Chapter 6: The Impact of Investment Treaty Law on Host State Behavior: Some Doctrinal, Empirical and Interdisciplinary Insights

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## Introduction

This chapter is intended as a mapping exercise to introduce a project which examines the effectiveness of international investment law, with particular focus on the role of international investment treaties in fostering good governance and rule of law on a national plane. The aim of the project is to analyze if investment treaty rules and remedies can have a transformative effect on the behavior of governmental agencies and officials in host States. Originally conceived with a view to protecting foreign undertakings from opportunistic governmental behavior, international investment treaties have gradually come to be interpreted as also requiring host States to maintain good governance standards in their dealings with foreign investors. Lack of transparency, stability, predictability as well as the lack of effective remedies and enforcement mechanisms at a national level can now lead to a host State’s liability in damages. The scope of investment treaty protection—and the extent of host State exposure to international arbitral review and monetary liability—has dramatically expanded, enabling investors to challenge a diverse range of national measures in an infinite variety of socio-economic settings. One of the emerging justifications for this expansion of international investment law is that the global network of treaties and its arbitration mechanism can act as (i) a catalyst of regulatory reform in host States or (ii) a substitute of otherwise lacking and ineffective governmental institutions in host States.

The project will test these claims and examine the role of international investment law in promoting the rule of law and good governance at a national level. Can investment treaty remedies induce governments into compliance with the rule of law and good governance standards? To what extent and how do investment treaty norms influence government decision-making in host states? How do host States respond to investment treaty remedies? To answer these questions, the project will undertake a critical analysis of evolving objectives and scope of international investment law. This will be followed by socio-legal and interdisciplinary analysis of the impact, both *ex ante* and *ex post*, of international investment law on governmental conduct. The capacity of the investment treaty regime to foster the rule of law and good governance reforms in host States will also be examined from a comparative perspective, with focus on the rule of law and regulatory compliance initiatives undertaken by the World Bank, IMF, and the European Union The overarching aim of the project is to offer an exposition of the evolving international investment law, examine the function of its remedial mechanism, and to engage with the hitherto underexplored questions of effectiveness and compliance in the investment treaty context. The aim of this chapter is to introduce some of the key research questions of the project and outline some of the principal strands of the argument. In particular, the chapter will focus on the genesis of the good governance arguments in investment treaty law and scholarship, as well as setting the stage for a socio-legal, interdisciplinary and comparative inquiry into the investment treaty regime’s power to bring about change in domestic legal and bureaucratic culture.

## Genesis of the Good Governance Rationale in International Investment Law and Scholarship

Historically, references to good governance, the rule of law and transformation of legal and bureaucratic culture in host States were sporadic and made predominantly in the context of justifications for the foreign investors’ right to claim monetary damages directly against host States. Since its inception in early international investment treaties, the private right to damages has been justified by reference to broader objectives of the international investment regime.[[1]](#footnote-1) Such objectives included the need to lower risks associated with investing in a foreign country and thus to reduce the cost of capital for host States. This, in turn, would increase the flow of inward investment and accelerate host States’ economic development. In order to achieve such risk reduction, host States would need to commit themselves not to engage in proscribed conduct, such as arbitrary and discriminatory action, uncompensated takings and breaches due process. This promise would be enforced by conferring upon the investor the right to claim monetary redress against the host State. The remedy of damages was thus regarded as “a relatively inexpensive commitment device”[[2]](#footnote-2) which would act as a means of attracting foreign investment and discourage host States from behaving unlawfully.

It was not until the first wave of investment arbitrations that the rhetoric of good governance was amplified and expressly embraced *de lege lata*. In a rising tide of investment claims challenging various host government acts, the boundaries of the notion of proscribed conduct have been pushed beyond the familiar. Expropriation has ceased to be a dominant cause of action, with investors increasingly making use of broader guarantees of fair and equitable treatment (FET) and sanctity of contract. A string of arbitral awards, including the famous *Metalclad*, *Tecmed*, and *Occidental* awards,[[3]](#footnote-3) proclaimed that transparency, stability, predictability, consistency ought to be construed as elements of FET. A failure to create and maintain a transparent, stable and predictable regime was found to be a sufficient ground for claiming compensation against the host State. These arbitral pronouncements have met with considerable skepticism. As one critic noted, transparency ‘is actually not a standard at all; it is rather a description of a perfect public regulation in a perfect public world, to which all States should aspire, but very few (if any) will ever attain.’[[4]](#footnote-4) However, in spite of a welter of criticism from various quarters, a number of subsequent tribunals have endorsed the interpretation of FET as requiring a duty to ensure transparency, stability and predictability. States have also been found to be under a duty to act proactively as opposed to merely avoiding prejudicial conduct to the investors. Even State action displaying “a relatively lower degree of inappropriateness” [[5]](#footnote-5) may now suffice to establish an investment treaty breach.

Beyond arbitral jurisprudence, references to good governance standards can be discerned in investment treaty instruments. Some treaties expressly require that States ensure “effective means of asserting claims and enforcing rights.”[[6]](#footnote-6) This ‘effective means’ provision was invoked in a number of investment disputes, including *AMTO v Ukraine*, where the claimants went as far as contending that the host State should be held to monetary responsibility for failing to create and maintain effective bankruptcy legislation.[[7]](#footnote-7) There are also international investment treaties that contain a host state obligation to “create and maintain in its territory a legal framework apt to guarantee to investors the continuity of legal treatment.”[[8]](#footnote-8) To borrow the phrase from the award in *El Paso v Argentina*, such provisions advance “a programme of good governance that no State in the world is capable of guaranteeing at all times.”[[9]](#footnote-9)

The proliferation of references to good governance in arbitral jurisprudence and investment treaty texts has coincided with a new wave of scholarship where considerable emphasis is made on the importance of the investment treaty regime in transforming governance culture and practices in host States. It has been argued that “...investment treaties aim at binding States into a legal framework that gives them an incentive and a yardstick for transforming their legal systems into ones that are conducive to market-based investment activities and provide the institutions necessary for the functioning of such markets.”[[10]](#footnote-10) The Oxford Handbook on International Investment Law states in its preface that “standards of due process and good governance required for foreign investment may spill over into domestic law and may set new standards also for the domestic legal system.”[[11]](#footnote-11) Dolzer has suggested that, especially in cases involving review of administrative law of host States, investment arbitration “may provide a powerful incentive to review and modernize their domestic legal systems.”[[12]](#footnote-12) This argument is also echoed in Vandevelde’s remark that BITs “embody norms that all countries committed to the rule of law should follow” and “can contribute greatly to institutional quality in host countries.”[[13]](#footnote-13) The recent scoping paper from the Organization for Economic Cooperation and Development (OECD) suggests that “indirect collective benefits” of international investment law for host societies comprise not only the ability of host States to attract investment even despite lacking domestic governance standards, but also the potential for change in “the political dynamic of reform of domestic dispute resolution and policy making institutions.”[[14]](#footnote-14)

The increasing frequency in which such claims are being made in scholarly discourse compels one to question their juridical underpinnings. Indeed, do investment treaties and their remedial mechanism intend to transform governance practices in host States? When approaching this question from a descriptive, historical and doctrinal, angle, one is faced with very limited textual support for interpreting international investment treaties as instruments designed to promote good governance in host States. The very fact that investment treaty forefathers and the founders of the ICSID Convention[[15]](#footnote-15) emphasized the importance of moving the resolution of investment disputes away from the (weak, biased and incompetent) domestic institutions and to independent international panels appears to provide ample evidence to the historical emphasis on the substitute nature of the investment treaty regime.[[16]](#footnote-16) Recent debates over the local remedies requirement and the role of domestic courts in adjudicating investment disputes in Australia and the European Union too have made it clear that investment treaty law and its remedial mechanisms were created and continue to function as an alternative to domestic structures and not as a means of bringing about change on a national level in developing States.[[17]](#footnote-17) The primary concern for advocates of the international investment regime was not to improve governance in host States but rather to limit foreign investors’ exposure to lacking domestic structures and practices by offering investors the possibility of exiting the domestic legal regime and using international remedies.

