In previous Chapters, I argued that ISDS experience ignites different political processes in the developed and the developing world which in turn leads to alternative policy outcomes. I showed that negative experiences with ISDS resulted in different policy-making processes in the United States and Ecuador. In this Chapter, I analyze the relationship between ISDS experience and investment treaty policy-making in the case of India. India offers the possibility of a nuanced evaluation of the argument; against the backdrop of an emerging economy that increasingly resists categorization as either a developed or developing country. Unlike the US and most Western European nations, India still receives substantially more foreign investment than what it sends abroad. For this reason, the Government of India (GoI) will predominantly read its first negative ISDS outcome from the position of a host state. Yet overseas direct investment has increased substantially in the past decades, from less than \$1 billion in 2000 to more than \$21 billion in 2016.¹ Thus, I expect the perspective of

¹Reserve Bank of India, Data on Overseas Investment.

India as a sender of capital to become more salient over time in relation to investment treaties, with home state considerations moderating final policy choices.

To explain India's reaction to ISDS experience, my argument looks at both policy-makers' ideas and the strategic environment in which they pursue them. While India opened up its economy to foreign investment in the early 1990s, it did not do so completely. Liberalization was significant mostly in relation to the insularity of the Indian economy up to that point. As I later show, Modi came to power in 2009 still stressing the need to make access easier to foreign capital. Pockets of protection for perceived strategic sectors amid a process of wider economic liberalization are tied to the resilience of nationalist ideas among Indian policy-makers. A strong commitment to nationalist ideas in the post-Independence period produced a highly interventionist state and managing such a state at India's scale required large bureaucracies (Kohli et al., 2004). Nationalist legacies are still observable today. As "the most revered nationalist leaders came to power through struggles for independence and postcolonial nationalist narratives, successively elected government leaders assess strategic value based on national institutional legacies" (Hsueh, 2012, 50). Despite a commitment to economic liberalization, India's political economy still remains quite statist by global standards. In this ideational context, the GoI's would be expected to view to ISDS disputes as unacceptable affronts to India's sovereignty, and more importantly, to the state's ability to intervene in the economy.

Independently of their convictions, policy-makers face constraints and opportunities in pursuing their preferred course of action. The argument suggests that, for less affluent countries, external pressures make radical policies less likely. Foreign firms and their home governments will warn host states about the economic fallout that

will follow from such policies. At the same time, like-minded states and international CSOs could make radical policies more likely as sources of political and technical support. Given India's status as a rising power, after nationalist policy-makers propose radical policies I expect external factors to have limited impact on their decision-making, either as limiting or enabling factors. The size of India's manufacturing and services sectors make it an attractive destination for FDI, as well as one of the largest markets for industrial and consumer goods. Moreover, the domestic reforms that Modi implemented to attract FDI were successful in turning the downward trend in FDI flows that followed the financial crisis, even from countries that India had no investment treaty with. Most notably, the US.² In a reverse of the argument that developing states were more likely to sign BITs when they experienced economic difficulties (Elkins et al., 2006), India had reasons to believe that implementing radical changes -even when multinational companies and their home governments were warning against it- would not diminish its standing as an attractive destination for FDI. This should weaken the capacity of foreign investors and their home governments to make threats about foregone investment and reduces market access thus reducing incentives to mobilize for India's exporting firms. Moreover, since limiting external factors are relatively weak, India should appear uninterested in coordinating policies with like-minded states. Thus, in these regards, India appears to be more like the US and less like Ecuador. However, since indigenous expertise on international investment law was not available in India, I should expect international CSOs to have a role as suppliers of technical expertise while policy-makers consider alternative policies. In this regard, India is closer to Ecuador than to the US.

²U.S. Direct Investment Position Abroad on a Historical-Cost Basis. Source: U.S. Bureau of Economic Analysis.

Regarding alternative explanations, New-New Trade Theory would explain this change in BIT policy by looking at the relative influence of firms. If the GoI adopted a policy that foreign investors resisted, then this would be explained by the rising influence of domestic firms that compete with foreign multinationals. Yet, as noted in the introduction to this Chapter, as India's treaty policy experienced a major overhaul, FDI policy remained unchanged. If the GoI was catering to domestic firms, then it is difficult to explain why similar changes were not observed in India's overall FDI policy.

On the contrary, throughout this period the Indian state appears fairly autonomous from non-state actors: domestic firms, foreign firms and civil society. Unlike points in the US and Ecuador Chapters, mostly when policies were discussed in the legislature, there were few access points in the Indian process for interested actors. The entire policy-making process was managed by mid-level bureaucracies mostly behind closed doors. That said, the resulting policy outcome cannot be fully explained by reference to the autonomy of the Indian bureaucracy. That is, external influence is not the only source of policy variation. States are complex machines; agencies have different mandates and their domains often overlap. Thus, even when bureaucrats do not take cues from outsiders, inter-agency rivalry can still emerge (Chibber, 2002). Without much outside interference, Indian ministries still developed different proposals for how to rekindle BITs. This relate to arguments that see the resulting policy change as the product of a (bounded) rational learning process. By focusing solely on the outcome of learning and not the process, it is difficult to explain where these disagreements come from.

The rest of this Chapter proceeds as follows. Section 6.2 provides the background

leading to the creation of India's treaty program in the 1990s. Section 6.3 covers India's first experience with ISDS. Since India was able to negotiate its way out of these disputes, concerns with BITs did not emerge within the government. Section 6.4 examines the origins and significance of the first arbitral defeat in the *White* case as well as the various reactions to it. Section 6.5 looks into the review of India's treaty network launched after *White* to show that government agencies -while in general critical of BITs and ISDS- had different policy preferences for the way forward. In Section 6.6 I explain how the arrival of the Modi government impacted the review process and analyze the new model treaty that emerged shortly after. I compare the draft and the final versions and assess reactions to both documents. While the final model was significantly toned down from its draft version, observers still considered it a radical departure from the past. Finally, Section 6.7 covers India's decision to terminate 58 of its existing treaties and re-interpret the remaining 25. Available evidence suggests that, so far, India's has had mixed success in rebuilding its treaty network on the basis of its new model.

6.2 Background

After its independence in 1947, India adopted a series of import-substitution policies including high tariffs and import quotas. The government eventually understood the potential for growth was limited if India was to rely purely on indigenous technology and skills. Thus, the GoI started to offer incentives and concessions to foreign investments. Given the protection offered to local industries, India was an attractive location to firms serving the Indian market from the outside through exports. As some of these firms established themselves in the country, by the late 1960s the trans-

fer of profits, royalties and other exits of capital associated with FDI had made their mark on the balance of payments. As a result, the GoI adopted a more restrictive attitude towards FDI. Among many regulations, some industries remained off limits to foreign investors and there were restrictions on investments with no prospect of technology transfer or where foreign investors were seeking more than 40% ownership.

Regulations started to loosen in the 1980s. For example, the GOI introduced exceptions to foreign ownership caps and streamlined the approval processes for new foreign investments (Kumar, 1998). The true paradigm shift, however, came in 1991 with the adoption of the New Industrial Policy (NIP). The NIP opened up Indian industries to FDI to unprecedented levels. It abolished the old system of industrial approval and made approval automatic for certain high-priority industries. It eliminated the 40% foreign ownership cap and, seeking to boost energy production, it allowed 100% foreign equity in the energy sector. It also allowed the use of foreign brand names for goods produced in India by foreign-owned firms (Nagaraj, 2003). On the diplomatic front, India joined the Multilateral Investment Guarantee Agency and started to aggressively sign bilateral investment treaties (Ahluwalia, 1994). India's approach to investment treaties was initially that of an FDI recipient, trying to signal to foreign capital that India was a secure location. Addressing the Federation of Indian Chambers of Commerce and Industry, Prime Minister P. V. Narasimha Rao declared "we intend to sign bilateral investment treaties to show our firm commitment and assurance to foreign investors."³ During the first five years of its treaty program, India signed 35 BITs, including with large capital-exporting countries like the UK, Germany, The Netherlands, and Mauritius. The latter became an important treaty

³RAO SEEKS TO CALM FOREIGN INVESTOR FEARS. (1993, September 29). Financial Times.

partner for India since many multinational firms, especially Americans, would route their investments to India through Mauritius.⁴

The division of labor among government units in terms of international investment agreements evolved in an unusual manner. Traditionally, the Ministry of Finance (MF) was in charge of negotiating stand-alone BITs with the Ministry of Commerce & Industry (MCI) -the unit handling WTO negotiations- managing free trade agreements. However, from 2005 onward, India started to enter into comprehensive economic agreements that not only regulated trade but also investment. Since these larger ‘trade+investment’ treaties remained in control of the MCI; two different agencies garnered authority to negotiate India’s obligations regarding foreign investment. It is important to note that the MCI also handles aspects of inwards FDI policy, thus their perspective was that of India as a recipient of foreign capital. At the same time, the MF is the unit in charge of overseas direct investment policy. Thus any concerns with the potential effects of alternative treaty choices over Indian investors abroad would emerge from Finance. This division of labor will give rise to alternative views about the extent to which India should revise its existing policy.

During the early years of India’s treaty program the prevailing view was that of the time; that BITs would serve as a “major catalyst for investment flows.”⁵ Acting on that understanding, in 1993 India adopted a pro-investor treaty template modeled after its first BIT with the UK, which itself followed the model the UK had developed in the 1970s. The 1993 Model granted Fair and Equitable (FET)⁶, Most Favored Na-

⁴Indian BITs are specifically termed Bilateral Investment Promotion and Protection Agreements or BIPAs. I use the term BIPA and BIT interchangeably.

⁵Foreword to the BIPA between Germany and India, Ministry of Finance. Available at: <https://dea.gov.in/sites/default/files/Germany.pdf> (Last accessed: January 17th, 2019).

⁶The FET standard is the most frequent clause invoked in ISDS disputes. Its the vague and expandable nature has allowed investors to use it to challenge a variety of regulatory measures by

tion (MFN) and National treatment, though only in the post-establishment phase.⁷ It had an open-ended, asset-based definition of investment with a non-exhaustive list including direct investment, portfolio investment and intellectual property rights (IPRs).⁸ The 1993 model also gave investors direct access to ISDS with no requirement to exhaust local remedies (Ranjan, 2014).⁹ This template was the basis from which India approached all subsequent negotiations. In 2003, the Ministry of Finance introduced a change to the Model in response to a new trend in India's BIT program. Treaties started to be signed with countries where India was sending FDI to, rather than receiving FDI from. That is, India was concerning itself with the level of protection that its investors would receive abroad and as a consequence, treaty drafters from the MF introduced provisions regarding indirect expropriation.¹⁰

The main difference between MF's BIPAs and the investment chapters in the MCI's comprehensive agreements was that the latter included pre-establishment obligations, although consistently with India's FDI policy, they were generally accompanied by lists of sectors where the pre-establishment rights would apply (Ministry of

their host states (UNCTAD, 2012a).

⁷This will be a contentious issue during negotiations with the US -whose model provides rights during both pre- and post-establishment stages- given India's various restrictions to entry for foreign capital.

⁸Broad asset-based definitions with open-ended lists offer more protection to investors than the alternative enterprise-based definition or definitions that explicitly exclude specific assets -like portfolio investment- or are accompanied by closed lists of protected assets. As arbitral tribunals interpret the treaty, a broad definition carries the risk of bringing into the scope of the treaty elements that were not considered to be protected at the time of the drafting (UNCTAD, 2011a, 6).

⁹While India was not a member of ICSID, investors could still lodge disputes either using UNCITRAL or ICSID Additional Facility rules.

¹⁰According to an official from the Ministry of Finance, the addition of indirect expropriation was closely related to India's growing position as a capital exporter: "When we started signing bilateral investment agreements, 21 out of our first 25 BIPAs were concluded with developed countries. Subsequently, almost all of our BIPAs have been concluded with emerging countries, particularly in Asia, Africa and South America. Therefore, in 2003, ten years after we have operated the model text, we decided to make several modifications in our model and we introduced a side letter on indirect expropriation. So the notion of creeping expropriation was included into the model text for the first time in 2003." (OECD and UNCTAD, 2010, 20)

Commerce, 2011, 3). Regarding the post-establishment phase, BITs and investment chapters in comprehensive agreements did not differ in substantial ways (Ministry of Commerce, 2011, 4). However, differences between both ministries will eventually emerge once India starts to rethink its investment treaty policy as a result of its first ISDS loss.

In sum, the period analyzed so far shows a treaty program designed solely for the purpose protecting investors with little consideration for the impact of such provisions on India's regulatory autonomy. Moreover, the emergence of India as a sender of investment overseas reinforced this view, as the only change to the Indian model was presented in 2003 as an improvement on the level of protection enjoyed abroad by Indian firms.

6.3 The first encounter with ISDS

This section examines the origins and consequences of the first ISDS claims ever lodged against India by foreign investors. Here I show how, even after the Dabhol cases, concerns with the potential impact of ISDS on India's regulatory sovereignty only emerged from a few voices outside the government, specifically from academia and CSOs, with no impact on treaty policy. I also analyze negotiations between India and the US for a bilateral investment treaty to show that at this point, India's model treaty was the more unbalanced in favor of investors than the American model, which reflected the US' reckoning with ISDS.

6.3.1 Disputes emanating from the failed Dabhol Power project

India's first ISDS experience came in 2003 and it emerged from a dispute involving the Dabhol Power project in the state of Maharashtra.¹¹ Dabhol was a product of state efforts to grow India's energy output by liberalizing and privatizing the sector, hoping these new opportunities would in turn attract foreign investment. The main investor in this project was the American firm Enron. After completion, it was to be the largest foreign investment project in the history of the country. Dabhol's economic significance was matched by the level of controversy surrounding it.¹² Public opposition to the project was a major factor in the 1995 state elections and the new Maharashtra government terminated the project. As a consequence, Enron lodged an arbitral suit in the arbitration facilities of the London-based International Chamber of Commerce (ICC). This was not an ISDS dispute. Enron's access to arbitration was not based on an international investment treaty. This was arbitration arising from the dispute settlement provisions of the specific contract between the Dabhol Power Corporation (DPC) -a subsidiary of Enron- and the Maharashtra State Electricity Board (MSEB) -an organ of the Maharashtra state. More importantly, unlike in ISDS disputes, this arbitral claim was specifically against a sub-national unit -the Maharashtra state and its electricity board- as a party in the said contract and not against the Republic of India (Choudhary and Kulkarni, 2011, 222).

Litigation at the ICC ended in 1995 when Enron and the Maharashtra Government agreed to renegotiate the deal. Problems eventually re-emerged during the second phase of the project. The MSEB defaulted on the payments to DPC because

¹¹For a detailed account of the dispute see Salacuse (2013).

¹²For an account of the project's lack of transparency, human impact, threat to villagers livelihoods and potential for environmental damage see Human Rights Watch (1999)

demand for electricity had not grown as expected and the price of energy from Dabhol was more than what consumers in the area were able to afford (Kundra, 2008). As a result, MSEB cancelled the contract in May 2001. Three American energy companies involved in the project -Enron, General Electric (GE) and Bechtel- had obtained insurance against political risk from the Overseas Private Investment corporation (OPIC), a US government agency.¹³ Thus, after MSEB terminated the contract they filed insurance claims against OPIC. Enron was at the time dealing with larger problems than Dabhol (see McLean and Elkind, 2013), thus after it declared bankruptcy in December 2001, it agreed to drop the insurance claim and transfer its full interests in the project to OPIC in exchange for \$16 million. The other two investors -Bechtel and GE- also filed insurance claims against OPIC and in 2003 each of them received \$27.5 million (Salacuse, 2013).

GE and Bechtel also sued India directly, this time through ISDS, seeking \$600 million in damages. Although there was no BIT between the US and India, the American firms invoked the ISDS provisions in the the India-Mauritius BIPA through their affiliates incorporated in Mauritius.¹⁴ After they lodged their claim, a number of European banks from the UK, The Netherlands, France, Switzerland and Austria also sued India under various bilateral investments treaties for its failure to protect loans they have made for the Dabhol project.¹⁵

¹³OPIC is a development finance institution that helps American firms enter into emerging markets by, among other services, providing coverage up to \$350 million against losses resulting from expropriation, regulatory risk, political violence and breach of contract.

¹⁴Bechtel Enterprises Holdings, Inc. and GE Structured Finance (GESF) v. The Government of India; Press release: Bechtel and GE File Arbitration Over Dabhol Power Company. (2003, September 22). Bechtel. Available at: <https://www.bechtel.com/newsroom/releases/2003/09/bechtel-ge-file-arbitration-dabhol-power-company/> (Last accessed: January 17th, 2019).

¹⁵ABN Amro N.V. v. Republic of India; ANZEF Ltd. v. Republic of India; BNP Paribas v. Republic of India; Credit Lyonnais S.A. (now Calyon S.A.) v. Republic of India; Erste Bank Der Oesterreichischen Sparkassen AG v. Republic of India; Standard Chartered Bank v. Republic of India. Investment Policy Hub, UNCTAD.

However, before these ISDS disputes advanced past the notification stage, the US government got involved. As a result of subrogation, once OPIC paid damages to GE and Bechtel it acquired their interests in the Dabhol project and was then allowed to make its own claim against India under the 1998 Investment Incentive Agreement between the US and India. This agreement regulated the functioning of the OPIC political risk insurance program and was not a BIT, thus did not create legal rights for private investors. Disputes could only emerge between the India and the US.¹⁶ After the parties filed to reach a satisfying outcome, OPIC filed for arbitration in November 2004. This constitutes -until today- the only time the US government has initiated an arbitral dispute against another state for claims arising from OPIC insurance (Crook, 2005). Ultimately, the parties arrived at a settlement in 2005 which also led GE, Bechtel and the foreign banks to drop their ISDS claims.¹⁷

The Dabhol experience raises two important points. First, there was little legal expertise available domestically and the GoI had difficulties preparing its response to the large number of disputes. The government changed the Indian legal team that had been representing the state and hired a UK firm which then resigned two weeks prior to the deadline for filing the defence statement (Papa, 2012). Second, consistent with my expectations, the US government interceded before the GoI on behalf of its firms trying to find a solution to the dispute. Answering a question in the upper house of the Indian Parliament in 2003, the Minister of Power recalled a visit from the US Assistant Secretary of Energy in the previous year during which she brought up the problems

¹⁶The Agreement provides for dispute resolution mechanism for disputes between the two Governments in relation to claims arising out of acts attributable to the governments of India or the US involving questions of liability under public international law and includes recourse to international arbitration.

¹⁷DABHOL POWER PROJECT (Lok Sabha Debate 16 December 2005 question no 3500). All rights previously possessed by GE, Bechtel and the European banks were transferred to state-owned Indian banks (Salacuse, 2013, 293).

with the Dabhol project. According to the Minister's recollection, Assistant Secretary Bailey told him "there was an erosion of confidence within the US Power Business Community about the Power Sector in India on account of certain contractual and payment problems...The main issue relates to the Dabhol Power Project."¹⁸ That firms and banks dropped ISDS disputes as a result of political negotiations between the US and India contributed to an understanding in the GoI that BITs were not a problem *per se* and that any eventual disputes could be handled in the same way.¹⁹ This lends support to the bounded rationality argument since Indian policy-makers failed to realize that the treaty provisions invoked by the energy firms and the banks could easily be invoked by other firms in the future. In Poulsen's terms, the Dabhol claims did not have enough perceived impact to warrant a change in treaty policy.

Third, the dispute highlights the complicated relationship between federalism - especially in a large democracy like India- and international investment law. The decision to terminate the contract that gave rise to the disputes had been made by the state government of Maharashtra; yet the respondent in the ISDS claims was the Republic of India. The government downplayed the extent to which India had been put on trial before international tribunals. In a question to the Finance Minister in the lower chamber about the potential liability that could follow from terminating the Dabhol contract, his response was that "No liability has been incurred by the *Government of India* so far on account of the Dabhol Power Company."²⁰ Yet the measures taken as part of the agreement between the parties indicate the GoI was

¹⁸Rajya Sabha debate, (2003, March 12), p. 179-180.

¹⁹An Indian CSO official portrays the attitude of the Indian government to the issue as follows: "Before [the first ISDS loss] it was 'we are different, we are India, 1.2 billion people, nobody can dare to sue us.' That kind of thinking was there. And India [was] not very much open in the economy, in the sense that government thought it could remain in control." Interview with Indian CSO official.

²⁰FOREIGN INVESTMENT IN DABHOL (Lok Sabha Debate 19 December 2003 question no 2705). Emphasis mine.

trying to avoid having to respond for actions of sub-national units in the future. India enacted a new electricity law that reduced the power of states in the energy sector and created an appellate tribunal to review decisions by state governments and energy boards (Kundra, 2008).

6.3.2 Between *Dabhol* and *White*: negotiations with the US

The GoI signed twenty more BITs between the Dabhol settlement in 2005 and its next ISDS claim in 2010. During this time, Parliament was not interested in finding out details about how the disputes were handled. Over the years, members of either chamber of the Parliament asked only one question about the Bechtel and GE arbitral dispute. Indian civil society had little interest and, as a consequence, expertise on investment treaties and ISDS. There were a few exceptions to this trend. Most notably, a large development organization -Madhyam- was active on investment treaties and developed a fair amount of expertise on the subject. This was facilitated by linkages with Northern CSOs. Initially, as a member of transnational campaigns against the Multilateral Investment Agreement (MAI) negotiated at the OECD in the late 1990s and -after MAI failed- against attempts to pursue the same agenda within the WTO.²¹ Later on, as ISDS became more controversial in Europe, Madhyam developed a partnership with the Dutch organization SOMO.

However, for the most part, Indian civil society cared about investment provisions only insofar it would relate to intellectual property rights (IPRs) and their impact on the capacity of Indian companies to produce generic drugs at low prices. They sent

²¹ “[w]e were part of a larger global civil society campaign...We played a critical role in educating the Indian government to take a firm stand on this MIA under the WTO framework.” Interview with Indian CSO official. For a discussion of MAI negotiations see Chapter 4.

letters to Indian officials²², organized demonstrations²³ and published op-eds in the Indian media.²⁴ This means that Indian civil society, for the most part, would only mobilize during prospective treaty negotiations with developed countries where IPRs tend to be more salient.

At this point, India launched BIT talks with the US. The United States was India's largest investment partner, representing 13% of India's FDI.²⁵ Although the US was already the largest foreign investor in India, American firms were interested in getting this treaty to improve their level of protection. The US India Business Council, gathering 275 of the biggest American companies investing in India, had made it a top priority for 2008 to "actively advocate" for the adoption of an investment treaty.²⁶ It was argued that a treaty would also lead to further investment by American firms. Speaking before the Confederation of Indian Industry and the American Chamber of Commerce in Chennai, the Under-Secretary for International Affairs of the US Treasury -David McCormick- noted that concerns over "regulatory environments, dispute settlement and investor protection in India inhibit foreign investment."²⁷ It is impossible to estimate whether -and if so how much- US investment was not taking

²²Letter by the President of the Delhi Network of Positive People. (2011, December 7). Available at: https://donttradeourlivesaway.files.wordpress.com/2011/12/dec-2011-letter-to-ec_final.pdf.pdf (Last accessed: January 22nd, 2019); Letter to Primer Minister Singh from Medecins Sand Frontieres. (2012, February 8). Available at: https://msfaccess.org/sites/default/files/MSF_assets/Access/Docs/Access.Letter.MSFtoIndian-PMFTA_ENG_2012.pdf (Last accessed: January 22nd, 2019)

²³For example, on March 2011 3,000 people protested New Delhi against the EU - India FTA's impact on the supply of affordable medicines. Available at: <https://www.doctorswithoutborders.org/what-we-do/news-stories/story/hivaidis-eu-india-free-trade-agreement-protest> (Last accessed: January 22nd, 2019).

²⁴Column: Why trade pacts are not working. (24 June 2013). Financial Express;

²⁵STATE DEPARTMENT ISSUES BACKGROUND NOTE ON INDIA. (2008, June 1). US Fed News. This does not include American FDI routed into India through Mauritius.

²⁶US, India eye bilateral investment treaty. (2008, January 10). Agence France Presse.

