Judicial Economy and Moving Bars in International Investment Arbitration

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Abstract

Historically, international investment law has centered on protecting foreign investors from direct expropriation, but much of modern law includes legal standards that allow investors to win compensation for other kinds of investor-state disputes. A prominent criticism among scholars and policy advocates is that modern legal protections allow investors to pursue increasing numbers of frivolous, low-merit cases. We contend that this claim overlooks the impact of judicial economy and changing legal standards: since foreign investors only need to prove a main legal violation to secure compensation, arbitrators can and do rule only on those standards that are most easily proven, in particular, contemporary legal protections. As a result, measures based on legal claims and rulings cannot provide definitive evidence of merit, and fears about trends in frivolous litigation under international investment law may be overstated.

1 Introduction

In 2016, hundreds of thousands turned out in Germany to protest the Transatlantic Trade and Investment Partnership (TTIP) that was then under negotiation. One divisive issue was international investment arbitration, which *The Guardian* newspaper summarized as "plans for a special court to hear cases by companies against governments over breaches of regulatory issues."[1] In fact, since the 1990s, thousands of international investment agreements (IIAs) have established a de facto international investment regime whereby foreign investors sue sovereign host states over property rights violations, in ad hoc tribunals via Investor-State Dispute Settlement (ISDS). Modern international investment law and ISDS developed as a means to encourage investment in countries with weak legal systems, allowing foreign investors to avoid potential political bias in domestic courts by using international arbitration instead. Critics wonder why foreign investors in developed democracies with strong rule of law should have access to ISDS, especially when domestic companies in those countries only have access to the domestic legal system.

Critics are further concerned about the scope of claims about property rights violations that foreign investors can bring in ISDS. The historical impetus for treaty-based investment protection was to stop developing country governments from directly expropriating foreign investments, in which the government would force a change in ownership without due compensation (Jandhyala et al 2011).[2] In recent decades such actions, while not eliminated, are on the decline (Minor 1994, Wellhausen 2015). However,

[1] "TTIP protestors take to streets across Germany," *The Guardian* (UK), 17 September 2016. Available at: https://www.theguardian.com/business/2016/sep/17/ttip-protests-see-crowds-take-to-streets-of-seven-german-cities.

[2] Although see St John (2018) for a nuanced argument that framers of German BITs were particularly responding to Nazi property rights violations, which were often undertaken in ways other than direct expropriation.

today's IIAs allow foreign investors to sue for compensation over host state actions that they claim unlawfully infringe on the value of their property, rather than affecting their ownership per se.[3] As *The Guardian* put it, foreign investors can win awards for what are "breaches of regulatory issues."[4] The concern is one of eroding sovereignty: foreign (and not domestic) investors can receive compensation for adverse effects of government regulations, regulations that may very well be seen by other actors as legitimate. Conflicts between host state regulatory autonomy and obligations to foreign investors have already roiled politics and fomented challenges to IIAs in developing countries (Peinhardt and Wellhausen 2016, Haftel and Thompson 2018). Such conflicts are spilling over to developed democracies, too: investors have sued European countries over property rights violations they allege to have emanated from the provision of green energy subsidies (Spain, Italy, and the Czech Republic), nuclear power regulation (Germany), and banking regulation choices made in the wake of the financial crisis (Belgium), not to mention over a variety of environmental and other regulations in the United States, Canada, and Mexico challenged through ISDS facilitated by NAFTA. In this context of widening claims of property rights violations, against both developing and developed countries, more observers are calling for reforming (or abandoning) modern international investment law (Waibel 2010).

One prominent criticism of ISDS is that modern legal protections allow foreign investors to pursue frivolous, low-merit cases, in which investors have little expectation of winning compensation. Some argue that the scope of cases that investors have the right to file, unconditional on the domestic constraints a host government might be facing, is

[3] On the history of ISDS, see St John (2018).
[4] *Ibid*.

normatively troubling (Simmons 2014, Van Harten 2010). Others argue that low-merit cases can create regulatory chill – even if the foreign investor never wins an award, the host state as well as other countries observing the arbitration might delay implementing the questioned regulation until the dispute is formally resolved (Pelc 2017). The foreign investor can thus win in terms of gaining time before having to change its business practices in the host state or in other chilled countries (Moehlecke 2018). This sort of use of ISDS is indeed far afield from the concept of protecting foreign investment from undue government interference. Low-merit cases lay bare inequities between foreign investors and host states in the *de facto* regime, and these inequities challenge the legitimacy of modern international investment law (Yackee 2012, Simmons 2014, Diependaele et al. 2019).

We agree that even a single frivolous case can have negative effects on the legitimacy and efficacy of international investment law. However, we argue that fears about frivolous, low-merit litigation brought by investors under international investment law may be overstated. Specifically, we take issue with the empirical finding that there has been an "increase in low-merit claims over time" (Pelc 2017: 561).[5] That finding, and indeed much empirical work on ISDS, relies on trends in filings and rulings on observable claims. However, two well-understood theoretical concepts have been overlooked by critics of modern international investment law: judicial economy, wherein arbitrators do not rule on all claims made in a given case, and moving bars, or changes in legal standards over time. We argue that these two theoretical concepts ensure that the qualities of observable claims

[5] Other scholarly work that incorporates this finding of a worsening, low-merit trend includes Betz and Pond (forthcoming) and Donaubauer and Nunnenkamp (2018). For an earlier, provocative argument that frivolous cases are prevalent enough that the law should allow respondent states to receive "moral damages," see Parish et al. (2011).

and rulings in ISDS cannot provide definitive evidence of whether cases themselves are of high or low merit. We make our argument through careful examination of developments in jurisprudence, and we use novel data on ISDS claims and rulings to illustrate observable implications of our argument.