The lack of textual support, as well as the historical emphasis on the internationalization of remedies as opposed to promoting change at a national level, seems to invite a conclusion that the good governance objective was never in the minds of treaty drafters but has become a popular banner inasmuch as it offered an additional justification for the recent expansion of the investment treaty regime and its increasingly intrusive reach. Indeed, a historical analysis of the investment treaty regimes exposes a noticeable circularity of the good governance argument: the weaknesses and shortcomings of domestic legal systems in developing States have been traditionally cited as a rationale for providing foreign investors with access to a stronger and more effective alternative mechanism on the international plane[[18]](#footnote-18); however, as this international mechanism came of age, its ability to spill over into the domestic arena and to strengthen governance institutions and practices at a national level is now being invoked as an example of positive side-effects of such internationalization. One is left with an impression that the good governance argument has been engineered in an attempt to deflect criticism that has been increasingly mounted against the widening scope of investment treaty rules and the growing reach of the institute of investor-State arbitration.

It could, of course, be argued that, even though initially created as a substitute for lacking and ineffective domestic regimes and not intended as a catalyst of regulatory reform in host States, international investment law has subsequently developed into a mechanism that can foster positive transformations at a national level. In other words, the ability to foster good governance and to strengthen the rule of law in host States may not have been a shared goal of investment treaty instruments but rather is an unintended and welcome side effect. Thus, although only legally enforceable by foreign investors, strict investment protection standards create a “spill over” effect that benefits national citizens and residents as the host country gradually develops better administrative practices to comply with international investment best practices.[[19]](#footnote-19) The need to comply effectively with the rule of law and principles of due process imposed by investment treaties may entail legal reforms and foster a more legalistic and rule-oriented administrative practice.[[20]](#footnote-20) However, given the investment treaty regime was conceived so as to insulate foreign investors from shortcomings of domestic regimes, by replacing the latter with a stronger and more effective international alternative, would host States not lose the incentive to carry out legal reforms? International investment law may indeed benefit individual investors by providing them with the option of side-stepping “what may be poorly functioning or biased domestic dispute resolution and policy-making processes”.[[21]](#footnote-21) However, the benefits of such internationalization for host state communities are less apparent. As Ginsburg has convincingly argued, by allowing foreign investors to resort to international treaties and arbitration and thereby avoid domestic law and institutions, international investment law does not ameliorate but in fact entrenches weaknesses of domestic legal orders.[[22]](#footnote-22) The availability of the investor-state dispute settlement regime on the international level, it has been argued, makes it easier for host governments to attract international investment without having to improve domestic governance mechanisms and practices.[[23]](#footnote-23)

## Does the International Investment Regime Conform to the Good Governance Standards that it Imposes on Host States?

Whilst contesting the juridical underpinnings of the argument that postulates the positive, albeit incidental, effect of international investment law on national governance structures and practices, this paper does not deny that such effect would be desirable. Numerous studies have doubted the positive effect of investment treaty instruments on foreign investment flows.[[24]](#footnote-24) Likewise, the role of investments in bringing about economic development of host States has been debated[[25]](#footnote-25), with none other than investment tribunals themselves at times downplaying the importance of the development objectives in interpreting key investment treaty provisions.[[26]](#footnote-26) As the existing foundations of investment treaty law are being increasingly criticized and contested, the regime’s capacity to transform legal and bureaucratic institutions and culture in host States could provide a very much needed *raison d’être*. From a theoretical perspective, an inquiry into the capacity of international investment law to bring about a positive change will provide new insights into the hitherto largely unexplored question of compliance in the investment treaty context.

So does the investment treaty regime possess the necessary characteristics that would enable it to have a transformative impact on domestic governance? To begin with, if international investment law is to foster good governance and the rule of law in host States, it should be rule-of-law compliant in the first place. In more specific terms, if subjecting host States to stringent standards of conduct, such as the duty to maintain transparency, stability, consistency and predictability, were to result in the host States embracing such standards in the domestic sphere, it could be argued that the international investment regime should also be transparent, stable, consistent and predictable. It has been noted earlier that the imposition of good governance standards by investment tribunals was seen by many as a step too far: is it fair and just to hold developing States responsible for a failure to conform to good governance standards that even developed States might frequently fail to achieve? A similar line of argument could be advanced in connection with the investment treaty regime’s role in fostering good governance in host States: is it fair, appropriate and desirable to impose monetary sanctions on host States that failed to ensure transparency, stability, predictability, and consistency where both substantive treaty rules and dispute settlement mechanisms fail to achieve the same?

It is telling that the arguments claiming spill-over effects of investment treaty law into the domestic arena and its capacity to foster good governance at a national level appear to have been prompted by a proliferation of claims brought under the FET standard. It was in the course of establishing the substantive content of FET that investment tribunals proclaimed a duty to maintain good governance standards to be required by the notions of fairness and equity. Yet the very jurisprudence of investment tribunals on FET as well as the formulation of the standard in investment treaty texts has attracted scathing criticism for lack of clarity, consistency, and predictability in arbitral practice. A recent UNCTAD report has observed that such shortcomings within international investment law would present considerable challenges to host States and their agencies that interact with investors.[[27]](#footnote-27) Indeed, “if the State and its subnational entities do not know in advance what type of conduct may be considered a breach of a treaty, then it cannot organize its regulatory and administrative decision-making processes and delegation in a way that ensures that its conduct will not incur liability under the FET standard.”[[28]](#footnote-28)

The question also arises about the design of investment treaty norms and the role it plays in facilitating the regime’s good governance mission. This calls for a comparative analysis of international legal regimes that expressly require changes in domestic administrative practices and procedures and those that do not require such norm adoption. One can draw useful insights from scholarly analyses of compliance in the GATT/WTO context. For example, Sykes observes that the “GATT had changed behavior and induced members to behave in ways that they would not have otherwise.”[[29]](#footnote-29) What lies beneath the GATT’s success in bringing about changes in government conduct? Could this be due to the nature of the GATT/WTO obligations many of which require substantive and concrete changes in domestic laws of States? One is also reminded of the concept of direct effect and its role in fostering compliance with European Union laws at a national level. In order to be effectively incorporated into national legal orders, rules must be clear, precise and unconditional.[[30]](#footnote-30) In contrast with multilateral trade norms, investment treaty rules are framed broadly and in abstract terms. This is especially true of FET standard which has been used as a basis for transforming a failure to comply with good governance standards into an actionable investment treaty breach. Not only is the FET standard phrased in what many consider broad and ambiguous terms, but its constitutive elements have not been adequately and consistently spelled out to enable their embedding in domestic regimes. Some of the prevailing interpretations of FET do not qualify “as a system of objective and accessible commands, commands which can be seen to flow from collective agreement rather than from exercise of discretion or preferences by those persons who happen to be in positions of authority.”[[31]](#footnote-31)

Besides the FET standard, investment treaties may also contain a loose obligation to create conditions favorable to foreign investment. In most cases, there is a declaratory statement to this effect contained in a preamble.[[32]](#footnote-32) In few investment treaty texts, such a loose commitment is encapsulated in a standalone provision mandating the state to create and maintain effective legal frameworks for investment.[[33]](#footnote-33) Beyond this often loose form of commitment, the bulk of existing treaties do not contain norms that would compel signatory states to enact appropriate domestic legislation and to effectively implement substantive obligations. Neither do such treaties have direct effect. Given the prevailing design of investment treaty norms, the extent to which procedural and substantive limitations imposed by decisions of arbitral tribunals on respondent states may be effectively embraced in daily bureaucratic practices is questionable. One might agree that arbitral review extends procedural and substantive limitations onto domestic regulators,[[34]](#footnote-34) but is it a one-off extension or one that affects the deep matter of domestic governance?

