

Reassertion of Control and Contracting Parties' Domestic Law Responses to Investment Treaty Arbitration: Between Reform, Reticence and Resistance

Mavluda Sattorova

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1. Introduction

History shows that attempts by states to reassert control over international investment law and dispute settlement are a cyclical phenomenon which manifests itself in various forms. Resistance is one of them. The foremost and oft-cited example of resistance towards the internationalisation of investment protection is the Calvo doctrine which underpinned an historic opposition by Latin American states to diplomatic protection and the notion of international minimum standard. The doctrine has exerted considerable influence on the subsequent development of international norms on investment protection, from the groundbreaking resolutions by the UN General Assembly (which purported to replace the idea of internationalisation of investment disputes with the principle of national treatment) to more recent calls to reinstate the local remedies rule in investment arbitration.¹ Although the practical significance of the UN resolutions was subsequently obliterated by an *enmasse* treatification of international investment law, whereby even the staunchest detractors of internationalisation signed investment treaties and joined the ICSID Convention, the echoes of Calvo's influence on national approaches can still be traced in existing investment protection instruments.²

More recently, reassertion of control through resistance to the internationalisation of investment protection and dispute settlement has manifested itself in a withdrawal by states (mostly developing countries) from the investment protection regime. To mention a few, in 2007 Bolivia submitted a written notice of its denunciation of the ICSID Convention, and a similar step was later taken by Ecuador in 2009. Furthermore, the Ecuadorian Constitution

¹ For instance, Australia has recently voiced its support for reinstating the local remedies rule to protect national adjudicatory powers over investment disputes. See L. Trakman 'Choosing Domestic Courts Over Investor-State Arbitration: Australia's Repudiation of The Status Quo', *UNSW Law Journal*, 35 (2012) 979.

² Notable examples are the Commonwealth of Independent States investment protection instruments which establish the primacy of national laws and remedies. See M. Sattorova, 'International Investment Law in Central Asia: The Making, Implementation and Change of Investment Rules from a Regionalist Perspective', *Journal of World Investment and Trade*, 16 (2015) 1089, 1094-5.

has been amended to expressly prohibit international arbitration of investor-state disputes.³ In 2009 Russia officially announced its decision to withdraw from the Energy Charter Treaty.⁴ Indonesia, too, has recently confirmed its intention to terminate and renegotiate more than 60 bilateral investment treaties.⁵

The current trend towards reassertion of control over investment protection and dispute settlement has not been limited to developing countries alone. As observed by the editor in the introduction to this volume, for the first time in the history of international investment law the interests of state parties, both developed and developing, are becoming approximated in the sense of their shared dissatisfaction with the drafting patterns on which the bulk of existing investment treaties are modelled. Faced with a growing number of investment claims and at the same time cognizant of the important gains bestowed by investment treaty instruments on their own businesses abroad, the governments of developed economies—most notably Canada and the United States—were forced to adopt a long-term review of their investment treaty policies. The reformed treaty models feature a number of significant changes symbolising an almost paradigmatic even if inchoate shift in the perceptions of investment treaty law and its principal functions. These innovations include references to the promotion of sustainable development as one of the overarching treaty objectives alongside investment protection, more detailed and elaborate provisions on expropriation and the guarantee of fair and equitable treatment, and public policy exceptions—all aimed at alleviating concerns over the growing exposure of states to investor claims.

Both resistance and reform have already received some attention in international legal scholarship.⁶ However, what remains unexplored is the existence of variation in the ways host states reassert control over international investment law. A significant number of states have so far refrained from any significant overhaul of their investment treaties. Others have attempted to reassert control over investment protection and dispute settlement through changes in domestic legal frameworks. Furthermore, existing scholarship has so far been preoccupied with patterns of state behaviour in the international scene, such as treaty reform, thus leaving unaddressed the reassertion by states of control over investment treaty law through changes in national laws and policies. The aim of this chapter is to analyse the hitherto less visible and underexplored patterns of state behaviour such as reticence (or

³ D. Ma, 'A BIT Unfair?: An Illustration of the Backlash Against International Arbitration in Latin America', *Journal of Dispute Resolution* (2012) 571.

⁴ See generally A. Kaushal, 'Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime', *Harvard International Law Journal*, 50 (2009) 491, 493, also A van Aaken, 'Perils of Success? The Case of International Investment Protection', *European Business Organisation Law Review*, 9 (2008) 1.

⁵ See an official notice at <http://indonesia.nlembassy.org/organisation/departments/economic-affairs/termination-bilateral-investment-treaty.html>; also recently Grace D. Amianti, 'Govt revises investment treaties', *The Jakarta Post*, 12 May 2015, available at www.thejakartapost.com/news/2015/05/12/govt-revises-investment-treaties.html.

⁶ See, for instance, M. Waibel *et al.* (eds.), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010); J. McIlroy, 'Canada's New Foreign Investment Protection and Promotion Agreement: Two Steps Forward, One Step Back?', *Journal of World Investment and Trade*, 5 (2004) 621.

selective adjustment), preservation of the status quo (or passivity), dispute prevention and domestic contestation (or grassroots resistance).

The chapter seeks to fill the gap in investment treaty scholarship by moving away from currently prevailing emphasis on the international dimension of state behaviour and towards the domestic dimension. In doing so, it intends to make a novel contribution to the debate by (1) examining the ways host state reassert control and exposing a variety of the actual rather than abstractly imagined patterns of state behaviour as emerging from recent empirical studies; (2) casting light on responses by developing states (rather than focusing exclusively on their developed treaty counterparts) and highlighting a significant variation in how states have behaved so far; and (3) forsaking the currently prevailing state-centric narratives of international investment law in favour of an approach which enables to identify some of the important actors and factors underpinning the emerging variety of ways in which host states seek to reassert control over investment treaty law and its arbitration mechanism.

The chapter will proceed as follows. Section 2 will juxtapose treaty reforms on the one hand and reticence and preservation of status quo on the other. It will question why the initial encounter with investor-state arbitration in a respondent capacity appears to have prompted a revision of investment treaties by countries such as Canada and the US, whilst other countries have shown a degree of reticence even after having become targeted by investment claims. In addressing this question, fresh empirical insights from developing countries will be analysed. Section 3 will critically examine the presently under-explored form of reassertion of control by host states – the creation of domestic mechanisms for dispute prevention and management. Even this form of reassertion of control by states manifests itself differently, with some states adopting a fully-fledged dispute prevention mechanisms whilst others confining themselves to dispute management only. This, in turn, prompts an inquiry into factors underlying host state choices. Section 4 will draw attention to the recent political contestation of investment treaty rules in domestic settings, including through grassroots opposition to new investment and trade agreements. It will examine how host state responses to developments in international investment law might be influenced by domestic political process, and what implications this entails for the existing conceptualisation of investment treaty-making. Section 5 will conclude by identifying some of the common factors that appear to underpin all four forms of reassertion of control by host states, and propose a re-orientation of existing narratives towards less state-centric and more pluralist understanding of host state behaviour in the investment treaty context.