Our argument emphasizes the effects that data-generating processes have on an analyst's ability to draw inferences from observables.[6] With close attention to selection issues, scholars can lay a firmer groundwork for characterizations of ISDS that, in turn, provide fodder for its critics and proponents. Indeed, properly adjudicating the question of whether the phenomenon of frivolous, low-merit ISDS cases is getting worse over time is important for agenda-setting in reform efforts.[7] In the absence of a worsening trend, reformers may reasonably de-prioritize efforts to combat frivolous ISDS cases. If new and creative empirical approaches do in fact uncover such a trend, resources put into reform efforts intending to solve problems of bias should be marshalled accordingly.

2 Judicial Economy

When judges are presented with complex cases, they often must consider multiple alternative arguments or streams of logic. Rather than deciding on each and every issue that is presented before her, a judge is encouraged not to decide legal issues that are not necessary to resolve the case; a ruling should answer "the question asked in the most direct

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[6] Many social scientists have successfully used selection bias as a means of testing hypotheses, and scholars in international law and international political economy are no exception (Strezhnev n.d., Johns and Pelc 2016, Lupu 2013, von Stein 2005).

[7] In promoting the Trans-Pacific Partnership (TPP), the Obama administration highlighted ISDS safeguards in the agreement that included "the ability to dismiss frivolous claims quickly." Given the US withdrawal from the TPP, more clarity on the issue of frivolous claims could inform whether and how such safeguards are prioritized in future efforts. See Jeffrey Zients. 26 February 2015. "Investor-State Dispute Settlement (ISDS) Questions and Answers. Available at: https://obamawhitehouse.archives.gov/blog/2015/02/26/investor-state-dispute-settlement-isds-questions-and-answers.)

manner, and via the shortest available route of legal analysis" (Weller 2011: 130). In the context of domestic law, Sunstein defines "decisional minimalism" as "the phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided," and he calls it a legal virtue (1999: 3). Sunstein argues that "minimalism is likely to make judicial errors less frequent and (above all) less damaging. A court that leaves things open will not foreclose options in a way that may do a great deal of harm" (1999: 4). Similarly, Posner argues that "a failure to economize wherever possible on…judicial resources may impose substantial social costs in the form of reduced judicial quality" (1983: 11).

Prior scholars have emphasized two possible, positive consequences of judicial economy at the international level. First, judicial economy can lower the costs of litigation, if only by cutting down on the time that arbitrators would have otherwise required to decide unnecessary legal issues. This can improve access, because high costs limit which litigants can afford formal proceedings (Davis and Bermeo 2009; Johns and Pelc 2016). Moreover, time spent in unnecessary proceedings can increase the harm caused by an ongoing legal violation, particularly in economic disputes (Johns and Pelc 2018).[8]

Such cost-saving benefits of judicial economy are particularly attractive in international investment law, because litigants directly bear the cost of ISDS proceedings. Investment arbitration is an *ad hoc* process: litigants choose which arbitrators to hire for their case, and pay them a daily fee for their services. Smaller firms can find it cost-prohibitive to access international treaties, and high-profile cases have resulted in

[8] Shany (2005: 919) argues that "since international courts are today busier than ever, considerations of judicial economy exert growing pressures on courts to delegate some decision-making powers to state authorities and to assume less intrusive … standards of review." Because ISDS tribunals are *ad hoc* and there is no formal international investment court, docket-driven pressures for judicial economy are less relevant.

bankruptcy for foreign investors.[9] States, too, incur significant costs when sued in ISDS; concern over the capacity of developing countries to pay such costs is another point of controversy around ISDS (Wellhausen 2016).[10] It follows that if an arbitrator needlessly prolongs a case by holding an excessive number of hearings, or drafting long awards that deal with unnecessary legal issues, then she risks losing out on future employment opportunities, because cost-conscious investors and respondent states would be less likely to nominate her to the tribunal.[11]

The second possible positive consequence of judicial economy is political: judicial economy may allow international tribunals to grant deference to states, thereby preserving state support for international law. International judges must not only focus on reaching the correct legal outcome; they must also be aware of maintaining state support for international law itself. States can leave institutions and legal commitments at will under the international legal principle of consent (Helfer 2005), and the threat of exit from a court's jurisdiction and from substantive legal obligations is always a concern (Johns 2014, 2015). As Palombino argues with reference to international law, "the principle of judicial economy requires the judge to obtain the best result in the management of a controversy with the most rational and efficient use possible of his or her powers" (2010: 909). For example, when the International Court of Justice ruled on the legal status of Kosovo in 2010, many observers criticized the Court for avoiding some legal issues. However, in his defense of the *Kosovo* advisory opinion, Weller argues that the case posed "enormously

[9] For example, the Loewen Group went bankrupt while fighting its high-profile case under NAFTA. See *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3.

[10] For comprehensive data and analysis regarding ISDS arbitration costs, see Franck 2019.

