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Bursting policy bubbles: The international investment treaty regime

Daniel Behn, Ole Kristian Fauchald and Malcolm Langford

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Bursting policy bubbles: The international investment treaty regime

Daniel Behn [*] *Ole Kristian Fauchald* [**] *& Malcolm Langford* [***]

20 March 2015

Abstract. The growth in the signing of international investment agreements (IIAs) in the period 1990 to 2009 can be characterised as an *international* public policy bubble. Like the rise of privatisation at the domestic level, the expansion of this international treaty regime was arguably premised on an over-estimation of the benefits of protection of foreign direct investment in light of available evidence. Yet, by the mid-2000s, the international investment treaty regime was experiencing an acknowledged legitimacy crisis and policymakers in many states began shifting course. After identifying this policy bubble, this paper aims to develop the literature on policy bubbles further by focusing on the *reaction* to a bubble. We firstly chart the *nature* of state responses to the IIA bubble by examining policymaker behavior through the prism of states both as principals (regime designers) and litigants (respondents in investment treaty arbitration). We secondly ask why some policymakers have *burst* (or deflated) the investment treaty bubble. In doing so, we argue that reactions are driven by either (1) an awareness of the disequilibrium or (2) a shift in the underlying equilibrium that exposes the original disequilibrium. Both of these shifts are dependent are changes in the rational choice (objective) and constructivist (perceived) calculations of costs and benefits. Here, we argue that exposure to litigation, in particular, has exposed the existence of disequilibrium while shifts in domestic ideological preferences and investment flows have changed the underlying equilibrium point.

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1. Introduction

Policy bubbles are not a purely domestic phenomenon, confined within state borders; international policy bubbles can also be created by states acting individually or collectively as they pursue international public policy objectives. One means by which policy objectives can be pursued is through treaty-making. The use of treaties to pursue policy objectives has risen significantly since the Second World War; a prominent example being the signing of over 3200 mostly bilateral international investment agreements (IIAs) since the early 1960s. The majority of these treaties were signed in a relatively short period of time: beginning in about 1990 and continuing through the late-2000s, suggesting that it may meet the criteria for a policy bubble: a "government overinvests in a single policy instrument beyond its instrumental value in achieving a policy goal" (Jones, Thomas and Wolfe, 2014: 149).

Within the emerging public policy bubbles scholarship, international public policy bubbles specifically, have received almost no attention (Moar, 2014). This is striking in the era of globalisation when international policymaking can have significant domestic consequences. However, we might expect that a higher threshold exists for the development of international policy bubbles. There are more actors and positive feedback loops are less institutionalised. Moreover, at the international level, the proliferation of particular policy objectives can be more diffuse and decentralized. In these cases, a social constructivist model of policy bubbles might be more apt. According to such an explanation, the oversupply of policy is not only the result of institutional pressures (or inertia), but also relates to the overall political climate and the ideas being pursued and disseminated by political or bureaucratic elites in both domestic and international discourse, for example where, pursuant to initiatives from domestic business and industry organizations, ministries of trade and industry of two countries get together to negotiate an IIA. In many instances the international conditions mirror domestic conditions particularly where elites of states and stakeholders meet in common forums (e.g. the OECD, World Bank).When viewed through such a lens, policy bubbles can develop even when knowledge and organizational capacity exists to inhibit them (Abolafia, 2010: 93).

The proliferation in the signing of IIAs, prominently in the period of 1990 through 2009, provides good evidence of a policy bubble. The development of the IIA bubble translates into one of the most remarkable extensions of international law in the post-war period. Signed as treaties between states, the IIAs provide extensive rights to third parties – foreign investors – against the host state. While each IIA is a stand-alone agreement with considerable diversity,

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agreements typically include the following: prohibition against expropriation without adequate compensation, full protection and security (FPS), fair and equitable treatment (FET), national treatment, most-favoured nation (MFN) treatment, free transfer of capital, presence of key personnel, and investor – state dispute settlement provisions (ISDS).

For a number of reasons that will be highlighted in this contribution, the creation of the IIA bubble has precipitated a backlash (or policy response) from some states, various non-governmental organizations (NGOs), and scholars over the past decade. Commonly referred to as a legitimacy crisis (Waibel, Kaushal, Chung and Balchin, 2010; for an overview, see Langford, 2011), IIAs are under attack, with even some prominent 'insiders' expressing disquiet (Douglas, 2011). Primarily, however, this phenomenon is not solely about the expansiveness of the substantive rights granted to foreign investors under IIAs, but rather the combination of such rights with the robustness of the dispute settlement mechanisms in these treaties and the increasing number and range of states subject to disputes. With over 600 known investment treaty arbitrations initiated to date, as well as an unknown number of cases that are kept secret and instances in which the threat of treaty arbitration has been used as a bargaining tool,[1] states hosting foreign investors are increasingly finding themselves having to defend their laws and policies before and in the shadow of international arbitral tribunals.

The primary focus of this article is not the policy bubble as such, but states' responses when faced with the perceived negative effects of the policy bubble. This corresponds to the interest in how "policymakers learn from non-proportionate policy responses" and respond to the question: "Why do some bubbles and anti-bubbles deflate on their own while others continue to grow?" [2] For all intents and purposes, it appears that the central target of state policy responses to IIAs is about one particular right: the remedial right granted to foreign investors (a private individual or corporation) allowing them to bring claims directly against the state hosting their investment. Some of these investment treaty arbitrations have resulted in sizable compensation awards for actions that many states believe are both legitimate and within their exclusive purview as sovereigns (Behn, 2014; Franck, 2014). The tension between the rights afforded to private foreign investors under IIAs and the legitimate rights of sovereign states to

[1] Not all investment treaty arbitrations are public, and many awards remain confidential. Awards that are public are made available at http://www.italaw.com (last visited 20 March 2015). Our guess is that there might be about one-third of all cases that are not known to the public.
[2] Moar and Tosun, *The Politics of Non-Proportionate Policy Response*, Workshop Outline, 2015, para. 1.

regulate in the public interest of their domestic citizenry has resulted in strategies being employed by certain states as a policy response to the IIA bubble.

For these states, the single overarching policy response to the IIA bubble may be characterized as the following: reasserting sovereign prerogative by limiting or reducing the international legal rights granted to foreign investors that could give rise to an investment treaty dispute under international law. And, as we shall see, this type of response is almost always employed by states that have been subject to at least one dispute (if not many), and is primarily aimed at solving what these states might consider to be the 'investment treaty arbitration problem.' Overall, these policy responses to the IIA bubble represent what has been termed the 'return of the state' in this area of international law (Alvarez, 2011).

There are, however, many states that are essentially satisfied with the way that IIAs and ISDS currently work. These states are dissatisfied with other states' responses to the policy bubble. Their position seems not to be any rejection of the ability of IIAs to fulfil their original policy goals, but they states may still have some sympathy for claims that ISDS over the last decade has been lop-sided, biased against states, and an unacceptable delegation of sovereign authority and control to international adjudicators.

Given this context and problematique, section 2 will firstly ask whether the proliferation of IIAs constitutes a policy bubble. Section 3 analyses how states are reacting to this bubble. It examines what responses to the IIA bubble states *as principals* are using to scale back the rights granted to foreign investors in IIAs and what tactics states are using *as litigants* when defending and justifying their actions in investment treaty arbitrations. Section 4 seeks to *explain* the pattern of these policy responses as to why some states seek to burst the bubble. It proposes a framework for understanding state responses to an international public policy bubble and applies it to the case of IIAs.

2. The international investment treaty bubble

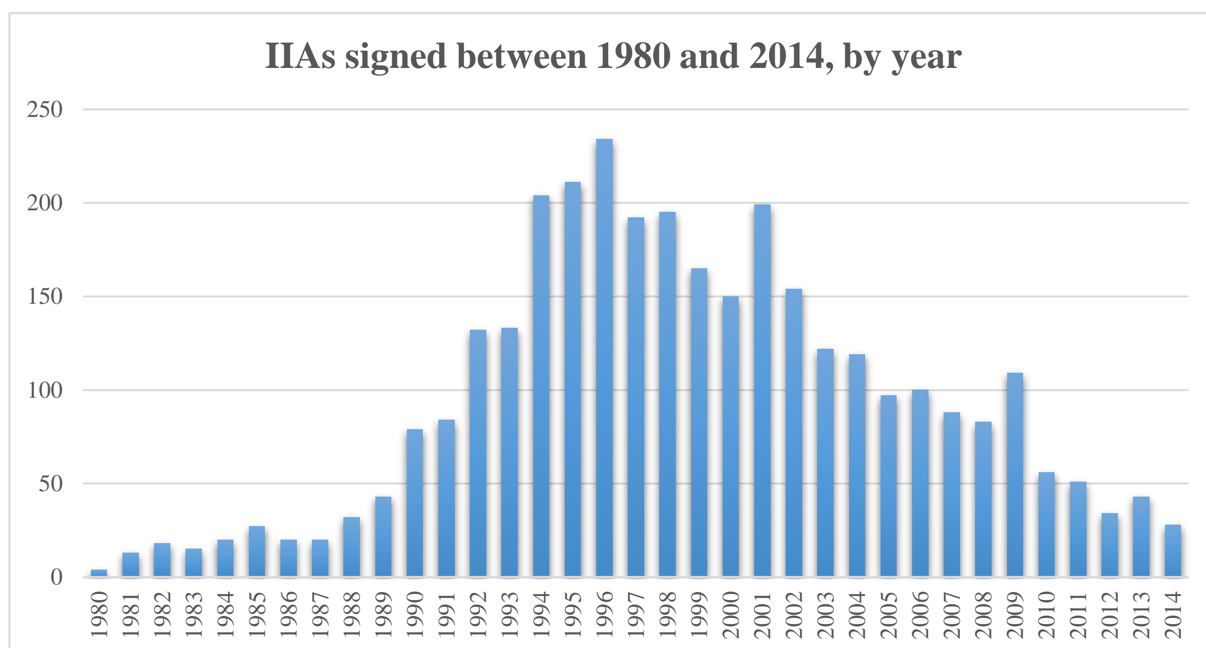
Can the emergence of IIAs be characterized as a 'policy bubble'? Maor (2014: 470, see also Jones et al. 2014: 149) sets out the following definition:

> A *policy bubble* is defined here as *a real and/or perceived policy overreaction that is reinforced by positive feedback over a long period of time*. "Policy overreaction" refers to a "policy that imposes objective and/or perceived social costs without producing offsetting objective and/or perceived benefits" … Only the pursuit of such

policies against *existing* knowledge to the contrary (i.e., the best available evidence at the time the policy is enacted) should be considered a bubble.