Another shortcoming of the existing investment treaty regime, which detracts from its capacity to command *ex ante* compliance (i.e. compliance with investment treaty norms before a dispute arises), and can discourage rather than encourage positive change in host States, is its lop-sided nature and the resulting ambiguity of normative values that it stands for and is able to export into domestic regimes. Of particular interest here is the much-criticized failure of international investment law to balance investment rights with investment responsibilities. Hirsch observes that “existing literature consistently emphasizes the importance of foreign investment as a channel for the diffusion of knowledge, technology and management practices.”[[35]](#footnote-35) Might this ‘channeling’ be useful in advancing our understanding of the role that investments *and* investment protection rules could play in entrenching, rather than eliminating, weaknesses in governance culture practices in host States? It has been reported, for instance, that the introduction of more stringent sanctions for bribery in U.S. legislation has arguably led to the loss of the Americans’ competitive position in the African market as compared to Chinese investors.[[36]](#footnote-36) Based on this analysis, it is safe to conclude that (1) prior to the adoption of more stringent anti-corruption laws, U.S. companies were complicit in corrupt practices in host States (2) Chinese investments may also connive at existing practices as they are unencumbered by fear of financial and criminal sanctions either in host States (due to intrinsic weaknesses of domestic anti-corruption laws) or in China (due to its reportedly relaxed attitude to Chinese companies operating abroad). A number of investment awards have also publicized instances of foreign investors’ participation in corrupt practices.[[37]](#footnote-37) Evidence of misconduct by multinational corporations and their complicity in illegal acts committed by governmental agencies in host States is an illustration of how investments can affect local communities not by eliminating inadequate governance practices but by entrenching them. As Hirsch notes, “international investments [and, I would add, international investment agreements] are not only *affected* by socio-cultural factors, they often *influence* the socio-cultural features of the involved communities.”[[38]](#footnote-38) The actual impact of investment treaty regime on socio-cultural settings of host communities would depend on the stance the regime takes on investor behavior. If investment treaty instruments and arbitral tribunals applying them in investor-State disputes turn a blind eye to illegality committed by an investor in host States, including the instances of bribery and complicity in other forms of illegal behavior, one cannot speak of a transformative effect and of fostering good governance. If investment treaty law continues to remain silent on investor responsibilities and, furthermore, extends protection to investment projects tarnished by illegality, it is not only far from exerting positive influence on domestic governance culture and practices but can arguably be seen as being complicit in perpetuating inadequate and undesirable patterns of government behavior in host States.

## Socio-legal Insights into Compliance with Investment Treaty Standards

At the heart of the argument that posits a transformative impact of investment treaty law on governance in host States is rational choice theory assumption that investment treaty rules act as “a deterrent mechanism against short-term policy reversals and assist developing countries in promoting greater effectiveness of the rule of law at the domestic level.”[[39]](#footnote-39) Thus, “[d]amages as a remedy sufficiently pressure States into complying with and incorporating the normative guidelines of investment treaties into their domestic legal order.”[[40]](#footnote-40) Despite having recurred in various arbitral decisions and scholarly writings, the claim that investment protection treaties promote the rule of law and improve governance on a national level has not yet been supported either theoretically or through empirical appraisal. The question of how the objectives of international law are to be achieved “necessarily includes social science knowledge; norm idealism without a reality check is at best naive, at worst untruthful.”[[41]](#footnote-41) Particularly in the context of legal policy and institutional design, “there is broad consensus that social science should be taken into account.”[[42]](#footnote-42) Just as with many areas of international law and policy, the claims regarding effectiveness of international investment law, including in the context of fostering good governance and the rule of law in host States, remain empirically and theoretically untested.[[43]](#footnote-43)

This project intends to fill this gap and examine the interplay between investment treaty disciplines and governmental conduct by focusing on the so-called incentive effects of investment treaty rules on bureaucratic behavior. If host States are expected to respond to investment treaty norms by adjusting their legal orders and ensuring *ex ante* compliance with the prescribed standards of governmental conduct, government officials ought to understand the scope and meaning of investment protection guarantees under existing bilateral and multilateral agreements. To what extent are government officials actually aware of and influenced by investment treaty disciplines in making their decisions? Preliminary empirical insights drawn from tentative case-studies involving government officials in developing States suggest that decision-makers with whom investors interact in the course of their business are rarely if at all aware of the fact that their behavior may lead to host State liability.[[44]](#footnote-44) Most of them are similarly uninformed of the very existence and relevance of investment treaty instruments in investor-host government relations. This lack of awareness has been discerned not only among government officials in local and regional governmental bodies but also among high-ranking officers at the top of government hierarchy. Interestingly, the surveyed officials were unaware of international investment law even after respective countries had been exposed to investment arbitration claims. The fact that those who interact with foreign investors have limited if any knowledge of investment law standards (to which host States have committed themselves and which would serve as benchmarks in assessing legality of their conduct) casts doubt on the deterrent effect of investment treaties, and in particular, their capacity to transform governance practices at the domestic level.

The claim that investment treaty law and its remedial mechanism promote good governance in host States is premised on the assumption that governments are rational decision-makers, and that the monetary consequences will necessarily lead to preventative practices in the form of better decision-making and *ex ante* compliance with investment treaty standards. Again, however, much of the existing scholarship tends to assume rather than examine in any real detail the impact of investment treaty remedies beyond the immediate effect of damages awards on the economic interests of investors.[[45]](#footnote-45) To what extent can States and public officials involved in investor-State relations be viewed as rational actors? A wealth of useful insights can be drawn from emerging empirical evaluations as well as interdisciplinary legal studies, including law and economics and behavioral legal analyses of the effect of liability rules on the behavior of the State.[[46]](#footnote-46) The assumption that States and public officials are rational actors is based on the premise that, under conditions of resource-scarcity, humans act as utility-maximizing, self-interested beings that respond to incentives in accordance with stable preference-ordering. When applied to investment treaty law, this assumption raises at least two questions: (1) what is the relationship between individual acts and collective decision-making in the context of governmental conduct that affects a foreign investor? (2) what would ‘preference ordering’ mean in a concrete situation involving a government official in a developing/underdeveloped host State? Experimental and empirical research has already shown that in many cases human behavior diverges from theoretical assumptions about rationality. To mention one example, as part of their recent study into why states sign investment treaties, Aisbett and Poulsen have concluded that developing countries have acted “predictably irrationally” by ignoring available information about the consequences of investment treaties and their potency.[[47]](#footnote-47)