²⁷UNDER SECRETARY MCCORMICK SPEAKS TO CONFEDERATION OF INDIAN INDUSTRY AMERICAN CHAMBER OF COMMERCE. (2008, April 23). US Fed News.

place due to absence of a treaty but it was nonetheless known that some American FDI was being re-routed through Mauritius who had a BIT in place with India.²⁸

Each party approached the negotiation with its own template. The most problematic aspect of the US model for India was that -unlike all treaties signed by India at the time- it would regulate the treatment of investors both before and after they establish in the country. The US insisted on providing national treatment relating to pre- and post-investment regulations which would have meant that American firms would be allowed to invest in the same sectors as Indian companies. India had come to great lengths in opening up its economy but certain sectors that American companies were interested in -like retail and insurance- retained limitations to foreign ownership.²⁹ Since restrictions were not country of origin specific, India wanted to provide MFN treatment, rather than national treatment, in relation to pre-establishment issues.³⁰

Regarding ISDS, the US model BIT was more progressive than the Indian template in terms of protecting the host state's regulatory autonomy. The American 2004 Model BIT reflected the early US experience with ISDS in NAFTA. Its newest text still granted investors direct access to international arbitration but reduced the scope of ISDS and limited arbitrators' interpretative freedom.³¹ India was negotiating on the basis of its 2003 Model which had not been revised after the first ISDS disputes coming out of Dabhol. Thus, ISDS was not a concern for India, even though a few CSOs insisted on it. According to a representative of Madhyam, "we raised this issue

²⁸According to an official from the Ministry of Finance, "[i]f we lift the veil of investments coming from Mauritius- maybe US is our largest investor, despite the fact that we don't have a bilateral investment agreement so far" (OECD and UNCTAD, 2010, 21).

²⁹Some of these restricted sectors were oil refining companies, print publishing, defence production, courier services, the tea industry, a range of broadcasting services, retail and satellites. India risk: Legal regulatory risk. (2008, July 28). Economist Intelligence Unit - Risk Briefing.

³⁰US bats for easier investment norms with India. (2008, May 8). The Economic Times.

³¹See Chapter 4.

with the Indian authorities. But at this time, the response was...‘Fine, you are raising a very valid question but ‘look’, our treaties are balanced otherwise investors would have sued us many times.’³² Although foreign investors had in fact lodged disputes against India, that these did not moved passed initial stages had convinced Indian officials that whatever problems emerge between foreign investors and the GoI could be solved through direct negotiations with no need for international tribunals weighing in. With major disagreements regarding pre- and post-establishment provisions and Presidential elections in the US taking place at the end of 2008, bilateral negotiations eventually lost steam.

In sum, India’s first encounter with investment arbitration was not perceived negatively by the Indian government who, it the end, was able to find a negotiated solution to the dispute. For this reason, no changes were made to India’s BITs. The GoI did not order a review of its existing treaties and, as the negotiations with the US show, did not bring up ISDS’s impact on states ability to regulate in relation to future BITs either. This first ISDS experience provides an opportunity to analyze India’s response in light of the rational or bounded rational alternative explanations. The first problem with these arguments is that it becomes difficult to a priori establish what a response consistent with the (bounded) rational expectations would be. Indian BITs remain unchanged but the GoI did implement changes that curbed the discretion of state governments in the energy sector and created an instance to review decisions by state governments and energy boards. It is unclear, then, whether this is a rational response to a dispute arising from decisions by a state government or whether it falls short from pure rational expectations.

³²Interview with Indian CSO official.

6.4 Rethinking India's investment treaties

That not all investment disputes could be negotiated away became clear for India in 2011. When the tribunal decided in favor of the claimant in *White Industries v. India*, it set in motion a process that would result in one of the most significant events for the international investment regime in recent years. This section examines the origins and significance of *White Industries* as well as the reactions to it from within and outside the GoI.

6.4.1 The turning point: *White Industries v. India*

For the single arbitral dispute that overturned India's entire approach to international investment treaties, almost nothing was known about this dispute as it was happening.³³ Luke Peterson -a journalist specialized in investment arbitration and founder of 'IA Reporter'³⁴- was the one to break the story on 7 July 2011. The article noted the secrecy surrounding the dispute calling it an "unpublicized treaty-based arbitration" whose details "remain shrouded in some mystery."³⁵ As the tribunal issued its decisions and both media and academic attention turned to this claim, detailed accounts emerged of the events leading to the dispute. White Industries (hereinafter White) was an Australian mining firm. Its operations in India began in 1989 when it entered into a joint-venture with a domestic firm -Coal India Ltd.- to develop a coal mine in

³³A search in the three largest news databases -Factiva, Nexis Uni and ProQuest Global Newsstream- shows no record of the dispute taking place until 1 August 2011, that is three months before the final award.

³⁴The 'Investment Arbitration Reporter' is a news and analysis service founded in 2008. It is regarded in the investment arbitration field as a thorough source of information about new and ongoing disputes.

³⁵India sued by foreign investor for investment treaty breach; complaint stems from willingness of Indian courts to consider set-aside of an earlier commercial arbitration ruling. (2011, July 7). Investment Arbitration Reporter.

Piparwar, Eastern India. According to the contract, White would provide the equipment and technical services and was to be paid approximately A\$206.6 million plus or minus various bonuses and penalties, for example in case production exceeded or fell short from the agreed upon targets. The contract also contained an international commercial arbitration clause in case of a dispute arose between the partners.³⁶

This was, up to the time, the largest investment ever made by an Australian company in India and both governments had been involved in seeing it through, especially on the Australian side. It was the Australian Trade Commission who had loaned Coal India the funds to import the Australian-made technology.³⁷ Disagreements eventually emerged between the partners over who deserved bonuses and penalties. In the late 1990s, Coal India withheld funds from White arguing the quality of the coal did not meet the standard established by the contract. To recover this money, White filed for arbitration with the International Chamber of Commerce (ICC) in 28 June 1999 and in 27 May 2002 the tribunal decided that White was entitled to A\$4.08 million. Stemming from a contract between two firms, the dispute had been managed privately with no participation from the GoI. However, this changed later in the year when White sought to enforce the ICC award in Indian courts and Coal India applied to the High Court of India to get the award set aside. By December 2009, seven years after the ICC award, the issue was still tied up in the courts. White sent a letter to the GoI arguing that Coal India's actions and the way in which domestic courts have handled the issue amounted to a breach of several provisions of the Australia-India BIT. Initially, in accordance with article 12.1 of the BIT, White attempted to solve the dispute amicably and sent a second letter on 30 March 2010 seeking negotiations.

³⁶White Industries Australia Limited v The Republic of India, UNCITRAL, Final Award (30 November 2011), p.16.

³⁷Ibid., p.14.

The GoI did not respond to either of these letters. Moreover, by June 2010, White's lawyers in India informed the firm that their claim was number 93 on the list of issues to be addressed by India's Supreme Court. There was no date or estimate of when the claim would be heard.³⁸ With no resolution in sight, White filed an ISDS suit against India in 27 July 2010.

The tribunal published its final award in November 2011. The panel did not agree with White in that court delays constituted a denial of justice. While it recognized the duration of domestic proceedings was "unsatisfactory in terms of efficient administration of justice," it saw no bad faith on behalf of Indian courts and considered to be relevant that "India is a developing country with a population of over 1.2 billion people with a seriously overstretched judiciary."³⁹ Yet, the tribunal did find that the delay showed India did not provide White with 'effective means' of asserting its claim and enforcing its rights. Although the Australia-India BIT did not include an 'effective means' provision, article 4.2 provided for the MFN standard.⁴⁰ This allowed White to invoke the 'effective means' standard that was provided for in the India-Kuwait BIT and to argue that, by not providing such a standard, India had violated the MFN clause in the applicable treaty. The Tribunal agreed with the reasoning and awarded White A\$4 million in addition to approximately \$600 thousand towards the costs of the proceedings and legal counsel. India was not happy with the use of an MFN clause to import provisions that were not included in the treaty. Indian officials argued "[t]he award is an interesting read as one wonders on which exact clause in the India-Australia BIT did the tribunal rely."⁴¹

³⁸Ibid., p.25.

³⁹Ibid., p.103-5.

⁴⁰"A Contracting Party shall at all times treat investments in its own territory on a basis no less favourable than that accorded to investments of investors of any third country."

⁴¹Department of Economic Affairs, Ministry of Finance, Government of India, Transforming

The significance of this outcome does not come from the size of the award, which is actually relatively low for ISDS disputes. Rather, more important was the fact that this was not a dispute arising from an extraordinary event.⁴² It was the slow speed with which cases progressed in the Indian judiciary. That meant that the tribunals decision could inspire other investors who found themselves in the middle of protracted legal disputes to seek a way out via ISDS. Thus, following the decision in *White Industries*, arbitration notices started to proliferate. After the Supreme Court of India cancelled 122 telecommunication licenses over grounds that state officials committed irregularities when they granted them, foreign companies that were operating under those licences started arbitration proceedings against India under BIPAs with Germany, Russia, Singapore and Mauritius.⁴³ A British hedge fund that held 2% of shares in Coal India sent the GoI a formal notice of a dispute under the India-UK BIT because of a dispute over energy prices.⁴⁴ As did so the mobile communications giant Vodafone, challenging the legality of a retroactive tax under the India-Netherlands BIT.⁴⁵ Many of these disputes, however, did not progress beyond

the International Investment Agreement Regime: The Indian Experience (Presentation at UNCTAD Expert Meeting, 25 February 2015), Available at: unctad-worldinvestmentforum.org/wp-content/uploads/2015/03/India_side-event-Wednesday_model-agreements.pdf (Last accessed: January 23rd, 2019)

⁴²Unlike, for example, the 'Argentina cases' that emerged out of the emergency measures taken during 2001 economic crisis. See Chapter 5.

⁴³Firms from the US and the UAE were major shareholders in the Mauritius-based firms that initiating disputes. AS DUST SETTLES ON ADVERSE ARBITRATION RULING AGAINST INDIA, A RUSSIAN INVESTOR PUTS INDIA ON NOTICE OF A TREATY CLAIM. (2012, February 28). Investment Arbitration Reporter; WITH INVESTMENT ARBITRATION THREATS MOUNTING, INDIA TAKES A DECISION AS TO WHETHER IT WILL COMPLY WITH UNFAVOURABLE BIT AWARD. (2012, July 26). Investment Arbitration Reporter; DEUTSCHE TELEKOM MAKES GOOD ON THREAT AND SUES INDIA OVER SATELLITE; REPLACEMENT ARBITRATOR IS NAMED IN CC/DEVAS CASE. (2013, October 22). Investment Arbitration Reporter

⁴⁴ARBITRATION THREATS CONTINUE TO MOUNT IN AFTERMATH OF FIRST SUCCESSFUL TREATY CLAIM AGAINST INDIA. (2012, March 28). Investment Arbitration Reporter.

⁴⁵In a decision heavily criticized by organizations representing foreign investors in India, the

initial notifications as the GoI embarked on conciliatory talks with the affected firms in an attempt to avoid reaching the arbitration stage (Karadelis, 2013).

6.4.2 Reactions to *White Industries*

One outcome from the dispute was that the media started to pay a lot more attention to investment treaties. Articles proliferated explaining what BITs are, quoting academics and CSOs from Europe, Canada and the US and referencing the experience of others countries with ISDS disputes.⁴⁶ Unlike it had been the case with *White*, the leading up to new ISDS claims, specially the one involving Vodafone, was reported in detail. Civil society organizations also mobilized more intensely. After the *White* verdict and with a series of new claims mounting, CSOs were now talking about a real danger, not a hypothetical scenario or a bad outcome that happened to others but would not happened to India. According to one organizer, “even before [*White*] we organized workshops...we would not then discuss an Indian case because there was no Indian case to discuss so we used to discussed international arbitration cases. After 2012...there was a lot of evidence that was particularly related to India and that helped our campaign...people could relate and say ‘ok, this could also happen to us.’⁴⁷ In June 2012, a collective of CSOs sent a letter to Prime Minister Singh raising

GoI imposed a retroactive tax on Vodafone’s acquisition of an Indian mobile phone business five years before. WIRE REPORTS: NEW ARBITRATIONS LOOM FOR ALGERIA, INDIA AND ARGENTINA. (2012, April 19). Investment Arbitration Reporter; Vodafone demands justice in tax dispute. (2012, April 17). The Times.

⁴⁶For example, see: Revisiting India’s bilateral treaties. (2012, February 23). Financial Express; Bilateral investment pacts: How MNCs sue governments to secure their investments. (2012, April 7). The Economic Times; Investment deals that BITe Business Line. (2012, April 23). The Hindu; Treaties that gave away the store. (2012, April 27). The Hindu; Taking notice of investment treaties. (2012, June 14). Business Standard; Column: BIT of a problem. (2012, June 29). Financial Express; Need to align bilateral investment treaty regime with global reality. (2013, January 7). The Hindu.

⁴⁷Interview with Indian CSO official.

their “concerns based on how the already existing [treaties] and their enforcement through Investor-state mechanism already undermine the domestic policy space and the justice system in our country” and citing the ongoing disputes with Vodafone over taxes, with a British hedge fund over coal price regulations, and with telecom companies over a Supreme Court decision. CSOs requested the GoI to turn its attention to the “urgent task of re-examining the existing BITs signed in the 90’s with the objective of [assessing] available options for India to re-assert the domestic policy space”⁴⁸ (Last accessed: January 25th, 2019) However, as I show in the next section, at this point the GoI had already ordered such a review process.

Parliament also started to discuss investment treaties and investment arbitration more frequently after *White*, although except for the MPs from the Communist Party of India, there were no expressions of concern or demands for policy changes.⁴⁹ For example, MPs asked various questions regarding the status of negotiations with the EU for a comprehensive agreement but they did not raise the issue of how to assure investor protections would not infringe on India’s regulatory space. The only exception being the Communist Party, whose general secretary wrote an op-ed about the EU treaty warning “[t]he investment protection provisions proposed would render any future regulation or law adopted in India susceptible to international arbitration if a foreign company perceives it to be infringing on its interests.”⁵⁰ MPs asked on a few occasions about new disputes and how was the government handling them but

⁴⁸‘Concerns Regarding Proposed US-India Bilateral Investment Treaty’, Letter to the Prime Minister of India from Manmohan Singh (2012, June 13). Available at: <https://donttradeourlivesaway.files.wordpress.com/2012/06/civil-society-letter-on-us-india-bit.pdf>

⁴⁹MP Rajeev from Kerala said of the *White* case, “It is very shocking that investors can sue the Government of India under a bilateral treaty,” and criticized the executive for its silence regarding the dispute: “The Government is not ready to make any public statement on this issue.” Finally he urged “upon the Government to revisit all the bilateral treaties.” PARLIAMENTARY DEBATES, RAJYA SABHA, OFFICIAL REPORT, 22 May, 2012, Vol. 225, No.35, p. 275

⁵⁰A treaty for the rich. (2012, May 25). Morning Star Online.

they were not discussed during open debates. When asked specifically about new disputes, the GoI recognized it had received notices from several investors.⁵¹ But the Government was also minimizing the risk of reaching a stage of arbitral disputes.⁵²

The reaction from the Law Commission of India (LCI) is worth noting given the role the Commission would play in moderating the 2015 draft model BIT. The Law Commission of India is a public institution that is part of the Ministry of Law and Justice. However, members are appointed on the basis of their legal expertise, not their partisanship. Commissioners tend to be former judges and legal scholars and they serve for three-year periods, during which they focus on different thematic areas and propose legal reforms. The government can direct which areas the LCI should work on during each term by giving it a specific mandate, but the Commission can also take on any issue it considers relevant and make recommendations to the government. In 2014, the LCI published a report on a proposal from the Ministry to amend the Arbitration and Conciliation Act of 1996. In its recommendations, the Commission recognizes the validity of White's claims. "The award of the Arbitral Tribunal," the report notes, "serves as a reminder to the Government to urgently implement reforms to the judicial system in order to avoid substantial potential liabilities that might accrue from the delays presently inherent in the system." (2014, 18). Thus, the view of the Commission appears to be that India's problems with investment arbitration are not solely a product of the terms of treaties and the workings of ISDS. Rather, the

⁵¹Cabinet members mentioned these were now being handled by an "Inter-Ministerial Group (IMG)...constituted ...to evolve a coordinated response of the Government to the legal notices to Government from foreign investors." PARLIAMENTARY DEBATES, RAJYA SABHA, OFFICIAL REPORT, 30 November, 2012, Vol. 227, No.6, p. 129.

⁵²"The notices are handled under the provisions of the applicable BIPAs, including, inter-alia, through negotiations with the foreign investors for an amicable settlement of the issues." PARLIAMENTARY DEBATES, RAJYA SABHA, OFFICIAL REPORT, 22 August, 2012, Vol. 226, No.8, p. 72.

report indicates that had White not experienced judicial delays, the dispute would have not existed in the first place. This is a very different assessment than what was emanating from other sectors within and outside the government and it foreshadows the moderate position the Law Commission will take in its assessment of the 2015 draft model BIT.

6.5 The review process

This section traces the different positions of government ministries during the review of India's investment treaty policy. The two main actors in this process were the Department of Industrial Policy and Promotion (DIPP) in the Ministry of Commerce & Industry and the Department of Economic Affairs (DEA) within the Ministry of Finance. These were the two ministries responsible for negotiating India's investment obligations under international law, respectively under BITs and FTAs

The first indication that the government was undergoing a review of India's investment treaties can be found in an internal paper prepared by the DIPP in 2011.⁵³ The paper mentions a proposal to revise the model text from the DEA who had circulated a version for comments. (Ministry of Commerce, 2011, 7) Later reports confirm a revision process was in motion.⁵⁴ The plan was to proceed in stages: first, all ongoing negotiations would be put on hold.⁵⁵ Meanwhile, an inter-ministerial group coordi-

⁵³The paper is not publicly available but an Indian CSO requested through the Right to Information Act. It is not dated but it is understood to have been produced in 2011 (Ranjan, 2014).

⁵⁴The Secretary of Commerce (MCI) said in April 2012 "[r]ight now the entire process is in the preliminary stage and it will be premature to say more on the issue." India to Revisit Investment Pacts to Keep Vodafone-Like Cases at Bay. (2012, April 26). The Economic Times.

⁵⁵GOVERNMENT OF INDIA, MINISTRY OF FINANCE, LOK SABHA, UNSTARRED QUESTION NO: 4322, ANSWERED ON: 22.03.2013. The only treaty signed during the entire review process was a BIT with the UAE. The conclusion of this treaty had been holding up the largest ever foreign investment in the Indian aviation industry involving the purchase of 24% of India's Jet

nated by the DEA would review existing treaties and put together a new draft model text.⁵⁶ The draft would then be submitted for public consultations. After receiving feedback, changes would potentially be made to the draft, resulting in a new Indian model treaty.

Even before the *White* dispute became publicly known, there were disparities between DIPP and DEA's views regarding investment treaties. DIPP seemed more attuned with ISDS developments elsewhere and with critical work coming out of UNCTAD and international CSOs. Differently, DEA did not show much concerns with potential arbitral disputes. After the GoI lost the case, DEA's position became much closer to that of DIPP. Both agencies were highly critical of BITs and of investment arbitration but there were still significant differences around three main points. First, whether investment treaties were necessary in the first place. Second, if India was going to sign treaties, whether it should provide for ISDS. And third, how to go about modernizing India's stock of old treaties.

In October 2010, only three months after *White* had filed for arbitration, the head of the DIPP gave the inaugural speech at a forum for international investment treaty negotiators organized by the International Institute for Sustainable Development (IISD).⁵⁷ During his remarks, he posed two questions for the forum: "Should developing countries enter into agreements on investment at all?" and "To what extent have these agreements achieved the intended benefits?"⁵⁸ He also referenced a

Airways company by Etihad. FDI-hungry govt defers bilateral treaties review. (2013, March 21). Financial Express.

⁵⁶India to Relook 82 Investment Treaties. (2013, April 5). The Economic Times - Bangalore Edition.

⁵⁷The Canada and Switzerland-based IISD is one of the largest organizations working on IIA reform. It organizes annual encounters of state officials from Developing Countries working on Investment treaties. Available at: <https://www.iisd.org/story/annual-forum-developing-country-investment-negotiators/> (Last accessed: January 23th, 2019)

⁵⁸Inaugural Address, Mr. R.P. Singh, Secretary, Department of Indus-

newly lodged dispute between Uruguay and Philip Morris.⁵⁹ He noted,

“This case has important repercussions for many developing countries, as it has brought to fore the ability of large corporations from developed countries to take advantage of investor protections that are available under trade agreements and bilateral investment treaties. It highlights the limitations on policy space that countries may be entering into through these treaties, without full awareness of the implications”⁶⁰

In December, the OECD and UNCTAD organized a symposium on international investment treaties in Paris. This time India was represented by a Secretary from the DEA whose views contrasted with those expressed three months earlier by the DIPP. The DEA official noted that “[s]o far, we had very little—I would say negligible exposure to international arbitration. But this is now widely believed that sooner or later, we may also face the heat of international arbitration.” (OECD and UNCTAD, 2010, 19). Yet there was no acknowledgement of any constraining effects these treaties might have on host states’ policy space, only a mention of the need to achieve “predictability and consistency” in arbitral awards (p. 22). In fact, the official said that when trying to negotiate with developed countries, especially the US and Canada, difficulties came from their insistence on provisions related to labor and the environment and non-party submission before arbitral tribunals (p. 22). These provisions, which were a consequence of the American and Canadian experience in

trial Policy & Promotion. IV Annual Forum for Developing Country Investment Negotiators. New Delhi, October 27, 2010. P.1-2. Available at: https://www.iisd.org/sites/default/files/material/dci2010_inaugural_address.pdf (Last accessed : January 23rd, 2019)

⁵⁹In a now infamous arbitral claim, Philip Morris argued that restrictions to branding on cigarette packaging amounted to expropriation of its intellectual property and a violation of the Uruguay-Switzerland BIT.

⁶⁰Ibid., p. 4.

NAFTA, were much more moderate than what India will include in its own model later on. Moreover, the DEA still recognized the value of BITs for boosting foreign investors' confidence. In relation to a treaty with the US, he said "investors will definitely feel more comfortable if the legal framework of investment agreement is there" (21). Unlike the DIPP official's remarks, the representative of DEA also talked about India's mixed status as both a receiver and sender of FDI: "This is the background against which our model text progressed...We are now having outward investment which is as important as inward" (20). From this position, India has competing interests; to protect its right to regulate but also to provide strong investment protections for its companies. Unlike DEA, DIPP had was not concerned with India's interests regarding BITs as an FDI exporter.

In 2011, the DIPP produced an internal paper on international investment agreements that would inform its position during the review process. The views of DIPP's officials appeared to have been influenced by their participation in the IISD Forum. The paper cites presentations made at the Forum by officials from other countries and by international CSOs. The work of UNCTAD's Investment division and other governments' experiences with investment arbitration -i.e. South Africa and Latin American states- also impacted the thinking of the DIPP (2019, 276). Both of these elements figure prominently in the internal paper.

The document begins by establishing -as the paper labels it- the "traditional theology" regarding investment agreements: they reassure foreign investors they will not be subject to arbitrary and discriminatory treatment; they are "the only effective way to address the 'dynamic inconsistency problem';⁶¹ and they are "essential to

⁶¹The paper defines the theoretical concept of dynamic inconsistency problem as the situation when "a state, is incentivized to change the rules to extract greater benefits (including expropriation) after the relatively immobile investment has been made by the foreign investor." (Ministry of

promote and protect foreign investment” (Ministry of Commerce, 2011, 4). It then goes on to debunk this theology by referencing a number of studies by academics and international organizations that find no evidence of a link between investment treaties and increased FDI inflows. Similarly, it mentions the fact that while India has no treaty with the US, American firms are the third largest foreign investor. The paper notes similar outcomes in South Africa and Brazil (6). The examples of South Africa -who had put all its negotiations on hold- and Brazil -who had never ratified any of the treaties containing ISDS it had signed- figure prominently throughout the paper.⁶² Providing a definite answer to the questions posed by DIPP during the IISD forum, the paper asserts, then, treaties “are neither necessary nor sufficient for promoting FDI” (5).

The paper goes on to identify what are ‘areas of concern’ in Indian treaties: the definition of investment, Fair and Equitable treatment, expropriation provisions, reservations and exceptions, conflicts with domestic laws and ISDS.⁶³ For each of these topics, the paper discusses the intended purposes of such provisions as well as the ways in which they can lead to undesired outcomes. In doing so, it provides examples from Indian or other treaties and from ISDS disputes against other states. For each topic, the paper delineates ‘worst case scenarios’ for India per its existing treaties and provides recommendations for how to better draft them. For example, regarding expropriation provisions, the paper recognized that while including a clause on expropriation without adequate compensation is ‘*de rigueur*’ for investment agreements,

Commerce, 2011, 4).

⁶²There are indications the DIPP sought out information from its Brazilian colleagues. The paper cites a consultation with Brazil’s chief negotiator from the Ministry of Foreign Affairs as a source (19).