The modern investment treaty regime is largely built on a network of more than 3200 bilateral investment treaties (BITs) and regional free trade agreements (FTAs) between home states and host states, [3] a handful of plurilateral investment treaties, [4] as well as customary international law (Dumburry, 2010). As can be seen in table 1 below, the cumulative total of all IIAs signed to date number 3200, but the vast majority of these treaties were signed in a period beginning around 1990 and continuing through the late-2000s. While IIAs do continue to be signed (34 were concluded in 2014[5]), the current numbers pale in comparison to the 238 IIAs signed in 1996 alone. During the mid-1990s, an IIA was being signed every other day.

Table 1. The IIA bubble



Before turning to the IIAs that were signed in the period after 1990, it might be helpful to briefly discuss the development of the modern IIA regime in the period predating 1990. The first investment treaty of the modern era dates to 1959 with signing of the BIT between

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[3] UNCTAD provides an extensive database on international investment agreements, http://investmentpolicyhub.unctad.org/IIA (last visited 20 March 2015).
[4] Such regional treaties include the Energy Charter Treaty (ECT), chapter 11 of the North American Free Trade Agreement (NAFTA), and the Association of South-East Asian Nations (ASEAN) Comprehensive Investment Agreement.
[5] UNCTAD, IIA Issue Note No. 1, February 2015, http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_ en.pdf (last visited 20 March 2015).

Germany and Pakistan. From the period 1959 through 1989, states signed 403 IIAs;[6] and the IIAs signed during this period tended to have a number of commonalities. First, of these 403 agreements, 299 of them included one state party from Western Europe.[7] Of the Western European state signatories during this period, the most prominent players include: 67 IIAs signed by Germany, 41 IIAs signed by France, 41 IIAs signed by Switzerland, and 31 IIAs signed by the Netherlands. Second, 207 out of the 403 IIAs signed during this period were between a Western European state and former colonial state. However, only 19 out 403 IIAs signed during this period were between a state and *its* former colony.[8]

From this basic information, the period between the signing of the fist modern BIT and the IIA boom of the 1990s, the practice of IIAs appears to be driven primarily by states from Western Europe with treaty partners from newly independent states in the direct aftermath of the decolonization period of the 1950s and 1960s. However, it also appears that Western European states were not so concerned about signing IIAs with their former colonies, but with newly independent states that had been colonized by other Western European states. The rationale for such a high number of IIAs signed in this period between Western European states and former colonies could be that capital-exporting states wanted to procure a competitive advantage over previous colonial occupiers , and that former colonies were seeking new and more diverse alliances.

Regardless of the exact reasons for why states signed IIAs during this initial period (1959 to 1989), the motivation for the signing of IIAs during the boom of the 1990s seems distinct; and it is in this second period that we claim that an IIA bubble emerged. For the first 10 years of the second period, we see the fall of the Soviet Union and the aggressive diffusion of policies and ideas of liberalization, privatization, and democratization being disseminated through what has been coined the Washington consensus (Williamson, 1989). The Washington consensus constituted a range of policies developed by Bretton Woods institutions in the late 1980s and the early 1990s as part of an overarching strategy that would usher in a new era of globalization based on the liberalization of trade and capital. These policies, which were promoted by Washington-based institutions in the 1990s, were also supported by Western democracies. While the investment protection and liberalization policies embedded in IIAs

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[6] UNCTAD IIA database, http://investmentpolicyhub.unctad.org/IIA/AdvancedSearchBIT? (search carried out 17 February 2015).
[7] Id.
[8] Id.

only formed a small part of the overall objectives embedded in the so-called Washington consensus, they were relatively easy agreements to sign given their largely bilateral structure; and many Western states had already created model BITs by the mid- to late1980s. Taken together, IIAs provided an ideal template for international treaties that could be signed in large numbers during a relatively short period of time.

The initial proliferation of IIAs (1990 to 1999) can be explained – at least partially – by the ideas embedded in the Washington consensus. It is more difficult, however, to explain why IIAs continued to be signed at a rapid pace from the period of about 2000 through 2010 despite some signals indicating that they might be contestable. By the end of the 1990s the policies of the Washington consensus were being seriously challenged by a variety of 'anti-globalization movements' led by both non-state actors and some states. These movements provided responded to significant developments such as the finalization of the Uruguay Round of multilateral trade negotiations, the negotiations of NAFTA, the failed efforts to negotiate a multilateral agreement on investment in the OECD (MAI), and the unsuccessful attempt to launch a new round of multilateral trade negotiations that would have included investment issues (the 'Millennium Round').

Despite these overall objections to the ideas of the Washington consensus, IIAs continued to be signed in the period of 2000 to 2010. The early 2000s also saw the beginnings of dissent within the international investment regime itself. Academics started to question whether IIAs served to promote foreign direct investment (references to be added*), and certain states began to question the content of their obligations under IIAs because of the increasing number of investment treaty arbitration being filed. Combined, it is therefore surprising that there was not a more precipitous decline in the signing of IIAs in the period of 2000 to 2010.

One possible explanation for this is that of bureaucratic inertia. This is where the positive feedback loops and self-perpetuating features of policy bubbles may provide a helpful explanation. The critical debate largely existed within a community of international law and policy specialists, and state bureaucracies engaged in IIA negotiations were largely unaffected by the general anti-globalization movements which many negotiators perceived as ill informed. If these explanations are valid, then it is possible to claim that current policy responses to the IIA bubble are driven by a rise in investment treaty arbitrations and an emerging realization that the substantive obligations undertaken in IIAs need to be reconsidered.

Table 2. IIAs signed and investor – state arbitration (ISA) cases filed annually

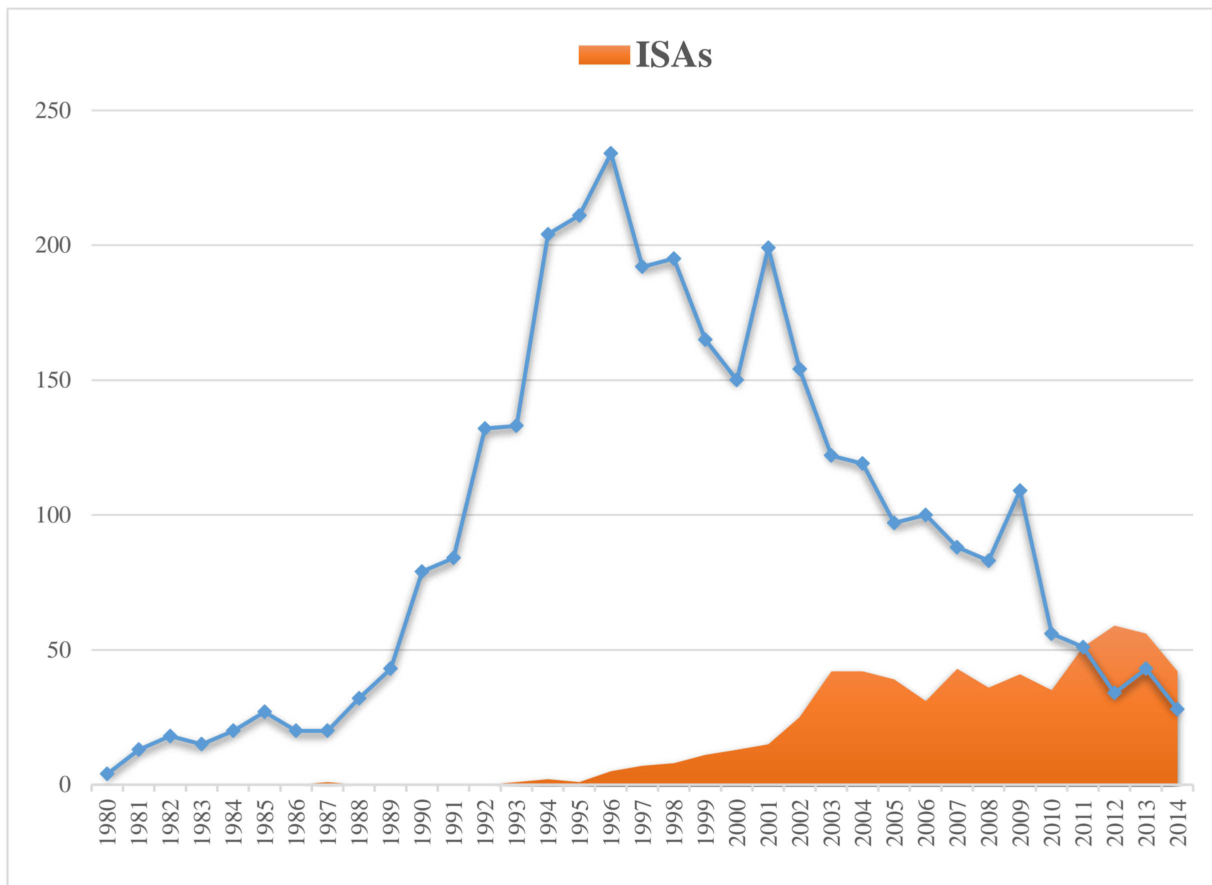

Table 2 indicates a strong correlation between the rise in the signing of IIAs and the subsequent rise in investment treaty arbitrations a decade later. One can visually identify two patterns when looking at table 2: 1) the emergence of the IIA bubble beginning in the 1990s followed by a 2) slow decrease in the annual signing of IIAs precipitated to a rise in the number of investment treaty arbitrations filed. Taken all together, we see the history of the IIA bubble as: a slow build-up in the period predating 1990 followed by an IIA signing boom in the 1990s followed by slow decline in the signing of IIAs as the annual number of investment treaty arbitrations rise.

As we have seen, there may be multiple reasons why there is a decline in the signing of IIAs. Our argument does, however, not depend on the claim that the increase in investment treaty arbitration triggered the deflation of the IIA policy bubble. Our argument is based on our finding that investment treaty arbitration is one of the factors that made states aware of the potential challenges of IIAs and is perceived by states as one of the problems that needs to be addressed in the context of IIAs. In the following sections, we will examine the ways that states are (dis)proportionately responding to the IIA policy bubble.