It should also be acknowledged that “individuals’ behavior and normative choices are significantly affected by the social context and socio-cultural factors.”[[48]](#footnote-48) Human action is not only “shaped by relevant economic constraints but also highly affected by people’s endogenous preferences, knowledge, skills, endowments, and a variety of psychological and physical constraints.”[[49]](#footnote-49) Indeed, bureaucratic behavior in developing States can be significantly influenced by conditions that are dramatically different from those in which western bureaucrats operate. Furthermore, international investment disputes usually arise from investor encounters with individual bureaucrats as well as with collective decision-makers. Each of these should be analyzed separately as individual and collective conduct may be subject to different influences. As Broude suggests, methodological statism ought to be avoided in favor of “recognition that states do not make decisions relating to international law; people do, or most often, groups of people.”[[50]](#footnote-50)

Given that many decisions on compliance or non-compliance with international law are ultimately made by individuals,[[51]](#footnote-51) would holding a host government to monetary liability have a subsequent deterrent effect and promote *ex ante* compliance with investment treaty rules, thus arguably leading to improved governance at a national level? In theory, the imposition of monetary liability on the State should compel a governmental agency to assume a responsibility for detecting, identifying, and controlling risk-increasing activities in which its departments and employees engage.[[52]](#footnote-52) Governments could be expected to put in place risk management measures to identify potential exposure to, and reduce the probability and magnitude of monetary liability. [[53]](#footnote-53) Such measures may include employee training programs and remuneration policies that link the cost of governmental responsibility to salaries and promotions. The capacity of the external regime to induce government officials to act in a certain manner and to refrain from certain types of behavior will hinge on the targeted government’s “monitoring ability”.[[54]](#footnote-54) A lack of proper incentive to avoid harm arises where neither the government nor its employees bear the costs of the harms that they cause.[[55]](#footnote-55) Thus, in order for investment treaty law to have an incentivizing and transformative effect on national governance practices in a host State, an internal loss-allocation regime should be in place to ensure that monetary losses incurred as a result of damages awards are shifted to a governmental agency which has managerial, supervisory, and budgetary authority and political power over bureaucrats whose activities lead to state liability.[[56]](#footnote-56)

However, in practice imposing liability on host governments does not necessarily lead to a risk-averse bureaucratic behavior. This preliminary conclusion draws on sample case-studies of national legal rules governing the payment of damages in connection with claims against state organs and government officials.[[57]](#footnote-57) It transpires that governments may often fail to respond to liability rules in the expected manner, and this finding undermines the strength of arguments postulating the positive impact of investment treaty norms on governance in host States. Sociologically, the very ability of the host government to act sensitively and thus respond to the harmful consequences of international liability by changing relevant practices can be severely circumscribed by the very weaknesses in the domestic legal and bureaucratic culture which international investment law can allegedly improve. Such shortcomings interfere with government ability to create and maintain an effective internal loss-allocation mechanism. Governments in democratic States with high levels of institutional capacity are more likely to show sensitivity to the imposition of international liability than those with a long record of pervasive corruption and cronyism.[[58]](#footnote-58)

## The Negative Impact of Investment Treaty Remedies: Deterring Good Governance?

Theoretically, if one accepts the argument that investment treaty standards and the imposition of monetary liability for their breach would act as a powerful incentive to change bureaucratic practices and culture in host States, then the very existence of such an incentivizing effect can be seen as confirming the possibility of a chilling effect on government decision-making. Put differently, if investment treaty law is capable of producing a transformative effect on government behavior, there is a likelihood that such effect will not always be positive (*i.e.* stimulate compliance with good governance standards) but in some cases negative (*i.e.* inhibit governments from otherwise desirable action and lead to the so-called regulatory chill).

The existence of a chilling effect of investment treaty law on national regulatory activity is a matter of an ongoing scholarly debate, particularly in the context of a clash between investment protection and States’ regulatory freedom to pursue environment protection, health and safety, and other public policy measures. Some scholars have argued that investment treaties “*should* not lead to a chill on environmental regulation nor obstruct measures that are introduced in an attempt to mitigate climate change.”[[59]](#footnote-59) This proposition, however, does not engage with empirical and theoretical studies on the effect of international rules on government conduct. Other contributions to the debate indicate that international investment treaties are likely to and in some cases do have a chilling effect on regulatory conduct.[[60]](#footnote-60) The aim of this project is not to record the fact that investment treaties restrict regulatory powers but rather to test this claim from various angles.

First, the effect of investment treaty norms on government decision-making needs to be examined against the backdrop of existing scholarship on regulatory chill in international economic law, with focus on qualitative evidence of a chilling effect of international norms on policy-making in such areas as environment protection and renewable energy development. It has been reported, for instance, that even in polities such as the EU, regulatory innovation can be hampered by a threat of international review and economic sanctions.[[61]](#footnote-61) Second, it is suggested that regulatory chill should be examined as a form of excessive risk-reduction strategy triggered by the imposition of monetary liability on the host State. Host States where internal risk-reduction mechanisms are in place are likely to be more susceptible to a chilling effect of investment treaty norms. This preliminary conclusion is supported by a recent study on bounded rationality, which suggests that decision-making in the investment treaty context varies with the extent of expertise in relevant government agencies and that developed countries with higher levels of administrative capacity may display different patterns of learning from their investment treaty experience.[[62]](#footnote-62)

Another neglected facet of the relationship between good governance and regulatory chill is the fact that good governance is not confined to the requirements of transparency and consistency in dealing with foreign investors; it should also encompass the host State’s obligation to adopt and implement policies that address challenges faced by a modern society, including protection of the environment, mitigation of climate change, and safeguarding of human rights. If States are expected to comply with good governance standards in their treatment of foreign investors, they should be afforded the corresponding degree of regulatory flexibility to ensure good governance in pursuing other policy objectives.

Finally, not only may developing countries respond differently to investment treaty norms than their more developed counterparts, but the effect of such norms – be it incentivizing or chilling—may also take different forms. Quite apart from fostering good governance and the rule of law in host States, investment treaty law may have a chilling effect not just by subjecting host governments to the threat of monetary liability but also by exposing them to the vagaries of inconsistency, ambiguity and unpredictable interpretation of its substantive provisions.[[63]](#footnote-63) Likewise, the imposition of stringent and demanding good governance standards on host States tends to highlight the difference in the respective positions of domestic and foreign claimants: the former can rarely if ever avail themselves of the opportunity to obtain monetary damages against their own governments, let alone on such grounds as a failure to maintain transparency, stability and predictability. Scholars have persuasively argued that “requiring governments to compensate foreign investors for their losses, while not extending equivalent protection to other private actors, is likely to lead decision-makers to over-value the interests of foreign investors.”[[64]](#footnote-64) Holding the State liable for failing to maintain good governance standards *vis-à-vis* foreign investors may translate into a pressure to treat foreign investors better than other businesses, as opposed to changing the generally prevailing governance culture and practices that had led to liability in the first place. There is little doubt that over-valuing foreign investors’ interests is unlikely to benefit host communities through a spill-over of good governance practices into the domestic sphere.[[65]](#footnote-65) Instead, the disadvantaging of domestic investors may lead to the internal political opposition and backlash against investment treaty law.[[66]](#footnote-66) The very fact that investment treaty remedies may lead to domestic discontent, backlash and even withdrawal shows that States do not always respond to such remedies positively.