2. Between reticence and preservation of status quo: why are states reluctant to launch a comprehensive treaty reform?

Although treaty reform manifests itself primarily through changes to international commitments of contracting state parties, it offers a useful backdrop against which domestic approaches to reasserting control over investment treaty law could be analysed. Investment treaty reform is frequently a reflection of a shift in the contracting state's perception of

international investment law, at times influenced by domestic political discourse and often accompanied by relevant changes in national laws and policies on investment. Such shifts in domestic attitudes are often prompted by the contracting state's exposure to investment arbitration claims. As evidenced by the recent history of international investment law, the first significant wave of reform was precipitated by the proliferation of investment disputes and the invocation of investment treaty rules against countries such as Canada and the US. Until then, it was deemed somewhat inconceivable that international investment treaties could be deployed against the very states that championed them. Once exposed to actual investment treaty claims, the erstwhile advocates of international investment protection had to revisit their stance so as to avoid having to pay significant damages awards in future arbitrations.

The reformist impulse, however, has not manifested itself uniformly. Unlike Canada and the US, many governments have remained somewhat reticent about changing their investment treaty practice. Amended model treaties of other investment protection champions—including the United Kingdom, the Netherlands, Switzerland—continue to follow the traditional drafting patterns and do not feature changes of the kind embraced in the revised Canadian and US treaty models. This is despite the fact that many of these countries—long known as strong advocates of investment treaty protection—had an experience of being targeted or threatened by investment disputes, with their governments being prompted to take a fresh look at their investment treaties. A similar inclination to preserve the status quo—or a considerable degree of reticence in reasserting control over investment treaty protection and dispute settlement—can also be discerned among many developing countries. The question arises as to why, despite having been drawn into investment arbitration in a respondent capacity, some states have not made significant changes in their investment treaty practice whilst others responded to their encounter with investment claims by revisiting the treaty rules. Recent empirical insights from developing countries, including Turkey and Uzbekistan, provide a useful background to address this question.⁷

Both Turkey and Uzbekistan have a significant number of investment treaties (76 and 46 respectively) and have been exposed to investment arbitration on a number of occasions. Both countries have experienced the financial implications of investor-state arbitration. For instance, even in a case where the investor claims were dismissed, Turkey's expenses amounted to USD 35,702,417.76. Similarly, although no damages awards have so far been issued against Uzbekistan, in defending its interests in one case alone – *Metal-Tech v Uzbekistan* – the government incurred arbitration costs in the amount of USD 7,985,954.95.⁸ Despite having actually experienced the financial bite of investor-state arbitration, both Turkey and Uzbekistan have so far refrained from systemic reform of their investment treaties. The important question that these examples prompt is why, notwithstanding the lessons about investment treaties and their liability implications, so many countries continue to be reticent about their investment treaties.

⁷ M. Sattorova, M. Erkan and O. Omiunu, 'How Do Host States Respond to Investment Treaty Law?: Some Empirical Observations', *The European Yearbook of International Economic Law* (forthcoming 2016).

⁸ *Metal-Tech Ltd. v. Republic of Uzbekistan*, Award, 4 October 2013 (ICSID Case No. ARB/10/3) para 414.

To begin with, the government of Turkey has not revised its investment protection commitments on a scale comparable to changes introduced in treaties of the US and Canada. Although the government proclaimed itself to be on path towards the so-called selective adjustment⁹ of its treaties, even a brief glance at its most recent treaties reveals limited and sporadic changes. Turkey's opting for making selective (and currently very piece-meal) modifications can arguably be explained by its desire to prioritise "low-hanging fruit" and to address most pressing and immediate concerns whilst postponing an overhaul of treaty's core commitments.¹⁰ According to UNCTAD, selective adjustments may also reflect the state's preference for tailoring treaty modifications to individual negotiating state parties 'in order to accommodate particular economic relationships.'¹¹ Furthermore, the incremental approach may appeal to certain countries because it 'makes it less likely that the change will be perceived as a reduction of the agreement's protective value'.¹²

Recent studies involving interviews with Turkish government officials offer further insights into the factors underpinning the reticence with which Turkey has approached its investment treaties in the years following its involvement in investor-state disputes.¹³ First, it transpires that, prior to Turkey's first encounter with investor-state arbitration, government officials had been largely unaware of the scope and implications of such treaties. The interviews reveal that some learning occurred after the country was first hit by investment treaty claims. However, they also suggest that learning has been confined to those who were involved, in one way or another, in the process of defending the government in investment arbitration. Officials in other tiers of the government showed very limited or no awareness of investment treaties even after the government had to defend itself in investment arbitration on more than one occasion. Second, even after Turkish officials became increasingly aware of investment treaties and their financial implications, no concrete steps were undertaken to prevent or delimit the state's exposure to investment treaty arbitration and its sanction mechanism. On some occasions, the government ignored its previous experience in evaluating future implications of investment treaties. For instance, respondents to interviews recalled a situation where the government proceeded with a ratification of an investment treaty without a proper legal screening, notwithstanding the country having been earlier exposed to a number of high-profile investment arbitration claims which in turn offered an opportunity to reflect on the scope of investment treaty commitments.¹⁴ This 'partial' learning and an 'incomplete' translation of the lessons learnt into concrete changes in law and policy may be relevant in explaining Turkey's current choice of selective and minor adjustment of its investment treaties. The emerging empirical evidence suggests that, reticence over reforming investment treaties is not always the reflection of the state's fear about diminishing protective value of treaties or its desire to tailor treaty commitments to individual treaty partners. State

⁹ UNCTAD, *Transformation of the international investment agreement regime*, TD/B/C.II/EM.4/2, available at http://unctad.org/meetings/en/SessionalDocuments/ciiem4d2_en.pdf 12-4. The recent Turkish BITs feature such innovations as a note on regulatory expropriation and, in some treaties, public policy exceptions. These changes are not made consistently in the recent treaty stock.

¹⁰ *Ibid.*, 14.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Sattorova et al, 'How Do Host States Respond to Investment Treaty Law'.

¹⁴ *Ibid.*

behaviour in signing and amending treaties is not always perfectly rational,¹⁵ and the government's choice to make only minor changes to its treaty commitments can be a product of incomplete learning, caused by the lack of awareness and insufficient coordination between various agencies and officials within the government.