⁶³Interestingly, the paper does not find the most favored nation provision to be of concern. After *White*, MFN will become a toxic provision for India.

it could nonetheless trump legitimate policy objectives. Thus, expropriation clauses should “include carve outs for legitimate implementation of state policy through regulation.”⁶⁴ The paper notes that -unlike the existing Indian model treaty- many countries do include such carve outs in their templates and names US and Canadian model BITs as examples.⁶⁵ Given the lack of protection that Indian treaties offer to its regulatory sovereignty, the worst case scenario describes the GoI issuing a compulsory licence⁶⁶ of a drug whose patent belongs to a foreign company. In this case, the patent holder could file an ISDS dispute claiming indirect expropriation of its intellectual property (11-2).

The paper devotes an entire section to the “Perverse Incentives in Investor State Disputes Settlement (ISDS).” Data on India’s record of ISDS disputes at the time came from UNCTAD’s database, which shows the DIPP had no direct information on this matter (16). All the listed cases are related to the Dabhol project, suggesting the DIPP was not aware of the ongoing White dispute. The paper decries the lack of impartiality and objectivity on behalf of arbitrators who are members of a ‘closed club’ and appoint each other to tribunals thus leading to a ‘revolving-door arrangement’ and to double-hatting, that is, “where an arbitrator in one case represents and investor against the same state in another arbitration” (17). Finally, the paper does not recommend a single policy course regarding the existing treaties, that is, renegotiation v. unilateral termination. Rather, it encourages the GoI to first decide whether investment treaties are needed in the first place. The DIPP’s view was that they

⁶⁴As the paper explains, “This will ensure that such actions are not deemed to be indirect expropriation and thus do not carry the liability to pay compensation” (11).

⁶⁵The suggested carve outs included: regulations for the protection of public health, safety and the environment, compulsory licences and government actions that could lead to defaulting on the debt of a foreign investor (11).

⁶⁶Compulsory licenses are state authorizations enabling a third party to make, use, or sell a patented product without the consent of the patent holder.

were not. That is, the Department wanted India to exit the investment regime. But if India decided to continue entering into BITs, then it recognized that it was necessary to develop a new model treaty that better protects policy goals like security, public health and environment protections and to renegotiate existing BITs to amend the ‘vulnerable’ clauses the paper identifies (21). The view from DIPP was that India should try to recover as much of its lost legal autonomy as possible from a deeply flawed regime.

Differently, DEA never considered the possibility of foregoing BITs. Nonetheless, they expressed concerns with the current situation:

“We believe in efficacy of bilateral investment protection agreements. We want such international agreements,” said the Minister of Finance, “[b]ut we want to guard against [them being] ingeniously interpreted to enlarge the jurisdiction of international arbitrations. And you would agree with me that there are numerous cases of jurisdiction hopping and jurisdiction shopping in international arbitration today.”⁶⁷

In fact, as the Commerce paper notes, Finance kicked off the review process with a proposal for a new template already on the table. Thus the DIPP’s goal was then to influence the new template as much as possible.⁶⁸ In terms of a new model, the main discrepancy between DIPP and DEA was regarding ISDS.⁶⁹ The DIPP wanted future

⁶⁷Intl arbitration is hijacking domestic judicial system: FM. (11 October 2013). Business Standard.

⁶⁸According to the Secretary of Commerce “Both the commerce department and the department of industrial policy & promotion are looking at existing investment treaties to see if there are any provisions which are difficult in terms of causing us problems later on or leading us to disputes.” India to Revisit Investment Pacts to Keep Vodafone-Like Cases at Bay. (2012, April 26). The Economic Times.

⁶⁹In a 2016 contribution to an edited volume, DEA officials acknowledged the early rift between those pushing for the abandonment of ISDS and those arguing that enforceable treaties improve the institutional environment for investors (Garg et al., 2016, 71-2).

investments treaties to exclude investors' access to arbitration while the DEA wanted to keep it, although in a revised form. When an MP asked the Minister of Finance whether "Government has decided to erase a key clause in bilateral investment treaties that allows for international arbitration," the answer was a plain "No, Sir."⁷⁰

Similar to the competing incentives facing the US, which were not present in Ecuador, DEA was balancing its interest in protecting India's regulatory autonomy with the protection of a growing number of Indian companies investing abroad. "With the growing clout of Indian companies investing in countries around the world, including the less stable countries in the African and South American regions, we are not in favour of reviewing this clause," said a DEA official,⁷¹ In spite of Finance's stand, Commerce & Industry had already started to make moves to exclude ISDS from the agreements it had authority over. Regarding investment chapters within FTAs, Commerce was taking "a two-level approach on the issue of the dispute resolution clause in these treaties," that is, ISDS provisions. The approach differentiated between FTAs in force and FTAs that had not been signed yet. For those in force, the GoI would ask its partners -and it is reported to have made that request to Singapore- to amend dispute resolution clauses to only allow domestic courts to hear eventual claims. Those agreements on the pipeline would have their provisions revised so that ISDS is excluded.⁷²

A third area of disagreement was what to do about the old treaties. The DIPP -backed by the ministries of coal and telecommunications-⁷³ wanted to terminate all

⁷⁰PARLIAMENTARY DEBATES, RAJYA SABHA, OFFICIAL REPORT, 15 May, 2012, Vol. 225, No.3, p. 125

⁷¹India may exclude clause on lawsuits from trade pacts. (2012, January 29). Live Mint.

⁷²India seeks treaty revisions to deal with corporate suits. (2012, April 4). Financial Express.

⁷³Unsurprisingly, since the two most controversial ISDS suits against India emerged from those two sectors.

existing treaties. “They should be revoked at the earliest,” DIPP officials said. The DEA preferred to seek the consent of India’s partners to a renegotiation, rather than forcing it by unilaterally terminating treaties.⁷⁴ Given the incompatibility between statements and actions from different GoI units, there was confusion about the fate of India’s treaties. Moreover, during the first years of the review process the coalition supporting the government was weak. Small parties weighed considerable influence under the threat of leaving the coalition and bringing down the government. With the formation of a new Bharatiya Janata Party (BJP) government under Narendra Modi in May 2014, a definite policy will eventually emerge.

6.6 The adoption of the new model BIT

This section examines the first product of the multi-year review process explained before: the new model BIT. I first explain how the arrival of the Modi government impacted the policy-making process. The new government did not bring a new vision for India’s BIT policy; if anything, the BJP government was more focused on attracting FDI than its predecessors. As I have shown so far, critical views have been present in India for years. The arrival of Modi mattered mostly because -due to its pro-business orientation and its strong mandate- foreign firms saw it as an opportunity to use ISDS disputes to gain leverage with the new government. This new wave of disputes, however, confirmed views entrenched in the Indian bureaucracy that BITs were seriously flawed. In less than a year, the GoI prepared a draft model BIT that was released to the public so that interested sectors could make comments

⁷⁴Ministries for scrapping of bilateral investment pacts. (2014, July 14). Financial Express; Fixing BIPAs. (2014, August 1). India Business Journal; Finance ministry to move Cabinet for clearing new BIPA text. (2014, June 25). The Times of India.

and recommendations. A few months later, a final model was approved. In the rest of this section I examine the most salient characteristics of the draft model, trace the wide variety of reactions to it and gauge the extent to which those views were incorporated in the final model.

6.6.1 The Modi government and a new wave of disputes

The BJP campaign made a big theme of encouraging FDI, employing slogans like ‘Red carpet, not red tape’ in relation to bureaucratic and regulatory obstacles to setting up foreign investments.⁷⁵ Early on in his term, Modi launched the ‘Make in India’ program, which allowed 100% FDI in 22 new sectors.⁷⁶ Unlike Rafael Correa in Ecuador, Modi did not make an issue of BITs and ISDS disputes during his campaign. In general, he paid little attention to international politics and institutions (Ganguly, 2017). Reports from the aftermath of the election suggest the pro-investment tone of the campaign was taken as a sign that the new government would “not likely to send foreign investors negative signals by threatening to withdraw or weaken BIPA protections.”⁷⁷ Thus, given the BJP’s friendly attitude towards FDI, it could have been expected that the new government would have settled for neither the exit policy recommended by the DIPP or the more revisionist policy preferred by the DEA and would have put in place a much tenuous reformist policy instead. Furthermore, Modi was considered to have received a strong mandate in the election, with the BJP winning the highest number of seats by any party on its own since 1984. With this

⁷⁵Red Carpet, Not Red Tape. May 10, 2014. Available at: <https://www.narendramodi.in/red-carpet-not-red-tape-3160> (Last accessed: January 31st, 2019).

⁷⁶Make in India. Governemnt of India. Available at: <http://www.makeinindia.com/home> (Last accessed: January 31st, 2019).

⁷⁷Indian government unlikely to weaken investment treaty protection for foreign investors. (18 June 2014). IHS Global Insight Daily Analysis.

amount of political capital, Modi could have imposed an alternative to the already set preferences of the bureaucracies.

This was precisely the view of a large number of foreign firms who saw the arrival of Modi as an opportunity to make their own issues a priority for the incoming government. As mentioned before, many foreign firms had notified the GoI about the possibility of arbitration if specific policies and regulations remained in place. The most notorious of these policies was the imposition of retroactive taxes. This had started as a conflict specifically with Vodafone but after the previous Congress retroactively amended the Income Tax Act so that it would apply to off-shore transactions, it became a thorny issue with other firms as well.⁷⁸ The measure was heavily criticized in India, including by the BJP then in the opposition. In its election manifesto the BJP had criticized the tax policies as ‘tax terrorism’ and had promised a solution to the disputes.⁷⁹

Assuming the new government would find a solution to these problems if pressed, Vodafone formally filed the long-threatened arbitral claim against India under the India-Netherlands BIT.⁸⁰ It did so only days before the official electoral victory of the BJP was to be announced. According to a London-based arbitration lawyer representing another investor affected by the retroactive tax, “the rationale for the

⁷⁸In December 2006, the Dutch Vodafone subsidiary acquired 67% interests in an Indian company (Hutchison Essar Ltd) from its parent firm, which was incorporated in the Cayman Islands, for \$11 billion. The Indian tax authority considered that Vodafone had to pay capital gains tax on the transaction amounting to \$2.2 billion. Vodafone disagreed, claiming the transaction involved two foreign firms, and brought the issue to Indian courts. The Supreme Court of India held that Vodafone did not owe any tax to the Indian government because the Income Tax Act, as it stood then, did not apply to those kinds of transactions. Right after the Supreme Court decision, the GoI introduced a bill in Congress to amend the Income Tax Act to clearly say that the type of off-shore transaction that Vodafone had made was taxable. Moreover, the amendment would apply retroactively to the date which the Indian Income tax had been enacted, that is, 1 April 1962 (Ranjan, 2019).

⁷⁹Full text: BJP manifesto for 2014 Lok Sabha elections. (7 April 2014). News 18.

⁸⁰Vodafone International Holdings BV v. Government of India [I], PCA Case No. 2016-35.

likes of Vodafone was 'nobody can settle this case and walk away from this tax except, maybe, a very strong prime minister who was representing a new party, with a strong power base and political capital at the beginning of his premiership.' That is the rationale, not just in tax but in other areas. 'Maybe he can settle them so I should start a BIT claim in order to give him something to settle.'⁸¹ A few days later, the Finnish firm Nokia announced its intention to file a similar claim under the Finland-India BIT.⁸² More claims followed in the coming months.

It turned out that the assessment of the foreign firms was wrong. The government did not roll back the offending policies and the claims were not settled.⁸³ This influx of new cases gave salience to the voices within the Indian bureaucracy that had been working on this issue for years. Under Modi, the review process continued with the same format. The work was managed by an inter-ministerial body housed within the Finance Ministry.⁸⁴ Under the chairmanship of the DEA, representatives from the Commerce & Industry, Coal, Telecommunications, Revenue and Law & Justice ministries would prepare a draft for a new model treaty.⁸⁵ The GoI enlisted the help of legal experts from abroad, including the Columbia Centre for Sustainable Investment, Victoria University, National University of Singapore, IISD and UNCTAD.⁸⁶ But at the same time, local CSOs and academics criticized the entire review process for a lack of transparency.⁸⁷ The group completed its task in September 2014 and the

⁸¹Interview XXIV.

⁸²Nokia invokes treaty in Indian tax battle. (14 May 2014). Global Arbitration Review.

⁸³Vodafone claim still on after India rules out tax law change. (15 July 2014). Global Arbitration Review. Most of these claims are now arriving to the hearing stages.

⁸⁴Bilateral trade agreements: Foreign investors may not be treated on a par with locals. (2015, July 27). The Economic Times.

⁸⁵2391, UNSTARRED QUESTION, 25.07.2014, FINANCE, Panda Shri Baijayant Jay.

⁸⁶New BIT text introduces 'obligation against graft.' (2014, December 16). Financial Express.

⁸⁷Column: Make BIT reviews transparent. (2014, May 29). Financial Express; Decoding India's New Model BIT (I). (2015, May 11). Madhyam.org.in.

DEA sent the new draft to the Committee of Secretaries for approval (Department of Economic Affairs, Government of India, 2015, 31) By December, the Committee of Secretaries had approved it and forwarded it to the Cabinet. Up to this point, the DIPP kept insisting on foregoing investment treaties altogether. The DEA attached to the draft a note with the DIPP's recommendation.⁸⁸ The Cabinet, however, was not going to approve the draft yet. First, it would submit it to public consultations to receive feedback from investors, experts and CSOs. To this end, the MF unveiled the new draft model on 24 March 2015 and invited public comments to be submitted online.⁸⁹

6.6.2 Characteristics of the draft model treaty

The new draft was a radical departure from the previous model. The spirit of the text is captured in one paragraph:

“This Treaty shall be interpreted in the context of the high level of deference that international law accords to States with regard to their development and implementation of domestic policies.”⁹⁰

While the GoI would insist the draft strikes a balance between investor protection and state regulatory autonomy; many commentators disagreed. It “tightens the reins so much,” one commentary said, “that it loses its identity as an investor protection treaty” (Rai et al., 2015, 8). While the draft differed from its predecessor in multiple

⁸⁸India to Revise Text for Bilateral Investment Treaty. (2014, December 16). The Economic Times - Bangalore Edition.

⁸⁹Draft Indian Model Bilateral Investment Treaty Text. Available at: <https://www.mygov.in/group-issue/draft-indian-model-bilateral-investment-treaty-text/> (Last accessed: January 31st, 2019).

⁹⁰Draft Model Text for the Indian Bilateral Investment Treaty [hereinafter, Draft Indian Model Treaty], Art. 14.9 (i).

ways, there are seven elements that deserve attention. From here onward, I use the term ‘draft’ to refer to the draft model treaty published in May 2015 and the term ‘final model’ to refer to the final treaty template approved in December 2015.

1. **Definition of investment:** the draft abandoned the open-ended, asset-based definition included in the previous model for an enterprise-based definition of investment.⁹¹ Open-ended asset-based definitions offer a maximum of investment protection because the treaty individually protects specific assets, for example shares or claims to money, rather than all of them together (UNCTAD, 2011a, 113). This can lead to a proliferation of claims, for example, by individual shareholders or by banks that were only tied to an investment as financiers. The enterprise-based definition included in the draft seeks to minimize the risk of claims by limiting protection to investors that have ‘real and substantial business operations’ in India and are under ‘control’ of foreign investors. Looking to maximize precision, rather than leave it to arbitrators to determine, the draft provided an exhaustive list elements that constitute ‘real and substantial business operations’, for example having made a substantial contribution to the development of the Host State including the transfer of technological know-how. But it also included a list that excludes certain types of business operations that are not ‘real and substantial’, for example the passive holding of stock or land. The draft also defined ‘control’ as the ability of the investor to appoint senior management in the company. The definition of foreign ownership was also geared towards limiting the scope of the treaty, defining the termed ‘owned’ as more than 50% of the enterprise’s capital. This limitation is all the

⁹¹Draft Indian Model Treaty. art. 1

more significant given that India still maintained 49% caps to foreign ownership in some sectors.

2. **Scope of the treaty:** The extent to which this draft is a direct reaction to the ISDS claims brought against India is evident in the exclusion of taxes from the substantive scope of the treaty. As mentioned before, the retroactive imposition of taxes gave way to a series of arbitral disputes. Furthermore, the draft made this issue non-reviewable. That is, in any dispute in which India claims that the actions being challenged by an investor are a matter of taxation policy, the tribunal would not be able to question the host state's decision.⁹² The draft also put the issuance of compulsory licenses in relation to intellectual property rights outside the scope of the treaty.⁹³
3. **Standards of treatment:** The draft does away with two traditional standards of treatment in international investment law; fair and equitable treatment (FET) and most favored nation (MFN) treatment. FET provisions appear in most BITs, often with very little guidance as to what constitute fair and equitable treatment of investors.⁹⁴ Tribunals have interpreted in multiple and inconsistent ways, making FET breaches the most commonly found breach in ISDS jurisprudence (see Picherack, 2008). The draft does not include an FET clause and instead provides a guarantee not to subject investors to "denial of justice under customary international law", "un-remedied and egregious violations of due process", or "manifestly abusive treatment involving continuous,

⁹²2015 Draft Indian Model BIT, art. 2.6 (iv).

⁹³Draft Indian Model Treaty, art. 2.6 (v).

⁹⁴Only 126 out of 2571 BITs mapped by UNCTAD do not contain an FET provision. UNCTAD, IIA Mapping Project.

unjustified and outrageous coercion or harassment.”⁹⁵ These standards set a higher threshold for a treaty breach than the traditional FET standard. It is even interesting to think what kind of coercion or harassment would an arbitral tribunal *not* consider unjustified.

In addition, the draft completely drops the MFN clause. This is in direct response to the *White* award. MFN was the provision that allowed the Australian investor to invoke a clause absent from the Australia-India BIT that was present in the India-Kuwait treaty. The complete elimination of this provision is rare.⁹⁶ The drafters could have chosen the many ways in which the MFN clause can be restricted to avoid treaty shopping, for example, specifying its scope is restricted to the application of domestic measures and not treaty provisions (UNCTAD, 2010; Nikiema, 2017).

4. **Investor obligations and counterclaims:** This was one of the most groundbreaking aspects of the draft. Regarding investor obligations, much like most agreements of their time, India’s existing treaties equipped the host state with “a small shield and a short sword” (Leikin et al., 2018, 7). A small shield because they did not impose any obligations on investors beyond the commonplace requirement that investments are made in accordance with the laws of the host country. And a short sword because treaties were silent regarding counterclaims. Tribunals have interpreted silences to allow for counterclaims only for violations of specific contracts or treaty provisions and not domestic laws.

With virtually no investor obligations contained in the treaties, the possibility

⁹⁵Draft Indian Model Treaty. art. 3.1 (i to iii).

⁹⁶Of the 2571 investment treaties coded by UNCTAD, 2527 include some type of MFN clause. UNCTAD, IIA Mapping Project.

of investors violating treaty provisions is thus minimal.

Much differently, the draft provided a long list of detailed investor obligations and an expanded scheme for counterclaims. It devoted an entire chapter to investor and home state obligations.⁹⁷ The draft required that investments should comply with domestic laws, which included, among others, laws concerning conservation of natural resources, human rights, consumer protection and fair competition. In addition to the domestic law compliance obligation, the draft also set out requirements in relation to corruption, disclosure of information and taxation.⁹⁸ Moreover, compliance with all these obligations was necessary for the investment to enjoy the protections provided by the treaty.⁹⁹ More radically, the draft also provided that in the framework of an ISDS dispute initiated by the investor, the host state could bring a counterclaim for alleged violations of any investor obligation.¹⁰⁰ Considering the scope of those obligations and how much of domestic law they encompassed, the draft practically elevated to the level of international law a series of requirements provided for in domestic legislation and made them enforceable under international arbitration.

5. **Expropriation:** like the old model, the draft included provisions against direct and indirect expropriation.¹⁰¹ However, the draft did so in a radically different

⁹⁷Draft Indian Model Treaty. Chapter 3. Although most of the articles refer to investor obligations, the draft required the courts of the home state to recognize the liability of their firms in situations where an investment causes damages or loss of life in the host country. This provision was modelled after the IISD model treaty and its inclusion is tied to the lasting impact of the Bhopal disaster in 1984. An eventual civil case against the company in the US was dismissed by a District Court on grounds of *forum non conveniens*, that is, that another court was better suited to hear the case.

⁹⁸Draft Indian Model Treaty. art. 8 to 12.

⁹⁹In fact, the draft required that investors demonstrate compliance with the law the moment they notify the host state of a dispute.

¹⁰⁰Draft Indian Model Treaty. art. 14.11.

¹⁰¹“Measures having an effect equivalent to expropriation.” Draft Indian Model Treaty. art. 5.1.

way. To qualify as such, expropriation needed to be both economic and legal. That is, it had to result in a permanent and total deprivation of the value of the investment *and* in the deprivation of the investors' control over the enterprise.¹⁰² In addition to this double test, the draft included a requirement never seen in any other treaty. To qualify as expropriation, the host state or one of its agencies must have appropriated the investment.¹⁰³ Such a requirement makes the indirect expropriation clause unworkable under the treaty, since the entire notion of a regulatory taking requires that state measures deprive the investor of the value of her investment without transferring its ownership to the state. The draft included a common provision in recent treaties that clarifies that public measures taken for the protection of legitimate public goals like public health, safety and the environment will not be considered expropriatory.¹⁰⁴ Yet the draft also put the decision of what constitutes a measure taken for such purposes outside arbitral review.¹⁰⁵ According to an MF official, “[e]ach nation has a separate criterion for what constitutes a public purpose...that is why, in India’s case, a foreign arbitration authority or tribunal cannot question India’s decision to deem any expropriation of a foreign investor’s assets as public purpose.”¹⁰⁶

¹⁰²Arbitral tribunals, in their assessment of indirect expropriation, have tended to focus on either approach to expropriation, legal *or* economic, but not both. If one is proven, the other one is presumed.

¹⁰³“an appropriation of the Investment by the Host State which results in transfer of the complete or near complete value of the Investment to that Party or to an agency or instrumentality of the Party or a third party.” Draft Indian Model Treaty. art. 5.2 (iii).

¹⁰⁴Draft Indian Model Treaty. art. 5.4.

¹⁰⁵An arbitral tribunal “shall not have authority to review the Host State’s determination of whether a Measure was taken for a public purpose or in compliance with its Law.” Draft Indian Model Treaty. art. 5.5.

¹⁰⁶Cabinet note on proposed bilateral investment treaty in a month. (2015, August 21). Business Standard.

6. **Exceptions:** An entire chapter in the draft was devoted to exceptions. Exceptions describing government actions that will not be considered violations of the treaty are not uncommon and have been on the rise.¹⁰⁷ Yet the draft went further than other treaties in specifying new types of policy goals that give rise to exceptions, i.e. remedying balance of payments or exchange rate problems, improving working conditions and protecting the privacy of individuals.¹⁰⁸ In addition to specifying various policy objectives, the draft made those exceptions self-judging. Moreover, the draft excepts from the treaty measures “taken by a local body or authority at the district, block or village level.”¹⁰⁹
7. **Dispute settlement provisions:** against the wishes of the DIPP, the draft provided for investor-state arbitration. However, ISDS provisions were so diluted that it is hard to envision a situation in which an investor could have used them successfully. The dissatisfaction with past cases is evident from the inclusion of an unusual article delineating what the purpose of ISDS is *not*:

“An Investor shall not use or threaten to use [ISDS] in order to obtain money, property, or any other thing of value from the Host State, or otherwise compel the Host State to act or refrain from acting.”¹¹⁰

The goal of shielding the Indian state from ISDS went beyond a statement of purpose. There were two provisions that in combination made the whole

¹⁰⁷Of all treaties coded by UNCTAD’s IIA Mapping project signed since 2010, 61% include a security exception; 51% include an environmental or public health policy exception; and 40% include other types of public policy exceptions. 34% include all three. UNCTAD, IIA Mapping Project.

¹⁰⁸Draft Indian Model Treaty. art. 16.1.

¹⁰⁹Draft Indian Model Treaty. art. 16.3.