## The Role of Remedy Design in Inducing Compliance with Investment Treaty Rules: Functional, Sociological, and Comparative Observations

The focus of the foregoing analysis was on the conceptual flaws and practical problems besetting the argument that claims a transformative impact of investment treaty law on governance in host States. Given its historical origins and existing design, the international investment regime appears to be an unlikely candidate for bringing about positive transformation in legal and bureaucratic culture and practices in host States. This, however, does not obviate the need to examine how the regime could be reformed and optimized to facilitate its good governance mission, including whether and how *ex ante* compliance with investment treaty prescriptions could be maximized through re-calibration of investment treaty remedies.

In examining the effectiveness of monetary sanctions as a means of encouraging host governments to improve domestic governance, one can start with an observation that “the gains of economic liberalization should not be lost to its beneficiaries”.[[67]](#footnote-67) It has been shown earlier, with reference to the genesis of good governance standards in investment treaty law, that the creation of the international investment regime was historically justified by the need to foster economic development. Yet can good governance, and for that matter, economic development be fostered through the externally imposed and crippling financial sanctions on host States? Political science literature offers interesting insights: in areas where furthering policy reforms is an express and primary mandate of relevant international institutions, the implementation of regulatory and legal changes in national frameworks has been encouraged by a promise of financial assistance rather than a threat of financial sanctions. To mention some pertinent examples, World Bank and IMF norms “have transformed, or are in the process of transforming, domestic administration in large parts of the world.”[[68]](#footnote-68) A parallel can also be drawn with the politics of conditionality—a bargaining strategy of reinforcement by reward[[69]](#footnote-69) – deployed by the European Union as part of its rule of law initiatives in the context of EU enlargement. In prompting the targeted post-communist countries in Eastern and Central Europe to embrace certain standards of good governance, the EU did not resort to reinforcement by support (unconditional assistance) or reinforcement by punishment (inflicting extra costs for failing to comply). Rather, it has followed a strategy of reinforcement by reward, with rewards delivered in cases of rule adoption and withheld in cases of non-compliance.[[70]](#footnote-70) This raises questions about the strategy of reinforcement by punishment which lies at heart of the remedial mechanism through which international investment law can allegedly transform domestic governance. Can host States be coerced into embracing good governance values? Is it fair, desirable, and effective to hold a host State to monetary liability for failing to ensure good governance, where such failure is the result of the host State’s lack of financial, institutional, political and social capacity?

The role of the currently prevailing monetary remedies in inducing *ex ante* compliance by host State authorities with first order investment treaty rules (and facilitating a positive impact on national governance) cannot be fully examined without analyzing the goal and design of remedies. Notwithstanding a large and growing body of scholarship engaging with various aspects of investment treaty remedies, the question of their function and goals remains largely unexplored. An overview of scholarly debates over remedies in GATT/WTO law offers useful insights.[[71]](#footnote-71) The primary remedy for a breach of multilateral trade rules is withdrawal (or modification) of a breaching measure. Compensation and suspension of concessions (also known as retaliation) are also available but not as an alternative to withdrawal; rather, compensation and retaliation can be used as temporary remedies pending the withdrawal of an inconsistent measure by the offending member. While the principal aim of withdrawal is to ensure compliance with multilateral trade rules, the goals of temporary remedies, including that of retaliation, have been the subject of scholarly debates. Pauwelyn, for instance, observes that “there has been a gradual evolution from ‘compensation’ (or simple rebalancing) to ‘sanction’ (or rule compliance).”[[72]](#footnote-72) Drawing on the negotiating history of the GATT/WTO, he concludes that “the movement from GATT to WTO has been one from regarding retaliation as aimed at rebalancing or compensation in GATT, to inducing compliance or sanction in WTO.”[[73]](#footnote-73)

In contrast with GATT/WTO law, pecuniary relief – the remedy of damages – has traditionally been regarded as a principal form of redress and a primary means of enforcing substantive investment protections. What is the goal of the remedy of damages in international investment law? Is it to induce compliance with substantive protection rules or to rebalance economic interests of parties to an investment dispute by compensating the aggrieved investor? From a historical and doctrinal perspective, the long-standing emphasis on monetary redress and the fact that the latter has rarely been accompanied by other remedies[[74]](#footnote-74) suggests that the primary goal of the remedial mechanism of international investment law has been to rebalance. The focus is thus on the victim (a foreign investor) and on eliminating negative economic consequences she incurred as a result of a breach.

Contrastingly, had the primary goal been to induce compliance, the remedies would have been focused on the breaching party, *i.e.* the host State, and on the need to punish it to deter future violations and induce it into acting in accordance with standards prescribed by international investment treaties. In view of the traditional focus on restoring economic interests of aggrieved investors, one could argue that compliance, including *ex ante* compliance, has not been the primary goal of remedies in international investment law. This evidence provides an antithesis to the argument postulating the capacity of investment treaty law to induce governments into *ex ante* compliance and to foster the rule of law and good governance on a national scale.

Far from being aimed at achieving *ex ante* compliance, international investment law can in fact be seen as enabling host States to violate their commitments. In her recent analysis of remedy design, Brewster has convincingly shown that “[d]ispute settlement provisions can sometimes make international obligations easier to breach, and governments may design dispute resolution systems to facilitate breach, rather than deter it. Where dispute resolution systems include specific remedy provisions, the system may price breach, permitting states to deviate from the agreement as long as the remedy is paid.”[[75]](#footnote-75) Indeed, whilst the function of remedies—even of those aimed at rebalancing economic interests—is to punish and disapprove, they can also operate as “permission, even entitlement, to undertake certain actions” and a “license to engage in behavior at a certain cost.”[[76]](#footnote-76) This is certainly true of redress to which investors are entitled under expropriation clauses in international investment agreements: States are allowed to expropriate foreign investment as long as expropriation is accompanied by the payment of compensation. One can only agree that “the structure of the remedy—one of compensation, without any assessment or incorporation of fault—indicates that the bilateral investment treaties is a pricing scheme.”[[77]](#footnote-77) Thus, where the costs of breaching investment treaty provisions are less than the host State’s gain from the same breach, the availability of monetary remedies may render it considerably more attractive for the State to choose breach over compliance.

So, “have [the States] promised to adopt policies that conform to the policy terms of the treaty, or have they only promised to provide a set level of compensation?”[[78]](#footnote-78) As noted earlier, the design of first order rules in investment treaties is not such that allows interpreting them as promises to conform to specific policy terms. Investment treaty protections lack the requisite specificity, and are frequently phrased negatively as a promise to refrain from certain types of behavior. Investment treaty remedies too, are more readily classified as a promise to pay compensation than a commitment to comply. Indeed, it has been observed earlier that the primacy of monetary remedies and the relatively limited role of non-pecuniary relief in investment treaty law points to the subordinate role that compliance plays in the hierarchy of the regime’s goals.

Thus, if host governments are allowed to not comply with substantive investment treaty prescriptions, it becomes all the more difficult to convincingly maintain that the existing regime could bring about a positive transformation in governance practices in host States through a spillover of good governance standards into the domestic sphere. If good governance standards that form part of investment treaty protections can themselves be ignored in return for the payment of compensation, it is difficult to envisage how host States would be motivated to commit to the same standards in domestic settings. Undeterred by the existing investment treaty remedy design, host States are not properly incentivized to undertake domestic reform and inculcate good governance standards in national legal and bureaucratic culture.