3. Responses to the international investment agreement policy bubble

The development of international law is often seen in teleological terms: an ever-expanding pattern of treaties and custom that, even if fragmented, increasingly constrains domestic sovereignty for the greater good of global governance. Success is thus commonly defined as the "victory of the supra- or multi-national over the parochial national" (Alvarez, 2011: 223). Empirically, this assumption of path dependency and evolutionary progress is risky. While the rules and institutions determined by politics are 'stickier' than those determined in economic markets (Pierson, 2000), they can shift decidedly over time in the reverse direction. If political contestation was present during the formation of any institution or rule, it is not axiomatic that it will disappear afterwards. Moreover, even when such seminal political contestation was not present, a regime's trajectory or external developments may engender new forms of political contestation.

As states are increasingly acknowledging that their IIAs have characteristics that lead us to classify them as a policy bubble, they are employing a wide-range of tactics, ranging from the well-known to the new and emerging, to scale back both the substantive and adjudicative rights granted to foreign investors in IIAs. These tactics or policy responses fall within two categories: (i) the state *as principal* – treaty-maker and international regime shaper ('treaty parties'); and (ii) the state *as litigant* in investment treaty arbitrations ('respondents', Roberts 2008: 184). The tactics that states have employed as *principals* include, inter alia, moratoriums on the signing of new IIAs, refusing to ratify signed IIAs, adjustments to negotiating strategies over new IIAs, termination of IIAs, development of new model IIAs, exclusion of investor – state arbitration clauses from some IIAs, calls for the renegotiation of IIAs already in force, and increased use of impact assessments and policy coordination during negotiations. The tactics used by states as respondents in disputes include, inter alia, attempts to bind adjudicators to sovereignty protecting interpretations of certain treaty provisions, domestic criminal proceedings against investor claimants after a dispute arises, non-compliance with awards, non-participation or the employment of delay tactics in investment treaty arbitrations, increased use of procedural motions for challenging arbitrators, security for costs, and other forms of injunctive relief, and proliferation of challenges to the jurisdiction of tribunals.

Equally, it is important to distinguish between the scope and intensity of state responses. Policy responses employed by some states may be *weak* and are not intended to engender

significant reform, constituted by subtle and discrete acts that amount to a tweaking of, or partial expression of discontent with the IIAs that they have signed. However, some responses are particularly *strong*. The state may take a systemic approach (e.g., seek to terminate all treaties or engage in constant non-compliance) or make radical departures from the spirit of the treaty regime (e.g., drastically curtail investor protections or harass foreign investors with criminal complaints).

Figure 1 melds this principal/litigant and strong/weak dichotomy in order to group the states' responses to the policy bubble. States that utilise strong form tactics as both principals and litigants are those that are most actively engaged in 'deflating the IIA policy bubble', and can be characterised as *absolute opponents* (group I). States that strongly seek reform, thus also seeking to deflate the bubble, but largely play by the rules of fair litigation can be labelled *principled opponents* (group II). States that largely support the regime but seek to obstruct proceedings when subject to investment treaty arbitrations through strong-form litigation tactics, they are not (yet?) seeking to deflate the bubble, can be labelled *reluctant compliers* (group III). Finally, there is a of states that explicitly adopt neither set of tactics, which we will call *compliers* (group IV). *(Reluctant) compliers* include states that actively or passively evince a formal commitment to the idea and practice of the regime. However, while there is evidence that these groups contain states that remain strongly committed to IIAs, including China, Germany and the Netherlands (Hadley, 2013: 275-309; Hadley, 2011; Allee and Peinhardt, 2011; Berger et al., 2011; Haftel and Thompson 2012: 29; Brown, 2013: 7), they may also contain false positives, i.e. states that move easily into another group once the costs of IIAs become more broadly recognized.

Figure 1. Mapping policy responses

Litigation responses		**Principal responses:** Strong	**Principal responses:** Weak or none
	Strong	I. Absolute opponents	III. Reluctant compliers
	Weak or none	II. Principled opponents	IV. Compliers

The function of these various policy responses to the IIA bubble also differ. Their activation may carry different *material* or *symbolic* effects for the future of the international investment

regime, with some tactics potentially precipitating both types of effects (on this general distinction, see Rodriguez-Garavito 2011; on the symbolic and communicative effect of law generally, see Meisenhelder 1981). The regime may be *materially* affected *systemically* if the space in which arbitrators operate in future disputes is curtailed, or *specifically* if states attempt to obstruct or block arbitral disputes to which they are a party. Primarily, tactics with material and systematic effects will aim at revising, restricting, reforming, or terminating the IIAs that grant arbitrators the authority to effectively adjudicate claims. Tactics employed by states and other stakeholders may have *symbolic* effects if they send a signal to arbitrators about state displeasure with the operation of the regime, which might result in arbitrators being more cautious or deferential in ruling against states. The symbolic effects might result from state criticism of the regime or partial exit but also indirectly through the use of various litigation tactics, which collectively might shift arbitrator behaviour towards a more deferential mode of adjudication. However, if these tactics by states are seen as overtly abusive or in violation of general principles of law, arbitrators may actually become less deferential. These symbolic effects, by a small number of particularly vocal states opposed to the regime, may also have indirect material effects by influencing the behaviour of other states. For instance, while many states perceive themselves as compliers their practices of treaty-making and litigation may be influenced by more vocal states, and they may consequently take the step from (reluctant) compliers to (principled/absolute) opponents.

3.1 States as principals

In the literature on the international investment regime, policy responses to the current backlash against the IIA policy bubble are commonly divided into two: exit and voice (Roberts, 2010; Alvarez, 2011). Exit involves a break with the regime while the use of voice seeks regime reform. However, these tactics can vary significantly in strength, as noted earlier. Figure 2 distinguishes the two categories of principal tactics according to their intensity, which range from full system exit (i.e., systemic termination of all treaties with no intent to renegotiate) through to minor modifications to treaty texts. The distinction between exit and voice is of course not watertight. A number of states have employed a combination of partial exit and partial voice tactics simultaneously, although their intentions for such a combination are not always clear.

Figure 2. States as principals: Different types of policy responses

Principal responses

	Strong (absolute or principled opponents)	Weak (reluctant compliers or compliers)
Exit	Systemic termination of treaties Termination of ISDS provisions Withdrawal from ICSID Refraining from ratifying signed treaties	Sporadic termination of treaties Sporadic termination of ISDS provisions Sporadic refrain from ratifying signed treaties
Voice	Attempting forced treaty renegotiation Systemic political delegitimisation New model treaties	Sporadic treaty renegotiation Sporadic clarifications of treaties Sporadic adoption of new model treaty clauses

This part of our contribution will examine and evaluate the different approaches that states are employing or have employed in their treaty-making capacity by focusing on strong-form sets of policy responses. To the extent that these responses are used as part of a strategy to oppose IIAs (deflate the policy bubble), these states can be classified as either absolute opponents or principled opponents (see figure 1 above). However, it is worth noting that not all states that use strong-form tactics necessarily share the overarching strategy of opposing IIAs. The tactics are not unidirectional. A few states (compliers) have recently used strong tactics to *expand* the rights of foreign investors under future IIAs (e.g. China, Germany).

3.1.1 Exit

The headline-making response to the IIA bubble is that of systemic forms of termination, either of substantive treaties or the ICSID Convention (also known as the Washington Convention). There are the classic examples of Latin American states terminating some of their BITs or exiting from the ICSID Convention; but none of these examples can be said to be a full exit from the international investment regime (references to be added*). Even though state exit from the international investment regime to date can thus only be characterized as partial, there is of course the possibility of full exit; and in most cases there are clear rules regarding states' exit from treaties. One key challenging issue that arises when the parties to

an IIA seek to terminate the treaty arises in relation to investors' interests. To what extent are their rights protected in such situations? This raises issues regarding the proportionality of policy responses to policy bubbles.

If a state seeking to terminate all its IIAs cannot achieve mutual agreement with other state parties to the IIAs, it faces a challenging situation. In these cases, it can be questioned whether systemic termination of the IIAs remains a real option. The two principal forms are termination of IIAs and withdrawal from procedural commitments to particular arbitration forums (e.g., through renunciation of the ICSID Convention). The first wave of states initially embraced the latter approach. Bolivia, Venezuela, and Ecuador withdrew from the ICSID Convention in 2007, 2009 and 2012, respectively. Argentina has also signalled its intention to follow suit and the Government introduced a bill in its parliament in March 2012 to this effect (Lavopa et al., 2013).[9]

This 'Latin American' strategy was completely precipitated by investment-related disputes that culminated in investment treaty arbitrations. An arbitration database reveals to date the following number of disputes filed per state: Bolivia (9), Venezuela (41), Ecuador (21) and Argentina (55).[10] The overwhelming majority of these disputes have been registered as ICSID arbitrations (87 % or 109 out of 126 disputes). Amongst these cases, one of the more high profile disputes was Bechtel Corporation's complaint against Bolivia, which culminated in the first-ever state withdrawal from the ICSID Convention (Barlow, 2007).[11]

However, the effectiveness of the ICSID Convention exit strategy has been questioned. The ICSID Convention is procedural not substantive in orientation. The stickiness of the international investment regime is highlighted by the range of impediments to effective withdrawal (see generally Lavopa, Barreiros and Bruno, 2013). Investors can turn to other alternatives for arbitration if they are provided in the relevant IIA. Frequently, an ISDS provision in an IIA will include a number of institutional and non-institutional options for claim initiation (of which ICSID arbitration is just one option). Obviously, withdrawal from the ICSID Convention does not imply withdrawal from other venues for investment treaty arbitration. Moreover, withdrawal from the ICSID Convention would not prevent investors from bringing cases under the ISCID Additional Facility rules. An effective unilateral

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[9] See also 'If Argentina withdraws from the ICSID convention,' http://www.lexology.com/library/detail.aspx?g=080c79bc-cce7-485f-97aa-27a5b2bdec5c (last visited 20 March 2015).
[10] See ITA law website, http://ita.law.uvic.ca (last visited 20 March 2015).
[11] *Aguas del Tunari S.A. v. Republic of Bolivia* (ICSID Case No. ARB/02/3).

withdrawal from the ISDS provision of and IIAs would require termination of the IIA or renegotiation of the IIA with ISDS provisions excluded. Thus, to date, the impact of ICSID Convention withdrawal has been more symbolic than material. Even though these Latin American states apparently wished to pursue a strategy of material exit, the result has been a tactic of voice, an expression of displeasure.

The 'stickiness' of the international investment regime consequently depends on the modalities of terminating the individual IIA as well as their broader characteristics. First, most treaties include 'tacit renewal' clauses, a feature somewhat peculiar to international investment treaty law. These clauses usually provide for automatic renewal of the agreement for a new fixed period (frequently for a subsequent period of 10 years). Any unilateral termination of these agreements would have no effect on investors' rights unless the IIA includes a separate termination clause.