¹¹⁰Draft Indian Model Treaty. art. 14.1. Given that the point of an arbitral claim is to eventually obtain monetary compensation from the state, this a strange addition. However, the choice of ‘shall’ instead of ‘must’ suggests the goal is to reassert a principle against extortion through ISDS.

treaty practically toothless. The draft barred a tribunal from re-examining a case settled by a judicial authority of the host state. And it also required the investor to exhaust all judicial and administrative remedies before the relevant domestic courts of the host state before initiating an arbitration.¹¹¹ That is, the treaty would require the dispute to first be tested in a local court. This could be decided in favor or against the investor. If the investor wins, then she has no interest in pursuing international arbitration. Yet if she loses, she would be barred from doing so because, per the treaty, arbitral tribunals could not review decisions from domestic courts.¹¹²

In general, the draft went beyond the incremental reforms seen in the more recent treaties of countries like the United States and Canada. The concern with protecting India's regulatory autonomy is palpable in virtually every article. Direct reactions to India's own ISDS experiences are evident in elements like the exclusion the MFN clause or the carving out of tax measures and decisions by local governments. Unsurprisingly, the draft generated strong and mixed reactions, from CSOs, scholars, firms and the legal profession. Those are presented in the next section.

6.6.3 Reactions to the draft model treaty

Domestic and international CSOs working in investment treaty reform praised the GoI and saw the draft as a good "balance between legitimate public welfare objectives

¹¹¹Draft Indian Model Treaty. art. 14.2 to 3.

¹¹²The only way out from this is article 14.3 (ii.a) which includes a "futility exception" according to which the investor can initiate an arbitral dispute if she demonstrates "there are no reasonably available domestic legal remedies capable of providing any relief for the dispute concerning the underlying Measure." The burden to show that there is no reasonably available relief falls on the foreign investor.

and investor rights.”¹¹³ Yet most of the reactions were negative and coalesced around the view that the treaty was not balanced at all, and it had rather gone too far in favor of the state. Two main groups voiced strong critiques. One were foreign firms. The US National Association of Manufacturers (NAM), representing the interests of hundreds of American firms investing in India, lamented the draft “deviate[d] substantially from global standards, providing much lower and in some cases no protections on core issues” (National Association of Manufacturers, 2015, 1). NAM warned the draft would make India unattractive to foreign investors¹¹⁴ and that insisting on this model it would make it impossible for India and the US to conclude a BIT.¹¹⁵ While NAM commended the decision to review the model treaty, all its recommendations involved reverting to the previous template. Regarding the investment definition, it recommended an asset-based definition that would cover all forms of investment (National Association of Manufacturers, 2015, 2). It considered the carve-outs unnecessary and inappropriate (National Association of Manufacturers, 2015, 4) and it urged for the FET and MFN standards to be re-introduced (National Association of Manufacturers, 2015, 5). It also recommended the entire chapter on investor obligations to be dropped from the final model (National Association of Manufacturers, 2015, 7). In relation to ISDS -seen as “critical to the operation of a successful BIT”-

¹¹³Decoding India’s New Model BIT (V). (2015, September 17). Madhyam.org.in; Similarly, according to CCSI: “India’s new model BIT makes clear that its goal is to accomplish more than mere investor protection...The model BIT is a step in the right direction.” Next generation treaty. (2015, November 12). Indian Express

¹¹⁴“In a world where there is substantial competition for investment flows to promote economic growth, India’s proposed movement backwards in investment treaty practice sends precisely the wrong signal to manufacturers in the United States and other investors.” National Association of Manufacturers (2015, 8)

¹¹⁵“If the Government of India is interested in improving its investment relationship with the United States and negotiating a BIT that would promote investment and economic growth, India would need to revise its draft BIT to include broad, strong and fully enforceable protections.” (National Association of Manufacturers, 2015, 2)

NAM criticized virtually all the innovations of the draft: the exhaustion of local remedies, the impossibility to challenge domestic judicial decisions, the inability of ISDS tribunals to review the government's invocation of the various exceptions and the possibility of counterclaims (National Association of Manufacturers, 2015, 7).

The second source of criticism was the legal profession. Legal scholars, practicing lawyers and members of the Indian judiciary saw the treaty as a political, knee-jerk reaction to ISDS cases that resulted in a legally unworkable template; one that would be very hard to convince partners to sign and that could hurt Indian investors abroad.¹¹⁶ This was the position of the Law Commission of India. It should be noted that while the Commission generally works with thematic mandates from the Ministry of Law and Justice, it decided to examine the draft model BIT on its own initiative (Ranjan, 2019, 286). The Commission convened a sub-committee of experts to write a report on the new draft. The sub-committee was comprised of legal scholars, justices and practicing lawyers who -unlike the representatives of foreign firms- agreed with the GoI in that the previous model was seriously flawed, sacrificing India's right to regulate in favor of investor protection.¹¹⁷ Yet they saw the draft as swinging too far in the opposite direction. Dissecting the draft article by article, the Commission's report warns the treaty fails to do what it is supposed to do, which is to provide a modicum of investor protection.¹¹⁸ In relation to the long list of investor obligations, the Commission saw them as unreasonable. The draft was demanding too much

¹¹⁶See, for example: Bidhuri et al. (2015); Rai et al. (2015); Ranjan and Anand (2017)

¹¹⁷See two op-eds by sub-committee members: Prabhash Ranjan (Indias draft BIT policy could end up scaring foreign investors: Heres why. (2015, September 21). *The Indian Express*) and Anirudh Krishnan (A bit for the state, a bit for the investor. (2015, September 8). *The Hindu*).

¹¹⁸Regarding the complete absence of the MFN, the report says "foreign investors will be exposed to the risk of discriminatory treatment by the Host State in application of domestic measures" (Law Commission of India, 2015, 24) and that the many self-judging exceptions included "could result in possible abuse by the Host State" (53).

and offering to little to foreign investors. This could be harmful for Indian investors abroad (Law Commission of India, 2015, 12) and it would be unlikely that potential treaty partners would accept it (40).

The Commission suggested changes to almost all articles in the draft. Regarding the ISDS provisions, the report did not recommend eliminating the requirement to exhaust domestic measures but rather suggested dropping the provision that would bar arbitral tribunals from reviewing any decision from domestic courts. When a member of parliament asked the Minister of Finance about the report, he replied all suggestions “have been considered in the final version of the model Bilateral Investment Treaty text.”¹¹⁹ Many recommendations made by the LCI did not make it to the final draft, though the report is believed to be the main reason for the relative moderation of the final model.¹²⁰

6.6.4 The final model treaty

The Cabinet approved the final model treaty in 16 December 2015. The effects of the criticism were notable since, in comparison to the draft, the final model was substantially toned down. It was, nonetheless, a fundamental break with past. Next I analyze how the previous seven elements from the draft fared in the final text.

1. **Definition of investment:** The final definition was not as narrow as the draft’s. It lost the requirements of having its management in the territory of the Host State, employing a substantial number of employees and having made contributions to development specifically in the form of technological transfers.

¹¹⁹PARLIAMENTARY DEBATES, RAJYA SABHA, OFFICIAL REPORT, 22 December, 2015, Vol. 237, No.19, p. 183.

¹²⁰Interview XXIV.

However, it remained an enterprise-based definition and did not include portfolio investments.¹²¹

2. **Scope of the treaty:** tax matters and compulsory licences regarding intellectual property rights remained outside the scope of the final model. The final text also excluded measures taken by local governments from its scope.¹²² Taken together, the provisions delineating the substantive scope of the treaty exclude the three most controversial areas in the debate around BITs and ISDS. Taxes and local government measures were the sources of India's most debated ISDS disputes- *White Industries* and *Vodafone I*. The possibility of patent holders using ISDS disputes to combat the production of generic drugs was the main focus of Indian CSOs during negotiations with the US and the EU.
3. **Standards of treatment:** both FET and MFN standards remain outside the treaty, although it softens some of the language by dropping the requirement that coercion and harassment need to be 'continuous, unjustified and outrageous' to qualify as abusive treatment.¹²³
4. **Investor obligations and counterclaims:** The largest difference between the draft and the final model was in relation to investor obligations and the possibility of counterclaims. The long list of specific obligations morphed into a requirement that investors "shall comply with all laws regulations, administrative guidelines and policies" and that they will not engage in corruption¹²⁴.

¹²¹Model Text for the Indian Bilateral Investment Treaty [hereinafter, Indian Model Treaty]. art. 1.

¹²²The draft also included a carve-out for local governments' measures but it was included in the chapter regarding exceptions. Indian Model Treaty. art. 2.4. (i).

¹²³Indian Model Treaty. art. 3.1. (iv).

¹²⁴Indian Model Treaty. art. 11.

It also includes a very soft aspiration that investors would try to “voluntarily” incorporate standards of corporate social responsibility.¹²⁵ Moreover, the final text makes these requirements unenforceable, since the entire article on counterclaims is removed.¹²⁶

5. **Expropriation:** Like the draft, the final model establishes that adverse economic impact as a consequence of a public measure is not enough to constitute expropriation.¹²⁷ Yet the additional elements that need to be taken into account differ drastically from one text to the other. The final model removed the need for public measures to result in permanent and complete value deprivation and the transfer of the value to the Host state. It simply stated that, in making a determination about an act of expropriation, tribunals need to consider other elements besides economic loss, such as the duration of the measure or its intent. Like in the draft, measures taken for the protection of legitimate public interests will not constitute expropriation but their self-judging quality is removed.
6. **Exceptions:** The list of public measures that cannot be challenged as violations of a treaty is much shorter in the final draft and replaces public goals like improving working conditions, remedying serious balance of payments problems and protecting the privacy of individuals with a general “law and regulations that are not inconsistent with the provisions of this Agreement.”¹²⁸ Unlike in the draft, the determination of whether a measure was necessary for the attainment of those purposes can be reviewed by an arbitral tribunal.

¹²⁵Ibid. art. 12.

¹²⁶According to some observers, the final model even takes away the small room for counterclaims India enjoyed under the previous model (Leikin et al., 2018).

¹²⁷Indian Model Treaty. art. 5.

¹²⁸Indian Model Treaty. art. 32.1. (iii).

7. **Dispute settlement provisions:** Regarding ISDS provisions, the final text follows the draft in that arbitral tribunals do not have jurisdiction to review decisions by domestic courts. But the final model drops the requirement that investors exhaust local remedies before starting an arbitral claim and replaces it by a complex temporal scheme. First, an investor can notify the host state about a dispute only after pursuing domestic remedies for at least five years.¹²⁹ After notifying the host state, a period of six months starts for negotiations and amicable settlement. If the parties cannot settle the dispute amicably, then the investor can lodge an arbitral claim provided four requirements: a. no more than six years have passed since the investor first knew of the public measure giving rise to the dispute. b. no more than twelve months have passed since domestic remedies were concluded. c. the investor gives notice to the state of her intention to lodge the claim ninety days in advance. d. the investor waves its right to continue any domestic proceedings.¹³⁰

If that was hard to follow, that is precisely the point. The result is a very small time window during which investors can submit claims before arbitral tribunals. As an illustration, if on 1 January 2021 the GoI adopts a regulation that a foreign investor considers to be in violation of an applicable treaty, then it is obliged to seek a domestic solution for at least five years. That is, until 31 December 2025. If at that point the matter is still pending and the investor wants to pursue arbitration, it has to notify the GoI about the existence of a dispute. Assuming the investor does so right away, on 1 January 2026, the next six months should be spent seeking an amicable solution. That is, until 30

¹²⁹Indian Model Treaty. art. 15.2.

¹³⁰Indian Model Treaty. art. 15.4 to 5.

June 2026. At that point, the investor can notify the GoI about its intention to lodge a arbitral claim but has to wait ninety more days before actually doing so. That is, until October 2026. However, the investor can only do so before six years have passed since she first knew of the measure. That means there is a three months period -until 31 December 2026- to submit the claim before an international tribunal.

Reactions to the final text were, again, mixed. Norther CSOs lamented that some provisions included in the draft did not make it to the final text.¹³¹ For the government, the entire process was a continuous search for a middle path between the interests of investors and the rights of governments. According to DEA officials, writing in their personal capacity, “[n]owhere is this delicate balancing act more evident than in the retaining of the ISDS system” They recognize that more radical options were on the table -most notably excluding ISDS- but, in their view, such changes would have risked “alienating the strong foundations of investment regime built over a number of years. Without ISDS, investment treaties will have no enforceability.” (Garg et al., 2016, 72-3). Observers strongly disagree with this assessment and still considered the model too much in favor of the state.¹³² According to a scholar part of the committee that authored the LCI report, the final model is so unbalanced that “a more truthful approach would then be to walk out of the BIT system altogether, instead of having your cake and eating it too.” (Ranjan, 2019, 350) Most commentators also noted that -as much as a novelty as the new model was- the real test was whether the govern-

¹³¹ “[M]any of the more noteworthy and progressive provisions regarding investor and home state obligations were either removed from or diluted” (Coleman and Gupta, 2017; Kelsey, 2016; Choukroune, 2016). Also, see *The Whole BIT*. Business Today, February 28, 2016.

¹³² For media commentary, see *As India’s New Bilateral Investment Strategy Sputters out, the Secrecy and Opaqueness Must Go*. (2017, May 1). *The Wire*; *An own-goal on FDI*. (2016, September 16). *Business Standard*. For scholarly critiques, see Raju (2016); Sharma (2015)

ment would find any takers, especially among countries with substantial investments in India.¹³³

6.7 The 2015 Model in action

The GoI decided the new Model treaty would not only be the basis for the negotiation of all future investment treaties and FTA chapters; but also that all existing agreements should be renegotiated according to the new template.¹³⁴ Striving for consistency, the responsibility for negotiating all future investment treaties and investment chapters was now under the Ministry of Finance. This marked a victory for the approach of Finance, solidifying the position that India would not forego investment treaties or ISDS. This section includes three vignettes into recent negotiations undertaken by India on the basis of its new model, with the US and the EU and also with Brazil. These are fairly recent events, and negotiations are ongoing in some cases, thus not a lot of information is available. Yet these processes are indicative not only of the extent of the changes in India's position but also the mixed success it has so far found in rebuilding its treaty network.

6.7.1 Modernizing existing treaties

Once India had a clear idea of what its treaties should look like, it could have gone about modernizing its old treaty stocks in two ways. They could have approached

¹³³Why the new BIT may not work. (2016, May 25). *The Hindu: Business Line*; Substantial changes introduced in new Model Bilateral Investment Treaty. (2016, February 18). *International Law Office*; "Bad for India Inc"? Modi's BIT recast causes concern. (25 August 2016). *Global Arbitration Review*. Also see Jandhyala (2015)

¹³⁴PARLIAMENTARY DEBATES, RAJYA SABHA, OFFICIAL REPORT, 16 December, 2015, Vol. 237, No.15, p. 88

each of their partners individually and asked for a renegotiation on the new terms. In this case, the partner can accept or decline and if it declines, the old treaty remains in place. The other way would have been to force the negotiation of a new treaty by unilaterally terminating the old one. The partner could decline to negotiate a new agreement but in this case, there would be no more treaty in place. India decided to offer the former and threaten with the latter.

Once the new model was ready, the GoI offered treaty partners the chance to renegotiate the agreement on the basis of the new model. If they refused, the treaty would be terminated. According to the Minister of Finance, “[w]e are entitled to ask for a renegotiation, in terms of the new terms, of the changed agreement that we have drafted. And these will all be subject to negotiation with our foreign partners.”¹³⁵ Up to this point, India had signed BITs with 83 countries but only a subset of those could be terminated because they were past their initial duration period or were close to it.¹³⁶ Thus by May 2016, India started to send termination notices to 58 countries, including the UK, France, Germany, Mauritius, The Netherlands, Spain and Sweden.¹³⁷ For the remaining 25 treaties the GoI sent proposals for a joint interpretative statement with the goal of guiding eventual tribunals towards a preferred interpretation of those treaties.¹³⁸ By June 2017, the Cabinet reported 11 countries had accepted to renegotiate their treaties.¹³⁹

¹³⁵India wants new foreign investment pacts to limit lawsuits. (2016, July 11). The Financial Express (Bangladesh).

¹³⁶Most investment treaties have an initial duration period during which parties cannot terminate the treaty. After the initial period, treaties generally remain in place unless either party decides to terminate them.

¹³⁷Kavaljit Singh and Burghard Ilge, Remodeling India’s Investment Treaty Regime. (2016, July 18). Madhyam.

¹³⁸For example, the statement would say that if the treaty is silent on whether tax issues are within the scope of the treaty, then it is implied that the treaty does not apply to those. Kavaljit Singh and Burghard Ilge, Remodeling Indias Investment Treaty Regime (II). (2016, July 20). Madhyam.

¹³⁹Tajikistan, Turkmenistan, Kyrgyz Republic, Switzerland, Oman, Qatar, Belarus, Thailand,

6.7.2 Negotiating new treaties: the European Union

Among the countries receiving renegotiation/termination notices there were 22 EU members. The response from many of them, according to the GoI, was that they could not make independent decisions about renegotiating investment treaties because the authority to negotiate them had been transferred to the European Commission.¹⁴⁰ However, the EU and India had been in talks for a comprehensive economic agreement that would include an investment chapter and a new round was going to take place after India adopted its new model.¹⁴¹ Thus, three new issues emerged: how compatible were the Indian and European preferences; how willing was either party to stall trade negotiations due to disagreements over investment; and how would the prospect of terminating existing treaties with individual EU members lure over the negotiations. Much like in the case of Ecuador, this section shows how European Union officials interceded in favor of their home firms. The EU wanted to avoid the cancellation of the BITs and was using trade issues as an incentive to keep India from going forward with the terminations. Unlike Ecuador, however, India was not willing to wait.

The Indian model was fundamentally different from the European approach of the time, represented by the investment chapter of its comprehensive treaty with Canada (CETA). Among other elements, it included an MFN provision and it did not require investors to litigate in domestic courts for five years. According to Indian negotiators, the exhaustion of local remedies was one of the toughest points to sell to

Armenia, UAE, and Zimbabwe. PARLIAMENTARY DEBATES, RAJYA SABHA, OFFICIAL REPORT, 28 March, 2017, Vol. 242, No.20, p. 109

¹⁴⁰PARLIAMENTARY DEBATES, RAJYA SABHA, OFFICIAL REPORT, 28 March, 2017, Vol. 242, No.20, p. 109

¹⁴¹Negotiations had seen 16 rounds of talks at the level of chief negotiators until they stopped in 2013.

developed countries.¹⁴² Moreover, the EU had recently launched its proposal to create a multilateral investment court and treaties signed from then onward would establish that once the court is created, disputes between investors and host states would be solved there. India had expressed its apprehension to the EU Court proposal.¹⁴³

The termination notices were not well received in Europe. During an Indo-German business summit, the President of the Federation of German Industries expressed German firms in India were careful about further investments because if the termination of the BIT.¹⁴⁴ The Association of European Chambers of Commerce and Industry sent a letter to the European commissioner for trade -Cecilia Malmstrom- to express concern with the decision by India to terminate its standing BITs. They warned the termination “could severely damage both European investment and trade flows, given that current legal protection in India is insufficient for foreign investors” and noted “the Indian offer still falls far short of the required level of ambition.”¹⁴⁵ Malstrom passed the message in a letter to the GoI, warning the terminations could “have serious consequences,” and that she “truly hope[d] that India will not opt for such a radical policy shift with regard to investment from the EU.”¹⁴⁶ The EU wanted the old treaties to remain in place until a the comprehensive agreement that would replace those treaties was adopted. According to the Commission’s vice president

¹⁴²Report from the 11th Annual Forum of Developing Country Investment Negotiators, IISD, February 2018. Available at: <https://www.iisd.org/sites/default/files/material/11th-annual-forum-report-en.pdf> (Last accessed: February 6th).

¹⁴³“We rejected it completely...If we want anything to do with investment we want it bilateral. We don’t believe in making investment as a subject of multilateral disputes,” said the Indian Minister of Commerce. India rejects bid for making investment a multilateral issue. (2017, January 23). UNI (United News of India).

¹⁴⁴Better framework conditions required in India. (2017, May 31). BDI.

¹⁴⁵Letter to Cecilia Malstrom from the President of Eurochambres, Arnaldo Abruzzini. 21 March 2016. Available at: http://www.eurochambres.eu/custom/Commissioner_Malmstrom_India_BITs-2017-00058-01.pdf.

¹⁴⁶India wants new foreign investment pacts to limit lawsuits. (2016, July 11). The Financial Express (Bangladesh).

“[c]ompanies from the EU need protection and are worried about the period between the two treaties.”¹⁴⁷ In the words of the Indian Minister of Commerce -Nirmala Sitharaman- “[t]he Finance Ministry refused to extend the treaties and now the EU is upset.”¹⁴⁸ India wanted to renegotiate on a clean slate since the GoI would have a better chance to get concessions if Europe’s choices were ‘no treaty or Indian treaty’ rather than ‘old treaty or Indian treaty.’ India -unlike Ecuador- was not willing to wait until the entire treaty was agreed upon before getting rid of the old treaties.¹⁴⁹

6.7.3 Negotiating new treaties: the United States

Over the years India and the United States have held many rounds of talks for an investment treaty to no end (see section Section 6.3.2). The US was still interested in concluding a treaty. Addressing the Society of Indian Law Firms, the US Ambassador to India -Richard Rahul Verma- said “[t]he absence of a bilateral investment treaty between our two countries is an impediment to growing our trade and investment.” He recognized the Modi government had made substantial advancements by lowering restrictions to foreign ownership and improving the ease of doing business but that the investment climate was also “about access to courts” and “about embracing international arbitration.”¹⁵⁰ Representatives from US firms confirmed this view. According to the President of the US-India Business Council (USIBC), “[w]e need to

¹⁴⁷Expiring bilateral treaties holding up Indo-EU trade talks, says official. (2016, November 12). Business Standard.

¹⁴⁸Peeved EU delays talks on FTA with India. (2017, January 20). Business Line (The Hindu).

¹⁴⁹The chair of a delegation of EU Parliamentarians to India recognized “[T]he termination of bilateral investment treaties by India is a problem...right now it is a hurdle in the FTA discussions.” EU wants bilateral treaties extended, India not keen. (2017, February 21). The Times of India.

¹⁵⁰Absence of BIT with India an impediment to bilateral trade: US. (2016, February 18). Press Trust of India.

make progress on the India-US bilateral investment treaty.”¹⁵¹

However, both firms and the US government were aware the new Indian model made the chance of an agreement more difficult. Ambassador Verma was “afraid things have become a bit more difficult.”¹⁵² Similarly, the USIBC’s President noted “[t]he gap between positions adopted by the two countries is huge. Expectations from the US side were very high, very different from India’s.”¹⁵³ Yet, much like in the EU talks, India was not willing to compromise, especially on the ISDS issue. India and the US “continue to have differences over who will get the right to arbitrate in case of an investment dispute,” said an Indian negotiator, “we have swallowed bitter pills in the past.”¹⁵⁴

6.7.4 Negotiating new treaties: Brazil

As most developing countries in the world, Brazil had signed many BITs containing ISDS in the 1990s. Yet unlike many of its peers, it never ratified them. In 2015, the Brazilian government started to sign new agreements -only with Latin American and African nations- and the Brazilian Congress has even ratified some of them. The main difference between these BITs and the previous ones was the dispute settlement mechanism. Among other characteristics, the Brazilian model does not include ISDS and only allows for state-to-state dispute settlement, it does not provide Fair and Equitable Treatment and it excludes tax issues (Maggetti and Choer Moraes, 2018;

¹⁵¹Undoing the Damage. (2016, August 14). Business Today.

¹⁵²He continued, “unfortunately those gaps do prevent us from moving forward and putting in place the kind of structural protections that investors in both our countries have come to expect in international commerce.” U.S. wants progress in investment pact talks with India: Envoy. (2016, June 28). The Hindu.

¹⁵³Undoing the Damage. (2016, August 14). Business Today.

¹⁵⁴Treaty with US faces delay. (2016, August 6). The Telegraph.

Campello and Lemos, 2015, see). During a meeting of the BRIC group in late 2016, India and Brazil initialized a treaty that, in some ways, rests at the lowest common denominator of investor protection between both treaties. Like the Brazilian approach, it does not include ISDS, not even with the complex temporal scheme of the Indian model. Like the Indian model, it also completely excludes the MFN clause even though other recent Brazil treaties do include it. It also excludes taxation and labor matters from the scope of the treaty.¹⁵⁵

6.8 Conclusion

My theoretical framework expects that, at varying levels of economic development, controversial ISDS disputes will provoke different political dynamics. As explained in Chapter 2, this is not due to a direct causal relationship between wealth and policy outcomes. Rather, I argue, policy reactions to ISDS in developed and developing states are subject to different limiting and enabling factors. Put briefly, in designing and implementing their preferred policies, developed country governments are caught between home firms and domestic CSOs while developing countries are limited by foreign firms and their governments while they can draw support from like-minded states and international CSOs. The reason for including a study of India was to test the argument in the case of an emerging economy that cannot easily be classified as a developed or a developing country.