Might a re-orientation of international investment law towards greater use of non-pecuniary remedies facilitate *ex ante* compliance with its prescriptions? The desirability of monetary remedies in the long term has been questioned in a number of scholarly sources and policy discussions.[[79]](#footnote-79)The traditional opposition to non-pecuniary remedies in the investment treaty context may in fact be gradually abating, even despite Article 54 of the ICSID Convention offering what many consider as limited enforcement possibilities. In his seminal paper on the subject, Schreuer has examined jurisprudence of international courts and tribunals, as well as the drafting history of the ICSID Convention to conclude that investment tribunals have the power to grant non-pecuniary remedies.[[80]](#footnote-80) Non-pecuniary relief has been awarded in investor-State arbitration, including in ICSID cases.[[81]](#footnote-81) Insofar as its capacity to induce governments to act in a certain way is concerned, non-pecuniary relief appears to be a functionally more suitable alternative to the remedy of damages.

However, if investment treaty law were more receptive to the use of non-pecuniary remedies that focus on compliance rather than enabling host States to “breach and pay”, would that enhance the regime’s capacity to foster good governance and the rule of law at a national level? In most cases, the choice of remedy would be dictated by a claimant-investor who may prefer to request non-pecuniary relief only in those situations where compliance by the State with investment treaty rules is in the investor’s best economic interests, not because the investor is concerned about the long-term positive consequences of non-pecuniary remedies on host State behavior and its compliance record. Tribunals, too, may have a certain degree of discretion in choosing the appropriate remedy; however, the ultimate choice will usually be determined by their mandate which is to resolve the dispute as opposed to promoting good governance and the rule of law in host States. Thus, the capacity of investment treaty law to command *ex ante* compliance and induce governments to act in a certain way hinges on the institutional design of the investment dispute settlement mechanism and the allocation of power and control between its key players.

## Conclusion

Why this project and why this chapter? The overarching aim of the project is to unpack existing assumptions concerning the effects of international investment law on host State conduct and the function of remedies in achieving investment treaty objectives as regards the promotion of good governance and rule of law in the domestic legal environment. The project is conceived to facilitate a more informed development of international investment law by contributing to a better understanding of its evolving functions and factors influencing compliance with its prescriptions at national and international levels. By focusing on the relationship between international investment law and host State behavior, the project aims to uncover some of the hitherto less explored aspects of the interplay between national legal systems and international law in general. This, in turn, will provide a basis for analyzing the ways in which such a relationship can be optimized, including through the creation of requisite legal and institutional mechanisms. The purpose of this chapter was to introduce the project and outline its research agenda, thus contributing to a burgeoning debate over the broader effects of the international investment regime on host communities and over the role of domestic agencies in shaping international law through their involvement in implementing its prescriptions.