[11] For discussion of competitive dynamics among the set of people qualified to serve as investment arbitrators, see Tucker 2018.

controversial" issues, and was just the latest in a string of highly politicized disputes to be pushed to the Court (2011: 129). It is unreasonable, he argues, to expect the Court to use its legal competence to decide political issues that cannot be resolved by states themselves.

In the realm of international economic law, a robust literature suggests that judges use judicial economy at the World Trade Organization to defer to states and maintain state support for international trade law. Davey (2001) argues that judicial economy exercised by judges on WTO panels allows the WTO as a whole to avoid unnecessary political conflicts. Brutger and Morse (2015) find that judicial economy is most likely in WTO rulings against the European Union and the United States, which they interpret as evidence that WTO judges moderate their adverse rulings against more powerful states. More broadly, Busch and Pelc (2010) find evidence that judicial economy is more likely when WTO members are divided on important issues.

That judicial economy can forestall unnecessary political conflicts and maintain (or avoid undermining) state support for international law is particularly relevant when it comes to ISDS. States have increasingly argued that international investment law and ISDS limit their legitimate regulatory authority (Johns, Pelc and Wellhausen 2019). Many states are renegotiating their treaty commitments to ISDS (Haftel and Thompson 2018), and some states have unilaterally withdrawn from ICSID jurisdiction in recent years because they believe that ISDS unfairly constrains their domestic economic policies (Peinhardt and Wellhausen 2016). In this environment, it follows that arbitrators are particularly attentive to maintaining state support for investment law and ISDS. Judicial economy is one obvious tool to do so.[12]

At the same time, scholarship on domestic law and some areas of international law identify possible negative consequences of judicial economy that might dissuade judges from exercising it. However, these downsides of judicial economy have a relatively small influence in ISDS, making them unlikely to outweigh its benefits for investment arbitrators. A first potential downside is that, by declining to address a legal claim, a judge might sacrifice an opportunity to establish precedent. Strictly speaking, judicial rulings in prior cases are not a binding source of international law, although they are considered a "subsidiary means for the determination of rules of law."[13] In practice, this means that international law operates according to what many scholars call *de facto stare decisis* (Bhala 2001; Schill 2010).

However, in ISDS arbitration, precedent plays a minimal role, as neither respondent states nor claimant investors have strong interests in using individual cases to establish favorable precedents for the future. Respondent states are always playing a defensive strategy because they are always the defendant, never the plaintiff. For a risk-averse host state, it is far better to have no ruling on an alleged violation than to risk losing a legal argument.[14] For their part, it is possible that foreign investors that foresee filing multiple

[12] In a 2016 interview, investment arbitrator Gary Born invoked the popular HBO television show *Game of Thrones* when he said that "winter is coming" for international investment arbitration. He argued that after enjoying "a long golden summer when everything went right," international lawyers needed to prepare to defend investment law from growing political opposition. Alison Ross "Game of Tribunals–Winter is Coming, Warns Born" *Global Arbitration Review* 15 July 2016. Available at: https://globalarbitrationreview.com/article/1067197/-game-of-tribunals-–-winter-is-coming-warns-born.
[13] Statute of the International Court of Justice, Article 38, para. 1(d).
[14] Contrast this with international trade law, in which states can be plaintiffs. Pelc (2014) argues that, in the trade setting, a state will often bring relatively small test cases to try to establish favorable precedents that can be used in later cases.

cases could press for extra legal rulings in order to bolster future cases. Yet because ISDS arbitrations rely on thousands of different IIAs and contracts, favorable precedents created with regard to one treaty may be inapplicable to an investor's case against another host state. Additionally, consistent with the relative unimportance of precedent for litigants, Tucker (2018) chronicles that staking out new ground in rulings is not a key cause of an individual arbitrator's success in the profession.

Second, litigants would be dissuaded from supporting the use of judicial economy if its exercise changes the magnitude of a legal remedy. This has little relevance in the setting of ISDS, as which legal claims an investor wins usually has little or no impact on the magnitude of the legal remedy. Like international law in general, international investment law is ultimately based on a remedial conception of justice (Shelton 2002; Johns and Parente 2019). When a foreign investor is harmed by a host state, it is entitled to restitution and/or compensation, meaning that it must be made whole for the harm that it has suffered. However, investors are not entitled to punitive damages under international law.[15]

For example, in *Micula v. Romania*, Swedish investors brought numerous legal claims against the Romanian government. After over 200 pages of dense factual findings and legal arguments about the investor's claim of a "fair and equitable treatment" (FET) violation, the arbitration panel abruptly wrote:

> In light of the Tribunal's conclusion that … the Respondent breached its obligation to treat the Claimants' investments fairly and equitably, the Tribunal does not need to address the Claimants' remaining claims. Indeed, each of those claims arises from the same facts as the fair and equitable treatment claim, and the Claimants claim the

[15] In some expropriation cases, an investor can be awarded interest and/or projected future earnings if it can prove that a host state was not expropriating for a public purpose or did not act in good faith. However, baseline damages cannot exceed the value of the initial investment.

> same compensation in each instance … Thus, even if the Tribunal were to find in favor of the Claimants with respect to these claims, this would not impact the Tribunal's calculation of damages. As a result, any legal findings on these matters are unnecessary.