A major factor limiting the tone of policy reactions in developed countries is the fact that, as much they would want to protect their regulatory autonomy from future

¹⁵⁵BRAZIL AND INDIA CONCLUDE BILATERAL INVESTMENT TREATY. (2016, November 28). Investment Arbitration Reporter.

disputes, their own multinational firms want strong protections for their investments abroad. Outflows of FDI from India have increased in recent years but its exposure to ISDS has been mostly as a respondent. This makes India's ISDS experience closer to that of Ecuador than that of the US. As of today, only 6 ISDS disputes have been brought by Indian investors against foreign states. American and European businesses, on the contrary, have accrued vast experience in the matter and are more likely to pay 'live' attention to developments in the area of international investment law. While a lot of negative commentary revolved around the impact of the new model treaty on Indian investors abroad, it came from scholars and legal practitioners.¹⁵⁶ There were no signs of Indian multinational firms lobbying the government regarding the draft model treaty or even expressing their views openly. However, this might change in the future. According to a London-based counsel specialized in India, "from my experience, Indian corporations are increasingly aware of the existence of BITs and we are seeing Indian corporates with interests in other parts of the world come to us and ask us to look at claims under BITs."¹⁵⁷ My argument would suggest that as Indian multinational firms grow in size and number and gain experience with investment treaty protections, India's treaties will start to show more deference to the interests of foreign investors.

For developing countries, the argument focuses on the external constraints and opportunities that policy-makers face in pursuing their preferred course of action. Given its status as an emerging economy, in this regard, India is closer to the experience

¹⁵⁶ "[T]he protections available to Indian investors stand to decrease if the 2015 Model BIT provides the template for future Indian BITs" (Triantafyllou and Menezes, 2018, 3) See also Nishith Desai Associates (2018).

¹⁵⁷ Interview XIV. Similarly, according to a counsel at one of the largest Indian legal firms, "Indian clients with significant investments abroad have privately expressed concerns about the revised text." "Bad for India Inc"? Modi's BIT recast causes concern. (25 August 2016). Global Arbitration Review.

of the US than that of Ecuador. In designing and implementing its desired policy, external factors did not play much of a role. However, the GoI was not subject either to the domestic interest groups that mobilized in support or against strong treaty protections in the case of the US. As said in the previous paragraph, Indian multinational firms did not yet develop an interest in India's BIT policy. Indian CSOs did not appear to have much influence either; the review process was not open to the public and was open to consultations mostly as a formality. This highlights a particularity of the Indian case: relative to the other cases, the Indian state is fairly autonomous. At high levels of state autonomy is where ideas held by policy-makers become more salient for informing policy reactions to negative ISDS experiences. The importance of both policy-makers' own inclinations as well as the capacity and autonomy of the state to see them through has implications for plurality in international law; as alternative centers of power assume leadership and advance alternate norms (Burke-White, 2015).

After India adopted its new model, the question was whether there would be any takers. Two years have passed since renegotiation/termination notifications were sent and there have been reports that "negotiations are going nowhere."¹⁵⁸ That is partially true. Focusing only on the EU, the US and Canada¹⁵⁹, then the home countries to the largest multinational firms in the world are definitely non-takers of

¹⁵⁸India's proposed investment treaty terms leave foreign partners cold. (2018, January 19). Reuters. This was also the view of my interviewees from India. Interview XXIV and XXV. Also see Ranjan (2019)

¹⁵⁹In 2007, long before the review process, Canada and India had agreed on the text of a BIT but it was never signed. After the new model, India wanted to revise the draft to reflect these changes but Canada refused, alleging there was already a text in place. Given how controversial ISDS is in Canada after NAFTA cases (see Chapter 4), the Canadian Minister of International Trade said "we are talking with India about progressive elements in our pacts. That is what people expect from us." However, there was still a concern from the Canadian side about the exhaustion of domestic remedies requirement in the Indian model. Lets talk investment treaty before free trade pact, Canada tells India Business Line. (2017, March 4). The Hindu.

the Indian model. The question that follows is, then, who loses from this stalemate. The US and Canada have no treaty with India and the sunset clauses in treaties with EU members will eventually end, with no EU-wide replacement treaty in sight.

With other partners, albeit slowly, India has been rebuilding its network. These are countries that have no problems with the Indian red lines, either because they share them (i.e. Brazil) or because they would be capital importing countries in relation to India and thus they would benefit from them (i.e. Belarus, Cambodia and Kyrgyzstan) or because India remains an attractive investment location even (i.e. Taiwan).¹⁶⁰ India has also successfully negotiated joint interpretative statements with Bangladesh¹⁶¹ and Colombia.¹⁶²

Not enough time has gone by to make a final judgment about the success or failure of India's new policies. An entire treaty network is not re-built in a day. That said, independently of how much time passes, the differences between the preferences of the core capitalist countries and the Indian template are simply too large. What will happen with India's investment treaty program in the coming years has enormous implications for the future of the investment regime. It will show whether revisionist policies can be accommodated as stable modes of participation or not. If the latter is true, two scenarios might be possible. India could retract towards tamer reformist

¹⁶⁰Although with Taiwan, India agreed to a four year, rather than five year, period for exhaustion of domestic remedies. INDIAN BIT NEGOTIATOR CLARIFIES COUNTRY'S STANCE ON EXHAUSTION OF REMEDIES, AND OFFERS UPDATE ON STATUS OF COUNTRY'S REVAMP OF BILATERAL INVESTMENT TREATIES. (2017, March 31). Investment Arbitration Reporter. INDIA AGREES NEW INVESTMENT TREATY TEXT WITH COLOMBIA, BELARUS AND TAIWAN, ADVANCING SOME OF ITS KEY CONCERNS SUCH AS PARTIAL EXHAUSTION AND HUMAN RIGHTS. (2019, January 1). Investment Arbitration Reporter.

¹⁶¹UNABLE TO UNILATERALLY TERMINATE A 2011 BIT, THE GOVERNMENT OF INDIA PERSUADES COUNTER-PARTY TO AGREE JOINT INTERPRETIVE NOTE TO CLARIFY BIT'S IMPLICATIONS. (2017, July 17). Investment Arbitration Reporter.

¹⁶²INDIA AGREES NEW INVESTMENT TREATY TEXT WITH COLOMBIA, BELARUS AND TAIWAN, ADVANCING SOME OF ITS KEY CONCERNS SUCH AS PARTIAL EXHAUSTION AND HUMAN RIGHTS. (2019, January 1). Investment Arbitration Reporter.

policies, perhaps due to concerns with harming FDI inflows or because India's own multinational sector starts demanding more protection. Or it could also be the case that, as India continues to struggle to find treaty partners, what was intended to be a revisionist policy might turn into a de facto exit. Either way, India will have recovered at least part of its international legal autonomy.

Chapter 7

Conclusion

NAFTA -‘the worst trade deal in the history of trade deals’- was a central theme of Donald Trump’s presidential campaign. Thus, after assuming office he formally notified Congress and the other two NAFTA parties that the US was seeking a renegotiation. As talks were ongoing, progressive Democrats in Congress and CSOs repeatedly told the executive that ISDS had to be dropped in the new deal.¹ At the same time, Republican lawmakers and business groups made clear that ISDS had to be included in NAFTA 2.0 if they were going to support it.² Thus, much like the George W. Bush administration in Chapter 4, the Trump government was caught between pleas from the left and CSOs and demands from American multinational firms and their allies in Congress. However, unlike Bush, Trump eliminated ISDS with Canada and severely limited it in relation to Mexico.

It is impossible to understand this shift without paying attention to the ideas motivating policy decisions. It was not only the nationalist tenor of the Trump White House that had little love for international institutions, but more important

¹HOUSE DEMOCRATS ENCOURAGED BY USTR MEETING; PATH ON ISDS STILL UNCLEAR. (13 October 2017). Inside U.S. Trade.

²U.S. BUSINESS GROUPS TIE SUPPORT FOR NAFTA 2.0 TO THE INCLUSION OF ISDS. (1 September 2017). Inside U.S. Trade; Lighthizer, Brady square off over ISDS at Ways Means trade hearing. (22 March 2018). Inside U.S. Trade.

were the views of the US top negotiator, Robert Lighthizer. In June 2017, a little over a month after being appointed US Trade Representative, Lighthizer testified before the Finance Committee of the Senate about the new administration's trade policy agenda. Naturally, much of the conversation revolved around NAFTA. When questioned particularly about the fate of the ISDS provisions, his response was that "clearly our investors have a right to have their properties protected."³ By itself, this comment would have signaled a continuation of the traditional Republican support for strong investor protections. After all, Trump himself holds many businesses overseas⁴ and he had also appointed Rex Tillerson as Secretary of State. Tillerson had been the head of the oil giant Exxon-Mobil, a firm that sued Canada on two occasions under NAFTA's ISDS rules.

However, Lighthizer was not done talking:

"on the other hand, there are, in my judgment, sovereignty issues, I'm always troubled by the fact that non-elected, non-Americans can make the decision that the United States law is invalid, this is a matter of principle, I find that -I find that offensive...We have two interests, both of which are valid. But as I say, personally myself, the most troubling part of all this, is that...it attacks our sovereignty."⁵

These remarks fit well with the story told in the previous Chapters. Policy-makers' ideas color their understandings of ISDS exposure. In the case of Lighthizer, he had

³SENATE FINANCE COMMITTEE HEARING ON THE PRESIDENT'S TRADE POLICY AGENDA AND F.Y. 2018 BUDGET - COMMITTEE HEARING

⁴In fact, in April 2018, news broke that Trump's lawyers threatened with investment arbitration under the US-Panama bilateral investment treaty in a letter to the Panamanian President requesting his intervention in a dispute over a hotel. Trump lawyers invoke BIT in Panama hotel dispute. (10 April 2018). Global Arbitration Review.

⁵Supra note 3.

consistently expressed his displeasure with international institutions overruling US policy.⁶ Yet he also recognized that, for the US, investor protections and ISDS go both ways. That ‘non-Americans can make the decision that the United States law is invalid’ is only a problem if one takes the perspective of the US as host to foreign firms. From the perspective of the US as a home for multinational firms, arbitrators would be making decisions about other countries’ laws for the benefit of American investors. His political views, however, led him to make policy decisions based on the former.

The renegotiation of NAFTA suggests the debate around investors’ rights in international agreements is far from settled. In tune with the argument made throughout the dissertation, it also shows that policy-makers’ ideas are an important part of the explanation for why governments’ preferences regarding this issue vary over time and across states amid competing demands from economic and civil society actors. In the rest of this Chapter, I dive further into the theoretical, policy and normative implications of my findings about the role of ideas, economic actors, civil society and power in the current backlash against investment treaties. To conclude, I engage with a pressing question posed by my findings: if states pursue alternative policies in reaction to their ISDS experiences, what is left for multilateralism in the international investment regime? I examine this question in light of ongoing ISDS reform talks at the UN and I argue that, in the coming years, the regime will be characterized by increasing pluralism.

⁶In August 2007, then as a trade lawyer at a DC legal firm, Lighthizer told the Subcommittee on Trade of the House Ways and Means Committee that “one of the biggest threats to our trade laws is from the dispute settlement system at the WTO.” Partner at Skadden, Arps, Slate, Meagher, & Flom Lighthizer testifies on legislation related to trade with China before House panel. (2 August 2007).US Fed News.

7.1 Theoretical and normative implications

7.1.1 The role of ideas

In Chapter 2, I used the analogy of ideas as lenses through which political actors filter their country's experience with investment arbitration. I also discussed alternative arguments that explain post-ISDS policies as the result of rational and bounded rational learning processes. In the rational world, policy-makers do not need glasses; they are perfectly capable of assessing the situation and deriving policies for the way forward. In the bounded rational approach, policy-makers are equally myopic and miscalculate the situation until the costs of the current behavior becomes sufficiently vivid. Rather, I argued that policy-makers' ideas are analogous to wearing colored glasses. The same picture looks different when looked at through differently colored lenses; some elements are highlighted and others are obscured. Comparably, ideas give meaning to an observable situation, provide a standpoint from which to critique it and allow actors to develop blueprints for a desired future. For example, in the Ecuadorian case, members of the constitutional assembly attributed the ongoing setbacks in investment arbitration to different causes. For conservatives, Ecuadorian officials did not have enough expertise to negotiate good treaties or to defend the country effectively during disputes. For the leftist lawmakers, the treaties were not a result of a lack of expertise but of political pressures from wealthy countries. Moreover, the legal defeats were not a matter of poor strategy. Differently, they believed that the system of ISDS is rigged in favor of investors from the start.

Of course ideas alone do not explain treaty policy outcomes. As important as the presence of particular ideas is their distribution. That is, the degree of consensus

around them. And when there is plurality of views, which is almost always the case, it is the ideas of those with veto-power that are most important. In the Indian case, two state agencies with treaty-making competences -the Ministries of Finance and of Commerce- had different views about what India's policy should be. While both proposed policy courses aimed at recovering India's legal autonomy, Commerce wanted to exit the investment regime while Finance preferred a revisionist policy. The Ministry of Finance, which is considered to be relatively more powerful and was coordinating the review process from the start, ended up winning the day.

Without paying attention to the role that beliefs and principles play in motivating some actions rather than others it is difficult to understand the plurality of approaches to investment treaties and arbitration that constitute the current 'backlash' in the international investment regime. What is at stake in reaffirming the role of ideational elements within the theoretical toolbox of IR scholars is not simply a more valid explanation of real-world outcomes. Scholars, observers and journalist often make a loaded distinction between pragmatism and ideology in the study of foreign policy. The former is charged with positive value; while the latter is lamented. Pragmatists tend to make decisions 'sensibly and realistically' in a way that is based on practical considerations. Ideologues do the opposite. They are 'stubborn', 'strident', and base their decisions on principles (that is, ideas) rather than 'facts'. Especially from the perspective of smaller countries, pragmatism tends to be equated with internationalism and the embracing of open markets while ideology is associated with political and economic nationalism (Castañeda, 2006). Because less powerful nations have to adapt to the world that surrounds them -a world that is shaped by the interests and actions of larger states- the most reasonable thing to do is not resist, open up

and operate in the world as is. If the opportunity arises, positive change should be attempted but through incremental reforms and without major disruptions.

In this mindset, radical policies like Ecuador's would be dismissed as ideologically-motivated and thus exceptional; while others' would be explained by reference to factors *other than* ideas, for example, structural forces, domestic coalitions, or the effects of international institutions. Rather, by highlighting the role of ideas across the different cases, my goal was to show two things. First, political actors are not more motivated by ideas in the South than in the North. Second, political actors trying to radically alter the status quo are not more motivated by ideas than those trying to preserve it. The difference is whether one's ideas are already embedded in existing institutions or not.

7.1.2 The role economic actors

But ideas do not have abstract influence on policy outcomes. Thus, I argued that the implementation of the policy preferences that ideas inspire takes place within particular international and domestic contexts that impose constraints on and provide opportunities for policy-makers. One source of constraints comes from the preferences and mobilization of domestic and foreign firms. My findings confirm insights from New-New Trade Theory (NNTT) in the sense that policy preferences appear to crystallize across types of firms rather than industries or sectors. Multinational firms generally mobilize to keep strong investor protections and access to ISDS both in their home countries and in the countries they invest in. The different business groups that appear throughout the Chapters represent firms from multiple industries that are united, at home, by being present in multiple countries or, abroad, by a

common national origin.

Differently, domestic firms that produce locally but place their products in foreign markets are not primarily concerned with investment treaties. However, one aspect that NNTT overlooks is the possibility of linkages between the issues that different firms care about and, more importantly, the ability of political actors to exploit those linkages in their favor. For example, Ecuadorian domestic exporting firms mobilized against revoking the contract of an American oil company when that would jeopardize preferential market access to the US and they were critical of the termination of the BITs when it would put a Free Trade Agreement with the EU at risk. Thus, against NNTT predictions, domestic exporting firms ended up caring about international investor protections, albeit indirectly through the explicit use of trade threats by the US and European governments for the protection of their own multinational firms.

7.1.3 The role of civil society

I also theorized about the role of civil society, whose main interest is to avoid public regulations being inhibited or rolled back because of investors' ability to invoke international treaty protections before ISDS tribunals. Drawing from the contentious politics framework, I made an important distinction between civil society actors as social movements and as civil society organizations (CSOs). They have common agendas but different resources to mobilize in furthering those. Social movements have the gift of numbers and thus they can carry on disruptive actions. In contrast, CSOs have the gift of technical expertise, both in the subject matter as well as in interest group politics. Most civil society actors have single agendas -environment, health, consumer protection, etc.- but CSOs are more likely to expand their interests from their par-

ticular issue to the way in which investment treaties inhibit regulatory controls in that area. Chapters 4 and 5 showed how this distinction mattered for civil society's impact on the policy-making process. American CSOs lobbied legislators effectively and provided valuable information about the potential impact of a multilateral investment agreement that was being negotiated at the OECD based on actual NAFTA cases. Differently, Ecuadorian indigenous and environmental movements carried out intense actions against oil firms due to the social and environmental consequences of their operations but they did not have equivalent interest on investment treaties, even though those firms invoked treaty protections against Ecuador.

That said, an unexpected finding from the Ecuadorian case was the active role of government actors in fostering civil society's interest on international investment treaties. In my theoretical framework, the interest of civil society actors is exogenous. They either have it or not. However, Ecuadorian officials with a radical agenda appeared to have been, in a way, trying to tie the governments' own hands by manufacturing a public demand for the termination of the BITs. This motivation can be seen behind the creation of a commission to conduct a public audit of Ecuador's investment treaties.

The issue of uneven technical expertise across civil society actors from different parts of the world has important implications for reform options that seek to enhance the transparency and democratic quality of ISDS by making documents and proceedings public and allowing civil society, especially from affected communities, to make presentations before arbitral tribunals. It is unclear how citizens from less affluent countries will be able to derive benefits from greater access to legalistic proceedings that take place in Washington DC, London or The Hague, and generally in English

or French.

Even the most resourceful CSOs find it hard to influence policy when conditions are not in their favor, that is, when they lack access points to the policy-making process. They need allies in positions of power and they need openings to reach them. Chapters 4 and 6 showed this clearly. In the United States, the CSOs were more effective in Congress than before the executive. They found a strong ally in John Kerry and other Democrats during the passing of the Trade Act yet they were not able to get additional concessions during the drafting of the 2004 Model BIT because the process was controlled by the Republican administration of George W. Bush. The India case showed a different type of obstacles to the influence of civil society. In the US case, there were institutional openings -i.e. the negotiation guidelines of the Trade Act were discussed in Congress and the US State Department and the USTR had to submit the draft model BIT to a public consultation- thus CSOs' influence depended on the receptiveness of policy-makers in those positions. However, Indian government agencies conducted their review of India's BITs and the drafting of the new model fairly autonomously. That is, there were not as many openings for civil society in the first place. Indian CSOs and scholars that had a marked interest in the issue complained about the opaqueness of the process and their inability to provide inputs. In the end, the revisionist policy that India adopted was a product of the government's autonomous preferences.

7.1.4 Power and international law

My findings also have implications for the way the relationship between power and international law is understood. Three approaches to these relationship can be iden-

tified. Classical legal thought believed that as international law developed, the world would see less displays of unilateralism, power politics and coercion (Steinberg and Zasloff, 2006). This is what Ian Hurd terms the 'enchanted' view of international law as inherently good, morally and politically (2016). Realists contest this and argue, much differently, that international law cannot have any effects on the world -good or bad- because it has no independent power and that compliant behavior is merely a coincidence; states follow the rules when doing so happens to be in their self-interest (Goldsmith and Posner, 2005). Yet another view comes from critical and third world approaches to international law. Here, international law is anything but powerless. It enables, perhaps, an even more powerful type of domination. In (re)producing political and economic inequality, legal institutions cloak the fundamental relationship between compliant behavior and the interests of powerful Western states or dominant classes who get a larger say in the content of the rules (Anghie, 2007). In this framework, the logical consequence of power made law is that those in the receiving position of power will come to resist it (Rajagopal, 2003, 416).

The preceding Chapters have something to say to each of these three approaches. An 'enchanted' view of the regime still exists, and it is strong among arbitration practitioners and the legal scholars supplying them with commentary. For example, according to the renowned German arbitrator Karl-Heinz Bockstiegel, by empowering private entities to sue states before international tribunals, the significance of ISDS is comparable to that of human rights courts:

“[c]ritics have forgotten what things were like without investor-state arbitration, when a foreign investor could only rely on diplomatic protection from its home state, which for political reasons often wasn't given. Now,

an individual can sue a state directly under human rights treaties and investors can defend their rights under investment treaties. These are two major legal milestones and you can't turn back the clock."⁷

Yet, growing dissatisfaction with the international investment regime among states, civil society and scholars from all over the world does not suggest that investment law is considered much of a force for good. For most critics, the fundamental problem is that rather than checking the power of sovereign states to treat foreign investors unfairly, international investment law has come to constrain their ability to regulate in the public interest. Thus, a juxtaposition of international law and state power cannot be sustained. Abuses of power cannot exist outside the legal rules that constitute them. That is, outside the laws that cast a state policy as unfair treatment rather than as a legitimate government act.

My findings on the limits and possibilities of exiting the regime are most relevant for Realist views of international law as epiphenomenal to states' interests and their power to tolerate the costs of non-compliance. Here, there would be little reason to expect states to comply with treaties when their interests and power change. Yet, as much of the evidence from the previous Chapters suggest, even when states' preferences change and they perceive their interests are no longer served by participating in investment treaties and ISDS, the various ways in which states attempt to disengage from previous commitments is still 'in compliance' with international law. Even the proponents of the most radical of the three policies examined, Ecuador's exit, made sure the cancellations were done according to each treaty's termination provisions. That is, states manage their degree of commitment to specific rules they like or dislike

⁷Portrait of the arbitrator. (6 May 2014). Global Arbitration Review.

in accordance to, rather than outside of, international law (Hurd, 2018, 269).

Lastly, this dissertation's findings have a lot to contribute to the third view of the relationship between international law and power. The move towards treaties and arbitration and away from diplomatic protection has been interpreted as attempts by those in positions of power -multinational corporations and their home states- to preserve their privilege through law rather than through acts of force (Miles, 2013; Maurer, 2013). Furthermore, that power made law generates resistance is palpable in investment law (Sornarajah, 2015). However, I find that dominance is not only evident in the preservation of the status quo nor that change only happens when resistance is successful. Power is also observable in the ability to make a choice about whose resistance merits change and in controlling the terms of that change (Rajagopal, 2003, 9). Reforms in the US and Europe were not a reaction to Third World resistance, even though that is where the brunt of ISDS' impact is felt. Rather, they emerged out of the political dynamics triggered by their own experiences with ISDS and the persistent resistance of their own civil society. In this sense, this relates to an 'inside-outside distinction' that Critical scholars place at the center of international economic law. "Across international legal regimes past and present we see the interests of the powerful applied under the legitimating shelter of law to the detriment of other peoples -laws or their application that would categorically be rejected at home: law for others" (Linarelli et al., 2018, 5). For example, trade agreements facilitate the free flow of goods and this results in unsafe labor practices elsewhere that would not be tolerated at home. Similarly, investors' use of ISDS against developing countries largely exceeds their use against wealthy states. Moreover, legal fees and awards take a much bigger portion of the former's budget. If this inside-outside distinction is

fundamental to the origin of these agreements, it is only natural that it should also govern the way they evolve and change.

7.2 Amid the rage, what is left for multilateralism in the investment regime?

The rest of this concluding Chapter deals with the implications of these findings for the future of the investment regime, particularly in its multilateral dimension. In his highly praised book, Stephan Schill made the argument that the thousands of existing BITs and FTA investment chapters constitute a multilateral system (2009). The distinction between multilateral and bilateral is not simply about numbers. For Schill, bilateralism puts sovereignty and state consent at the center and seeks to advance only the interest of the concerned states. Conversely, multilateralism “assumes the existence and legitimacy of interests of an international community beyond the interests of States” (p. 362). Because the international community has an interest in “the functioning of the global economic system” (p. 373) the multilateral investment regime seeks to eliminate state behavior that is contrary to that goal.

While investment treaties are mostly bilateral or plurilateral, Schill’s argument goes, it is their content that makes the regime multilateral. International investment law “is not based on specific reciprocity, but orders investment relations objectively on the basis of general principles” (p. 17). Of these principles, the most ‘multilateralizing’ of them all is the most favored nation (MFN) treatment because it expands the terms of a treaty to all investors whatever their home countries are. Furthermore, ISDS has a multilateralizing effect as well because it “effectively removes the power of

States to both unilaterally defect from investment treaties and bilaterally negotiate around the consequences of breaches of such treaties” (p. 242). Schill also assumes that because of the multilateral effects that treaties have, dissatisfied states will find it very hard to change the system. Plus or minus some adjustments, BITs and ISDS are the end of investment legal history.