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 Alan O. Sykes, “Public Versus Private Enforcement of International Economic law: Standing and Remedy”, *Journal of Legal Studies* 34, no. 2 (2005): 631. [↑](#footnote-ref-1)
2. *Ibid*., 644. [↑](#footnote-ref-2)
3. See *Metalclad Corporation v The United Mexican States,* ICSID Case No ARB (AF)/97/1, Award ¶¶ 71-99 (Aug. 25, 2000), (2001) 40 ILM 36, *Técnicas Medioambientales Tecmed, S.A. v The United Mexican States,* ICSID Case No ARB(AF)/00/2, Award, ¶¶ 154-164 (May 29, 2003) 10 ICSID Rep 130, *Occidental Exploration and Production Company v The Republic of Ecuador*, LCIA Case No UN 3467, Award, ¶¶ 184-191 (Jul. 1, 2004). Unless otherwise indicated, all cases cited in this chapter are available online at “Investment Treaty Arbitration (ITA)”, accessed January 23, 2014, <http://italaw.com>. For a critique, see Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Oxford: Hart Publishing, 2009), 309. [↑](#footnote-ref-3)
4. Zachary Douglas, “Nothing if Not Critical for Investment Treaty Arbitration: *Occidental*, *Eureko*, and *Methanex*” *Arbitration International* 22, no. 1 (2006): 28. [↑](#footnote-ref-4)
5. *Saluka Investments BV v. The Czech Republic*, PCA—UNCITRAL Arbitration Rules, Partial Award, ¶ 293 (Mar.17, 2006). [↑](#footnote-ref-5)
6. See *e.g.* art II(7) of the Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, Aug. 27, 1993, U.S.-Ecuador, accessed January 29, 2014, http://unctad.org/sections/dite/iia/docs/bits/us\_ecuador.pdf; also art 10(12) of the Energy Charter Treaty, Dec. 17, 1994, 2080 UNTS 100. [↑](#footnote-ref-6)
7. Limited Liability Company *AMTO v Ukraine*, SCC Case No 080/2005, Final Award, ¶¶ 75, 85 (Mar. 26, 2008). [↑](#footnote-ref-7)
8. See Article 2 (4) of the Italy–Jordan BIT, discussed in *Salini Costruttori SpA and Italstrade SpA v Jordan,* ICSID Case No ARB/02/13, Decision on Jurisdiction, ¶ 126 (Nov. 15, 2004) (2005) 44 ILM 563. [↑](#footnote-ref-8)
9. *El Paso Energy International Company v Argentina*, ICSID Case no ARB/03/15, Award, ¶ 342 (Oct. 31, 2011), IIC 519 (2011). [↑](#footnote-ref-9)
10. Stephan Schill, *The Multilateralization of International Investment Law* (Cambridge: Cambridge University Press, 2009), 377. [↑](#footnote-ref-10)
11. Peter Muchlinski, Federico Ortino and Christoph Schreuer, “Preface”, in *The Oxford Handbook of International Investment Law,* eds.Peter Muchlinski, Federico Ortino and Christoph Schreuer(Oxford: Oxford University Press, 2008), vi. [↑](#footnote-ref-11)
12. Rudolf Dolzer, “The Impact of International Investment Treaties on Domestic Administrative Law”, *New York University Journal of International Law and Policy* 37, no. 4 (2005): 972. [↑](#footnote-ref-12)
13. Kenneth J. Vandevelde, “Model Bilateral Investment Treaties: The Way Forward”, *Southwestern Journal International Law* 18, no. 1 (2012): 313. [↑](#footnote-ref-13)
14. David Gaukrodger and Kathryn Gordon, “Investor-state dispute settlement: A scoping paper for the investment policy community" (OECD Working Papers on International Investment, No. 2012/3, OECD Investment Division):13, accessed January 29, 2014, [www.oecd.org/daf/investment/workingpapers](http://www.oecd.org/daf/investment/workingpapers). [↑](#footnote-ref-14)
15. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 UNTS 159 (‘ICSID Convention’). [↑](#footnote-ref-15)
16. Commentary on the ICSID Convention has almost invariably stressed its role in the depoliticization of investor-State dispute settlement by offering moving matters from the control of domestic institutions to independent third-party panels. Finally, an overview of primary texts on international investment law shows that most authors are in agreement as to the intention behind the creation of International Investment Law (IIL) and its remedial mechanism, such intention being mostly to offer an alternative to domestic structures. See, for instance, Christoph Scheurer et al, *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press, 2009), 352; Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford: Oxford University Press, 2007), 128. [↑](#footnote-ref-16)
17. See Mavluda Sattorova, “Return to the Local Remedies Rule in European BITs?: Power (Inequalities),Dispute Settlement, and Change in Investment Treaty Law,” *Legal Issues of Economic Integration* 39, no. 2 (2012): 223–248. [↑](#footnote-ref-17)
18. Aron Broches, “The Convention on the Settlement of Investment Disputes between States and Nationals of Other States”, *Recueil des Cours de l’Academie de Droit International* 136 (1972), 337, 343; Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford: Oxford University Press, 2010), 358; Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2008), 214-5. [↑](#footnote-ref-18)
19. Roberto Echandi, “What Do Developing Countries Expect from the International Investment Regime?” in *The Evolving International Investment Regime: Expectations, Realities, Options,* ed. Jose E. Alvarez et al. (Oxford: Oxford University Press, 2011), 13. [↑](#footnote-ref-19)
20. *Ibid*., 14. [↑](#footnote-ref-20)
21. Gaukrodger and Gordon, *Scoping Paper*, 13. [↑](#footnote-ref-21)
22. See Tom Ginsburg, “International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance”, *International Review of Law and Economics,* 25(2005): 107, 121. By allowing foreign investors to exit domestic legal orders, IIL also creates the problems of reverse discrimination against domestic investors as well as regulatory chill. See also UNCTAD Series on Issues in International Investment Agreements II: *Fair and Equitable Treatment: A Sequel* (United Nations, New York and Geneva, 2012), 12. [↑](#footnote-ref-22)
23. *Ibid*., see also Gaukrodger and Gordon, *Scoping* Paper, 14. [↑](#footnote-ref-23)
24. One of the leading texts is Karl P. Sauvant and Lisa E. Sachs, *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (New York: Oxford University Press, 2009). See also Mary Hallward-Driemeier, “Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit . . . and They Could Bite,” World Bank Development Research Group Policy Research Working Paper 3121 (Washington, D.C., 2003); Jennifer Tobin and Susan Rose-Ackerman, “When BITs Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties,” *Review of International Organizations* 6, no. 1 (2011): 1–32. However, compare Jeswald W. Salacuse and Nicholas P. Sullivan, “Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain,” *Harvard International Law Journal* 46 (2005): 67–130; and Eric Neumayer and Laura Spess, “Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?” *World Development* 33, no. 10 (2005): 1567–85. [↑](#footnote-ref-24)
25. See, for instance, Jason W. Yackee, “Do BITs Really Work? Revisiting the Empirical Link between Investment Treaties and Foreign Direct Investment” in *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows,* eds.Karl P. Sauvant and Lisa E. Sachs (New York: Oyford University Press, 2009), 1-23; also Olivier De Schutter, Johan F. Swinnen and Jan Wouters, eds. *Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements* (Abingdon: Routledge, 2013). [↑](#footnote-ref-25)
26. While many tribunals interpreted a contribution to the economic development as one of the key criteria in identifying the existence of a protected investment, a number of arbitral panels dismissed the criterion. See, *e.g.* *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award ¶ 111 (Jul. 12, 2010); and *Mr. Patrick Mitchell v the Democratic Republic of the Congo*, ICSID Case No ARB/99/7, Decision on the Application for Annulment of the Award, ¶ 39 (Oct. 27, 2006). [↑](#footnote-ref-26)
27. UNCTAD, *Fair and Equitable Treatment*, 12. [↑](#footnote-ref-27)
28. *Ibid*. [↑](#footnote-ref-28)
29. Alan O. Sykes, “The **Inaugural** **Robert** A. **Kindler** **Professorship** of **Law** **Lecture: When is International Law Useful?,”** *New York University Journal of International Law & Politics* 45, no. 3 (2013):  **793.** [↑](#footnote-ref-29)
30. See Sacha **Prechal**, “Does Direct Effect Still Matter?,” *Common Market Law Review* 37, no. 5 (2000): 1047–1069. [↑](#footnote-ref-30)
31. Montt, *State Liability*, 309. [↑](#footnote-ref-31)
32. See Preamble to the Chile—Malaysia BIT, Agreement between the Government of Malaysia and the Republic of Chile on the Promotion and Protection of Investments, Nov. 11, 1992, Chile-Malay., accessed January 29, 2014, <http://unctad.org/sections/dite/iia/docs/bits/chile_malasia_sp.pdf>. [↑](#footnote-ref-32)
33. See Article 2(4) the Italy-Jordan BIT (Agreement between the Government of the Hashemite Kingdom of Jordan and the Government of the Italian Republic on the Promotion and Protection of Investments, Jul. 21, 1996, Jordan-Italy, accessed January 29, 2014, <http://unctad.org/sections/dite/iia/docs/bits/italy_jordan.pdf> ) and Article II(1) of the Canada – Ecuador BIT (Agreement between the Government of Canada and the Government of the Republic of Ecuador for the Promotion and Reciprocal Protection of Investments, Apr. 29, 1996, Can.-Ecuador, accessed January 29, 2014, <http://unctad.org/sections/dite/iia/docs/bits/canada_ecuador.pdf>). [↑](#footnote-ref-33)