In the panel's view, answering additional legal questions was unimportant, because the Swedish investors had already "won" the right to compensation because of the FET violation. Similarly, in *Ascom and Others v. Kazahkstan*, the tribunal ruled that the state's actions amounted to an FET violation. The tribunal then chose not to rule on the claimants' seven additional claims, on the grounds that additional violations would not affect the damages owed to the investors.[16] Finally, arbitrators in *Bosca v. Lithuania* reached the same conclusion, deciding that an FET violation means that "any additional breach is not relevant unless it leads to additional damages, which it would not do here."[17]

Finally, judicial economy can have negative consequences if, by limiting the scope of the decision, a judge makes her ruling more vulnerable to being overturned on appeal. However, in modern international investment law, host states have very limited opportunities to challenge arbitration awards, which lessens the incentives that investors have to try to win more claims as insurance against challenges. If the tribunal is convened at ICSID, a party can file for annulment of the award, but this is explicitly not an appeals process. Annulments must be based on errors in process and not in reasoning. Annulment is rare regardless of whether it is sought by states or investors; out of the hundreds of IIA-related awards issued by ICSID tribunals, only twelve have been successfully annulled by 2018 (Tucker 2018: 141). Otherwise, the closest host states can come to challenge awards

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[16] *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan, SCC Case No. V 116/2010.*

[17] *Luigiterzo Bosca v. Lithuania, UNCITRAL, Award 17 May 2013*, para. 244.

is the ability of parties, under some conditions, to file for set-aside proceedings in domestic courts at the seat of jurisdiction following a ruling.

Appeals are also not a major issue in ISDS because there is not a clear-cut concept of "double jeopardy" in the system. Many investors have access to ISDS under a variety of bilateral treaties because of their multinational holdings (Wellhausen 2015). Thus, an investor could very likely bring new proceedings in the event of an overturned pro-investor ruling, making the number of claims ruled on in the initial proceeding less relevant, although we note that restarting litigation is costly. The main exception to this line of reasoning is in the case of enforcement proceedings. Investors seeking to enforce arbitral awards can file enforcement proceedings in domestic courts of states in which the respondent host state has recoverable assets (Wellhausen 2019). As the law around these kinds of proceedings is quite decentralized and in flux, the merits of a case may play more of a role in an investor's ability to succeed, such that the investor might have more incentive to win more claims in its initial proceedings.

In sum, judicial economy in ISDS has negligible downsides and can contribute to two major positive consequences: lowering the economic cost of justice, and preserving state support for international legal institutions via deference.[18] Thus, we expect investment arbitrators to exercise judicial economy. As we demonstrate below, our argument here holds in the data: investment tribunals regularly exercise judicial economy and do not rule on all claims brought in ISDS. The ISDS claims that receive rulings are subject to a selection process driven by judicial economy.

[18] Note that these two possible positive consequences are not mutually exclusive; both can occur simultaneously. We therefore view these alternative explanations of why investment arbitrators might use judicial economy as complementary, rather than competing, explanations. We remain agnostic about the circumstances under which one or the other consequence provides greater motivation to a given arbitrator.

3 Moving Bars, or Changing Legal Standards

In this section, we argue that investment arbitrators' decisions about which claims to rule on and which to pass over are not driven by a static concept of legal merit. We do so by explaining the concept of moving bars: legal standards change over time. If the bars are moving, we cannot infer changes in the quality of cases from changes in the win-rates on one particular category of legal claim over time. We argue that indirect expropriation claims have been judged against a relatively stricter test over time, such that trends in indirect expropriation win-rates are not an appropriate measure of quality, contra Pelc (2017). To make our argument, we illustrate whack-a-mole dynamics between two key claims in modern international investment law: indirect expropriation, and fair and equitable treatment (FET).

When suing via ISDS, foreign investors draw from a menu of claims available to them based on the treaty or investor-state contract invoked. Modern international investment law lacks the standardization and coherence that is apparent in other areas of international law, like international trade law under the GATT/WTO. However, under most instruments, investors have access to three sets of claims: (1) rules regarding expropriation of foreign investors; (2) absolute treatment standards; and (3) relative treatment standards. The first two categories are most pertinent to our argument.[19]

3.1 Rising Bar for Indirect Expropriation

[19] Less pertinent to our argument are the set of standard relative treatment standards. National treatment specifies that a foreign investor must receive treatment that is at least as favorable as the treatment received by a similar domestic investor (that is usually defined as an investor in "like circumstances"). For an illustration, see for example *Cargill, Incorporated v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2. Most-favored nation treatment specifies that a foreign investor must receive treatment that is at least as favorable as the treatment received by a foreign national from another state. For an illustration, see for example *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan,* ICSID Case No. ARB/08/2.

Many critics of ISDS focus on the first set of expropriation standards and in particular on indirect expropriation. In contrast to direct expropriation, when the state's actions deprive a firm of ownership of its investment, indirect (or creeping) expropriation occurs when a government's actions violate pre-existing contracts or laws and reduce the value of a foreign firm's property without necessarily changing ownership. A pivotal ruling with regard to this claim came in 2000 in *Metalclad v. Mexico*, brought under NAFTA Chapter 11. The US firm Metalclad argued that a local Mexican government's actions amounted to indirect expropriation, because the refusal to issue an environmental permit meant that the land it owned could no longer be developed into a hazardous waste landfill. The arbitral tribunal agreed, writing,

> expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favor of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.[20]

The 2000 *Metalclad* ruling provided a clear example of indirect expropriation in the form of regulatory taking as the basis for awarding compensation. The particularly troubling optics around a hazardous waste landfill and environmental pollution also made it a focal point that spurred early outcry that international investment law was dangerous for host state sovereignty.[21]

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[20] See *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000, para. 103.