Interviews and a historical analysis of national statutory material in Uzbekistan also suggest a degree of reticence and a tendency for preserving the status quo with regard to the countries investment treaty commitments. An initial encounter with investor-state arbitration raised the level of awareness about the reach of investment treaties and their financial implications for the government.¹⁶ Just as in Turkey, however, the increasing levels of awareness were confined to government officials directly involved in defending the state in investment arbitration cases. This 'partial learning' has not been translated into a concerted effort to prevent or mitigate future exposure of the government to investment claims—Uzbekistan has continued to sign and ratify investment treaties and there is no evidence of the government intention to amend its existing treaties. What is noteworthy is the fact that the government did make an attempt to prevent its exposure to future investment claims through making relevant changes in domestic legislation. For instance, one such attempt was made in 2006 when following a number of claims brought against the state by foreign investors¹⁷ the central ministerial body initiated proceedings in the constitutional court requesting an interpretation of a dispute settlement provision in the law which provided for investors' access to arbitration.¹⁸ The constitutional court held that certain investors "mistakenly construed" the provision concerning the settlement of an investment dispute by means of arbitration as an expression of state consent to refer disputes to ICSID in line with the Washington Convention. Having acknowledged that generally recognised principles of international law take precedence over national laws, the constitutional court stressed the supremacy of the national constitution and pointed to a provision therein which vested the competent state courts with jurisdiction over the adjudication of disputes involving governmental bodies. It thus concluded that the contentious provision could not be relied upon as an expression of consent to ICSID arbitration, and express and written consent to arbitration ought to be obtained in each individual case.¹⁹ Despite having resorted to constitutional review in an attempt to regain control over investor-state dispute settlement, the government of Uzbekistan

¹⁵ See L. Poulsen and E. Aisbett, 'When the Claims Hit: Bilateral Investment Treaties and Bounded Rational Learning,' *World Politics*, 65 (2013) 273.

¹⁶ Sattorova et al, 'How Do Host States Respond to Investment Treaty Law'.

¹⁷ The decision of the Constitutional Court does not specify which foreign investor claims prompted a request for the interpretation of the relevant provisions in national law. The existing data on investment arbitration claims brought against Uzbekistan suggests that the request for interpretation might have been the consequence of arbitral proceedings initiated in PCA Case No. AA280 between *Romak S.A. (Switzerland) v. the Republic of Uzbekistan*, and *Newmont USA Limited and Newmont (Uzbekistan) Limited v. Republic of Uzbekistan* (ICSID Case No. ARB/06/20). See also Sattorova, 'International Investment Law in Central Asia', 1113.

¹⁸ Decision of the Constitutional Court of the Republic of Uzbekistan 'On interpretation of part 1 of Article 10 of the Law of the Republic of Uzbekistan on Guarantees and Measures of Protection of Foreign Investor Rights', translated by the author; a version in Russian is available at www.lex.uz/pages/getpage.aspx?lact_id=1267669.

¹⁹ *Ibid.*

did not amend the relevant provisions in either the national statutes or its subsequent investment treaties.²⁰

These case-studies indicate that even though, as some scholars have suggested, the country may initiate a revision of its investment treaties after experiencing their bite²¹, host state responses may significantly vary. In contrast with Canada and the United States, developing countries such as Turkey and Uzbekistan have so far been reluctant to launch a comprehensive revision of their investment treaties. The empirical insights also call for an inquiry into the causes of such variation. One, perhaps too obvious an explanation, can be found in a hegemony narratives of international investment law. The reluctance on the part of developing states to embrace treaty reform at the same pace as that of Canada and the United States could be attributed to the fact that ‘... BITs, and the terms within them, are particularly susceptible to global power dynamics. For one, most treaties are signed by pairs of states in which one state is to some degree more powerful than the other.’²² The qualitative insights referred to above also point to internal capacity (or the lack of it) as a potentially significant factor underlying the host state’s choice to refrain from any significant changes in its investment treaty policy. Lack of awareness of true implications of investment treaty law, insufficient coordination between various agencies and officials within the government, and inability to translate lessons learnt into concrete legal changes appear to play a part in host government’s decision to preserve status quo or make only minor changes to its investment treaty policy.

Another hypothesis is that the current reticence with regard to modifying investment treaties can be attributed to the fact that both Turkey and Uzbekistan perceived their experience of investment arbitration as overall positive. Some respondents in the Turkish case study pointed to the fact that a number of unmeritorious claims against the country were dismissed, thus leaving the government with an impression that the investment arbitration regime is overall balanced, and hence it would be in Turkey’s interests to remain committed to its investment protection promises.²³ Respondents also referred to the use of investment arbitration by Turkish investors abroad, which the respondent believed to contribute to the perception of the regime as being useful for Turkey.²⁴ It can be inferred that the government of Uzbekistan have so far been reticent in its stance on investment arbitration (even despite announcing its intentions to change national laws on investment protection in the past) because no damages or arbitration costs award has so far been rendered against it. Yet again, notwithstanding the small scale of interviews, the emerging empirical data suggests that host state reticence in reasserting control over investment protection disciplines, including state reluctance to launch a comprehensive revision of its investment treaties, is driven by a

²⁰ *Ibid.* See also Sattorova, ‘International Investment Law in Central Asia’, 1113-4.

²¹ Poulsen and Aisbett, ‘When the Claims Hit’, 282.

²² T. Allee and C. Peinhardt, ‘Evaluating Three Explanations for the Design of Bilateral Investment Treaties’, *World Politics*, 47 (2014) 62.

²³ This echoes explanations for the selective adjustment strategies and reticence towards reform, see UNCTAD, *Transformation of the international investment agreement regime*, 14.

²⁴ *Ibid.*

number of factors and not limited to the state's desire to preserve the protective value of treaties.

At the same time, while both the bargaining power of a host state and the extent of its exposure to financial consequences of investment arbitration (and its rate of success in defending itself in investment disputes) may be significant factors, they do not quite explain the variation in the ways many host states, in particular developing countries, have acted—or attempted to reassert control—after their encounter with arbitration and its sanctions mechanism. A brief look at how other developing countries responded to their encounter with investment treaty law and arbitration suggests that other factors might be at play in motivating states to reassert control over international investment law in one or another way.

Kazakhstan, for instance, has experienced the full bite of investment treaty law, with significant sums in damages awarded to investor-claimants in a number of cases.²⁵ The extent of Kazakhstan's liabilities under investment arbitration awards to date should arguably have prompted the government to scale back its investment treaty commitments. Although no empirical data is currently available to evaluate the perceptions of the investment treaty regime among government officials in Kazakhstan, an overview of national laws relating on investment protection and dispute settlement to date show no signs of the government intention to modify its existing investment treaties or incorporate relevant safeguards into new treaties so as to delimit the state's exposure to financial consequences of defending itself in investor-state disputes. Instead, the government responded by creating domestic mechanisms for defending state interests in investor-state arbitration and, importantly, for the prevention of investment disputes. Similar developments can be discerned in other developing countries, including Colombia and Peru both of which introduced domestic legal frameworks for the prevention and management of investment disputes. The following section will critically evaluate this form of reassertion of control by host states over investment treaty law, namely reassertion of control through changes in domestic, not international, legal commitments.