34. Benedict Kingsbury, Nico Krisch and Richard Stewart, “The Emergence of Global Administrative Law,” *Law & Contemporary Problems* 68, no. 3-4 (2005): 15, 36. [↑](#footnote-ref-34)
35. Moshe Hirsch, “The Sociology of International Investment Law” in *The Foundations of International Investment Law: Bringing Theory into Practice,* ed. Zachary Douglas, Joost Pauwelyn, and Jorge E. Viñuales *(*Oxford: Oxford University Press, 2014, forthcoming), 4-5. [↑](#footnote-ref-35)
36. Andrew B. Spalding, “The Irony of International Business Law: U.S. Progressivism, China’s New Laissez Faire, And Their Impact in the Developing World,” *UCLA Law Review* 59 (2011): 354. [↑](#footnote-ref-36)
37. See *World Duty Free Company Limited v Republic of Kenya*, ICSID Case No ARB/00/7, Award (Oct. 4, 2006); *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No ARB/03/25, Award (Aug. 16, 2007). [↑](#footnote-ref-37)
38. Hirsch, *Sociology*, 4. [↑](#footnote-ref-38)
39. Echandi, *What Do Developing Countries Expect*, 13. [↑](#footnote-ref-39)
40. Schill, *Multilateralization*, 373. [↑](#footnote-ref-40)
41. Anne van Aaken, “Towards Behavioral International Law and Economics,” *University of Illinois Law Review* 1 (2008): 47, 51. [↑](#footnote-ref-41)
42. Ibid., 51. [↑](#footnote-ref-42)
43. Except for a burgeoning body of research, including recent studies authored by Jonathan Bonnitcha, Emma Aisbett, Lauge Poulsen, Jason Yackee and Susan Franck. Although Bonnitcha has examined the impact of investment treaty law on government decision-making, the focus, thrust and methodology of his research are different from that which we use in this project. See respectively Jonathan Bonnitcha and Emma Aisbett, “An Economic Analysis of the Substantive Protections Provided by Investment Treaties,” in *Yearbook on International Investment Law & Policy 2011-2012*, ed. Karl Sauvant et al (New York: Oxford University Press, 2013), 681-204; Lauge N. Skovgaard Poulsen and Emma Aisbett, “When the Claims Hit: Bilateral Investment Treaties and Bounded Rational Learning”, *World Politics* 65, no. 2 (2013) 273-313; Jason Webb Yackee, “Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence,” *Virginia Journal of International Law* 51, no. 2 (2010-2011) 397-441; Susan D. Franck, “Development and Outcomes of Investment Treaty Arbitration,” *Harvard Journal of International Law* 50, no. 2 (2009): 435-489. [↑](#footnote-ref-43)
44. By the time of finalising this chapter, the author completed small scale interviews in 4 developing countries which had exposure to investment treaty claims. [↑](#footnote-ref-44)
45. So far, the majority of scholarly works positing a transformative effect of investment treaties on domestic governance contain no reference to empirical or other evidence to support the existence of such an effect. See Schill, *The Multilateralization of International Investment Law,* 377; Muchlinski, Ortino and Christoph Schreuer, *Preface*, vi; Dolzer, *The Impact of International Investment Treaties,* 972; Vandevelde, *Model Bilateral Investment Treaties,* 313; and Echandi, *What Do Developing Countries Expect,* 13. [↑](#footnote-ref-45)
46. See Bonnitcha and Aisbett, *An Economic Analysis of the Substantive Protections*, 681-204; Poulsen and Aisbett, *When the Claims Hit,* 273-313; Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment?,* 397-441; and Franck, *Development and Outcomes of Investment Treaty Arbitration*, 435-489. [↑](#footnote-ref-46)
47. Poulsen and Aisbett, *When the Claims Hit*, 301. [↑](#footnote-ref-47)
48. Hirsch, *Sociology*, 3. [↑](#footnote-ref-48)
49. Tomer Broude, “Behavioural International Law” *Hebrew University of Jerusalem International Law Forum Research Paper No. 12-13* (2013), 20-21, accessed January 30, 2014, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2320375>, citing Francesco Parisi and Vernon Smith, “The Law and Economics of Irrational Behavior: An Introduction”, in *The Law and Economics of Irrational Behaviour,* (Stanford University Press, 2005), 1. [↑](#footnote-ref-49)
50. *Ibid*, 40. [↑](#footnote-ref-50)
51. *Ibid*, 44. [↑](#footnote-ref-51)
52. David Cohen, “Regulating Regulators: The Legal Environment of the State,” *University of Toronto Law Journal* 40 (1990): 245. [↑](#footnote-ref-52)
53. *Ibid*, 246. [↑](#footnote-ref-53)
54. Eric A. Posner and Alan O. Sykes, *Economic Foundations of International Law* (Cambridge, Mass.: Harvard University Press, 2013), 115. [↑](#footnote-ref-54)
55. *Ibid*, 115. [↑](#footnote-ref-55)
56. Cohen, *Regulating Regulators*, 213. [↑](#footnote-ref-56)
57. On file with the author; these preliminary studies looked into the legislation in a developing country, two developed States and two emerging economies. [↑](#footnote-ref-57)
58. A somewhat similar conclusion has been made by Aisbett and Poulsen, who suggest that developing country governments may be “more prone to biased processing of information about the implications of BITs than developed country counterparts with higher levels of administrative capacity.” See Poulsen and Aisbett, *When the Claims Hit*, 302. [↑](#footnote-ref-58)
59. Stephan Schill, “Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?,” *Journal of International Arbitration* 24, no. 5 (2007): 469. [↑](#footnote-ref-59)
60. See e.g. Emily Barrett Lydgate, “Biofuels, Sustainability, and Trade-related Regulatory Chill,” *Journal of International Economic Law* 15, no. 1 (2012): 157; Kyla Tienhaara, “Regulatory Chill and the Threat of Arbitration: A View From Political Science,” in *Evolution in Investment Treaty Law and Arbitration,* ed. Chester Brown and Kate Miles (Cambridge: Cambridge University Press, 2011), 606-628. [↑](#footnote-ref-60)
61. It has been reported that suggestions for a stronger articulation of environmental and sustainability requirements in the EU Renewable Energy Directive failed to make way into the final version of the document since a compromise had to be made between the EU’s commitment to environment protection and sustainable development and its obligations under multilateral trade agreements. The European Commission has acknowledged that the desire to prevent claims under WTO law was a motivating factor for not adopting stronger criteria. See Lydgate, *Biofuels*, 164. [↑](#footnote-ref-61)
62. Poulsen and Aisbett, *When the Claims Hit*, 302. [↑](#footnote-ref-62)
63. UNCTAD, *Fair and Equitable Treatment*, 12. [↑](#footnote-ref-63)
64. Jonathan Bonnitcha, “Outline of a Normative Framework for Evaluating Interpretations of Investment Treaty Protections” in *Evolution in Investment Treaty Law and Arbitration,* ed. Chester Brown and Kate Miles (Cambridge: Cambridge University Press, 2011), 128. [↑](#footnote-ref-64)
65. Ginsburg, *International Substitutes for Domestic Institutions*, 121. [↑](#footnote-ref-65)
66. See Michael Waibel et al, ed., *The Backlash against Investment Arbitration* (Alphen aan den Rijn: Kluwer Law International, 2010). [↑](#footnote-ref-66)
67. Celine Tan, “The New Disciplinary Framework: Conditionality, New Aid Architecture and Global Economic Governance” in *International economic law, globalization and developing countries*, ed. Celine Tan and Julio Faundez (Cheltenham: Edward Elgar, 2010), 122. [↑](#footnote-ref-67)
68. Kingsbury, Krisch and Stewart, *The Emergence of Global Administrative Law*, 37. [↑](#footnote-ref-68)
69. Frank Schimmelfennig and Ulrich Sedelmayer, “Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe,” *Journal of European Public Policy* 11, no. 4 (2004): 662. [↑](#footnote-ref-69)
70. *Ibid*. [↑](#footnote-ref-70)
71. See Article 3.7 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154. See also, Peter van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, 2nd ed. (Cambridge: Cambridge University Press, 2008), 218-33. [↑](#footnote-ref-71)
72. Joost Pauwelyn, “The Calculation and Design of Trade Retaliation in Context: What is the Goal of Suspending WTO obligations?”, in, *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement,* eds. Chad P. Bown and Joost Pauwelyn (Cambridge University Press, 2010) 36. [↑](#footnote-ref-72)
73. *Ibid*. [↑](#footnote-ref-73)
74. For an overview and discussion of primary and secondary remedies in investment treaty law, see OECD, “Investor-State Dispute Settlement: Summary Reports by Experts at 16th Freedom of Information Roundtable”, OECD, Investment Division (Mar. 20, 2012), accessed January 30, 2014, <http://www.oecd.org/daf/inv/investment-policy/50241347.pdf>. [↑](#footnote-ref-74)
75. Rachel Brewster, “Pricing Compliance: When Formal Remedies Displace Reputations Sanctions,” *Harvard International Law Journal* 54, no. 2 (2013): 259. [↑](#footnote-ref-75)
76. *Ibid*, 271-272. [↑](#footnote-ref-76)
77. *Ibid*, 294. [↑](#footnote-ref-77)
78. *Ibid*, 279. [↑](#footnote-ref-78)
79. See, OECD, *16th Freedom of Information Roundtable*. [↑](#footnote-ref-79)
80. Christoph Schreuer, “Non-pecuniary Remedies in ICSID Arbitration” *Arbitration International* 20, no. 4 (2004): 325. [↑](#footnote-ref-80)
81. Of more recent cases, see e.g. *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award (May 12, 2010). [↑](#footnote-ref-81)