[21] See for example the PBS documentary, "Bill Moyers Reports: Trading Democracy" (premiered 5 February 2002).

Legal scholars have come to characterize two competing doctrines in jurisprudence on indirect expropriation. The first, typified by *Metalclad*, is the sole effects doctrine.[22] Dolzer and Bloch (2003) define this as a ruling that "restricts itself to focusing solely on the particular effect that a given measure has on the legal position of the investor" (158). The second has come to be known as the police powers doctrine, which "considers, in establishing whether a regulatory measure amounts to an expropriation, the purpose and context of the measure" (Brunetti 2003: 151). This contextual approach allows for "a more elaborate weighing and balancing exercise" incorporating the government's goals, in contrast to the sole effects doctrine (Dolzer and Bloch 2003: 158).[23] Both doctrines remain relevant to indirect expropriation jurisprudence today, which means that these competing doctrines have resulted in a "fragmented and frequently contradictory body of jurisprudence" (Olynyk 2012: 254).

As summed up by Knahr (2007), "since there is no definition of what constitutes indirect expropriation the scope and meaning of this notion has to be determined through arbitral practice" (85).[24] This reality has created considerable uncertainty for investors bringing indirect expropriation claims, not to mention the host states they are suing (Mostafa 2008: 268). It also clearly influences tribunal decision-making. Knahr (2007) observed a trend in arbitral practice against successful claims of indirect expropriation:

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[22] Brunetti (2003: 151) argues that this doctrine descended from the Iran-US Claims Tribunal, noting for example the ruling in the *Tippetts* case: "The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact." *Iran-US Claims Tribunal, Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA, 6 IRAN-U.S. C.T.R., at 219 et seq.* See also Dolzer 2002, Olynyk 2012.
[23] For more on the implementation of police powers doctrine, see Weiner 2003, Heiskanen 2003, Vicuña 2003, Olynyk 2012.
[24] "Once the jurisprudential fact that ownership itself involves a bundle of intangible rights in relation to property is acknowledged, then it follows that it is not only the outright taking of the whole bundle of rights but also the restriction of the use of any part of the bundle that amounts to a taking under the law" (Sornarajah 2004: 368).

"What becomes also apparent from the most recent cases is the fact that tribunals remain hesitant to actually reach findings of expropriation" (101).[25] In short, the expansion of indirect expropriation into a contradictory body of jurisprudence has made the bar for indirect expropriation rise.

3.2 Lowering Bar for Fair and Equitable Treatment (FET)

Given the higher bar for indirect expropriation, Knahr (2007) articulated investors' clear alternative: "claimants are certainly well advised to pursue claims that they had been treated unfairly and inequitably – the threshold for a finding of a violation of this standard seems to be comparatively lower and has so far promised a higher chance of success" (102). The evolution of jurisprudence on indirect expropriation created incentives for tribunals, and thus litigants, to turn to the absolute treatment standard called fair and equitable treatment (FET).[26] Today, common causes of adverse host government action that lead foreign firms to invoke the FET standard include: violations of due process in domestic judicial and administrative proceedings; non-transparency about government policies and procedures; arbitrary, unreasonable, or discriminatory treatment; policy changes that violate legitimate expectations about the regulatory environment; and acting in bad faith towards foreign firms. Even a cursory glance at these causes suggests that state actions that trigger an indirect expropriation claim make also be likely to underpin an FET claim.

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[25] Today, the understanding among lawyers in this space is that tribunals are increasingly unwilling to make a finding of indirect expropriation if a host government's actions are only temporary or reduce the value of an investment only incrementally (Interview, Los Angeles, May 2018).

[26] Less pertinent to our argument is the "full protection and security" absolute treatment standard that requires that host states refrain from military attacks against foreign firms and their property. It is also often interpreted to require that host states provide basic protection against attacks by third parties, like rebel groups and militias. For an illustration, see for example See *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3.

In early ISDS cases, the bar for FET was high: FET was vague, with no clear identity of its own, with one scholar noting that "the content of this standard has caused much anxiety" (Sornarajah 2004: 235-236). *Metalclad* was again a pivotal case in its development: the *Metalclad* finding that "Mexico failed to assure a transparent and predictable framework" for the US investor typifies how FET has come to be interpreted (cited in Lowenfeld 2007: 557; see also Sornarajah 2004). Transparency and predictability are core to the concept of "legitimate expectations" that has come to underpin FET rulings. Tribunals now consider FET claims per a legitimate expectations test: at the time of the claimant's initial investment, could they reasonably and legitimately expect that the offending state action would not take place?[27] For example, the tribunal in *Grand River v. USA* found no FET violation even though the new US regulation at issue did significant harm to the claimant's investment; the tribunal's reasoning was that the claimant had been exploiting what was in truth a loophole in US tobacco regulation, and the claimant could not reasonably expect that the loophole would not eventually be shut.[28]

As recounted by Sornarajah, "It was only when tribunals started including the violations of legitimate expectations…that the fair and equitable standard dawned suddenly as the driving force behind investment arbitration" (2017: 416).[29] Given "the fact that expropriation has become difficult to establish where there is no direct taking of property" (Sornarajah 2017: 554), there was room for an alternative legal claim to overtake that of indirect expropriation, and FET based on legitimate expectations has done

[27] Dolzer (2002) called for "legitimate expectations" to be a concept used in assessing indirect expropriation (78-79). Vicuña (2003) noted early developments of "legitimate expectations" standards around indirect expropriation in UK courts (193). Yet the concept today is squarely associated with FET.