3. Dispute prevention and management: what for and at whose behest?

3.1. Re-asserting control through establishing domestic frameworks for dispute prevention

While developed states appear to have reacted to the first wave of investment disputes and the prospect of being targeted by investor claims by expressing disbelief and, in some cases, a degree of incredulous consternation, for many developing countries the primary concern has been the costs of liability and of defending against investor claims.²⁶ For instance, Kazakhstan's liabilities under recent investor-state arbitration awards exceed the sum of USD

²⁵ A brief look at the awards rendered against Kazakhstan indicate that its liabilities thereunder exceed USD 640 million.

²⁶ See UNCTAD, *Best Practices in Investment for Development. How to prevent and manage investor-State disputes: Lessons from Peru*, Investment Advisory Series, Series B, number 10 (United Nations, 2011).

640 million.²⁷ After being drawn into investor-state arbitration, many developing states realized that no adequate domestic institutional frameworks were in place to detect and solve disputes with investors at early stages, resulting in the general lack of preparedness for investment arbitration. To address these concerns, a number of countries have been reported to be ‘proactively implementing policies aimed at preventing international investor-State arbitration, where possible.’²⁸

The creation of dispute prevention mechanisms is arguably the most predictable response by a state to being placed in a respondent’s seat. Many traditional justifications of international investment law and its arbitration mechanism have argued that damages as a remedy would sufficiently pressure host states into complying with and incorporating the normative standards prescribed by investment treaties into their domestic laws.²⁹ In other words, holding a host state liable for an investment treaty breach would prompt the state to reassert effectively control over investment dispute settlement by creating a governmental agency responsible for detecting, identifying, and controlling risk-increasing activities in which its government agencies and officials may engage.³⁰ Here, a host state is able to reclaim control over the outcomes of investor-state arbitration not through changes to its investment treaty commitments or modalities of its participation in the investment arbitration regime but rather through focusing on the behavior of its government officials and agencies that interact with foreign investors and whose acts can result in investor-state arbitration disputes. In order to prevent the detrimental financial impact of investment treaty sanctions whilst also maintaining its own favorable reputation as a treaty partner and a recipient of investments, a host state would need to create an internal loss-allocation regime 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.³¹ Since investor-state disputes originate in problems which investors encounter in their dealings with host government organs, a monitoring and response mechanism should target all stages of government decision-making: it is essential that ‘all levels of government and agencies that interact with foreign investors understand the scope and consequence of the commitments under IIAs and the practical implications for their day-to-day activities.’³²

Just as is the case with the reformist trend on the international level, however, reassertion of control through focusing on domestic mechanisms of investment dispute management and

²⁷ This is a total of sums awarded against Kazakhstan in the following cases: *Stati, Ascom Group SA, Terra Raf Trans Trading Ltd v Kazakhstan*, SCC Arbitration V (116/2010), Award 19 December 2013; *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003; *Biedermann International, Inc. v. The Republic of Kazakhstan and The Association for Social and Economic Development of Western Kazakhstan "Intercaspian"*, SCC Case No. 97/1996.

²⁸ UNCTAD, *Best Practices in Investment for Development. How to prevent and manage investor-State disputes: Lessons from Peru*, Investment Advisory Series, Series B, number 10 (United Nations 2011)10.

²⁹ S.W. Schill, *The Multilateralization of International Investment Law* (Cambridge University Press, 2009) p. 373.

³⁰ D. Cohen, ‘Regulating Regulators: The Legal Environment of the State’, *University of Toronto Law Journal*, 40 (1990) 245.

³¹ *Ibid.*, 213.

³² UNCTAD, *Best Practices in Investment for Development*, 11.

prevention has different modalities. Again, there is considerable variation in the ways the notions of dispute prevention and management have been embraced among host states. Some countries have responded to their encounter with investment arbitration and its liability mechanism by putting in place a fully-fledged dispute prevention and management framework. Others have only created an agency responsible for defending government interests in investor-state arbitration. There are also examples of host states which have not created any such mechanism even after their involvement in investor-state arbitration incurred significant expenses for the state budget. This variation is currently underexplored, and so are the factors underpinning state motivations to adopt one or another form of dispute management and prevention. Are the emerging domestic strategies adequate and effective enough to allow states to regain control over investor-state dispute settlement? What lies beneath the fact that some states have out in place a comprehensive dispute prevention strategy whilst others confined themselves to optimizing defense in investment disputes thus focusing only on dispute management?

An overview, albeit cursory, of the existing domestic mechanisms of dispute prevention and management points to an inchoate but probably paradigmatic shift from the historically prevalent emphasis on internationalisation of investment protection towards an emerging recognition of how important domestic structures are in both settling and preventing investor-state disputes. The discussion below also seeks to identify some possible explanations for host state choice of reasserting control over investment protection through making changes in domestic legal orders. To this end, the analysis will differentiate between the two principal responses by host states discernible in recent practice: (1) the creation of a full-fledged dispute *prevention* framework and (2) the creation or reform of the existing dispute *management* mechanisms.

3.2. Dispute prevention as a means of reducing host state exposure to investment arbitration

One of the most well-known models of proactive domestic response to investment arbitration is that which Peru adopted after having faced first investment claims and realising that ‘the institutional framework required to optimally defend the State in ISDS cases was not in place.’³³ To address this shortcoming, in 2006 Peru adopted Law No 28933, followed by a number of regulatory decrees in 2008 and 2009 that created the International Investment Disputes State Coordination and Response System (hereinafter the Response System).³⁴ The Response System has brought together the different state agencies that are involved in creating the international investment legal framework.³⁵ The three crucial pillars of the system are (1) a direct link enabling investors to register their concerns or investment problems so that they can be addressed before escalating into an investment arbitration

³³ *Ibid.*, 19.

³⁴ *Ibid.*, 20.

³⁵ *Ibid.*, 22

dispute;³⁶ (2) government agencies' obligation to promptly report to the Response System Coordinator any investment disagreement or dispute that may result in an investment arbitration case;³⁷ (3) the allocation of responsibility for financial costs of Peru's involvement in an investment dispute on the agency that took measures which triggered the dispute.³⁸ The framework also incorporates a training component to ensure that government agencies at all levels and tiers are aware of Peru's investment obligations and their consequences.