The findings from the previous Chapters challenge some of Schill’s arguments, especially the extent to which state sovereignty and consent have been put aside to create a multilateral legal order for the protection of the international community’s interest in the functioning of an open global economy. After controversial experiences with the enforcing of these treaties, states have attempted to reassert their international legal autonomy in different ways and to varying extents. These are not necessarily moves to become closed-off to foreign investment but to recover choice over how the costs and benefits of those investments are allocated and the ability to decide when the goal of economic openness becomes secondary to other concerns. Against this backdrop, an important question is how much space remains for multilateralism in the international investment regime. The ongoing reform talks at UNCITRAL provide an opportunity to explore this.

ISDS reform talks at UNCITRAL

That the investment regime evolved to be something more than a collection of bilateral and plurilateral agreements is observable in the ongoing deliberations for a possible multilateral reform of ISDS at the United Nations Commission On International Trade Law (UNCITRAL). ISDS does not exist independently of the specific treaties that create it yet states recognize that reforming the way in which bilateral and plurilateral investment treaties are enforced is a matter of concern for the entire

international community. UNCITRAL is the core legal body of the United Nations system in the field of international trade law and works for the modernization and harmonization of rules on international commercial transactions by preparing legal texts and providing technical assistance to states seeking to reform laws. In June 2017, the Commission entrusted Working Group III (WG3) to explore the possibility of a reform of ISDS.

In late November 2017, governments from all regions got together in Vienna to begin debates about a potential reform. WG3 did not have a highly ambitious mandate. That is, to avoid alienating unconvinced states, it was not assumed that there was a need to reform ISDS. Rather, that was something yet to be determined. According to its mandate, WG3 was supposed to do three things: (i) first, identify and consider concerns regarding ISDS; (ii) second, consider whether reform was desirable in light of any identified concerns; and (iii) third, if the Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to Commission.⁸ Whatever emerges from this UNCITRAL process will come to a vote in the UN General Assembly. While the mandate started from the lowest common denominator, in its procedural aspects it already reflected some of the core concerns with investment arbitration. First, it specifically required for the process to be fully transparent. All sessions are public, recordings are available online and non-governmental organizations were invited to participate as observers. Second, the process would be government-led. This was a big change from the way in which business is normally conducted at UNCITRAL. As a legal body working on economic law, the Commission often covers relatively apolitical, technical issues and thus many states have been content to delegate their representation in whole or in part to arbitration practitioners.

⁸https://uncitral.un.org/sites/uncitral.un.org/files/draft_report_of_working_group_iii_for_the_website.pdf

The worry was that arbitration practitioners would attempt to stall, thwart or water down any reform attempts on the basis that they have a vested financial interest in maintaining the status quo. That governments reclaimed UNCITRAL from the experts is symptomatic of the larger issue at stake: the recovery of state authority from the apolitical experts tasked with keeping public power in check so that economic forces can operate freely. That said, some delegations, like Switzerland and the United States, included lawyers with experience as arbitrators or counsel in ISDS disputes.

Yet that states were willing to discuss a solution to the various problems associated with investment arbitration in a multilateral setting should not lead to overstate the degree of consensus. A running theme through this dissertation has been that differences across policy reactions to ISDS are politically meaningful and reflective of alternative understandings of how much state policy autonomy should be sacrificed so that foreign investors operate in a free and predictable environment. Thus, these differences are likely to emerge any time states come together to debate the future of investment arbitration. That consensus would be hard to come by was evident in the Group's inaugural session in Vienna in November 2017. Regarding procedural matters, WG3 was unable to keep with UNCITRAL practice of appointing its chair by consensus. In previous working groups, the chair have been agreed upon ahead of the meeting, such that someone would have been elected by consensus on the first morning. In WG3, the debates around the election of the chair went for a day and a half, which is considerable since the entire session would last only five days. Moreover, for the second known time in UNCITRAL's history, delegates had to vote in order to break the deadlock, resulting in the election of a Canadian official.⁹

⁹UNCITRAL MEETINGS ON ISDS REFORM GET OFF TO BUMPY START, AS DELE-

In more substantial terms, delegations expressed marked disagreements with respect to which concerns about ISDS are, in fact, legitimate. For example, many states lamented that ISDS is too expensive and cases take too much time but others - including Russia, Chile, and Mexico- disagreed. Regarding claims about duration, they asked whether arbitral disputes were notably slower than domestic courts or other international tribunals such as the International Court of Justice or the WTO panels.¹⁰ Similarly, many delegations mentioned the lack of consistency in arbitral awards as a major problem, commenting on the frequency with which arbitrators reach divergent readings of similarly or identically-worded provisions. Argentina was vocal about this issue since the tribunals deciding on the many disputes that emerged from its 2001 economic crisis made diverging interpretations of the same clauses. The US, South Korea and Israel downplayed the degree to which inconsistency was a problem and attributed the divergent interpretations to the fact that they stem from differing treaties and/or different facts (Roberts and Bouraoui, 2018a).

Working Group III met three more times so far, in April 2018 in New York, in October 2018 in Vienna and in April 2019 again in New York. As the latest Working Group session got underway, it soon became clear that it would be difficult, if not impossible, to agree on any single way forward. Thus, it was ultimately agreed to work on multiple tracks so as to accommodate the wishes of governments that were sharply divided. In future WG3 sessions, delegations will work on a variety of reforms, some being more structural in nature -like the EU proposal for an investment court-, other reforms fitting within the current system -like an arbitrator code of conduct-,

GATIONS CANT COME TO CONSENSUS ON WHO SHOULD CHAIR SENSITIVE PROCESS ENTAILING A RARE VOTE. (9 December 2017) Investment Arbitration Reporter.

¹⁰ANALYSIS: WHAT DID GOVERNMENTS AGREE (AND DISAGREE) ON AT RECENT UNCITRAL MEETINGS ON INVESTOR-STATE DISPUTE SETTLEMENT REFORM?. (2 January 2018). Investment Arbitration Reporter.

and others seeming to straddle these categories -like a permanent appellate body for ISDS decisions that states could opt-in to.

The discussions at UNCITRAL illustrate how states exercise power by controlling the scope and limits of possible change. Yet, UNCITRAL also shows that wealthy capital exporters are deeply divided on this issue. A division appeared between some states that seem inclined toward incremental, bilateral reforms -such as the US and Japan- and others that openly embrace systemic, multilateral reform -such as the European Union and Canada. As ISDS became politically unworkable in Europe, the EU proposed the creation of a multilateral investment court. That is, the EU's solution to the legitimacy crisis of treaty arbitration is to make the regime more multilateral, moving from ad-hoc arbitral tribunals to a single permanent court open to any state. This court, however, would still be a form of ISDS. Investors would bring claims against their host states under the applicable treaties. The US and Japan, among others, prefer to deal with ISDS' problems on a treaty-by-treaty basis, pointing at the reforms included in revised versions of TPP and NAFTA as examples. However, that the options seem to be contained between a court system or targeted reforms to the current ISDS system leaves aside the views of states, and of civil society, that reject the need for international tribunals for investors in the first place.

Moreover, while UNCITRAL has gone out its way to emphasize how inclusive and transparent this process is, developing countries and CSOs have criticized the degree to which this has been true so far. The last meeting in New York was characterized by the presence of a larger than usual amount of states present: 400 delegates from 106 states. Importantly, a significant number of countries from the developing world, particularly Africa, joined WG3 for the first time. This was partly due

to the UNCITRAL travel fund, newly replenished courtesy of the European Union and Switzerland. It was also due to the active role of CSOs encouraging attendance by these states. The International Institute for Sustainable Development and the Columbia Center for Sustainable Investment, the two most influential international CSOs who featured prominently in the previous Chapters, were active in getting developing states to show up. However, as many interventions praised the inclusive quality of the process, several state delegations from smaller countries lamented they were left out from informal consultation breaks where compromises have been hammered out.

Similarly, around 70 observer organizations representing various non-state stakeholders were present in the last New York meeting. However, CSOs have noted that the vast majority of the organizations are directly or indirectly linked to the private arbitration industry with only a minority representing wider public interests. The Dutch CSO SOMO calculated the break down of each sector to 85% and 14% respectively for the first two UNCITRAL sessions.¹¹ Moreover, the powerful American CSO Public Citizen, along with other CSOs, applied to be observers at the April 2018 meeting and were rejected by UNCITRAL on grounds they would not be bringing sufficient unique experience. The decision seemed arbitrary given that, after criticism ensued, they were accepted to attend the following WG3 meeting. Arbitration practitioners are also linked to the process through an academic forum set up to study the desirability of reform and examine possible options. Early discussions at the Working Group revolved around the framework set by papers produced by the academic forum. In terms of membership, of its 103 members, at least 26 members have acted as arbitrator in ISDS. Lastly, the process also provides informal opportunities for the

¹¹The limitations of the UNCITRAL process on ISDS reform. (30 October 2018). SOMO.



Figure 7.1: The UNCITRAL process according to CSOs. Source: SOMO.

arbitration community to be involved. Attendees from the approved organizations reported that during the UNCITRAL meeting, a member of the US delegation took the floor and invited all the government delegates to an evening event hosted by his law firm, King and Spalding. This is the law firm that, among other claimants, represented Chevron in its infamous case against Ecuador.¹² Noting these events with concern, CSOs have defined the heavy involvement of the arbitration community as ‘letting the foxes guard the hen-house’ (Figure 7.1).¹³

The next meeting of WG3 is scheduled to take place in Vienna in October 2019. Successive sessions will be crucial because government representatives will start working on the substance of the various reform proposals. Given that it was agreed in New York to work on multiple tracks and that consensus is virtually non-existent, the process is likely to take a long time. Inequality of resources tends to be an issue in drawn out diplomatic processes. That more developing countries than ever before

¹²Corporate Lawyers Hijack UN Meeting, While Civil Society Is Sidelined. (24 May 2018). Truthout.

¹³Supra note 11.

attended the last WG3 meeting was commendable but there is no guarantee that donors will continue to foot the travel bills of these delegations. Moreover, given that the universe of possible reforms stretches between improving the current system and setting a permanent court, it is unclear what and how CSOs can contribute to the process. As stated in a letter to UNCITRAL from over 300 civil society groups, governments “should put their efforts into discussing how to move away from the current investment treaty system altogether.”¹⁴ That said, findings from Chapter 4 on the different strategies pursued by civil society during the negotiations of the OECD multilateral agreement on investment suggest that CSOs will likely have more impact when they attempt to influence international negotiations indirectly, by promoting awareness and interest on the issue among policy-makers at home, rather than trying to intervene in international processes directly.

7.3 Pluralism ahead

The positions of developed countries are set for the moment. The European Union and Canada, two countries where civil society has mobilized strongly against ISDS, think that disputes between foreign investors and host states should be resolved before a permanent multilateral court, with a pre-existing bench and an appellate stance. The court would be open to any countries who would establish in their treaties that all eventual disputes would be settled there. In fact, their latest FTA provides for a bilateral investment court system which should be replaced by an eventual multilateral one. During the renegotiation of NAFTA, Canada pitched the idea to the

¹⁴Global Civil Society Sign-on Letter on UNCITRAL’s Investor-State Dispute Settlement Reform Discussions. 30 October 2018. Available at: <http://www.s2bnetwork.org/wp-content/uploads/2018/10/UNCITRAL-Global-Letter-Oct-30-2018.pdf>.

US unsuccessfully but the EU has been able to get Singapore, Mexico and Vietnam to accept the court system in their respective agreements. The United States and Japan, much differently, prefer to deal with this matter bilaterally. This does not necessarily mean that they will choose more pro-investor arrangements, as shown by the US position in NAFTA 2.0. However, without relatively less domestic pressure than in Europe, it does mean that these governments will be able to make decisions on a partner-by-partner basis. That the perspective from which the US enters a negotiation matters for the resulting investor protections included in a treaty matters is already evident in the retooled NAFTA. With substantial FDI coming from Canada but mostly unidirectional investment flows going into Mexico, the US decided that ISDS would remain in place *only* for the latter, albeit it would be seriously scaled back, even though the stock of American FDI in Canada is three times larger than in Mexico.¹⁵ Moreover, the US has not attempted to renegotiate its existing BITs with other developing countries and the presence of arbitration lawyers in the American delegation to UNCITRAL talks suggests the US is not done with investment arbitration.

At the same time, some emerging powers have taken alternative positions that do not fit well with what those of the core capitalist countries. Brazil has traditionally rejected ISDS and considers disputes should be resolved between states. India, as shown in Chapter 6, has adopted a markedly pro-state new treaty template that, even though still includes it, imposes severe limitations to investors' access to ISDS and reduces the substantive protections offered to investors. While these countries have had moderate success convincing other countries to sign BITs -for the most part, only smaller states have accepted their templates- they do present yet another

¹⁵According to 2017 values. Office of the United States Trade Representative.

model for governing relations between foreign investors and sovereign states. The space between the preferences of these emerging economies and the preferences of developed countries is too big for any mutually acceptable treaty to be concluded. However, what needs to be remembered is that, since Brazil never ratified a BIT and India terminated all of them, foreign investors in these countries will not enjoy the same level of protection they do in smaller countries. Unlike in most of the developing world where unbalanced treaties signed during the 1990s and early 2000s are still in force, the status quo does not benefit multinational firms with investments in India or Brazil. The crucial question regarding revisionist countries like India and Brazil is, as their economies continue to grow and so do their FDI outflows, whether their own firms will start to demand their governments to approach investment treaties from the position of a home state, rather than a host, and thus provide them with stronger protections in their dealings abroad.

Given the variety of positions that developed and emerging economies have adopted, smaller states that want to enter into economic agreements with them will have to accept pluralism in their own treaty networks, with some agreements enforced via ISDS, others before an international court, some through state-to-state mechanisms and others in domestic courts. In negotiations with the US or the EU, states concerned with giving investors a right to challenge their policies before international tribunals, independently of their type, might not have much of a choice but refusing to sign treaties altogether. Yet, as states move away from stand alone BITs and FTAs towards more encompassing economic agreements, this might make it harder for smaller states to leave the negotiation table over concerns with investment when market access is also on the line. Their best bet, thus, would be to focus on getting

concessions in terms of substantial provisions that better preserve their regulatory autonomy or conditioning treaty protections to specific goals, like a substantial economic contribution of the investment to the host state.

Another approach for smaller countries could be to write in contracts with foreign investors a provision requiring firms to resign to applicable investment treaty protections and operate only according to the terms of the contract (Arato, 2016). As mentioned in Chapter 5, Ecuador attempted to bar oil firms from taking disputes before ICSID by writing this limitation in their contracts. In November 2017, Argentina passed a law on public-private partnerships, or PPPs, that established a legal framework to govern new investments in infrastructure. In the case of foreign investments, each individual contract could, if both parties agree, include access to international arbitration for any eventual dispute. However, this would also mean that investors are barred from invoking protections under bilateral investment treaties and that the applicable law for the arbitration proceedings would be the PPP law.¹⁶ That is, instead of the generally broad definitions and open-ended provisions found in BITs, arbitrators would be applying Argentine law. Of course, nothing precludes governments from passing pro-investor laws and entering into bad contracts. Foreign firms are not necessarily the weaker party in negotiations with states. That said, scholars of international investment law should not dismiss the potential for the system of investment treaties to be hollowed out by a move towards contract protections.

The discussion so far has been future-oriented. Yet the truth is that 1,703 investment agreements are in force today that were signed before 2000, that is before states started to incorporate lessons from ISDS experience into their drafting choices. Old

¹⁶Signed contracts. Ministry of Transport of Argentina. Available at: <https://ppp.vialidad.gob.ar/contratosfirmados/>.

treaties ‘bite’, 84% percent of all ISDS cases had been filed under treaties concluded before 2000. Furthermore, only two investment treaties that are in force today were signed before 2000 by more than one country from the G7: NAFTA and the Energy Charter. At the same time, 434 pre-2000 treaties are still in force between members of the G7 and other countries.¹⁷ While investment disputes born out of NAFTA and the Energy Charter have led to major changes in the treaty policies of the US and the EU, their consequences has been mostly forward-looking. The adoption of the 2004 US model BIT, as examined in Chapter 4, is directly linked to the early ISDS disputes under NAFTA. Similarly, the European proposal for a permanent investment court came out of the popular mobilization against ISDS in TTIP and CETA which emerged from a series of controversial disputes against Germany under the Energy Charter. Regarding past-oriented changes, wealthy countries have only been keen to revise these two treaties. ISDS has been partially dropped from NAFTA 2.0 and a reform of the Energy Charter is being debated in 2019. Yet they have not shown much interest in modernizing the rest of their treaties.¹⁸ There is little to fear from their remaining BITs because they regulate fairly unidirectional flows of investments. American, Canadian and European companies will keep invoking them against other states but not the other way around.

Thus, the modernization of old, pre-ISDS experience BITs is unlikely to take place unless developing countries put pressure on their wealthier partners. According to UNCTAD calculations, by the end of 2019, 1,154 investment treaties would have

¹⁷International Investment Agreements Navigator. Division on Investment and Enterprise. UNCTAD.

¹⁸The exception is a recent declaration by the EU issued on 15 January 2019 where they announced their intention to terminate all intra-EU BITs. The reason behind this is a decision from the European Court of Justice in March 2018 that ISDS between EU members states is incompatible with EU law.

reached a stage where they could be unilaterally terminated (UNCTAD, 2017). This number will only grow in the coming years. Yet, as the previous Chapters suggest, this is not an easy endeavour. When countries announce their plans to unilaterally terminate treaties, foreign firms and their home governments are quick to warn that reputational and economic losses will follow and not all countries that have suffered under these BITs are equally inclined to tolerate those costs. As ISDS disputes continue to emerge from these treaties and the various ongoing efforts fail to deliver on past-oriented reforms, more states might be willing to unilaterally cancel their old BITs. Although cases of large-scale terminations are too recent to assess whether countries have actually incurred economic losses as a result, the experience of these countries will be important for those considering similar actions in the future. Opportunities to coordinate terminations with other like-minded countries at regional forums or at UNCTAD could also encourage undecided states.

In any case, developing countries looking to get rid of ‘the BITs that bit them’ should remind their wealthier partners of their own trajectory. When the renegotiation of NAFTA concluded, the Canadian Minister of Foreign Affairs celebrated that ISDS would not be in place between Canada and the US. “One of the achievements I’m most proud of is that the investor-state dispute resolution system, which in the past allowed foreign companies to sue Canada, will be gone,” she said, “[t]his means that Canada can make its own rules.”¹⁹ It should not be hard to imagine that developing countries might want to make their own rules too.

¹⁹Chrystia Freeland: The USMCA is a good deal for Canadians. (October 29, 2018). Vancouver Sun.

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Appendix A

Chapter 3

A.1 Measuring international legal autonomy

To create this country-year measure, I first assigned an individual score to each relationship between a given country and all other countries in the world per year. That is, I started with a country-partner-year score that represents the legal status of each individual relationship. Each country-partner-year can obtain a score ranging from 0 to 1. A pairing only gets a 1 if there is no investment treaty in force between the two countries. This could be because the countries never signed one; they signed one but it never entered into force; or the treaty was terminated. If there is treaty in force between the two countries in a given year, the score for the pairing is determined by the content of the treaty in place, which can be more protective of foreign investors or of states' regulatory sovereignty.¹ For an indicator of treaty content, I calculated a measure of State Regulatory Space (SRS) applying the coding guidelines developed

¹In cases where more than one treaty applies to the investment flows between two countries in a given year, the corresponding score for that particular country-partner-year is the lowest. For example, since 2007, economic relations between the United States and Uruguay have been covered by two treaties, the 2005 US - Uruguay BIT and the 2007 US - Uruguay TIFA. The rationale for this is that investors can treaty shop thus they will chose the more favorable set of rules among those available.

by (Broude et al., 2017). This produces a score that after normalized ranges from 0 to less than 1; with 1 being reserved to absence of treaty and thus, maximum legal autonomy. Unlike the available literature on investment treaties (Manger and Peinhardt, 2017; Allee and Peinhardt, 2014), my focus is not pairs of countries that had already signed a treaty but on economic relationships that can be legalized or not. For this reason, a single treaty provides information for the measure at multiple points and in different ways. For example, the content of NAFTA determines the ILA score for all Canada-US and US-Canada observations from 1994 onward. For all observations before 1994-when the treaty was not in force- it is the absence of NAFTA which makes the ILA score take the value of 1. After the treaty enters into force, the score becomes that accorded by the SRS coding guidelines, which in the case of NAFTA is .55.

The second stage of constructing this measure involves collapsing all country-partner-year scores into one country-year ILA score. To do so, I calculated a weighted average of all country-partner-year scores. A weighted average results from the multiplication of each component by a factor reflecting its importance. Each component, in this case each country-partner-year score, is multiplied by the partner's share of world GDP in the observation year. This is necessary because, otherwise, averaging all ILA scores in their raw, un-weighted form would make the ultimate country-year score equally informed by the legal status of the relationship with a large economic partner than by the legal status of the relationship with a small partner from which a country is unlikely to receive any FDI. To take this into account, each country-partner-year score is multiplied by the share of world GDP corresponding to that economic partner (Partner GDP / World GDP).²

²Ideally the measure would be weighted by FDI inflows from the partner country but such measure

For example, in 1993, Canada and Argentina were bound by the 1991 Argentina - Canada BIT but NAFTA between Canada, Mexico and the US has not had not yet entered into force. The unweighted score for Canada-Argentina 1991 comes from the treaty's SRS score based on its content, 0.27 while the unweighted score for Canada-US 1991 is the maximum possible because there is no treaty, that is, 1. However, given the different in size between Argentina and the US, when it comes to aggregating all the scores per partner into one ILA score for Canada in 1991, the score for the US counts for 22% of the total Canadian ILA score while Argentina counts for 0.8%, according to each partner's share of total GDP.

A.1.1 Steps to create the International Legal Autonomy measure

1. I started with the COW dyadic trade (COWDT) database as the basis for a country-partner-year dataset. That is, each country will have a score in its relationship with any other country in the world each year.
 - (a) Drop all years before 1957. The year of my earliest treaty.
 - (b) Drop countries with less than 300,000 population.
 - (c) COWDT stops at 2014. I need up to 2017. I added rows for these three years.
 - (d) In COWDT, each dyad appears once. I need it twice (US-CAN and CAN-US). I copied the dataset, switched who is country 1 and country 2 and

does not exist except for a few countries that collect it for their own purposes. The next best choice would be dyadic trade volumes, since mutual trade tends to correlate with mutual FDI. While this indicator is available there is a significant amount of missing data.

then bound them.

(e) I excluded intra EU dyads. Investments are subjected to EU laws. Added 2 indicators that take a 1 if country1 and country2 are EU members in that year. Dropped observations with a 1 in both.

2. Prepare treaties dataset. I need to know if a dyad is covered by a treaty or not in a given year and for that I need to merge the dyads with the treaties.

(a) I converted my treaty dataset to country-treaty-party. That is, US-NAFTA-CAN; US-NAFTA-MEX; CAN-NAFTA-US; CAN-NAFTA-MEX.

(b) Added COW codes for all

3. Merge dyads and treaties. Each treaty appears as many times as parties it has. E.g. 'US Poland BIT' appears for POL-USA and USA-POL.³

4. Clean the country-partner-year data

(a) For those dyads that never sign a treaty, added a no treaty treaty title.

(b) Some dyads are covered by more than one treaty. These dyads will appear twice. Eventually if in a given year a dyad has two treaties in force, I will select the treaty with the lowest score to be the score of the dyad, since investors can invoke either treaty.

³If a country-partner pair signed a treaty at any year, the treaty will appear for all years, even before they signed it. Later I will add signature, force and termination years to establish the status of the treaty each year.