Second, even once termination is achieved, states may face 'survival clauses.' Most BITs include a 'tail' that provides treaty protections for foreign investors (who made their investment prior to the termination of the treaty) for an extended period after the treaty terminates. These provisions prolong investor protections for an average of 12.5 years after treaty termination in order to provide a predictable legal environment (Gordon and Pohl, 2015: 19). The consequences of such lock-ins mean that it could take states a few decades before a full exit could be completed. Gordon and Pohl (2015: 20) estimate that in the event of a hypothetical mass exit in 2014 via unilateral terminations, almost all treaties would be binding until 2025. And, even by 2034, survival clauses in a quarter of today's treaties would continue to operate. Only in 2049, would the last treaty cease to have an effect.

Third, the stickiness of IIAs is further enhanced by the bilateral character of most of these treaties. Such treaties are frequently signed as a token of friendly relations (references to be added*). It is likely that a decision to unilaterally terminate an IIA could be perceived as unfriendly. We therefore expect countries to strongly prefer mutual agreement as the means for systemic termination of IIAs.

These may be the reasons why the Latin American tactic of systemic withdrawing from IIAs has been limited. The UNCTAD database shows that 149 IIAs have been terminated, of which 27 are listed as unilaterally denounced, 16 are listed as being mutually terminated and

106 were replaced by a new IIA.[12] In a sample of 1,896 treaties, Gordon and Pohl (2015: 18) found that only 19 treaties (less than 1%) had been terminated. Only a minority of these terminations are represented by the Latin American group.[13] Of the group, Ecuador has perhaps been the clearest, announcing that it will denounce or terminate treaties with the US, the UK, the Netherlands, Germany, France, Canada, Switzerland, Finland, Sweden, China, Argentina, Chile, and Venezuela.[14] Yet, while Ecuador made these announcements in 2009, they have only been able to terminate its IIAs with other Central and South American states (the only successful terminations outside this region have been with Finland, Romania and Germany). While Ecuador has been threatening to terminate its treaty with the US for many years, it so far has not done so.

Another exit strategy does not attract headlines or much scholarly comment: that is omission of ratification. A significant number of IIAs simply fail to enter into force. The UNCTAD database lists 771 treaties that have been signed but not entered into force, of which 622 were signed before 2010. This is a high number given that the total number of entries in the database is 3,466.[15] Some countries, such as Algeria, Tajikistan, South Africa, and Zimbabwe, have a particularly high ratio of treaties not in force.[16] Explanations for such behaviour may be rational (signal openness to foreign investment but avoid commitment) or political (domestic backlash after signature).

3.1.2 Hybrid responses

A second group of states have adopted an approach that combines different exit and voice tactics. As noted above, most IIAs have termination clauses allowing for one state party to the treaty to unilaterally give notice of the intent to not renew a treaty for an extended period as stipulated in the treaty. This automatic renewal is typically subject to provisions that allow for either state party to unilaterally terminate the treaty by giving notice prior to the treaties' expiration (often requiring such notice one year ahead of the renewal). An emerging tactic is

[12] UNCTAD IIA database, http://investmentpolicyhub.unctad.org/IIA/AdvancedSearchBIT? (search carried out 17 February 2015).
[13] Venezuela withdrew from its FTA with Colombia and Mexico and BIT with Netherlands. Bolivia unilaterally terminated its BITs with the US, Germany and Spain. Argentina terminated its BIT with India.
[14] See http://www.milbank.com/images/content/5/7/573.pdf (last visited 20 March 2015).
[15] UNCTAD IIA database, http://investmentpolicyhub.unctad.org/IIA/AdvancedSearchBIT? (search carried out 17 February 2015).
[16] Id. The numbers of treaties signed before 2010 that are still not in force are: Algeria: 22 out of 55 (40%); Tajikistan: 18 out of 42 (43%); South Africa: 25 out of 56 (45%); and Zimbabwe: 27 out of 39 (69%).

to request termination of the treaty with the intention of renegotiating a new treaty with the same state party. The approach is staggered so that it takes account of the various lock-in provisions.

Such initiatives could aim at renegotiating ISDS provisions or substantive clauses that are regarded as particularly controversial. Whether the other treaty-parties are likely to be more sympathetic to such approaches than to unilateral termination is hard to predict. States belonging to the group of compliers could in some cases prefer that the other treaty-parties remain within the regime, and accept the renegotiation of the IIA. However, other compliers may oppose renegotiation because it could set a precedent and lead to further calls for systemic reform.

What is common to all states in this hybrid category is that they have also been subject to investment treaty arbitration or, in the case of Australia, had sufficient pre-warning of a potential dispute. This fits with the aggregative pattern of renegotiation tactics. According to Haftel and Thompson (2012: 27), there is only a 10% likelihood of renegotiation amongst states that have never experienced an investment treaty arbitration; a figure that rises to 50% for states that have experienced 10 or more disputes.

This hybrid approach is likely to become frequently adopted amongst those states who believe that IIAs are one-sided agreements that protect investors at the expense of a state's legitimate policy goals and its ability to regulate in the public interest. A prominent example of this is Indonesia's notification that it intends to terminate all of its existing BITs with the goal of renegotiating new BITs with many (if not all) of its previous treaty partners. This process has now commenced with its formal notification to the Dutch Embassy of its intention to terminate the BIT on its expiry on 1 July 2015 (Trakman and Sharma, 2014: 1). Indonesia is joined by a number of other states who have adopted variations on this approach. The Czech Republic has been the most active: It initiated an internal policy review, mutually terminated treaties with Italy and Ireland, and has renegotiated seventeen other treaties (Gordon and Pohl, 2015). In the renegotiated treaties, there is a significant weakening of particular investor protections.

A materially different but symbolically similar strategy has been pursued by Australia. In negotiations over a FTA with the United States, Australia and the US mutually agreed that there was no need to include ISDS provisions in the agreement, arguing that domestic courts were sufficient for such purposes. In line with this negotiation and following the initiation of a

high profile case by Phillip Morris against Australia, the government announced in 2011 that no future IIA with Australia would include ISDS provisions. However, in a move which indicates that Australia may be defecting from its own policies, Australia recently signed and ratified an FTA with Korea that included strong ISDS provisions.

The current negotiations between the European Union (EU) and the US on the TTIP are stuck on whether or not to include ISDS provisions. In this case, it is interesting to note the role of civil society and scholars. Both the US and the EU representatives who are negotiating the TTIP have expressed a desire to include ISDS in the treaty. However, there has been considerable public outcry on this issue and both the US and the EU have had to respond to contentions – against their stated positions – that ISDS should not be included in the TTIP (references to be included*).

South Africa has possibly adopted the most hybrid approach, combining all of the above elements. Its new policy towards IIAs was triggered by the case of *Foresti & Ors v. South Africa,*[17] which was launched in 2006 by Italian shareholders of a Luxembourg-based granite mining corporation. The investors challenged legislation that, inter alia, required affirmative action by companies to improve the rights of historically-disadvantaged South Africans with respect to employment, management and capital shares in the mining sector. In 2007, the Government placed a moratorium on the negotiation of any new IIAs and conducted a full and comprehensive review of its IIA policy. At the conclusion of the review in 2010, it announced that South Africa would: refrain from entering into BITs unless there were compelling reasons for such a course of action; terminate existing BITs and offer renegotiation on the basis of a new model; and adopt a new Foreign Investment Act that would provide clear domestic remedies for investors but only in conformity with the Bill of Rights in the South African constitution. The State has now served 13 termination notices on other states (Feris, 2014: 2) which includes major economies such as Belgium/Luxembourg, United Kingdom, France, Germany and Finland (Gordon and Pohl, 2015).

3.1.3 Systemic voice

A final approach is a more indirect or step-by-step move towards 'balanced' treaties. This phenomenon can be traced back to the negotiations of NAFTA and the multilateral agreement on investment (OECD) in the 1990s. These policy responses generally form part of a hybrid

[17] (ICSID Case No. ARB(AF)/07/01). Registered 1 November 2006; discontinued 4 August 2010.

strategy and thus it is rare to find states pursuing this goal solely through 'voice' tactics. Moreover, clear instances of systemic political delegitimisation of IIAs are hard to identify beyond countries' attempts at termination of the ICSID Convention.

However, the adoption of a 'new generation' of model treaties over the past 10 years is a signal from some key countries that IIAs are in need of reform. These countries form a third category of states that seek to use only systemic voice strategies. In the early 2000s, the United States (US) sought to develop a third generation model BIT that reflected the fact that it had been the subject of a number of suits by Canadian corporations under the NAFTA. The 2004 model US BIT scaled back a number of investor protections in favour of protecting the sovereign prerogatives of the state hosting foreign investment (see the protest by Schwebel, 2009 on this point). While the 2004 model and more recent 2012 model include robust ISDS provisions, these provisions have been more thoroughly refined and many of the substantive provisions have been revised (reduced). Overall, the models seek to "recalibrate the balance between the rights accorded investors and a nation's right to regulate in the public interest" (Alvarez, 2009: 834).

It has been contended that the new restrictive US model treaty has been as influential as the earlier expansive version:

> If the United States led the charge in favour of investor protections, it now appears to be leading the drive in the opposite direction. The 2004 U.S. Model BIT is at least twice as long as it once was – and as every lawyer knows, the length of a treaty is often inversely related to the rights that it accords. The 2004 U.S. Model BIT has now shrunk, sometimes dramatically, virtually every right originally accorded to foreign investors while at the same time increasing, sometimes vastly, the discretion accorded host states (Alvarez, 2011: 235).

The changes have been influential beyond the US and are reflected in treaties negotiated by states as diverse as Canada, Mexico, India and China (Alvarez, 2011: 237). The recently concluded Comprehensive Economic and Trade Agreement between Canada and the EU (CETA, 2014) is particularly important in this regard, as it signals the future direction of the EU and consequently of its Member States with regard to IIAs. The CETA follows the approach of the US and Canada in most respects. Gordon and Pohl (2015: 37-38) find that while significant differences remain, there is a convergence towards the US and Canadian model treaties. However, many countries having adopted model treaties since 2000 have refrained from significant modifications, including Germany (model treaty of 2008), France (model treaty of 2006), India (model treaty of 2003) and Italy (model treaty of 2003).