Whilst aimed at facilitating an amicable settlement of investor-state disagreements and enabling the state to prepare a strong defense in arbitration, the imposition of responsibility on the agency whose actions led to the dispute aims to enhance accountability of government bodies for breaching Peru's investment treaty commitments.³⁹ An overarching aim of the policy is to serve as a deterrent of measures not compatible with treaty standards.⁴⁰

Peru's model of the response system is notable in that it goes beyond the immediate concerns relating to optimal defense of the state interests in investment arbitration and acknowledges the importance of raising the awareness among, and ensuring accountability of, public officials in different tiers and branches of government. The UNCTAD report has stressed the importance of awareness when noting that 'disputes that reach the stage of arbitration can originate with measures taken by agencies or entities that at times do not have full understanding or knowledge of the commitments undertaken by central governments in IIAs.'⁴¹ As mentioned earlier, recent case-studies support this finding – the awareness of investment treaty law and its liability implications for host states is particularly low among government officials in local and regional executive bodies and the judiciary.⁴² As a consequence, such decision-makers are unlikely 'to internalise the constraints of investment treaty protections'⁴³ not only when evaluating the adoption of new governmental measures but also in exercising their day-to-day decision-making powers vis-à-vis foreign investors. The empirical data suggests that, even after the respective governments became exposed to a number of investment treaty arbitrations, many government officials in the executive and judicial organs have remained unaware of both the very existence of investment treaty law and of the fact that their acts or omissions affecting foreign investors may lead to investment arbitration claims.⁴⁴ Peru's model addresses these concerns: its function is not limited to creating financial deterrents against illegal behaviour by bureaucrats but also importantly includes a training component to raise the levels of awareness about investment treaty law and its liability implications, such awareness being a prerequisite to effective dispute prevention.

³⁶ *Ibid.*, 25.

³⁷ *Ibid.*, 30.

³⁸ *Ibid.*, 31.

³⁹ *Ibid.*, 31.

⁴⁰ *Ibid.*, 46.

⁴¹ *Ibid.*, 12.

⁴² See Sattorova et al., 'How Do Host States Respond to Investment Treaty Law'.

⁴³ J. Bonnitca, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Oxford University Press, 2014), p. 122.

⁴⁴ See above nn. 17-20 and accompanying text.

Peru's is an example of the state reasserting control through a fully-fledged dispute management and prevention framework. Other broadly similar examples can be found in Kazakhstan. In Kazakhstan, for instance, the initial exposure to investment arbitration has led to the creation of a department vested with the task of dealing with investor claims. Representing and protecting Kazakhstan's interests in investment disputes are not the only functions of the department; its other objective is to prevent investment disputes. What is interesting is how the notion of prevention is described in the agency's mandate: it comprises legal expertise of investment contracts and international agreements as well as analysis of the matters relating to harmonisation and implementation of international norms into national legislation.⁴⁵ However, beyond the references to dispute prevention and implementation of international norms in the national sphere, there is no evidence of how learning from its involvement in investment arbitration is to be translated into concrete changes in the legal environment the shortcomings of which are often seen as an impediment to doing business in the country.⁴⁶

At the same time, analysis of developments in the national legislation reveals some evidence of changes aimed at the improvement of an investment climate in general, thus alluding to the government's recognition of the importance of dispute prevention. For instance, the most recent amendment to the Law on Investments has created an investment ombudsman.⁴⁷ One of the principal functions of the ombudsman is to provide a rapid response system for difficulties which foreign investors may encounter in their dealings with various government agencies in Kazakhstan. Some of its key responsibilities include (1) solving issues related to rights and interests of foreign investments during implementation of investment projects, (2) mediating settlement of disputes between investors and state authorities, (3) offering support in legal proceedings, (4) where problems cannot be solved under the existing legislation, designing and recommending proposals on the improvement of the legislation to the competent legislative organs of the Republic of Kazakhstan.⁴⁸ It is not clear from the official statements accompanying this legal development whether the creation of the ombudsman was linked to concerns emanating from Kazakhstan's experience of acting as a respondent in a number of investment treaty arbitrations. The media briefs suggest that the ombudsman was modelled on the South Korean experience, where the eponymous institution played a central part in the state's investment promotion strategy (as opposed to being designed to prevent investment disputes).⁴⁹

⁴⁵ The outline of the department's mandate in Russian language is available on the website of the Ministry of Justice of the Republic of Kazakhstan at <http://kapital.kz/details/27535/ne-tolko-zacshichshatsya-no-ivnimatelnee-chitat-kontrakty.html>. See also http://tengrinews.kz/kazakhstan_news/kazakhstan-otstoyal-iski-3-milliarda-dollarov-mejdunarodnyih-arbitrajah-2013-godu-250785/.

⁴⁶ See, for instance, the United States Department of State, Bureau of Economic and Business Affairs, 2013 Investment Climate Statement – Kazakhstan, February 2013, available at www.state.gov/e/eb/rls/othr/ics/2013/204668.htm.

⁴⁷ See www.invest.gov.kz/?option=news&itemid=136.

⁴⁸ See Article 12-1 of the Law № 373-II On Investments, 8 January 2003, as amended 12 June 2014.

⁴⁹ See eg <http://treviainternational.com/kazakhstan-investors-monitor-july-16-2013/>. See Sattorova et al., 'How Do Host States Respond to Investment Treaty Law'.

3.3. Dispute management: a minimalist approach

Reassertion of control through emphasis on domestic prevention and management of investment disputes is not representative of how most developing countries have responded to their involvement in investment arbitration. As is the case with the investment treaty reform trend, at one end of the spectrum are the countries such as Peru where dissatisfaction with their experience of investment arbitration has prompted the creation of domestic legal solutions aimed at reducing the state's future exposure to liability towards foreign investors. At the other end of the spectrum are the countries which have opted to make only minor domestic legal changes and those where the encounter with investment treaty arbitration has not led to the adoption of any concrete dispute prevention strategy. This section will seek to uncover the relative reticence on the part of some countries in embracing fully-fledged dispute prevention mechanisms and analyse the factors which may explain such patterns of reassertion of control by host states.

Consider, for example, Turkey. In the aftermath of the first wave of investment claims against the government an executive decree No 659 regulating the provision of legal services for government departments put the legal department of Prime Minister's office in charge of defending Turkey's interests in international disputes, including in investment arbitration cases.⁵⁰ The department may handle the claim by itself or coordinate actions of the government authorities involved in the dispute. The decree does not expressly mention dispute prevention or accountability of government agencies in cases where their actions result in Turkey's international responsibility. Turkey's response has thus been confined to optimizing the defense of the state's interests in investment arbitration, with the questions of investment dispute prevention left largely unaddressed.

Contrastingly, Uzbekistan's experience of defending itself in a number of investment arbitration cases has not elicited any notable institutional changes with regard to either dispute prevention or management. The Ministry of Justice remains responsible for representation of the government interests in investment arbitration, and no special unit or department has been created to prevent and manage investment disputes. Neither have there been any formal changes to the existing legal framework on the payment of awards and judgments rendered against government organs and/or their officials.⁵¹ As mentioned earlier, an attempt was made to change the interpretation of the provisions granting foreign investors access to international arbitration; despite the fact that the government representatives expressed an intention to remove the state consent to arbitration from the law, the subsequent amendments to the law left the relevant provision intact. The question arises as to the factors underlying this variation in domestic law responses: why have some states taken a more comprehensive approach to investment dispute prevention than others?

⁵⁰ Law No 659 of 29 September 2011 (the Turkish language version is available at <http://mevzuat.basbakanlik.gov.tr/>).