Country1	Country2	Year	Treaty
MEX	CAN	2015	NAFTA
MEX	CAN	2016	NAFTA
MEX	CAN	2015	TPP
MEX	CAN	2016	TPP

5. Added treaty attributes. I needed years of signature, force and termination to determine the status of the treaty and thus which country-partner-years it applies to and which ones are not covered by any treaty. Each treaty has a unique title. I merged by title and import signature year, entry into force year, termination year and termination type (unilateral, expiration, consensual, replaced).
6. Added State Regulatory Space score to each treaty. Each treaty has a unique title. I merged by title.
7. Transformed SRS scores to be used to calculate the country-partner-year score. Made the scores range from 0 to 1. 1 will eventually be 'no treaty' thus I created a fake treaty with a score higher than any observed score. That way no observed treaty will reach 1 after converting.
8. Assigned a ILA measure to each country-partner-year. For this I first needed a status variable for each country-partner-year to determine the corresponding score.
 - (a) Never treaty: those country-partner-year that never signed one. ILA=1

Title	Country	Partner	Year	Sign.year	Force.year	Termination.year	SRS	status	ILA
Afghanistan - Germany BIT (2005)	Germany	Afghanistan	2004	2005	2007	Not terminated	.11	No treaty yet	1
Afghanistan - Germany BIT (2005)	Germany	Afghanistan	2005	2005	2007	Not terminated	.11	Just signed	1
Afghanistan - Germany BIT (2005)	Germany	Afghanistan	2006	2005	2007	Not terminated	.11	Just signed	1
Afghanistan - Germany BIT (2005)	Germany	Afghanistan	2007	2005	2007	Not terminated	.11	In force	.11

- (b) No treaty yet: observation year less than signature year. ILA=1
- (c) Just signed (not in force): observation year larger or equal than signature year less than entry into force year. ILA=1
- (d) In force: observation year larger or equal than entry into force year less than termination year ILA=SRS score⁴ terminated: observation year larger or equal than termination year. ILA=1

9. Weighted average by share of World GDP.

- (a) The share of World GDP of the partner is calculated yearly using PENN tables RGDPE.
- (b) $ILA \text{ weighted} = ILA \text{ unweighted} * (RGDP \text{ partner} / \text{World RGDPE})$

10. Collapse into one country-partner-year row. Some pairs of countries are covered by more than one 1 treaty.

- (a) Collapsed by country code, partner code and year. I keep the smallest SA value. This represents the least favorable treaty for states, assuming investors will treaty shop.

11. Collapse into one country-year measure.

⁴569 treaties of 3310 do not have an SRS score. For those, the SA score will be NA in the years in which the treaty is in force.

- (a) Added all weighted scores for each country per year.
- (b) They have already been multiplied by a proportion (Share of GDP) so just adding is enough to complete the weighted average.
- (c) Thus, the resulting score can be calculated with the resulting formula where i is the observation country, t is the observation year, f is the other member of each dyad and n is the number of considered dyads:

$$ILA_{i,t} = \sum_{i,f}^{i,f=n} ILA_{i,f,t} * \left(\frac{GDP_{f,t}}{WorldGDP_t - GDP_{i,t}} \right)$$

A.2 Additional figures

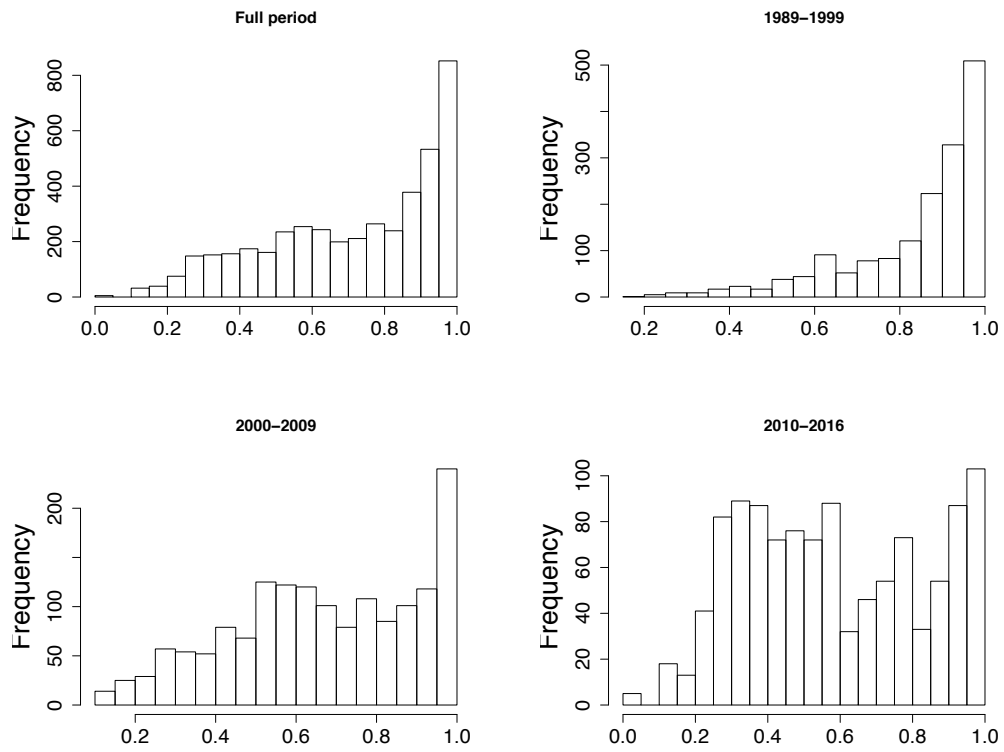


Figure A.1: Histograms by period

A.3 Variation in investment treaty content

International investment treaties generally comprise three sets of provisions: definitions; substantive obligations; and dispute settlement provisions.

A.3.1 Definitions

The way in which a treaty defines what constitutes an ‘investment’ and who counts as an ‘investor’ determines how much foreign economic activity that takes place in a given country is protected by international law. If definitions are broad and open-ended, virtually all flows of capital sent by any type of foreign actor will enjoy the same level of protection. Alternatively, states might choose to differentiate between types of investments and only provide protections to the kind of investment they value most. One way to do this is by introducing requirements and limitations in definitions of what and who is protected.

Definitions of covered investments are generally broad, including loans, cash, contractual rights and minority shareholdings; which is beyond what generally counts as FDI.⁵ One way in which states can limit the scope of a treaty is by explicitly excluding portfolio investments from the protection offered. Whether portfolio investment should be offered the same protections as FDI is a controversial question. This type of capital movement does not carry any of the positive aspects associated with FDI, such as technology and skills transfers (UNCTAD, 2011b, 29). Additionally, it is considered that that purely financial investments are not exposed to the same type of risk given that investors can withdraw their capital more easily.⁶ A few high-profile

⁵FDI implies a degree of control over the operations of the foreign enterprise, either through acquiring a or merging with a preexisting foreign company or establishing a new one.

⁶Capital controls means that portfolio investors might not be completely free to withdraw their

ISDS cases have arisen from portfolio investments. For example, in 2007 a group of 180,000 Italian bondholders lodged an ICSID claim against Argentina under the Argentina - Italy BIT after its decision to default on the payment of its privately-held external debt (Kabra, 2015). In 2015 Deutsche Bank sued Sri Lanka for violations of the Germany - Sri Lanka BIT for failure by a state-owned oil company to pay a hedging contract with the German bank (Anghie, 2015).⁷ As most treaties, both of these agreements do not exclude portfolio investment from the scope of the treaty, yet-except for a dip in 2013-the proportion of treaties doing so has increased in recent years (Figure Figure A.2).⁸

Other ways to limit the scope of the treaty is through the investor definition. In *Saluka Investment BV v. Czech Republic*, a Japanese corporation brought a claim against the Czech Republic for violations of the Netherlands - Czech Republic BIT through a shell company incorporated in the Netherlands. At the time, Japan and the Czech Republic did not have an investment treaty in place. Shell companies, also known as mailbox companies, are enterprises that have no connection with the state in which they are incorporated beyond an interest in taking advantage of a particular regulatory environment and are controlled by a different company based in another state. While the tribunal in that case expressed “some sympathy” with the idea that a shell company with no substantial economic activities in a country should not

investments, in this respect they can be considered to be in a better position than foreign direct investors.

⁷Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2

⁸For example, the Ethiopia - Nigeria BIT of 2008 established in Article 1 that ““investment” means assets invested or acquired by an investor of one Party in the territory of the other Party, through the total ownership of enterprise or the participation in the ownership of an enterprise which gives a significant grade of influence to the investors in the management of the enterprise. Such assets...shall exclude assets not acquired in the expectation, or not used for the purpose of, economic activity or other business purpose and shall also exclude portfolio investments such as stocks or shares of companies in a Party acquired for speculative purposes and held for a short-term by investors of the other Party.” Available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/5160>.

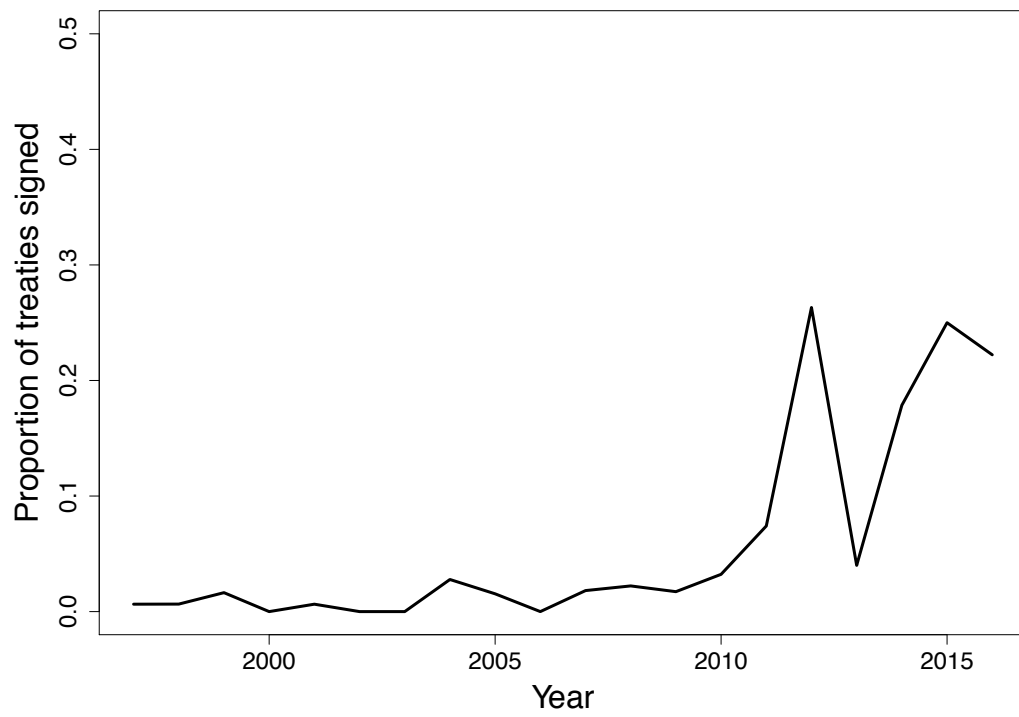


Figure A.2: Proportion of treaties signed excluding portfolio investment

be able to invoke provisions in treaties signed by that state and warned about the potential for “abuses of the arbitral procedure, and to practices of treaty shopping”, the arbitrators held the final view that they were nonetheless bound by the language of the treaty and could not impose a narrower definition of investor than what the text provides.⁹ As a consequence, the arbitration continued and the tribunal found the Czech government liable for 281 million dollars. To avoid such outcomes, states can include in their treaties a provision that requires investors to carry on substantial business operations in their formal home country.¹⁰

A different way to avoid shell companies claiming treaty protections is through the inclusion of a ‘Denial of Benefits’ (DoB) clause. DoB clauses are generally designed to exclude certain subjects from treaty protections. Through this clause, host states may deny treaty benefits to shell companies constituted in the territory of the other party by individuals from a third country that has no treaty with the host state or from the host state itself (UNCTAD, 2011b). Both of these strategies, the inclusion of a substantial business operation requirement and the DoB clause, have been increasingly popular in recent years (Figure Figure A.3). In sum, definitions can qualify the resulting degree of policy space that a treaty provides by expanding or reducing the scope of the treaty. Investors and investments falling outside the definition cannot claim the protections offered by the treaty and thus have to rely solely on domestic legal protections.

⁹Saluka Investments B.V. v. the Czech Republic, UNCITRAL Partial Award, 17 March 2006, paras. 240-241.

¹⁰For example, the Argentina - Qatar BIT of 2016 in its Article 1.1.d states that “A company formed under the legislation of one of the Contracting Parties which has its principal place of business within the territory of such Contracting Party shall not be deemed an “investor” under this Agreement where it is controlled by nationals of a third State or of the host State. Furthermore, a company formed under the legislation of such Contracting Party shall not be deemed an “investor” under this treaty where it does not conduct substantial business activities within the territory of such Contracting Party.” Available at:<http://investmentpolicyhub.unctad.org/Download/TreatyFile/5383>.

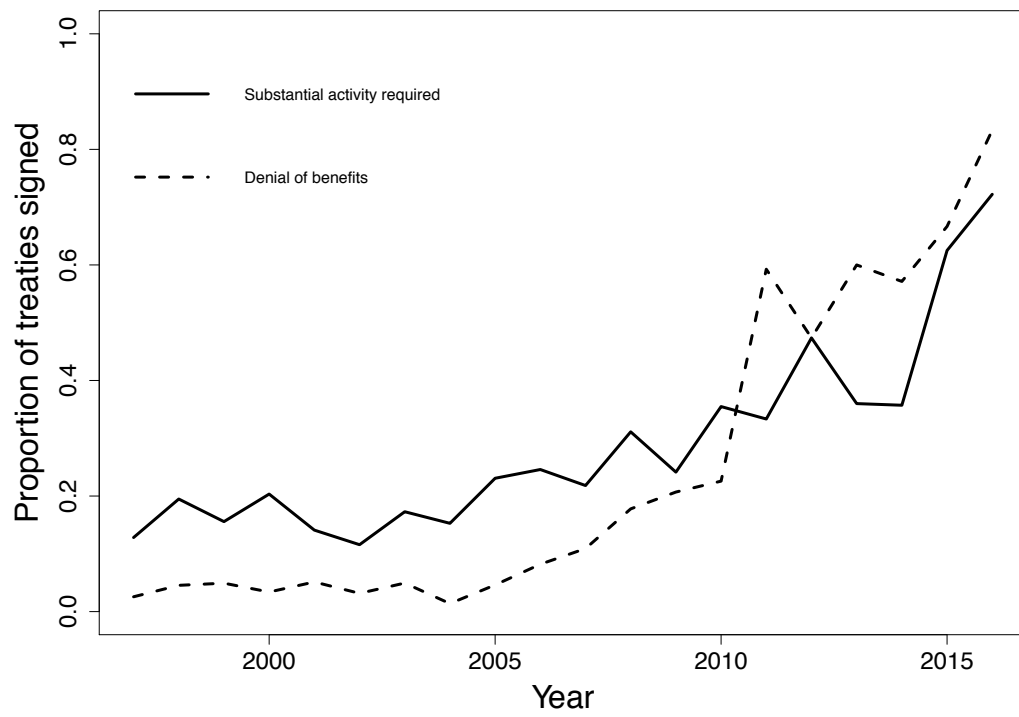


Figure A.3: Proportion of treaties signed with investor definition limitations

A.3.2 Substantive obligations

Substantive obligations determine what kind of treatment must the host state provide to foreign investors. These obligations can be general standards of treatment like Most Favored Nation Treatment, National Treatment of Fair and Equitable Treatment but can also be specific guarantees like the prohibition of expropriation or the freedom to transfer funds outside the host state.

Treaty drafters can refine and qualify these obligations in different ways so that host states are more or less restricted by them. For example, expropriation clauses could only cover direct expropriation, that is, situations in which the state takes a title of property away from the private investor without proper compensation. However, full on direct expropriation is nowadays less common. More frequently, investors claim that hosts states engage in *indirect* expropriation. These acts leave property titles untouched but nonetheless affect the capacity of investors to enjoy the benefits of such property. For example, an arbitral tribunal found that Poland had committed indirect expropriation when a state-owned enterprise in control of Polish airports took various measures that deprived an Indian company from the use of its investment in a duty-free store at the Warsaw airport. The unlawful measures-including preventing the delivery of goods to the stores, scheduling arbitrary safety inspections, and cutting off electricity supply-did not nullified the investors' ownership of the store but made it virtually impossible to operate.¹¹

To protect investors against this kind of taking, treaties generally include particular obligations against indirect expropriation. In this regard, a long-standing concern with investment treaties is that they may allow investors to portray legitimate gov-

¹¹Flemingo DutyFree Shop Private Limited v the Republic of Poland, UNCITRAL. Award.

ernment regulation in the public interest as indirect expropriation. To avoid this, drafters can specify which state actions may or may not be challenged as indirect takings. Treaties can include precise definitions of what constitute such an unlawful act or can carve out from it an array of regulatory measures undertaken to protect legitimate public welfare objectives.¹² That is, if claims arise under treaties including these provisions, arbitrators cannot make a decision that indirect expropriation has taken place if the regulation being challenged by the investor was adopted towards a public interest goal, such as protecting public health, security or the environment. These types of provisions were virtually absent from treaties signed during the first part of the considered period but have been increasingly popular in recent years (Figure Figure A.4).

A.3.3 Dispute settlement

The dispute settlement mechanisms included in IIAs are what sets them apart from most other economic treaties. Most investment treaties include an investor-state dispute settlement (ISDS) system that provides investors with the right to start disputes regarding alleged treaty violations before international arbitral tribunals composed of three private lawyers.¹³ These tribunals are generally created under the auspices

¹²In the Canada - Guinea BIT of 2015, the drafters added interpretative guidelines refining the definition of indirect expropriation: “except in rare circumstances, such as when a measure or a series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, a non-discriminatory measure of a Party that is designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, does not constitute indirect expropriation.” Available at: <http://investmentpolicyhub.unctad.org/IIA/mappedContent/treaty/3578>

¹³Each party to the dispute selects one member of the tribunal and the two selected arbitrators - in agreement - choose the third one, who presides the tribunal. If they fail to reach an agreement, the institutions under which the tribunal is constituted appoints the third member. The selection of individuals to serve as arbitrators is one of the most controversial procedural aspects of ISDS. As a lawyer with experienced representing states in ISDS disputes notes, the “unfortunate reality is that

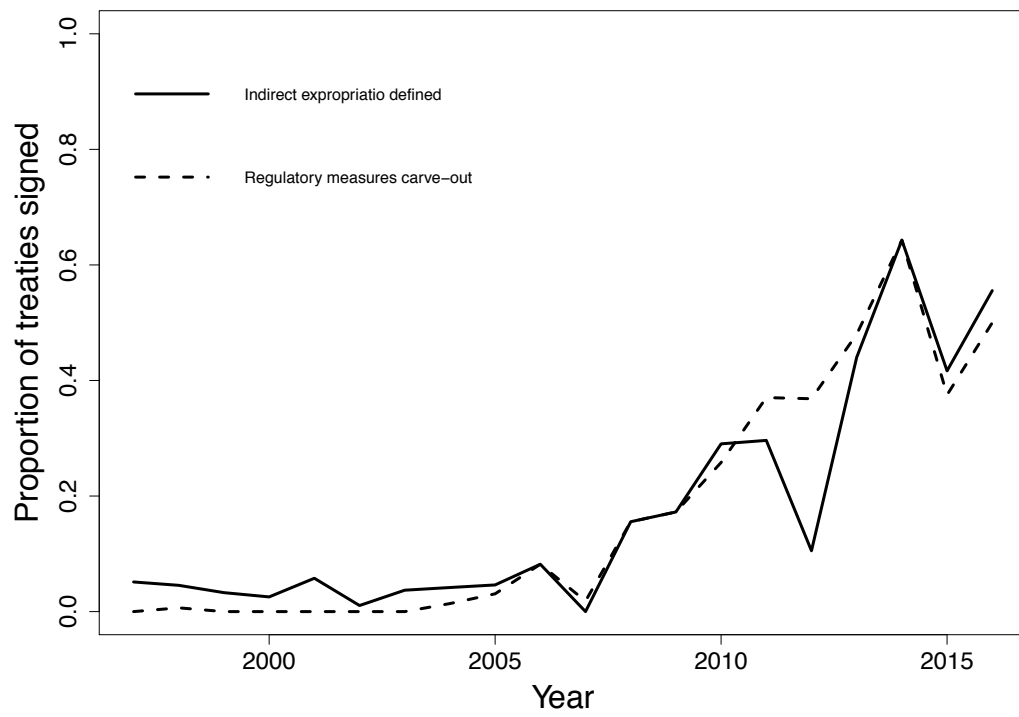


Figure A.4: Proportion of treaties signed refining the definition of expropriation

of one of the following institutions: the International Centre for Settlements of Investment Disputes (ICSID); the United Nations Commission on International Trade Law (UNCITRAL); the International Chamber of Commerce (ICC); or the Stockholm Chamber of Commerce (SCC).

ISDS has become the most controversial aspect of investment treaties. Critics of this system argue that it allows foreign investors to “frame questions of domestic constitutional and administrative law as treaty claims, and take those claims to a panel of private international arbitrators, circumventing local, state or federal domestic administrative bodies and courts.”¹⁴ Moreover, investors are not generally using ISDS to challenge instances of direct expropriation in states with weak institutions, which historically has been the ultimate goal of international investment law. The majority of known disputes is concerned with regulations adopted by governments in democratic states (Pelc, 2017). Moreover, arbitration is extremely expensive, both in terms of damages awards and litigation fees.¹⁵ It is argued that the prospect of multi-million fees and awards has a deterrent effect on states who end up foregoing regulations when they expect a challenge before arbitral tribunals. This phenomenon is often referred to as ‘regulatory chill’ (Tienhaara et al., 2009).

States might decide to exclude this controversial dispute settlement system and rely on a state-to-state mechanism, as Brazil has decided to do in recent years or as

the pool of candidates with a clear track record favoring investors in investor-state arbitration is far wider and deeper than the pool of candidates having sensitivity to the interests of states” (Kahale, 2018).

¹⁴“220+ Law and Economics Professors Urge Congress to Reject the TPP and Other Prospective Deals that Include Investor-State Dispute Settlement (ISDS),” September 7, 2016. At: <https://www.citizen.org/sites/default/files/isds-law-economics-professors-letter-sept-2016.pdf>

¹⁵As of today, the largest award granted by an arbitral tribunal was in the *Occidental v. Ecuador* case in which the American claimant received \$2.36 billion. In terms of litigation costs, on average, costs involved in each claim, including legal fees and tribunal expenses, have exceeded \$8 million per party (Gaukrodger and Gordon, 2012, 43-51).

Australia did during the Labor government that followed a controversial suit by the tobacco giant Philip Morris.¹⁶ The complete exclusion of ISDS, however, is still uncommon (Figure Figure A.5). Yet, when parties decide to keep the ISDS mechanism in their treaties, there are still ways to limit the scope of disputes covered. For example, treaties can allow investors to only initiate claims for alleged breaches of specific treaty obligations only, rather than any breach of contracts between the state and investors from the other treaty party. This is an important question for establishing the tribunal's jurisdiction, as contractual claims can only be brought before domestic courts. Thus, by portraying those as violations of international law, investors have recourse to another layer of jurisdiction that might be more beneficial to them. By establishing clear distinctions between treaty and contract breaches, states attempt to reduce the array of actions they could be brought to arbitration for. Under this distinction, a claimant cannot simply argue that because they are foreign investors and their investment required them to sign a contract with the state, then any breaches of that contract would automatically be considered violations of the investment treaty between their host state and their home country. They would have to establish in their claim how is it that the breach of the contract results in a violation of any of the specific rights provided for in the treaty.

Treaties could also exclude either a particular policy or certain economic sector from the ISDS scope. Excluding policy decisions or economic areas from ISDS is similar to reservations except they are only excluded from the dispute settlement mechanism; the substantive obligations are still valid for these provisions or sectors. That is, certain state actions cannot be challenged through arbitration, like decisions

¹⁶Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12

about the admission of foreign investments¹⁷ or whether investors in certain areas cannot bring their claims to arbitration, for example, investments in real estate or financial institutions.¹⁸

Differently, limitations can be temporal. Treaties can impose a time limit for the submission of the arbitral claim. This period is often 3 or 5 years from the date on which the claimant first acquired, or should have first acquired, knowledge of the treaty violation. As shown in Figure Figure A.5, while states have increasingly resorted to the mentioned ways to limit their exposure to ISDS in their recent treaties, some are more common than others. States concerned with the negative effects of ISDS seem to prefer limiting -rather than eliminating- investors' access to arbitral tribunals.

A.3.4 State regulatory space: coding guidelines

Preamble

1. Preamble - cumulative
 - (a) Right to Regulate = 0.25
 - (b) Sustainable Development = 0.25
 - (c) Social Investment Policy = 0.25
 - (d) Environmental Investment Aspects = 0.25

Scope and Definition

¹⁷The Italy - Mexico BIT of 1999 establishes that decisions made by the parties' that deny an acquisition by investor from the other party for national security reasons cannot be challenged as violations of National Treatment or Fair and Equitable Treatment.