3.1.4 Concluding remarks

The above discussion reveals the diversity of state responses to the IIA policy bubble, as well as the remaining divergence in opinions regarding the costs and benefits of IIAs. While the number of states that have taken measures to deflate the bubble is small and may seem geographically limited, there are signs that more and more states are revising their approach to IIAs. Even among this groups of states not all can be clearly viewed as absolute or principled opponents to the *current* regime. The Latin American states have clearly moved into the strong column of figure 2 while the US, Canada and the EU lie perhaps between strong and weak.

It is not clear which tactic will have the greatest impact on the regime in terms of deflating the bubble. The new model treaties may exert the strongest material and symbolic effects on the overall international investment regime; although it is dependent on how negotiators, arbitrators and legal counsel to disputing parties respond to the new provisions and signals. Together, at least, the emerging trends to withdraw from the ICSID Convention, the systemic behaviour in terminating, renegotiating and not ratifying IIAs and the potentially new generation of model treaties are significant; and in themselves have served as effective means to initiate deflation of the IIA policy bubble.

3.2 States as litigants in investment treaty arbitration

The role of the state as a litigant in international legal disputes is quite different from its role as principal; as litigant in an international dispute, much of the state's authority as a sovereign is limited. When a state consents to a treaty with a dispute settlement mechanisms, it largely defers powers to a third party adjudicator. The state has reduced ability to *ex post* modify the terms to which it has agreed, and it has limited the types of tactics it can employ to influence the proceedings. While litigation tactics cannot constitute means to deflate the IIA policy bubble, our study of such tactics can serve to identify states that are likely to become (principled/absolute) opponents to IIAs. Moreover, litigation tactics may serve as reinforcing supplements to the tactics that states use as principals.

States are always on the respondent side of the dispute in investment treaty arbitration. With counterclaims being infrequently invoked,[18] state respondents in investment treaty arbitration

[18] Information regarding counterclaims to be added*.

are primarily concerned with avoiding liability that could result in large damage awards. In the early days of investment treaty arbitration claims, the infrequency of disputes meant that states likely responded and participated in defending investment treaty claims with few specific tactics in mind. However, as the regime has grown, states have developed a variety of tactics in defending claims; especially those states that have had to defend against multiple claims (e.g. Argentina, Venezuela). There is little evidence that states are taking extreme measures such as refusing to participate in arbitral proceedings[19] or directly influencing arbitrators.[20]

There is, as we shall further explore below, evidence that states are becoming more sophisticated and tactical in the ways that they are defending claims. According to prominent practitioner in a recent keynote speech at an energy arbitration conference:

> There is a developing consensus among states that it is acceptable, and even virtuous, to challenge investor-state arbitration as an infringement on the rights of the public to pass laws through their democratically-elected representatives. Thus it has become *de rigueur* for a sovereign to challenge and obstruct the arbitral process, through challenges to the appointed arbitrators, jurisdictional objections, and post-award challenges to awards and their enforcement (Cassin 2015).

This claim is also empirically backed, with evidence that states are employing increasingly aggressive tactics in defending investment treaty claims. These include a number of procedural and legal tactics, such as utilizing the domestic criminal system of the respondent state, claimant and witness intimidation, reinterpreting treaties after a dispute is filed, refusing or delaying enforcement of awards (including excessive use of the ICSID annulment process), using novel jurisdictional challenges, and employing various tactics for delaying proceedings or making them excessively costly (such as refusing claim consolidation, claim bifurcation, challenging arbitrators, and partial, delayed or no compliance with procedural and substantive orders).

While it is clear that some of these tactics can be highly obstructionist in effect, many (but not all) simply mirror those adopted by investors and are usually tied to issues of financial

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[19] Some of the early (mid-twentieth century) investment arbitrations involving contract-based claims were adjudicated without participation of the respondent state (see for example, the Libyan hydrocarbon concession arbitrations of the 1970s). References to be added*.

[20] There is an infamous (and unique) example where Indonesian officials abducted an arbitrator upon arrival at Schiphol airport in the Netherlands in order to prevent him from attending hearings in the Hague to which he was a member of the tribunal. See *Himpurna v Indonesia* (2000) 15 Mealey's Int'l Arb. Rep. (February); (see also Schwebel, 2006..

attrition and legal capacity. Many investment treaty arbitrations involve large multinational corporations with seemingly endless litigation budgets. In these types of cases, we often see investor claimants using their superior financial position to dominate arbitral proceedings. However, more recently, and directly related to the expansion of investment treaty arbitration, we are also seeing instances where the opposite is true: respondent states using a superior financial position to make claims brought by small claimants economically untenable or unreasonable.

Whether it is the investor claimant or the respondent state, the high-stakes and serious nature of many investment treaty arbitration claims can lead to the employ of aggressive litigation tactics on both sides. It is therefore important, for the purposes of this contribution (which focuses on states), to restrict the scope of what we mean by litigation tactics in this context. We intend to focus exclusively on shifting trends in litigation tactics employed by respondent states where sovereign authority, i.e. tactics that can only be pursued by a state party to the dispute, is used to obstruct or unbalance arbitral proceedings initiated by private parties. Such tactics raise concerns regarding their proportionality. As indicated in figure 3, extensive resort to such 'strong' litigation tactics could place states as either 'absolute opponents' of or 'reluctant compliers' to the international investment regime. However, an excessive use of other litigation tactics, which we refer to as *obstructionist*, may in some circumstances also place a state in these categories if combined with breaches of the equality of arms principle.

Figure 3. States as litigants: Litigation responses

	Litigation responses Strong (possible absolute opponents or reluctant compliers)	Weak (principled opponents or compliers)
(Ab)using position as sovereign	Abusing criminal proceedings during disputes Refusing to enforce or satisfy arbitral awards Seeking reinterpretation of treaty after a dispute is filed	Active enforcement of domestic law against investor Initiating negotiations with source state as a response to dispute
Obstructionism	Vigorous litigation tactics (e.g. jurisdictional challenges and procedural tactics) to delay proceedings or make them costly Delaying enforcement of awards (e.g., excessive use of the ICSID annulment process)	Vigorous litigation tactics within the parameters of the 'equality of arms' principle

We are particularly concerned with litigation tactics where the state can be seen to deviate from the 'equality of arms' principle. Thomas Waelde (2008: 167) states the issue as:

> 'Equality of arms' is a foundation principle of investment arbitration procedure. A government sued on the basis of an investment treaty, signed to encourage foreign and private investment by promising effective protection, should prosecute its case vigorously but within the framework of the principles of 'good faith' arbitration, the applicable arbitration rules, and with respect to 'equality of arms.'

Some governments may not exercise self-restraint, possibly because the investment treaty arbitration is seen as a major domestic political or economic risk or as a function of domestic of governance issues. The latter may occur where the government is used to controlling internal adjudication directly or indirectly and there is no clear separation between the government as dispute party on the one hand, and as sovereign, regulator, and 'owner' of a massive machinery of government on the other (Waelde 2008: 168).

As the investment treaty arbitration caseload grows, we are increasingly able to identify litigation trends where sovereign deference to the 'equality of arms' principle is waning and where states behave in ways that make us question whether they are on the verge of becoming opponents to the regime. Moreover, we will also be looking for states that are using such litigation tactics to support existing efforts to deflate the IIA policy bubble, thus emerging as absolute opponents to the regime. We will look at three recent trends that represent strong litigation tactics in which the state clearly abuses its role as sovereign: 1) criminal proceedings during disputes, 2) (ab)using other prerogatives of the state, and 3) refusing to enforce or satisfy arbitral awards. These tactics are of course used on a case-by-case basis and they are closely tailored to the specifics of each case. Moreover, many states are only subject to investment treaty arbitration in a very limited number of instances. It is therefore challenging to identify clear patterns and general trends. We will therefore proceed by first providing an overview of the cases that we have identified under each of these categories. We have identified cases on the basis of statements in tribunal decisions and news reports. We have been unable to estimate the amount and characteristics of unknown cases.

3.2.1 Criminal proceedings during disputes

The most significant and recent tactical shift in the way that respondent states are defending investment treaty arbitration claims is in the area of domestic judicial proceedings. It is of course reasonable and not unusual for respondent states to use their judiciary to enforce domestic law against foreign investors operating within their borders. What is relatively new is a tactic whereby the domestic judicial machinery is activated as a response to an investment treaty claim. This tactic is arguably (ab)used for three purposes: 1) to obstruct, delay, or interfere with the proceedings of the investment treaty arbitration; 2) to (ab)use the domestic legal system to obtain evidence and information that can be used against the claimant in the arbitration proceedings; and 3) to intimidate, scare or coerce the claimant and its witnesses after the investment treaty arbitration is initiated. All three of these tactics are within the purview of the respondent host state to initiate, but can be seen as disproportionate where they have disguised objectives or constitute bad faith manoeuvres in order to gain advantage in a pending arbitration.

In *Border Timbers Limited v. Zimbabwe*,[21] a group of Dutch and Swiss farm owners in Zimbabwe claimed that their farms were unlawfully expropriated. During the course of the proceedings, the claimants received a letter from Zimbabwe's attorney general demanding that they disclose certain documents in connection with the arbitration; and that if they refused, Zimbabwe would institute domestic criminal proceedings.[22] In a procedural order dated 13 June 2012, the president of the tribunal directed Zimbabwe to cease pursuit of the demands.[23] A year later the claimants requested urgent injunctive relief in relation to a number of threatening altercations on the claimant's farm to which the local police refused to provide assistance. In a procedural order refusing to grant the claimant's relief, the tribunal noted "that the Claimants continue to 'feel intimidated' by the threats made against their staff and that this intimidation is 'heightened by the fact that the Police will not act.'"[24]

In *Quiborax v. Bolivia*,[25] the claimant brought a claim for compensation against Bolivia for unilaterally revoking several mining concessions. Almost three years into the arbitration, Bolivia initiated criminal proceedings against the main shareholder of Quiborax for allegedly forging documents.[26] The effect was to limit the claimant's ability to access important documents relevant to the arbitration (they were seized by the state in relation to the domestic criminal proceedings); and that "the criminal proceedings are aggravating the dispute because they put intolerable pressure on them to abandon their claim and are thus aimed at avoiding the resolution of the dispute."[27] There is evidence that the initiation of the criminal proceedings was designed as part of a larger defence strategy Bolivia developed specifically for this arbitration. In its decision on provisional measures, the tribunal stated:

> [T]hat it cannot fail to note that these [criminal proceeding] actions were taken after an inter-ministerial committee specifically recommended in the 2004 Memo that Bolivia should try to find flaws in Claimants' mining concessions as a defense strategy for the ICSID arbitration. Seen

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[21] *Border Timbers Limited, Timber Products International (Private) Limited, & Hangani Development Co. (Private) Limited v. Republic of Zimbabwe (Border Timbers)* (ICSID Case No. ARB/10/25), pending.