⁵¹ The Russian language version of the rules governing the payment of judgments and awards of compensation for damages caused by government bodies and officials is available at www.lex.uz.

3.4. Reassertion by whom? Domestic reforms and their (external) champions

A comparative assessment of Peru and Kazakhstan's responses with those of Turkey and Uzbekistan offers some potentially useful insights and raises some novel questions. First, contrary to the assumption that an exposure to investment arbitration is likely to compel the host state to set up a mechanism to prevent future disputes, it appears that states can differ significantly in the way they respond to investment treaty disciplines and in particular, to the costs of arbitration and the imposition or threat of monetary liability. Even though both Turkey and Uzbekistan incurred significant financial costs in defending themselves in investment arbitration cases, neither has translated its 'learning' experience into concrete steps towards preventing investment claims and, particularly, towards addressing the causes of investment disputes. One possible explanation for this is that, due to a degree of success with defending their interests, the two countries perceived their experience of investment arbitration to be overall positive and thus did not see any reason to query and address the underlying causes of investment disputes. However, Peru could be said to be in a comparable position with regard to a high proportion of cases where investors failed to succeed in their claims against it; nonetheless, the government of Peru did put in place a mechanism to prevent and manage investment disputes. Other examples of countries which introduced a formal dispute prevention and management system include Colombia which, despite having never faced an investment arbitration claim, nevertheless established a formal legal framework with the aim of reducing the risks of non-compliance with the international commitments it assumed under investment treaties.⁵² Thus, the fact that Turkey and Uzbekistan did not create similar dispute prevention mechanisms may not necessarily be attributable to their satisfaction with the outcome of the investment disputes brought against them; a more complex chain of causative events is likely to be in work.

Another possible explanation for the fact that no formal dispute prevention mechanisms were created in Turkey and Uzbekistan could be found in the involvement of international organisations, including the providers of technical assistance, in devising the relevant rules and their implementation. A brief look at the genesis of the dispute prevention systems adopted in Peru and Colombia shows a key role played by external entities such as UNCTAD and the EU.⁵³ During the first years after the dispute prevention systems were launched, both governments received support from UNCTAD and the EU to organise training of government officials.⁵⁴ While it is not clear whether the idea for the formal prevention mechanism too came from the external actors, it seems that the availability of capacity-building support frequently plays a decisive role in government decision-making. Conceptually, the variation in the ways developing host states responded to investment treaty arbitration—and the emergence of domestic mechanisms for dispute prevention through which states can mediate their participation in the investment treaty regime—reveal the importance of peering behind

⁵² USAID/APEC, *Investor-State Dispute Prevention Strategies: Selected Case Studies*, 2013, available at http://www.apec.org/Groups/Committee-on-Trade-and-Investment/~/_media/Files/Groups/IEG/20130625_IEG-DisputePrevention.pdf, 13.

⁵³ *Ibid* 16 (noting the support Colombia received from the EU to implement its dispute prevention strategy); also UNCTAD, *Best Practices in Investment for Development*, 37.

⁵⁴ *Ibid.*, 37-8.

the notion of state as a unitary actor and identifying domestic factors that shape international legal behaviour of states. As Chayes and Chayes argued in their management theory of state compliance with international law, '[i]n modern times, the sovereign is no longer a unitary actor who can bind the domain by his own will. Power in modern states is recognized as being distributed along formal and informal networks, and legitimacy is compromised unless consent to international commitments is elicited through internal procedures, formal or informal.'⁵⁵

That dispute prevention and management frameworks in Peru and Colombia have been created with the aid of international organisations brings to the fore international relations theories which link changes in government behaviour with the availability of resources. Long before the investment arbitration has captured the attention of international scholarly community, Chayes and Chayes argued that the process of facilitating state compliance with international rules should involve *informing* states of international laws and building state capacity to comply.⁵⁶ When analysed through this lens, the fact that some developing states (such as Turkey and Uzbekistan) have not adopted formal measures on the prevention of investment disputes need not necessarily be regarded as either their satisfaction with the regime or their deliberate defiance to act. Rather, such behaviour of contracting states parties can be a result of ambiguities surrounding investment treaties and of their implications for host states, as well as a lack of host state capacity to reassert control through making relevant changes in domestic laws. As the qualitative studies referred to above indicate, the ways developing countries respond to investment arbitration can be significantly influenced by a lack of awareness about international investment law and a lack of capacity to effectively 'learn' and to translate lessons from their involvement in investor-state arbitration into concrete changes. If host states are expected to respond to investment arbitration by refraining from behaviour that leads to investment disputes, it is essential that '[t]he issue of the party's capacity to carry out its obligations is examined and addressed, perhaps by some form of technical assistance or other resources if available'⁵⁷ – so as to raise the levels of awareness and to help put in place effective dispute prevention mechanisms at a domestic level.

The fact that international organisations may have played a significant part in the creation of domestic dispute prevention frameworks in developing countries also raises an important question: is this a reassertion of control by host states or by international organisations? Does the involvement of international organisations carry an enabling effect or is it effectively an exercise of control by external actors over developing governments preventing the latter from making their own choices with regard various modalities of participation in the investment treaty regime? Might externally imposed models hamper the emergence of 'internally felt' norms and the production of new, innovative ways of interaction between developing states and the global investment protection regime? While answering these questions falls outside the scope of this chapter, it is fitting to stress the need for less state-centric and more

⁵⁵ A. Chayes and A. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, Cambridge MA 1995) p. 128.

⁵⁶ *Ibid.*, 25.

⁵⁷ *Ibid.*, 110.

pluralistic analyses of developments in investment treaty law. A steadfast adherence to the unitary conception of states hides the variety of domestic and external factors which underpin choices made by host governments in deciding how to regain control over the formation and interpretation of investment protection rules.

4. Domestic contestation: towards pluralist explanations of host state approaches to investment treaties and arbitration

Peering beyond the unitary conception of state is also a useful analytical exercise inasmuch it allows to differentiate yet another form of reassertion of control over international investment law—domestic contestation of investment treaties and investment arbitration—and to identify some of the forces that have precipitated related developments in the international investment law regime. Recent debates over megaregional investment agreements have cast into a sharp relief the presently underexplored role of domestic groups—and of domestic political process—in shaping host state behaviour and modalities of its participation in the investment treaty regime.