¹⁸The Cameroon - Turkey BIT of 2012 establishes that disputes related to real state are solely under the jurisdiction of the parties' courts and cannot be submitted to arbitration.

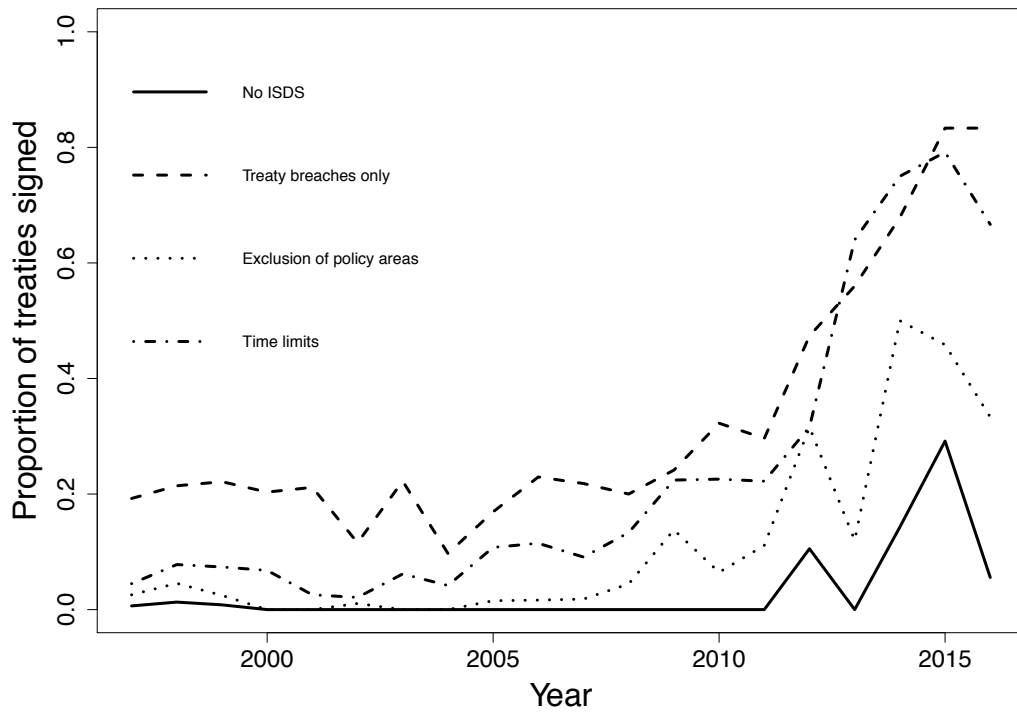


Figure A.5: Proportion of treaties signed including limitations to ISDS

2. Definition of investment
 - (a) Asset vs. enterprise based - ordinal
 - i. Asset based = 0
 - ii. Enterprise based = 1
 - (b) Limitations - cumulative
 - i. Excluding portfolio investment = 0.2
 - ii. Excluding other specific assets = 0.2
 - iii. Characteristics of investment = 0.2
 - iv. Host state laws = 0.2
 - v. Closed list = 0.2
3. Definition of investor - Specifying a natural person - cumulative
 - (a) Exclusion (no mention of) of Permanent Resident = 0.25
 - (b) Exclusion of dual nationality = 0.25
 - (c) Substantial business activity required = 0.25
 - (d) Owner and Control defined = 0.25
4. Limiting substantive scope of the treaty - cumulative
 - (a) Taxation = 0.25
 - (b) Subsidies grants = 0.25
 - (c) Government procurement = 0.25
 - (d) Other subject matters = 0.25

Non Discrimination and other Standards of Treatment

5. Most Favored Nation

(a) Establishment ordinal

- i. Pre and post establishment = 0
- ii. Post Establishment = 0.5
- iii. No MFN = 1

(b) Exceptions - cumulative

- i. Taxation = 0.25
- ii. Procedural ISDS = 0.25
- iii. No MFN = 1

6. National Treatment

(a) Establishment - ordinal

- i. Pre and post establishment = 0
- ii. Post Establishment = 0.5
- iii. No NT = 1

(b) Like Circumstances - ordinal

- i. No = 0
- ii. Yes = 0.5
- iii. No NT = 1

7. Fair and Equitable Treatment

(a) International law qualification - ordinal

- i. Non-qualified FET = 0
- ii. International law = 0.25
- iii. Customary IL = 0.5
- iv. CIL + minimum standard of treatment = 0.75
- v. No FET = 1

(b) FET elements listed - ordinal

- i. No = 0
- ii. Yes = 0.5
- iii. No FET = 1

8. Full protection and security - ordinal

- (a) Unqualified FPS = 0
- (b) FPS with reference to domestic laws = 0.5
- (c) No FPS = 1

9. Prohibition on unreasonable, arbitrary, discriminatory measures - ordinal

- (a) Yes = 0
- (b) No = 1

Expropriation and other Substantive Obligations

10. Expropriation

- (a) Scope of expropriation clause - ordinal

- i. Direct and indirect expropriation = 0
 - ii. Only direct expropriation = 0.5
 - iii. No expropriation clause = 1
 - (b) Limitations on expropriation - cumulative
 - i. Indirect expropriation defined = 0.25
 - ii. General regulatory measures = 0.25
 - iii. Compulsory licenses = 0.25
 - iv. No expropriation clause = 1
11. Compensation
- (a) Relative rights to compensation - ordinal
 - i. MFN NT = 0
 - ii. MFN or NT = 0.5
 - iii. No Compensation clause = 1
 - (b) Absolute right to compensation in certain circumstances - ordinal
 - i. Absolute rights to compensation = 0
 - ii. No Compensation clause = 1
12. Prohibition on Performance Requirements - ordinal
- (a) Clause exists (TRIMs or list) = 0
 - (b) No clause = 1
13. Umbrella Clause ordinal

(a) Clause exists = 0

(b) No clause = 1

14. Entry and sojourn of Personnel - ordinal

(a) Clause exists = 0

(b) No clause = 1

15. Senior Management and/or Boards mandatory clause - ordinal

(a) Clause exists = 0

(b) No clause = 1

16. Free Transfers - cumulative

(a) BOP exception = 0.33

(b) Other specific exceptions = 0.33

(c) No free transfers clause = 1

17. Subrogation clause - ordinal

(a) Clause exists = 0

(b) No clause = 1

18. Non-derogation clause - ordinal

(a) Clause exists = 0

(b) No clause = 1

Good Governance

19. Good governance - cumulative

- (a) No good governance provisions = 0
- (b) NO transparency clauses directed at States = 0.15
- (c) Transparency clauses directed at investors = 0.15
- (d) Health Environment = 0.14
- (e) Labor Standards = 0.14
- (f) Corporate Social Responsibility = 0.14
- (g) Corruption = 0.14
- (h) Not lowering standards = 0.14

Flexibility

20. Denial of Benefits - cumulative

- (a) Substantive business operations = 0.33
- (b) Diplomatic relations = 0.33
- (c) Unilaterally discretionary DoB = 0.33

21. Scheduling Reservations - ordinal

- (a) No S R = 0
- (b) Reservations (negative list) = 1

22. Essential security exception - cumulative

- (a) ESE clause exists = 0.25

(b) ESE defined = 0.25

(c) ESE self-judging = 0.50

23. Public policy exceptions - cumulative

(a) Public Health and environment = 0.5

(b) Other = 0.5

24. Prudential carve-out - ordinal

(a) No clause = 0

(b) Clause exists = 1

25. Right to regulate - ordinal

(a) No clause = 0

(b) Clause exists = 1

Institutional Issues and Final Provisions

26. Mechanism for consultations between State parties - ordinal

(a) No = 0

(b) Yes =1

27. Institutional framework (Committee) - ordinal

(a) No = 0

(b) Yes =1

28. Limiting temporal scope of BIT - ordinal

(a) Silence or pre-existing investment = 0

(b) Post-BIT investment only = 1

29. Preexisting disputes covered - ordinal

(a) Silence = 0

(b) No = 1

30. Treaty duration - ordinal

(a) No duration specified = 0

(b) 15 years or more = 0.33

(c) 10 years = 0.66

(d) Less than 10 years = 1

31. Automatic renewal - ordinal

(a) Yes, indefinite = 0 (or if initial duration is indefinite)

(b) Yes, fixed term = 0.5

(c) No = 1

32. Modalities for denunciation - ordinal

(a) No = 0

(b) A year or more = 0.5

(c) Less than a year = 1

33. Survival Clause Length - ordinal

- (a) 15 years or more = 0
- (b) 10 years = 0.33
- (c) Less than 10 years = 0.66
- (d) No survival clause = 1

Procedural provisions (ISDS)

34. Alternatives to Arbitration - ordinal

- (a) No clause (compulsory ISDS) = 0
- (b) Clause exists - voluntary recourse to alternatives = 0.25
- (c) Clause exists - mandatory recourse to alternatives = 0.75
- (d) No ISDS = 1

35. Scope of claims - ordinal

- (a) Any dispute relating to investment = 0
- (b) Listing specific basis of claim beyond treaty (e.g. contractual disputes) = 0.33
- (c) Limited to treaty claims = 0.66
- (d) No ISDS = 1

36. Limitation on provisions subject to ISDS - ordinal

- (a) No Limitations = 0
- (b) Limitation of provisions subject to ISDS = 0.75
- (c) No ISDS = 1

37. Limitation on scope on ISDS - cumulative

- (a) No Limitations = 0
- (b) Exclusion of policy areas from ISDS = 0.33
- (c) Special mechanism for taxation or prudential measures = 0.33
- (d) No ISDS = 1

38. Type of Consent to Arbitration - ordinal

- (a) Expressed or implied consent = 0
- (b) Case-by-case consent or no ISDS at all = 1

39. ISDS rules: domestic courts forum selection - ordinal

- (a) No mention of domestic courts or investor option = 0 (*collapsed two categories*)
- (b) Yes, pre-condition for international arbitration = 0.5
- (c) No ISDS = 1

40. Particular Features of Investor-State Dispute Settlement - cumulative

- (a) None = 0
- (b) Limitation period = 0.25
- (c) Provisional measures = 0.25
- (d) Limited remedies = 0.25
- (e) o ISDS = 1

41. Interpretation - cumulative

- (a) None = 0
- (b) Binding interpretation = 0.25
- (c) Renvoi = 0.25
- (d) Rights of non-disputing contracting party = 0.25
- (e) No ISDS = 1

42. Transparency in Arbitral Proceedings - cumulative

- (a) Making documents publicly available = 0.25
- (b) Making hearings publicly available = 0.25
- (c) Amicus Curiae = 0.25
- (d) No ISDS = 1

A.4 Additional models

A.4.1 Additional models for ILA difference

Table A.1: Results - Additional models including FDI

	<i>Dependent variable:</i>	
	ILA diff. <i>OLS</i>	ILA diff. sign <i>logistic</i>
	(1)	(2)
ISDS resp t-5	0.001*** (0.0004)	0.036** (0.018)
ISDS claim t-5	-0.0002* (0.0001)	0.008 (0.012)
GDP t-1	-0.003 (0.003)	-0.290 (0.216)
Polity2 t-1	0.0005 (0.0003)	0.061*** (0.022)
Population t-1	-0.00002 (0.00005)	0.0002 (0.003)
FDI inwards stock	0.001 (0.001)	-0.135 (0.093)
FDI outward stock	0.001 (0.001)	0.010 (0.046)
Constant	0.011 (0.026)	1.115 (2.194)
Observations		3,214

Note: *p<0.1; **p<0.05; ***p<0.01

A.4.2 Additional models for treaty signature

Table A.2: Results - Models 1, 2 and 3

	<i>Dependent variable:</i>		
	Treaty ratification		
	(1)	(2)	(3)
	(Full sample)	(OECD)	(Non-OECD)
ISDS resp t-5	-0.117*** (0.025)	0.125*** (0.048)	-0.288*** (0.046)
ISDS claim t-5	-0.067*** (0.015)	-0.079*** (0.016)	-0.373*** (0.122)
GDP t-1	-0.287 (0.175)	-2.857** (1.278)	-0.195 (0.187)
World treaties t-1	0.0002* (0.0001)	-0.0001 (0.0004)	0.0002** (0.0001)
Country treaties t-1	-0.005 (0.006)	0.023** (0.012)	0.009 (0.008)
Inward FDI t-1	0.00004 (0.00004)	0.0002* (0.0001)	0.00004 (0.00004)
Polity2 t-1	0.048** (0.019)	0.113 (0.143)	0.035* (0.020)
Govt. majority	0.412*** (0.134)	0.493 (0.309)	0.529*** (0.158)
Constant	2.516 (1.641)	37.343** (16.891)	1.367 (1.736)
Observations	3,181	710	2,471

Note:

*p<0.1; **p<0.05; ***p<0.01

A.4.3 Additional models for treaty content

Table A.3: Results - Moving average

	<i>Dependent variable:</i>
	Regulatory space score
ISDS resp t-5 home	0.003 (0.003)
ISDS resp t-5 host	0.003 (0.005)
ISDS claim t-5 home	0.006*** (0.002)
ISDS claim t-5 host	-0.003 (0.006)
GDP t-1 home	-0.001 (0.002)
GDP t-1 host	0.005*** (0.002)
Inward FDI t-1 home	-0.00000 (0.00000)
Inward FDI t-1 host	-0.00000 (0.00000)
Polity2 t-1 home	-0.001*** (0.0004)
Polity2 t-1 host	0.0001 (0.0004)
Americas	0.042*** (0.006)
World avg. reg. space. t-1	0.975*** (0.169)
Constant	-0.040 (0.062)
Observations	1,269
Adjusted R ²	0.310

Note:

*p<0.1; **p<0.05; ***p<0.01

Table A.4: Results - Lost ISDS disputes

	<i>Dependent variable:</i>		
	Regulatory space score		
	(1)	(2)	(3)
	(Full sample)	(North-South)	(South-South)
Pro-Inv sum t-1 home	0.003 (0.007)	0.040*** (0.012)	-0.004 (0.008)
Pro-Inv sum t-1 host	-0.001 (0.007)	0.004 (0.008)	-0.004 (0.010)
ISDS claim t-5 home	0.007*** (0.002)	0.004** (0.002)	0.013* (0.008)
ISDS claim t-5 host	-0.002 (0.004)	-0.008*** (0.003)	0.008 (0.008)
GDP t-1 home	-0.001 (0.002)	-0.003 (0.003)	0.003 (0.004)
GDP t-1 host	0.006*** (0.002)	0.006*** (0.002)	0.006* (0.003)
Inward FDI t-1 home	-0.00000** (0.00000)	0.00000 (0.00000)	-0.00000** (0.00000)
Inward FDI t-1 host	-0.00000 (0.00000)	-0.00000 (0.00000)	-0.00000 (0.00000)
Polity2 t-1 home	-0.001*** (0.0004)	-0.002** (0.001)	-0.001 (0.001)
Polity2 t-1 host	0.0001 (0.0004)	0.0002 (0.001)	0.00002 (0.001)
Americas	0.048*** (0.007)	0.041*** (0.008)	0.054*** (0.012)
Constant	0.255*** (0.038)	0.251*** (0.051)	0.347*** (0.087)
Observations	1,269	672	484
Adjusted R ²	0.341	0.354	0.373

Note:

*p<0.1; **p<0.05; ***p<0.01

Table A.5: Results - Combined ISDS experience

	<i>Dependent variable:</i>		
	Regulatory space score		
	(1)	(2)	(3)
	(Full sample)	(North-South)	(South-South)
Combined ISDS resp t-5	0.002 (0.002)	0.008*** (0.003)	0.0003 (0.003)
Combined ISDS claim t-5	0.006*** (0.002)	0.003* (0.002)	0.011 (0.007)
GDP t-1 home	-0.002 (0.002)	-0.004 (0.003)	0.003 (0.004)
GDP t-1 host	0.006*** (0.002)	0.007*** (0.002)	0.006* (0.003)
Inward FDI t-1 home	-0.00000** (0.00000)	0.00000 (0.00000)	-0.00000** (0.00000)
Inward FDI t-1 host	-0.00000** (0.00000)	-0.00000** (0.00000)	-0.00000 (0.00000)
Polity2 t-1 home	-0.001*** (0.0004)	-0.002* (0.001)	-0.001 (0.001)
Polity2 t-1 host	0.00005 (0.0004)	0.00000 (0.001)	0.0001 (0.001)
Americas	0.048*** (0.006)	0.043*** (0.008)	0.052*** (0.012)
Constant	0.262*** (0.039)	0.250*** (0.051)	0.350*** (0.087)

Note:

*p<0.1; **p<0.05; ***p<0.01

A.4.4 Additional models for treaty termination

Table A.6: Results - Models 4 and 5

	<i>Dependent variable:</i>	
	Treaty termination	
	(4)	(5)
	(Full sample)	(North-South)
Pro-Inv t-1 home	0.024 (0.033)	-0.041 (0.154)
Pro-Inv t-1 host	0.044 (0.028)	-0.006 (0.048)
Claims under treaty t-1		
GDP t-1 diff.	-0.158*** (0.038)	-0.322*** (0.050)
ISDS claim t-5 home	-0.0005 (0.005)	0.015** (0.006)
ISDS claim t-5 host	-0.058 (0.053)	-0.245* (0.133)
EU	-0.151 (0.153)	0.494* (0.267)
Latam	0.058 (0.217)	0.581* (0.300)
Treaty age	0.025*** (0.009)	0.032*** (0.012)
Yearly terms. t-1	0.016*** (0.006)	0.004 (0.010)
Constant	-4.841*** (0.213)	-5.243*** (0.351)
Observations	18,299	8,757
Log Likelihood	-1,040.159	-490.903
Akaike Inf. Crit.	2,100.318	1,001.805

Note:

*p<0.1; **p<0.05; ***p<0.01

Table A.7: Results - Models 6 and 7

	<i>Dependent variable:</i>	
	Treaty termination	
	(6)	(7)
	(South-South)	(Full sample)
Pro-Inv t-1 home	0.042 (0.036)	
Pro-Inv t-1 host	0.111*** (0.034)	
Claims under treaty t-1		0.074 (0.061)
GDP t-1 diff.	0.032 (0.061)	-0.166*** (0.037)
ISDS claim t-5 home	-0.030** (0.014)	-0.002 (0.006)
ISDS claim t-5 host	-0.003 (0.047)	-0.047 (0.049)
EU		-0.160 (0.153)
Latam	-0.282 (0.340)	0.168 (0.192)
Treaty age	0.018 (0.019)	0.026*** (0.009)
Yearly terms. t-1	0.024*** (0.008)	0.018*** (0.006)
Constant	-5.199*** (0.347)	-4.830*** (0.212)
Observations	9,559	18,299
Log Likelihood	-532.477	-1,041.000
Akaike Inf. Crit.	1,082.954	2,100.001

Note: *p<0.1; **p<0.05; ***p<0.01

Appendix B

Chapter 6

B.1 Interventions during constitutional debates

The table includes a quote from every legislator that made remarks on the issue. Some legislators intervened multiple times.

Table 1 – Investment arbitration in the Constitutional Assembly

Legislator	Party	Quote
For		
Alexandra Ocles	PAIS	[T]he spirit of this article is to reject arbitration between the state and legal subjects like companies, corporations, transnational firms...in controversies derived from contractual relations (038-132)
Geovanny Atarihuana	MPD	Instruments like the famous ICSID...should be rejected for the people. If at any time a government that was not committed to its people, but to other interests, signed it we need to terminate the treaty. These are not ideological dogmas, but concrete facts...70% of claims at ICSID lodged by transnational enterprises against states, fundamentally, from the third world...has been ruled in favor of the enterprises (038-146)

Normal Wray	PAIS	Up to what point can Ecuador affect an investment that has come to Ecuador to damage the environment, contaminate water sources, damage people's lives or even eradicate indigenous populations, as history has shown here? Up to what point a country has the possibility to make sovereign decisions about that without being sued before an international instance? (038-158)
Abel Ávila	MPD	I would rather invest 25 million [the cost of a referendum for the approval of a treaty] rather than be tied to the possibility of transnationals like OXY, before an international organization like ICSID, taking 3,000 million dollars for having not considered the decision of signing a treaty in light of the national interest (038-165)
Martha Roldós	RED	...that would allow us, Ecuadorians, to recover our sovereignty, be able to say no and not have international arbitrations that force us to accept investment conditions that are harmful for life, health and nature (038-170)
Gerardo Nicola	PAIS	...what emerged is the pressure inflicted on weaker countries to negotiate on unequal terms (038-171)
Francisco Velasco	PAIS	what [article 422] means is that companies that go to a country need to respect the laws of that country, it is not that hard...let me read a list of all the international treaties the US has not signed...and they want us to sign treaties...and they want us to not control them when they come to loot our country (038-173)

María Augusta Calle	PAIS	there are several bilateral investment treaties that are not beneficial for our country. This government is reviewing all of them, because it cannot be allowed for our few resources to be looted through international treaties...it has been talked this will affect legal security...they should see that we are including an article saying controversies...will be resolved according to the laws of the country (038-176)
León Roldós	RED	I am against international arbitration that starts from the assumption that investors are always right (049-128)
Rolando Panchana	PAIS	What should not happen is that others pretend to take us before jurisdictions that manage a different type of law...that manage other rules within which we have to defend ourselves in foreign languages, with procedures alien to our reality (049-173)
Against		
Wladimir Vargas	PRIAN	What country or businessman will sign a contract to litigate in Ecuador, without the guarantee of international arbitration? That is why international arbitration was invented (038-133)
Catalina Ayala	PSP	The fear of international companies of the Ecuadorian justice is fair. What is going to happen with the treaties, the contracts we have already celebrated? (038-138) The problem is not the arbitration clause...it is how treaties are negotiated...we do not know how to defend ourselves during arbitrations, we do not always hire the best lawyers (038-139)

Pablo Lucio Paredes	MFY	People around the world will not care that Ecuador doesn't like arbitration, what they will say is 'Sirs, if you don't like arbitration we won't establish relations with you.' The world is not going to change in order to please us...we lost against Occidental after using all international instances, not just arbitration we went to the Queen's courts...we cannot pretend all those places...are sold in favor of multinational companies. We lost because we did things wrong (038-143)
Mae Montaña	UNO	When we have difficulties, we go to the other extreme...This means closing the doors to possibilities of having advantageous commercial agreements in a country where that is what is needed most (038-157)
César Rohón	PSD	Arbitration is not an attack against Ecuadorian sovereignty, it is an asset for the country when it signs these documents for avoiding conflicts (038-157)
Cristina Reyes	PSC	Forbidding judicial institutions that operate within the law makes us go backwards as a country...the state policy should be to choose the center and rules that would govern each arbitration carefully in each investment treaty negotiation...The solution is not to bury judicial tools, but to perfect them and professionalize their application. Please, let's not isolate Ecuador from the world (049-132)

B.2 Attendees to meetings of the Foreign Affairs

Commission of the National Assembly

Table 2 – Attendees to Commission meetings

BIT partner	Government attendees	External attendees
Germany	Under-Secretary for Economic Affairs and Trade, Ministry of Foreign Affairs (MFA)	German Chamber of Industries and Commerce; Federation of Bi-National Chambers of Commerce
United Kingdom	Under-Secretary for Economic Affairs and Trade, MFA	Ambassador; commercial attaché; British Chamber of Industries and Commerce; Federation of Bi-National Chambers of Commerce
China	Under-Secretary for Economic Affairs and Trade, MFA	Ambassador; Chinese Chamber of Commerce
Finland	Under-Secretary for Economic Affairs and Trade, MFA	Nordic Chamber of Commerce
France	Under-Secretary for Trade, MFA	Government representative
Sweden	Under-Secretary for Trade, MFA	Consul
The Netherlands	Under-Secretary for Trade, MFA	Government representative
Chile	Vice-Minister, Ministry of Production (MP)	Ambassador
Venezuela	Vice-Minister, MP	
Canada		Ambassador; Canadian Chamber of Commerce

B.2. ATTENDEES TO MEETINGS OF THE FOREIGN AFFAIRS COMMISSION OF THE NATIONAL ASSEMBLY

Switzerland	Under-Secretary for Economic Affairs and Trade, MFA; Vice-Minister, MP	
Argentina	Under-Secretary for Trade, MFA	Ecuadorian Chamber of Industries and Production
United States		American Chamber of Commerce; Association of Flower Producers and Exporters; Ecuadorian Chamber of Industries and Production
Spain	Under-Secretary for Trade, MFA	Trade Observatory (think tank)