[22] *Border Timbers*, Directions Concerning Claimants' Application for Provisional Measures of 12 June 2012, 13 June 2012.

[23] *Border Timbers*, Directions Concerning Claimants' Application for Provisional Measures, 12 June 2012.

[24] *Border Timbers*, Procedural Order No. 4, 16 March 2013.

[25] *Quiborax S.A. & Non-Metallic Minerals S.A. v. Plurinational State of Bolivia (Quiborax)* (ICSID Case No. ARB/06/2), pending.

[26] Peterson, Luke (2010). *Arbitrators order that (Bolivian) criminal proceedings be suspended*, Investment Arbitration Reporter, 9 April 2010, http://www.iareporter.com/articles/20100410_3 (last visited 20 March 2015).

[27] *Quiborax*, Decision on Provisional Measures 1 February 2010, para. III.132.

> jointly with the 2004 Memo, the corporate audit and the criminal proceedings appear to be part of a defense strategy adopted by Bolivia with respect to the ICSID arbitration.[28]

In that same decision, the tribunal ultimately ordered Bolivia to suspend all pending criminal proceedings against the claimants and their witnesses pending the outcome of the arbitration.[29] Given the close connection of these criminal proceedings with the arbitration, the tribunal was concerned that the respondent state's domestic actions could "jeopardize the procedural integrity of this arbitration." [30] The claimant alleged that these criminal proceedings also served to reduce the willingness of witnesses to participate in the arbitration for fear of reprisals.[31]

In *Caratube v Kazakhstan (Caratube II)*,[32] claimants initiated new proceedings relating to a previous award, *Caratube v Kazakhstan (Caratube I),*[33] which concerned the unilateral termination of a hydrocarbon concession. In what appears to be an increasingly personal and highly charged dispute, the claimants sought injunctive relief in order to protect Devincci Hourani (one of the primary claimants in the case), his relatives and associates from investigations and harassment relating to their alleged involvement in a 2004 murder in Lebanon. According to the request, Kazakhstan had enjoined as a *partie civile* in criminal proceedings against Hourani in Lebanon for the alleged murder of Anastasia Novikova; and its involvement in these proceedings and other campaigns against the Hourani family were "an impermissible act that prevents them from asserting their rights in this Arbitration."[34] While the tribunal denied the claimants' request for provisional measures, it "found that the Claimants have shown a certain need for protection in this Arbitration" and that the request was not "unreasonable under the circumstances".[35]

In *Al Warraq v. Indonesia*,[36] a Saudi banker brought a claim that the nationalization of Bank Century (a bank to which he was a shareholder) amounted to an unlawful expropriation. Indonesia defended the nationalization as an appropriate response to a foundering institution,

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[28] Id. at para. III.122.
[29] Id. at para. V.2.
[30] Id. at para. V.1.
[31] Peterson, supra note 31.
[32] *Caratube International Oil Company LLP & Devincci Salah Hourani v. Republic of Kazakhstan (Caratube II)* (ICSID Case No. ARB/13/13), pending.
[33] *Caratube International Oil Company LLP v. Republic of Kazakhstan (Caratube I)* (ICSID Case No. ARB/08/12), Award, 5 June 2012.
[34] *Caratube II,* Decision on the Claimants' Request for Provisional Measures, 4 December 2014, para. 135.
[35] Id. para. 155.
[36] *Hesham T. M. Al Warraq v. Republic of Indonesia (Al Warraq)*, UNCITRAL, Award, 15 December 2014.

and argued that the claimant was actually responsible for why the bank needed to be bailed out in the first place. In a domestic criminal proceeding that pre-dated the initiation of the arbitration, an Indonesian court found Al Warraq guilty *in absentia* of numerous financial crimes relating to his involvement in Bank Century.[37] After the initiation of the arbitration, Al Warraq claimed that Indonesia attempted to derail the arbitration by freezing his assets and obtaining an Interpol Red Notice against him.[38] Ultimately, however, the tribunal held that these actions by Indonesia did not amount to a disruption of the *status quo ante* or as a violation of its obligations to not aggravate the arbitration.[39]

Churchill v. Indonesia,[40] concerns a claim that Indonesia had unilaterally and without cause terminated mining licenses in East Kalimantan. After the claim was brought, Indonesia initiated criminal proceedings against the claimants alleging that the mining licenses were procured through forged documents.[41] The claimants contend that these criminal proceedings were initiated by Indonesia to "'cause maximum surprise and disruption,' and was a 'tactical move' directly connected to the arbitration."[42] In carrying out their criminal prosecution against the claimants domestically, Indonesia raided the offices of the claimants and confiscated numerous documents and computer hard drives that (as claimants allege) could be used as evidence against them in the pending investment treaty arbitration.[43] While it is possible that the raid and the forgery proceedings are not being pursued in order to gain tactical advantage in the arbitration, there may be a good argument that Indonesia is using its sovereign authority in contravention of the 'equality of arms' principle or that its level of obstructionism places its actions in a more questionable category. Nonetheless, in a recent procedural order, the tribunal declined to order Indonesia to desist from its criminal proceedings pending the outcome of the arbitration.[44] The tribunal did, however, observe:

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[37] Peterson, Luke (2014). *In Al Warraq v. Indonesia award, arbitrators devote bulk of their analysis to assessing investor's treatment in light of UN human rights treaty norms*, Investment Arbitration Reporter, 19 December 2014, http://www.iareporter.com/articles/20141219_1 (last visited 20 March 2015).
[38] Id.
[39] Id. *Al Warraq* Award not publically available.
[40] *Churchill Mining & Planet Mining Pty Ltd, formerly ARB/12/40 v. Republic of Indonesia (Churchill)* (ICSID Case No. ARB/12/40 and 12/14), pending.
[41] Hepburn, Jarrod (2014). *Arbitrators again decline to order Indonesia to desist with criminal investigation into alleged forgery of mining license in Churchill & Planet Mining case*, Investment Arbitration Reporter, 30 December 2014, http://www.iareporter.com/articles/20141230 (last visited 20 March 2015).
[42] Id.
[43] Id.
[44] *Churchill,* Procedural Order No. 14, 22 December 2014.

> [T]hat it is also aware that Indonesia is currently in possession of documentation and hard drives obtained through the raid of 29 August 2014. It can thus not rule out that Indonesia may seek to file evidence into the record obtained through the criminal investigation… To avoid that the risk mentioned above materializes, the Tribunal is of the view that the Respondent should seek leave from the Tribunal before introducing evidence which it has obtained or will obtain through the criminal investigation conducted on the allegation of forgery. This recommendation is meant to avoid any unfair advantage and level the playing field between the Parties.[45]

The final example deals with threats related to the potential initiation of an investment treaty claim. In *Bozbey v. Turkmenistan*,[46] a Turkish businessman brought a claim relating to investments made in the agricultural sector in the 1990s. Bozbey alleged that "he was caught up in a wave of anti-Turkish sentiment in Turkmenistan, culminating in his imprisonment and mistreatment after he refused to comply with a request for a bribe issued by a local tax official."[47] After 18 months in prison, he returned to Turkey and initiated a claim with the United Nations Human Rights Committee (UNHRC). In that claim, he alleged that he was tortured while in prison and most importantly, he claimed that while in prison, officials "wanted him to sign legal documents … to undertake that he would not make any complaints and apply to any international arbitration institution regarding his investments in the country."[48] The UNHRC concluded that his conditions of detention constituted "a violation of his right to be treated with humanity and with respect for the inherent dignity of the human person under article 10, paragraph 1, of the Covenant."[49] While Bozbey did ultimately bring an investment treaty claim, he had to abandon it before its conclusion because he could not meet the tribunal's request for an advance on costs.

As these cases demonstrate, it may be difficult to trace whether and how states use criminal proceedings in the context of investment treaty arbitrations. Moreover, we are frequently faced with situations where it is impossible or very difficult to determine who is at fault; the investor, the state, or both. The cases we have identified indicate varying types of domestic proceedings that states have brought against claimants after the initiation of the investment claim; and the general reluctance of tribunals to order injunctive relief against such domestic

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[45] Id. at paras. 81-82.
[46] *Farouk Bozbey v. Turkmenistan,* UNCITRAL, case not publically available. Discontinued 16 August 2013.
[47] Hepburn, Jarrod & Luke Peterson (2013). *After claims of human rights violation are borne out, businessman pursues ad-hoc investment treaty arbitration against Turkmenistan*, Investment Arbitration Reporter, 3 April 2013, http://www.iareporter.com/articles/20130403_3 (last visited 20 March 2015).
[48] *Omar Faruk Bozbey v. Turkmenistan*, Communication No. 1530/2006, U.N. Doc. CCPR/C/100/D/1530/2006 (2010), para. 5.6.
[49] Id. at para. 7.3.

proceedings. Tactically speaking, it appears that respondent states have a general degree of latitude in pursuing domestic criminal proceedings and that these proceedings may be effective in gaining an advantage over claimants. Due to limited ability of investment tribunals to obtain evidence, we may fear that success in such proceedings could be higher for states that suffer from corruption or lag behind in their implementation of 'rule of law' standards. Such states are consequently most likely to make use of these tactics.

3.2.2 (Ab)using other prerogatives of the state

The second category of litigation tactics pursued with increasing frequency by respondent states in investment treaty arbitrations relate to its dual role as both party to the dispute with a foreign investor and party to the treaty upon which the dispute is based. This dynamic can create a scenario where the respondent state in an ongoing dispute attempts to modify the provisions of a treaty in order to gain advantage in a dispute to which it is a party. Timing is crucial. A state as a party to a treaty can always request the renegotiation (or interpretation of particular provisions) of a treaty with its treaty partner or partners. In a variety of ways, these new or subsequent treaties or agreements will bind adjudicators in future disputes.[50] Renegotiation or modification becomes problematic where applied to an ongoing dispute.