[28] *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, NAFTA*, filed in 2004 and award issued in 2011.

[29] Sornarajah (2017) claims that "legitimate expectations" is a concept that was "plucked from the air" (417).

so. In short, the clearer jurisprudence on FET created incentives for tribunals to prioritize FET claims over claims of indirect expropriation, and for litigants to adjust the thrust of their arguments accordingly.

For at least for some arbitrators, the shift to FET was an intentional way to avoid continuing to expand the definition of expropriation into more nuanced judgements of what constituted an indirect taking. Perhaps inevitably, as FET has gained traction with tribunals, investors have responded accordingly by invoking FET claims in response to a broader swath of events. For example, in 1999, the UN Conference on Trade and Development wrote that "there is little authority on [FET's] application," but by 2012 provided definitions of many categories of FET violations (Sornarajah 2017: 417). Just as occurred in the development of indirect expropriation jurisprudence, concerns over expanding the definition of FET are emerging. Sornarajah (2017) worries that recent awards have made FET "the most important provision in the investment treaty, virtually absorbing all other claims that can be made under the treaties" (241). Whatever the normative implications of the expansion of FET, this worry underscores our bigger point that jurisprudence is dynamic: indirect expropriation used to virtually absorb all regulatory-related claims, and now FET may be filling a similar role.

For our purposes, the takeaway from this jurisprudential history is the following: we cannot infer trends in the quality of cases from changes in indirect expropriation win-rates over time, because tribunals and litigants changed their legal strategies as the controversy around indirect expropriation raised the bar on those rulings. Nor can we infer trends in quality from FET rulings, as their relative unimportance before the emergence of legitimate expectations tests conditioned tribunals' willingness to rule on FET claims and thus investors' interests in making them. Perhaps FET will someday go the way of indirect expropriation, such that tribunals and litigants turn to another standard. Lastly, it would be wrong to put much stock in inferences of case quality by comparing early indirect expropriation win-rates with late FET win-rates, because judicial economy is taking place across the population of claims made as the bars are changing.

4 Empirical Evidence

To support our arguments rooted in jurisprudential history, we use novel data on the claims foreign investors have made when filing for ISDS arbitration, including a careful analysis that distinguishes between lost claims and claims on which the arbitral tribunal does not rule. This exercise further underscores that the observable evidence on which critics have relied does not demonstrate that today's ISDS cases are trending toward less legal merit.

4.1 Anatomy of an Investor-State Dispute Case

Before discussing the data, we provide a brief overview of the ISDS process. Figure 1 presents the basic timeline of an ISDS case. First, the claimant files their case against the host state, including a list of alleged violations of the provisions of the relevant IIA or contract. Next, arbitrators examine the claimant's case and decide whether the court has standing to rule on the investor's claims. If jurisdiction is declined, the case ends and none of the alleged claims receive a ruling. Jurisdiction is often declined for reasons unrelated to any of the alleged claims, such as challenges to the claimant's ownership of the investment[30] or a finding that the investor has failed to comply with the dispute settlement

[30] For example, see *Romak S.A. v. The Republic of Uzbekistan, PCA Case no. AA280,* decision issued 2009.

procedures outlined in the relevant IIA.[31] If arbitrators find that they do have jurisdiction to rule on the case, the proceedings advance to the merits stage.

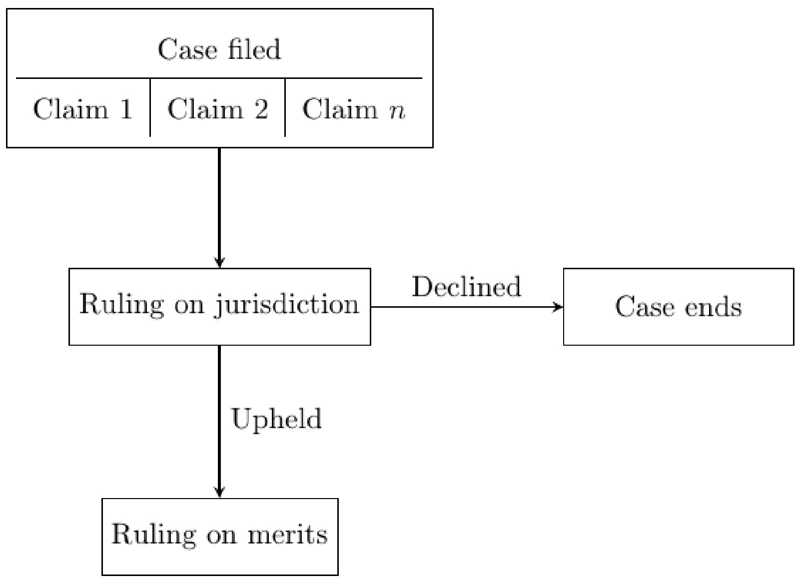

Figure 1: Timeline of an ISDS case

Once a case has advanced to the merits stage, the tribunal examines each claim individually. For each claim, there are three possible ruling categories: it can be upheld, declined, or not ruled on at all. Figure 2 shows the possible outcomes for a case in which the investor alleges two claims, based on the tribunal's decisions on each claim.[32] Note that the only requirement for a case to be classified as an investor victory is that a single one of the investor's claims be upheld. This means that, conditional on one of an investor's claims being upheld, the outcome of the case is unchanged regardless of whether the second claim receives a ruling or not. It is problematic not to distinguish claims that were not ruled on