In the European Union, the debate was sparked in 2013, after the European Commission was issued with a mandate to negotiate a free trade agreement with an investment chapter between the US and the EU—the Transatlantic Trade and Investment Partnership, or TTIP. In what was an unprecedented step in the history of international investment agreements, the Commission opened up public consultation, inviting the general public to express its position on the inclusion of provisions on investment arbitration in the proposed agreement. Although the Commission subsequently declined to register the European Citizens’ Initiative STOP TTIP launched by NGOs and supported by the Greens,⁵⁸ the debate about investment treaty protection and arbitration has received considerable attention in political discourse. The European Economic and Social Committee has voiced its opposition to the inclusion of investor-state arbitration provisions in the TTIP or in the EU-Canada Comprehensive Economic Trade Agreement (CETA). As stated by the rapporteur, ‘[t]his is not an opinion against investor protection but an opinion that opposes ISDS which is not a form of dispute settlement acceptable to a large majority of civil society’.⁵⁹ While the draft opinion of the Legal Affairs Committee of the European Parliament initially favoured investor-state arbitration provisions, it subsequently changed its tenor as a result of amendments from the Greens and the radical left (GUE).⁶⁰ Six out of the 14 parliamentary committees—including the committees on Economic and Monetary Affairs, Legal Affairs, Employment, Environment, Petitions and Constitutional Affairs—expressed their opposition to the investor-state arbitration mechanism and its inclusion in the TTIP.⁶¹ In France, the website of

⁵⁸ The European Citizens’ Initiative (ECI) provides a platform for citizens to present a legislative proposal to the Commission, if they collect over a million signatures.

⁵⁹ See www.eesc.europa.eu/?i=portal.en.press-releases.35910

⁶⁰ See Euractiv, ‘Parliament’s opposition to TTIP arbitration on the rise’, available at www.euractiv.com/sections/trade-society/parliaments-opposition-ttip-arbitration-rise-313935.

⁶¹ <http://www.euractiv.com/sections/trade-society/parliaments-opposition-ttip-arbitration-rise-313935>.

the Socialist Party has reported that the European social-democratic heads of states and of governments agreed on a common position to block the inclusion of provisions on investor-state arbitration. The opposition to investor-state dispute settlement has also escalated in Germany, with the leader of a parliamentary group for the Left party expressing concerns over the lack of transparency⁶², and the German Environment Minister, Barbara Hendricks dismissing the investment arbitration mechanism as ‘simply not necessary.’⁶³

Interest-group politics and the heightened public attention to TTIP negotiations and the matters of investment treaty protection have most certainly influenced the EU’s evolving position on investment treaty protection. As evidenced by the Commission’s statement following the analysis of the public consultation submissions, the EU had to acknowledge the existence of considerable scepticism against investment arbitration.⁶⁴ The Commission has responded by stressing its commitment to the reforms aimed at designing ‘more balanced investment chapters’ in EU agreements.⁶⁵ One example of such reform is the incorporation of ‘a set of modern provisions which rebalance the rights of the state and the investor in favour of the state, and its right to regulate in the public interest’ in EU-Canada CETA.⁶⁶ Other proposed reforms include measures to increase transparency of arbitral proceedings,⁶⁷ creating a code of conduct for arbitrators, access to an appeal system and, a medium term goal, working towards the establishment of a permanent multilateral investment court.⁶⁸

A similar agitation over investment treaties and investment arbitration has been a feature of the domestic political process surrounding the negotiation of TTIP, TPP (Transpacific Trade Partnership) and CETA in the United States and Canada respectively. In the US, the matters relating to investment protection made a significant issue in the political discourse already in 1992 when one candidate in presidential elections campaigned against NAFTA.⁶⁹ The influence of domestic political actors on the process of formation and change of US investment treaties is particularly discernible when viewed in the context of fast track authority. Fast track legislation, also known as trade promotion authority or ‘TPA’, was first adopted in the Trade Act of 1974. It was designed to strike a balance between Presidential

⁶² ‘Berlin anti-TTIP trade deal protest attracts hundreds of thousands’, available at www.theguardian.com/world/2015/oct/10/berlin-anti-ttip-trade-deal-rally-hundreds-thousands-protesters.

⁶³ Euractiv, ‘France and Germany to form united front against ISDS’, available at www.euractiv.com/sections/trade-society/france-and-germany-form-united-front-against-isds-311267.

⁶⁴ The European Commission, ‘Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement’ (Brussels, 13.1.2015 SWD(2015) 3 final), available at << http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf>>

⁶⁵ See the statement by the Commissioner Cecilia Malmström, available at http://ec.europa.eu/commission/2014-2019/malmstrom/blog/investments-ttip-and-beyond-towards-international-investment-court_en.

⁶⁶ *Ibid.*

⁶⁷ See eg ‘European Commission pushes for full transparency for ISDS in current investment treaties’, available at http://europa.eu/rapid/press-release_IP-15-3881_en.htm.

⁶⁸ See C. Malmström, ‘Investments in TTIP and beyond - towards an International Investment Court’, available at http://ec.europa.eu/commission/2014-2019/malmstrom/blog/investments-ttip-and-beyond-towards-international-investment-court_en.

⁶⁹ See J. E. Mendenhall, ‘The Evolving U.S. Position on International Investment Protection and Its Impact on the U.S. Position in the Trans-Pacific Partnership Negotiations’ in NJ Calamita and M Sattorova, *The Regionalization of International Investment Treaty Arrangements* (BIICL, London 2015) p. 255.

and Congressional authority: although the US Constitution grants Congress a final say on trade matters, the ‘fast track’ approval now enables the President to negotiate trade agreements and bring them back to the Congress for an up-or-down vote only. To renew the expired fast track authority in 2002, the Bush administration had to establish some support within Congress, including through addressing concerns increasingly voiced by environmental and other groups over the implications of investment protection for public policy regulations.⁷⁰ As a consequence, the Bush Administration negotiated a binding interpretation of the NAFTA Chapter 11 clarifying the scope of certain substantive investment obligations.⁷¹ From a broader political perspective, the binding interpretation—a first significant step in investment treaty reform—was a product of the government’s political strategy to prevent members of the Congress from using the contentious investment rules as a reason to oppose future trade agreements.

Recently, the TTIP/TPP negotiations have caused division within the Democratic Party and proved to be a bone of contention in the political discourse over the fate of the proposed trade promotion authority (replacing the fast track authority that expired in 2007). An open letter to the US Senate and Congress initiated by Alliance for Justice, an NGO, and endorsed by prominent US figures including Professor Joseph Stiglitz and leading academics from Yale, Harvard and the University of California, urged the US government not to include investment arbitration provisions in the TPP.⁷² Anti-TPP/TTIP groups rallied against the renewal of fast track authority.⁷³ In a letter addressed to Ambassador Froman, US based labour, environmental, health, consumer, business, family farm, faith based and other interest groups commended the creation of a public consultation process for the European civil society and requested that the same opportunity be provided to stakeholders and NGOs in the US.⁷⁴ Although unions succeeded in pressuring House Democrats to vote against Obama’s trade agenda in order to derail the renewal of TPA⁷⁵ (which would make it easier for the US government to conclude the TPP deal), only two weeks later the fast track bill did receive US Senate approval and was signed into law on June 29, 2015.⁷⁶ However, the prospects of TPP ratification still remain questionable as the fate of the trade deal has turned into one of the hotly contested issues taken up by the 2016 presidential election campaigns. While the negotiation of the TPP has been concluded and the text released in November 2015⁷⁷, the text may still undergo further legal review, and domestic political dynamic may yet precipitate

⁷⁰ *Ibid.*

⁷¹ *Ibid.*, 265.