Roberts (2010: 179-80) highlights this relationship and the issues it can create in the adjudication of investment treaty disputes:

> The Vienna Convention on the Law of Treaties … provides that the treaty parties' subsequent agreements and practice shall be taken into account in interpretation, recognizing the significant and ongoing role of the parties in interpreting their treaties. Yet investor-state tribunals have tended to shun this interpretive approach, apparently because of concerns about ensuring the equality of arms between claimant investors and respondent states and protecting against the adoption by states of self-interested interpretations. This divergence can be traced to states' dual role under investment treaties as treaty parties (with an interest in interpretation) and actual or potential respondents in investor-state disputes (with an interest in avoiding liability).

[50] The classic example is the interpretive statement issued by the Free Trade Commission (FTC) under the North American Free Trade Agreement (NAFTA). After arbitrations brought under NAFTA contribution 11 where treaty parties were dissatisfied with interpretations of the FET standard in the treaty, the FTC (comprised of the US, Canada, and Mexico) issued a binding interpretive statement restricting the interpretation of the FET standard to the customary international law minimum standard of treatment. This statement has had the effect of constituting a subsequent agreement under international law and has bound future NAFTA tribunals.

In *Sanum Investments v. Lao PDR*,[51] an investor from Macao brought a claim based on the China-Lao PDR BIT. At issue in the case was whether the BIT was intended to include protections for investors from Macao (the location of the investor claimant). In its award on jurisdiction, the tribunal held that the BIT does cover the investor from Macao and that the tribunal does have jurisdiction over the claim. Despite agreement to settle the case in mid-2014,[52] the respondent state continued to pursue set-aside proceedings against the award on jurisdiction in Singapore (the seat of the arbitration); and in January 2015, the Singapore High Court issued a decision setting aside the jurisdictional award.[53] One of the primary reasons for setting aside the award was based on two letters from the Chinese government (which were a response to a request from Lao PDR) stating that the China-Lao PDR BIT does not apply to Macau.

In *Ecuador v. US*,[54] one of very few state – state disputes based on a BIT, Ecuador argued that US refusal to issue an interpretive note or amendment to the US-Ecuador BIT on the scope of the 'access to justice' provision in that treaty was unlawful. This dispute arose out of an earlier investment treaty claim, *Chevron v. Ecuador (Chevron I)*,[55] where Ecuador was dissatisfied with the tribunal's interpretation of the 'access to justice' provision. Ecuador brought the case with the aim of binding future tribunals, including the tribunal in the ongoing dispute of *Chevron v. Ecuador (Chevron II).*[56] While the state – state dispute was dismissed by the tribunal for lack of jurisdiction, if it had been successful it would have bound a tribunal to a restrictive interpretation of a treaty provision that would favour Ecuador in an ongoing case.

In a somewhat different case, *Detroit International Bridge v. Canada*,[57] the non-disputing NAFTA state parties (US and Mexico) sought to attend the hearings, but were challenged by

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[51] *Sanum Investments Limited v. Lao People's Democratic Republic,* UNCITRAL, PCA Case No. 2013-13, Award on Jurisdiction 13 December 2013.

[52] *Sanum Investments Limited v. Lao People's Democratic Republic,* UNCITRAL, PCA Case No. 2013-13, Settlement Award 15 June 2014.

[53] *Government of the Lao People's Democratic Republic v. Sanum Investments Ltd*. [2015] SGHC 15, 20 January 2015.

[54] *Republic of Ecuador v. United States of America,* UNCITRAL, PCA Case No. 2012-5, Award 29 September 2012.

[55] *Chevron Corporation (USA) & Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Award, 31 August 2011.

[56] *Chevron Corporation & Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, pending.

[57] *Detroit International Bridge Company v. Government of Canada (Detroit Bridge),* UNCITRAL, PCA Case No. 2012-25, pending.

the claimants who categorically wanted to exclude them. Despite the US being the home state of the investors in this case, the claimants did not want the US to attend the hearings due to a pending parallel litigation in US courts.[58] The claimants in the case contend that the US was only seeking to attend the hearings in order to gain evidence that could be used against them in these proceedings.[59] Ultimately, the tribunal sided with the claimants and rejected the request to attend the hearings, but did later hold that the US and Mexico could have access to a transcript of the hearing subject to redaction of certain confidential information.[60] What is interesting about this case is the allegation that the US tried to gain advantage in a parallel case in US courts. While this case appears to be an outlier, and the non-disputing state party rights under NAFTA are not typical, it could illustrate a tactic that could be pursued more frequently as treaties incorporate more substantial rights for third party interveners.[61]

These cases indicate that states possess little leeway to abuse their role as parties to treaties when acting as respondents in investment treaty arbitrations. General rules of international law, according to which disputes shall be determined on the basis of the law applicable at the time of the event that triggered the disputes, would generally prevent resort to such tactics. In situations where one could argue for flexibility in the application of the general rules, it is likely that tribunals will require strong arguments for exemptions to be accepted.

3.2.3 Refusing to enforce or satisfy arbitral awards

The difficulty in compelling states to satisfy international arbitral awards against them is a long-standing problem. What might be new or shifting is the means by which states are avoiding enforcement. One of the central reasons driving the negotiation of the ICSID Convention in the 1960s was precisely related to the problem of enforcement. Article 53 of the ICSID Convention attempted to resolve this problem by making ICSID arbitration awards directly enforceable against the state.

The direct enforceability of awards under the ICSID Convention was systemically challenged for the first time following Argentina's financial collapse in 2001. Argentina has been

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[58] Peterson, Luke (2014). *After excluding USA and Mexico from NAFTA hearings, tribunal grants access to transcripts and frowns on investor's attempt at wholesale redaction*, http://www.iareporter.com/articles/20140713 (last visited 20 March 2015).
[59] *Detroit Bridge*, Procedural Order No. 9, 5 June 2014.
[60] Id.
[61] One example is the Dominican Republic-Central American Free Trade Agreement wherein non-disputing state parties have intervention rights similar to those under the NAFTA.

steadfast in refusing to enforce ICSID awards. The argument has been that despite the reference to the direct enforceability of awards in the ICSID Convention, the Argentinian Constitution requires that all payments out of the state treasury must first be authorized through a domestic court judgment. Given the high number of ICSID awards against Argentina in the past 10 years, this non-compliance has put considerable strain on the long-term viability of the regime overall. While Argentina has recently satisfied five of its outstanding awards through a negotiated settlement, a number of final awards remain unsatisfied.[62]

In addition to the Argentinian cases, there are some states that resist compliance with awards rendered against them.[63] Zimbabwe,[64] Russia,[65] Kyrgyzstan,[66] and Thailand[67] have all refused to comply with any awards rendered against them. In addition, there are a number of respondent states that have sought to delay or refuse enforcement in individual cases: Guatemala,[68] Kazakhstan,[69] Mexico[70] and Venezuela.[71] In general, these states have a record

[62] Luke Peterson, *After settling some awards, Argentina takes more fractious path in bond-holders case, with new bid to disqualify arbitrators*, Investment Arbitration Reporter, 20 December 2013, http://www.iareporter.com/articles/20131230 (last visited 20 March 2015).

[63] The cases listed in this section are limited to treaty-based investment claims (and may not be exhaustive). In addition to the states listed, there are a few states that have not enforced contract-based investment claims or have not complied with settlement agreements. Primarily, these include: Lao PDR, the Dominican Republic, the Democratic Republic of Congo, Ukraine, and Turkmenistan.

[64] *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe* (ICSID Case No. ARB/05/6), Award, 22 April 2009.

[65] *Hulley Enterprises Limited (Cyprus) v. The Russian Federation* (UNCITRAL, PCA Case No. AA 226), Award, 18 July 2014; *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (UNCITRAL, PCA Case No. AA 227), Award, 18 July 2014; *Veteran Petroleum Limited (Cyprus) v. The Russian Federation* (UNCITRAL, PCA Case No. AA 228), Award, 18 July 2014; *Renta 4 S.V.S.A, Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valors SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. The Russian Federation* (SCC No. 24/2007), Award, 20 July 2012; *RosInvest Co UK Ltd. v. The Russian Federation* (SCC Case No. V079/2005), Award, 12 September 2010; *Mr. Franz Sedelmayer v. The Russian Federation* (SCC), Award, 7 July 1998.

[66] *Stans Energy v. Kyrgyz Republic* (Moscow Chamber of Commerce and Industry (MCCI)), Award, 30 April 2014; *OKKV (OKKB) and others v. Kyrgyz Republic* (MCCI), Award, 21 November 2013; *Lee John Beck and Central Asian Development Corporation v. Kyrgyz Republic* (MCCI), Award, 13 November 2014; *Sistem Mühendislik Inşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic* (ICSID Case No. ARB(AF)/06/1), Award, 9 September 2009; *Petrobart Limited v. The Kyrgyz Republic* (SCC Case No. 126/2003), Award, 29 March 2005.

[67] *Walter Bau AG v. The Kingdom of Thailand* (UNCITRAL), Award, 1 July 2009.

[68] *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23), Award, 29 June 2012.

[69] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16), Award, 29 July 2008.

[70] *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2), Award, 18 September 2009.

[71] *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian*

of complying with some awards and rigorously fighting enforcement in others (reference to be added*).

The above list of countries includes none from North America and Western Europe. However, there is one case that illustrates that refusal to enforce awards may be relevant for these states as well. In *Micula v. Romania*,[72] a group of investors initiated a claim under the Sweden-Romania BIT alleging that Romania withdrew a number of incentives in breach of the BIT. The European Commission (EC) intervened as *amicus curiae* expressing doubts as to whether an ICSID award against Romania would be enforceable. On 11 December 2013, the tribunal issued a final award against Romania in the amount of 250 million USD. In May 2014, the EC formally enjoined Romania from satisfying the ICSID award.[73] The EC claims that the ICSID award is compensation for incentives that Romania had to remove in order to join the EU. These incentives constituted illegal state aid under the EU; and therefore, as the EC argues, any payment of compensation for the withdrawal of such illegal state-aid (i.e. the ICSID award) would be considered illegal state aid itself and therefore unenforceable.[74] This case also illustrates the limits of this tactic, as the claimants have sought to have the award recognized and enforced by US courts.[75] While it is commonplace for non-ICSID arbitral awards to involve the assistance of domestic court proceedings for their enforcement, it is quite rare for a successful claimant to seek recognition of an ICSID award in a state other than the state against which the award was rendered.[76]

3.2.4 Concluding remarks

Our study of cases indicates that the more experienced a state is in defending against investment treaty claims, the more sophisticated (and less reliant on its power as a state) it

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Republic of Venezuela (ICSID Case No. ARB/07/27), Award, 9 October 2014; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1), Award, 22 September 2014.

[72] *Ioan Micula, Viorel Micula and others v. Romania* (ICSID Case No. ARB/05/20), Award, 11 December 2013.