[31] For example, see *Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12,* decision issued 2012.
[32] It is also possible that one claim be declined and the other not ruled, resulting in a state win. As will be discussed, however, this outcome effectively never occurs in practice.

from claims that were ruled on and declined; this leads to the conflation of claims that were found to lack merit and claims whose merit went unexamined. As will be discussed, we make the distinction between nonruled and declined claims in our novel data, which allows us to highlight trends of judicial economy in international investment arbitration.

Claim 1 decision	Claim 2 decision	Case outcome
Upheld	Upheld	Investor win
Upheld	Declined	Investor win
Upheld	Not ruled	Investor win
Declined	Declined	State win

Figure 2: Potential outcomes of ISDS cases, conditional on reaching merits stage

4.2 Data

Our database of investor-state arbitration cases includes those brought at the World Bank's ICSID, those available in the commonly used UNCTAD Investment Dispute Settlement Navigator, and several dozen additional cases not present in UNCTAD.[33] Our data includes all cases filed through 2017 with public ruling documents available, but most recently filed cases are either still pending or the ruling documents have yet to be made public.[34] Due to our concern that such small samples may not be representative, we only present data from cases filed from 1987 (the first modern ISDS case) through 2012, with rulings assessed as

[33] Expanded from Wellhausen 2016. Some cases excluded from UNCTAD are brought under investor-state contracts rather than treaties. That distinction means little for our ability to accurately judge trends in the quality of cases brought in international tribunals over time.
[34] For example, only 8 of the 76 cases filed in 2015 currently have public documents available (as of November 2018).

of November 2018. This covers 317 cases, of which 154 (49 percent) had a pro-investor ruling, 74 (23 percent) had a pro-state ruling on the merits, and 89 (28 percent) had a pro-state ruling on jurisdiction.

Note that not all ISDS cases are public: while all cases heard at ICSID are known, cases under UNCITRAL rules have been able to be kept private, particularly when triggered by an investor-state contract rather than an international treaty. Further, legal texts are regularly redacted, especially in rulings dating farther back in time. Litigants often refuse to disclose the content of their initial filings as well as the outcome of arbitration, including the text of rulings, the direction of rulings, and the compensation awarded (if any) (Hafner-Burton, Steinert-Threlkeld, and Victor 2016). Litigants also can and often do settle cases after formally beginning arbitration but before the tribunal reaches a ruling; the terms of these settlements are rarely public.

These realities generate biases in the set of cases on which analysts can make inferences about the quality of investor claims over time. It could be that investors tend to redact information in cases in which their claims are weak or unsuccessful; this would mean that the body of public information is biased toward higher-quality cases. If so, existing work has faced a high hurdle in showing declining quality among a non-random sample that might be comprised of exactly the cases increasing in quality over time. Our point is that trends on filings and rulings cannot in themselves establish whether the quality of cases over time increases or decreases, irrespective of transparency-related biases. While we can only explore public filings and rulings, our arguments regarding judicial economy and changing legal standards would apply to all cases should they ever be known.

Our novel empirical contribution is to code several aspects of the legal claims and rulings made in ISDS cases in order to provide evidence consistent with our arguments.[35] Our dataset codes 1,109 legal claims in 317 ISDS arbitrations filed from 1987 through 2012 that were ruled on by the end of 2018. Cases are coded using original case documents, mainly the Notice of Arbitration, the Award, and all available separate opinions and annulment proceeding documents. Therefore, with a few exceptions, no coding was done for cases without public documents. Those exceptions are when highly detailed case notes are available through secondary legal sources, particularly the *ICSID Review.*[36] We coded the instance of a legal claim in an investor's filings; whether that claim was ruled on; the direction of the ruling; as well any role it might have played in annulment or other post-initial ruling proceedings or dissenting opinions. Further, we capture and code text in the rulings concerning the tribunal's choice to rule on (some) claim(s). To characterize this text in general, sometimes the tribunal deems that it lacks jurisdiction to rule on the claim. Sometimes, the tribunal deems it unnecessary to rule, usually because it has already ruled that the offending act has violated a separate claim. We also capture the instances in which the tribunal does not mention a claim in the analytical section of an award, and the instances in which the tribunal does not rule for idiosyncratic reasons.[37]

Specialists may be interested to know that our decision to rely on original case documents sets our claims coding apart from that in the UNCTAD Investment Dispute Settlement Navigator, the data on which many scholars in this area rely. When no official

[35] The full codebook is available in the Online Appendix, available at the Review of International Organizations' webpage.
[36] Links to external sources are provided in the replication files.
[37] These include the tribunal noting special agreements between the parties and partial settlements that make a ruling unnecessary.