⁷² See www.washingtonpost.com/r/2010-2019/WashingtonPost/2015/04/30/Editorial-Opinion/Graphics/oppose_ISDS_Letter.pdf.

⁷³ See ‘Labor groups rally against trade promotion authority’, available at

<http://thehill.com/policy/finance/238956-labor-groups-rally-against-trade-promotion-authority>.

⁷⁴ The letter available at www.etuc.org/sites/www.etuc.org/files/press-release/files/letter_to_amb_froman_requesting_public_consultation_on_investment_2014.pdf>>.

⁷⁵ See Trade Promotion Authority (TPA): Frequently Asked Questions, at <https://fas.org/sgp/crs/misc/R43491.pdf>.

⁷⁶ Reuters, ‘Obama signs trade bills into law, says tough battle still ahead’ 29th June 2015, available at www.reuters.com/article/us-usa-trade-obama-idUSKCN0P92GP20150629#qMeQYbHfz0FkB8ze.97.

⁷⁷ See <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>>>.

other developments in the substance and the scope of the agreement's investment protection commitments.

Even a brief glance at the political dynamic underpinning the negotiation of new transatlantic and transpacific agreements reveals that the formation and change of international investment agreements is becoming increasingly influenced by domestic politics—a factor that has been somewhat neglected in existing investment treaty scholarship. Domestic political structures and preferences appear to play a significant part in shaping the ways in which host states have responded to developments in international investment law. The importance of viewing state behaviour not just as a set of strategic calculations by a unitary actor but rather as a product of complex interactions between political players at the domestic level has been acknowledged in the more recent theories of compliance with international law. Notable among them is Joel Trachtman's domestic coalitions-based theory which seeks to explain and predict state behaviour by uncovering 'the black box of the state in order to see the internal workings of the domestic political process' and focusing on the individuals and groups that influence governments through political institutions and social practices.⁷⁸ Trachtman exposes the cracks in the explanations based on the unitary model of the state—including their ignorance of the domestic political dynamics which underpin the state's decision to comply, modify or withdraw from international legal regimes.⁷⁹ He argues that 'there is no unified, *ex ante* national interest. The national interest is the result of a domestic political process, taking into account opportunities and risks in the international market.'⁸⁰ Indeed, as the recent developments in investment treaty practice demonstrate, the unitary model of the state may have been a reasonable heuristic device where investment treaty rules were predominantly matters of foreign policy determined independently of domestic constituents' interests and preferences. It can still be used as an effective analytical tool in explaining treaty practice of states where domestic political input is stifled or non-existent. However, as investment treaty reform in the US and the EU has revealed so far, international investment law has been increasingly moving from the realm of "beyond the border" to "inside the border" issues.⁸¹

It is important to remain cognizant of the limits of explanatory and predictive powers of the domestic-coalitions based theory in the particular context of international investment law. As Trachtman acknowledges, where decisions are made by administrative agencies and the judiciary, 'both at some distance from the full brunt of legislative lobbying'⁸², a different theoretical model would be required. As the discussion above suggests, Trachtman's theory is more suitable for explaining state behaviour in the international scene, i.e. the formation and reform of investment treaties. It is certainly less suited for explaining the reassertion of control over international investment law by developing states through making changes in

⁷⁸ Joel P. Trachtman, 'International Law and Domestic Political Coalitions: The Grand Theory of Compliance with International Law', *Chicago Journal of International Law*, 11 (2010) 128-9.

⁷⁹ *Ibid* 130.

⁸⁰ *Ibid.*, 130-1.

⁸¹ *Ibid.*, 131.

⁸² *Ibid.*, 134.

national legislation, including in countries where national constitutional arrangements and political conditions militate against the emergence and effective functioning of sufficiently robust domestic constituencies.

Yet, just as is the case with the management of compliance theory by Chayes and Chayes, the application of the domestic coalitions-based theory would make an important contribution to legal discourse by moving away from the prevailing state-centric narratives of international investment law towards deconstructing the notion of state and identifying other actors and factors which determine the ways in which host states respond to the rapid developments in investment treaty practice and arbitral caselaw. It can also be useful in predicting state behaviour in the international investment policy scene. With domestic constituencies becoming increasingly vocal in the debate over international investment agreements, the shape of the latter is likely to be correspondingly influenced by the domestic political configuration within host states. In particular, much will depend on how a particular host state accommodates the interaction between various stakeholders and how its laws enable the formation of communities willing to expend political capital in support of one or another policy stance on international investment protection. For instance, the EU laws on citizens initiative—a platform allowing citizens to initiate legislative proposals by making a collective submission to the Commission—provide a useful illustration of how national (or in the case of the EU, supranational) law can influence the outcome of international treaty reform by enabling or preventing domestic interest groups and individuals from having a say in the political debate. Put differently, national laws mediating the relationship between individuals and the state may play a pivotal role in shaping international outcomes, i.e. the ways in which host states reassert control over international investment law.

5. Conclusion

This chapter has sought to explore the domestic dimension of the reassertion of control by state parties. Drawing on recent empirical insights from developing countries, it has highlighted the variation in the ways host states have responded to the fast-paced changes in international investment law and attempted to uncover some of the factors behind such variation. It transpires that whether host states have shown reticence, embarked on domestic reform of dispute prevention and management mechanisms, or grappled with domestic contestation of investment treaty rules, all of these forms of reassertion of control hinge on socio-economic, political and legal capacity of host states. Developing countries in particular appear to have been influenced by the lack of awareness of true implications of investment treaty law, insufficient coordination between various agencies and officials within the government, and inability to translate lessons learnt into concrete legal changes. Although the amount of empirical data is currently limited and further longitudinal studies on a broader geographical scale are necessary, the emerging findings point to the growing importance of peering behind the unitary conception of state and identifying the factors which shape host state engagement with international norms on investment protection and dispute settlement. The chapter also makes a case for a greater focus on the perceptions and reality in developing

countries, whose patterns of participation in the making and implementation of investment treaty norms still remain under-analysed.

The chapter has also drawn attention to the currently under-explored role of international organisations in influencing host states' choices in reasserting control over international investment law. Given the evidence of the involvement of international organisations in constructing recent dispute management and prevention mechanisms in developing states, the overarching question is: reassertion of control by whom? The chapter has also sought to cast light on grassroots opposition as a form of domestic response to international investment law. Just as is the case with the emerging evidence regarding the role of international organisations in motivating states to act in one of another way, the recent examples of domestic political contestation of investment treaty norms point to the importance of constructing a more nuanced portrayal of international investment law, so that a plurality of external and domestic influences are identified in elucidating the ways host states realign their international investment protection commitments.