[73] Letter from the European Commission 26 May 2014, as confirmed in: European Commission State Aid Investigation, State aid SA.38517(2014/C) (ex 2014/NN) – Romania Implementation of Arbitral award Micula v Romania of 11 December 2013, 1 October 2014.

[74] Id.

[75] *Viorel Micula v. Government of Romania*, Petition to Confirm ICSID Award and Enter Judgment, US District Court for the District of Columbia, Case 1:14-cv-00600-RMC, 8 April 2004.

[76] There are a few non-recent examples of successful claimants seeking recognition of ICSID awards in French and US courts: *S.A.R.L. Benvenuti & Bonfant v. Republic of the Congo*, 13 January 1981, Tribunal de Grande Instance, Paris, 108 Journal du droit international 365 (1981); *Liberian Eastern Timber Corp. v. Liberia*, 12 December 1986, US District Court for the Southern District of New York, 650 F. Supp. 73 (1986); *Societe Ouest Africaine des Betons Industriels v. Senegal,* 5 December 1989, Court of Appeal, Paris, 117 Journal du droit international 141 (1990).

becomes in its defences. While some of the litigation tactics will have both material and symbolic effects, we find that it is the latter that are likely to have the most influence on the system, since the tactics are unlikely to have material consequences beyond the specific dispute. Collectively, however, the various litigation tactics we have explored may have significant effect on the way that investment treaty arbitration is perceived. The amount of resources dedicated by states in investment treaty arbitrations and the creativity and seriousness by which respondent states litigate these cases provide signals to arbitrators and to system watchers at-large. Potential litigants may think twice before bringing a case. And states may have significant interest in making system watchers aware of the burden that these cases place on them.

We find that there may be an increasing acceptance among investment tribunals of respondent state litigation tactics that previously could have been classified as abusing their position as sovereign. There may emerge an increasing consensus among states and civil society[77] that investment treaty arbitration is an illegitimate form of dispute resolution and that states subject to disputes are entirely justified (and may even be perceived as noble) in employing any conceivable litigation tactic to resist or obstruct this type of arbitration. However, there have been few cases before investment tribunals so far, and it remains unclear how the tribunals will respond if they are faced with a more systematic resort to such litigation tactics. Therefore, it is still too early to tell what impact litigation tactics will have on the international investment regime as such.

Our examination of litigation tactics shows that there is significant recent developments. For a few states, such tactics are part of their overall strategy to oppose the international investment regime, perhaps qualifying them as 'reluctant compliers' (or 'absolute opponents' if combined with strong tactics as principals). However, most states applying such tactics do so in an ad hoc manner, and should rather be classified as 'compliers.'

4. Explaining deflation of the policy bubble

Our starting point when considering shifting state tactics in the context of the IIA policy bubble is that states have voluntarily consented to being bound by the provisions of the IIAs and that they have voluntarily accepted that such obligations can be adjudicated and enforced

[77] One example is the *Public Statement on the International Investment Regime – 31 August 2010,* http://www.osgoode. yorku.ca/public-statement-international-investment-regime-31-august-2010 (last visited 20 March 2015).

through mandatory ISDS provisions. Taking this point of departure, states start out as compliers to the IIAs to which they are parties. However, two main reservations should be made: 1) Many states (have) fail(ed) to ensure broad bureaucratic and political support for their IIAs. This means that states cannot always be considered as unitary entities when categorising them as compliers. 2) It is necessary to consider IIAs against the background of existing customary international law in the field of international investment law. Hence, states may be bound by rules similar to those found in IIAs regardless of whether they choose to join such treaties.

This contribution has suggested that when states become dissatisfied with aspects of their IIAs, they may choose one of three strategies: they may become 'reluctant compliers,' 'principled opponents,' or 'absolute opponents.' We have also suggested that certain tactics are primarily associated with such strategies based on a basic distinction between states 'as principals' and 'as litigants'.

The question we now ask is: Why have some states moved to deflate, if not puncture, the IIA policy bubble? Explaining the backlash is complex and causes cannot be assigned to a kneejerk sovereignty or *realist* reflex: that states never intended to cede sovereignty and that treaty commitment constitutes a false positive. It is true that one of the main concerns that states express about IIAs is their potential to interfere with domestic policy and the ability of the state to regulate in the public interest (Schneiderman, 2008), but it can also be argued that IIAs manifest the states' sovereign ability to advance a public interest: the long-term policy goal of economic development through the promotion of foreign direct investment.

A reaction to a policy bubble in our view can be explained by two factors: (1) states become aware of the disequilibrium point and thus move their policies closer to the equilibrium of costs and benefits; (2) the underlying equilibrium point shifts thereby exposing the original position of disequilibrium. An example of a category one factor would be the awareness of the policy costs generated by litigation against the state. An example of category two would be a shift in investment patterns or ideological preferences that change the likely costs and benefits.

Thus, to understand why there is a reaction to the investment treaty bubble, we need to look more closely at the cost-benefit calculation proposed in the policy bubble literature: *objective* and *perceived* costs and benefits.

First, *rational choice* theories highlight the *objective* incentives and constraints for states in entering the regime. For example, states may balance: 1) making credible commitments in order to gain investment versus ensuring sufficient legal certainty over the potential costs of commitment; and 2) whether they will be predominantly capital exporters or importers in the future. The existence of these two uncertainties means that states may need to ensure sufficient flexibility in regime design (or impose it later) to be able to respond if the basis for these trade-offs changes.

Thus, one way of understanding the current backlash is that states are reassessing the utility of the sovereignty restricting rights of treaties governing this area of international law (see, e.g., Lavopa, Barreiros and Bruno, 2013). As has been explored above, it is clear that states have the ability to modify and influence the international regimes to which they have consented. However, we have shown that the existing web of IIAs has a high degree of 'stickiness' and that states are likely to face significant delays in their efforts to exit or change their obligations.

As the practice of investment treaty arbitration develops, originally unanticipated consequences have become clearer; and the disequilibrium point arguably exposed. The importance of mandatory ISDS provisions in IIAs as a means to challenge policies that investors perceive as detrimental to their interests has become clearer to many states. The state – as the primary mover in consenting to international treaties – can assert its sovereign authority by modifying or exiting regimes that are no longer perceived to be in that state's interests. Provided sufficient knowledge, whether IIAs remain a benefit to the state can be subjected to a cost-benefit analysis. For some states, it is clear that the costs do outweigh the benefits; and in coming to this realization they are likely to design strategies and tactics to remedy the imbalance.

Moreover, for some states, the benefit-cost analysis may have been highly stacked objectively in favour of commitment. A positive IIA policy was part and parcel of international structural adjustment packages for highly-indebted states (Elkins, Guzman and Simmons, 2006). As these states have become independent of such policies of the World Bank and the IMF, it should not be expected that their investment treaty policy would remain static. Moreover, for all states, there have been significant shifts in stocks and flows of foreign direct investment in recent decades (see UNCTAD, 2014). This makes IIAs less attractive for some states and

more attractive for others. In both of these cases, the underlying equilibrium point has shifted and states are possibly alert to the new balance of costs and benefits.

Second, the associated *normative* or political climate at the domestic and international level has also shifted with a partial pushback in the last decade against the march of global neoliberalism. This suggests a rise in *perceived* costs. In the 1990s, UNCTAD recorded that 90% of regulatory reforms/changes concerning investment inflows were pro-liberalisation while that figure fell to less than 70% in 2009 – a third were restrictive (Alvarez, 2011: 233-4). Even the IMF has recognised that an overly liberalised capital regime was partly to blame for the global financial crisis. Thus, the perception of the costs of the investment regime has clearly shifted and has shifted the original equilibrium point. However, the shift in ideology may have also encouraged a more critical evaluation of the original policy choice and exposed the policy overreaction.

These cost-benefit calculations were also affected by certain background institutional and legal conditions that fostered ready commitment yet turned out to be highly fragile in practice. First, IIAs were an exemplar of isomorphic institutionalism, easy and attractive to sign. Only two states were required for an agreement, parliamentary assent was almost never a major problem, and the whole event provided a perfect media event for visiting heads of state. Government officials have acknowledged that the content or implications of treaties were rarely scrutinised (references to be added*). It was only when they were named as a respondent in a case that the implications, let alone the existence of the treaty, became clear. Moreover, the pedigree of many of these treaties can be traced to a small number of model BITs developed by a few capital-exporting states in the 1980s and 1990s. Therefore, while each BIT should be viewed as a distinct and negotiated document between two states, the reality is that many BITs are very similar in the rights granted and – until the mid-1990s – do not appear to be the result of hard fought negotiation, but rather were often signed with little or no change from the capital-exporting states' model.

There are consequently many reasons why we are seeing a backlash against the extensive web of IIAs that were signed during the last decades of the twentieth century. Commentators and negotiators talk about new 'generations' of treaties that seek to redefine the balance between rights of investors and policy freedom of states, as well as the role of ISDS.

Our study of the various tactics of states as principals and litigants can serve as a basis for categorizing states. While there is a rather significant range of states have employed tactics

that place them as 'principled opponents,'[78] or 'reluctant compliers,'[79] very few – if any – states have become 'absolute opponents' to the IIA regime.[80] While the number of states in these categories may seem small and it can be argued that the relevant states are marginal mostly marginal in terms of recipients and sources of FDI, we should be careful not to underestimate the impact that the tactics may have on the IIA policy bubble.

However, the very existence of absolute opponents raises new questions. Could their response be described as a 'policy anti-bubble'? In turning their back on the international investment regime, it might be asked whether they have over-estimated the costs of the regime. Does the result of regional exceptionalism on international treaty investment regimes represent a disproportionate reaction? Thus, we may be able to observe the creation of a new disequilibrium point as some states react to the original policy bubble. Whether this is the case is controversial but the question is worth considering.

[78] Arguably, the following states could be considered to be in the process of becoming 'principled opponents,' based on our findings above: Argentina, Australia, Bolivia, the Czech Republic, Ecuador, Indonesia, South Africa, and Zimbabwe.

[79] Arguably, the following states could be considered to be in the process of becoming 'reluctant compliers,' based on our findings above: Argentina, Bolivia, Indonesia, Kazakhstan, Kyrgyzstan, Russia, Thailand, and Zimbabwe.

[80] States qualifying as both 'reluctant compliers' and 'principled opponents' may be classified as 'absolute opponents.' This could apply to Argentina, Bolivia, Indonesia, and Zimbabwe.

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