case documents are available, UNCTAD attempts to gather a list of claims from third-party sources such as news outlets; for cases filed through 2012, UNCTAD reports claims and rulings on 21 cases for which we do not have official case documents. We believe that UNCTAD's method of gathering claims leads to underreporting. News outlets are likely to report on only the most salient claims (such as expropriation), or on only claims that received rulings (either pro-investor or pro-state). Thus, cases coded from third-party sources are likely to underestimate the total number of claims and overestimate the percentage of claims that receive rulings. In order to identify instances of judicial economy, it is important that we have access to the full set of legal claims in each case. Because case documents remain private only when neither party wishes to make them public, excluding cases with private documents could bias our observed trends if such cases differ systematically from cases with public documents. However, because both states and investors can choose to unilaterally release ruling documents, we argue that private cases are unlikely to be biased towards either state or investor; even if an investor would prefer not to release documents in a pro-state ruling, for example, the state could do so without the investor's permission.

An investor is constrained in the claims it makes based on the claims available in the underlying treaty or contract it invokes in its ISDS filing. While the body of thousands of IIAs have many similarities, there are considerable differences in the extent to which they preserve what Broude, Haftel, and Thompson (2018) call "state regulatory space." One way in which this variation manifests is in the kinds of claims available to investors in ISDS. Today, effectively all ISDS-enabling IIAs provide investors a standard menu of six claims: direct expropriation, indirect expropriation, FET, full protection and security, national treatment (NT), and most-favored nation treatment (MFN).[38] Our main analyses focus on trends in these claims, as investors' choices to invoke other claims beyond these are constrained based on the treaties and contracts to which they have access (and any possible treaty-shopping within that set). However, in robustness in the Appendix and in our replication data, we consider all claims.

Specialists may be interested to know how we code FET claims and minimum standard of treatment (MST) claims, especially as our coding rule is different from that employed by UNCTAD.[39] In brief, there is considerable disagreement in legal practice and scholarship over the meaning and even the existence of MST (Guzman 1998; Paparinskis 2013). FET is sometimes referred to as the modern-day version of MST (Blandford 2017, Haeri 2011, Jiminez 2001).[40] UNCTAD treats MST and FET claims as necessarily implying one another: if an investor alleges an FET violation or an MST violation, UNCTAD codes the existence of both an FET and an MST violation. This results in UNCTAD recording significantly more MST and FET claims than we do, as each incidence of one of the claims is double-counted as an incidence of the other.

In contrast, we see considerable support for the view that FET should be considered as an autonomous standard (separate from MST) in international investment law. In particular, Kalicki and Medeiros (2007) point out that the development of the legitimate expectations test has moved FET away from the objective tests of MST (investors must have access to courts, for example) and towards its current status as a more context-

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[38] See Appendix Figure 6a for longitudinal trends in the six core claim types.
[39] See Appendix Figure 3a for more information comparing our data to UNCTAD data.
[40] NATFA parties in 2001 clarified that, under the treaty, FET does not require more than MST, and the US has included language on this point in its subsequent IIAs (Lowenfeld 2007: 556-557).

specific protection (could the investor have foreseen the offending state action at the time of investment?). Dumberry (2016) argues that the independence of FET and MST is evidenced by the fact that FET clauses began to be implemented in IIAs during the 1960s and 1970s, an era in which the MST protection was highly contested. Haeri (2011) further argues that separating FET from MST (and sometimes excluding MST altogether) was an intentional move on the part of developing states when designing their IIAs: developing states wanted to prevent the expansion of MST, as such an expansion would disproportionately disadvantage states that do not have the ability to meet the requirements set by developed states. Defaulting to double-counting FET and MST ignores the political context in which the claims originated. In the Appendix we show that our identified trends are robust to considering MST claims as a seventh claim in addition to the core set of six.[41]

4.3 Patterns

To illustrate the trends of judicial economy and moving bars in international investment arbitration, we present a series of figures generated from our original claims coding dataset.

4.3.1 Judicial Economy

To illustrate arbitrators' usage of judicial economy, we document the gap between the number of claims alleged by investors and the number of claims that receive rulings. As explained above, in the interest of maximizing comparability across IIAs, we present here only the set of core claims that are common to most investment agreements. That is, investors can make up to six claims and tribunals can make up to six rulings. Investors

[41] See Appendix Figures 4a and 5a.

alleged an average of 2.3 claims per case, with a standard deviation of 1.2 claims. In the Appendix, we present figures that include all alleged claims and rulings; unsurprisingly, the average number of alleged claims is higher (3.5 per case, with a standard deviation of 1.6 claims), but the trends identified here are robust.[42]

Figure 3 displays the percentage of alleged claims that receive rulings over time, and the average number of core claims alleged per case. With the exception of 1992 (during which there was only one case, which was thrown out on jurisdiction), all claims brought by investors received rulings from arbitrators until 1997. After 1997, the proportion of claims receiving a ruling fell substantially, dropping to less than 50 percent in 2006 and again in 2009. While the proportion of claims receiving a ruling has fallen steadily since 1997, the average number of claims alleged per case remained fairly stable; this suggests that the declining proportion of ruled claims cannot be explained by an upward trend in the number of claims alleged per case.

[42] See Appendix Figures 1a and 2a.

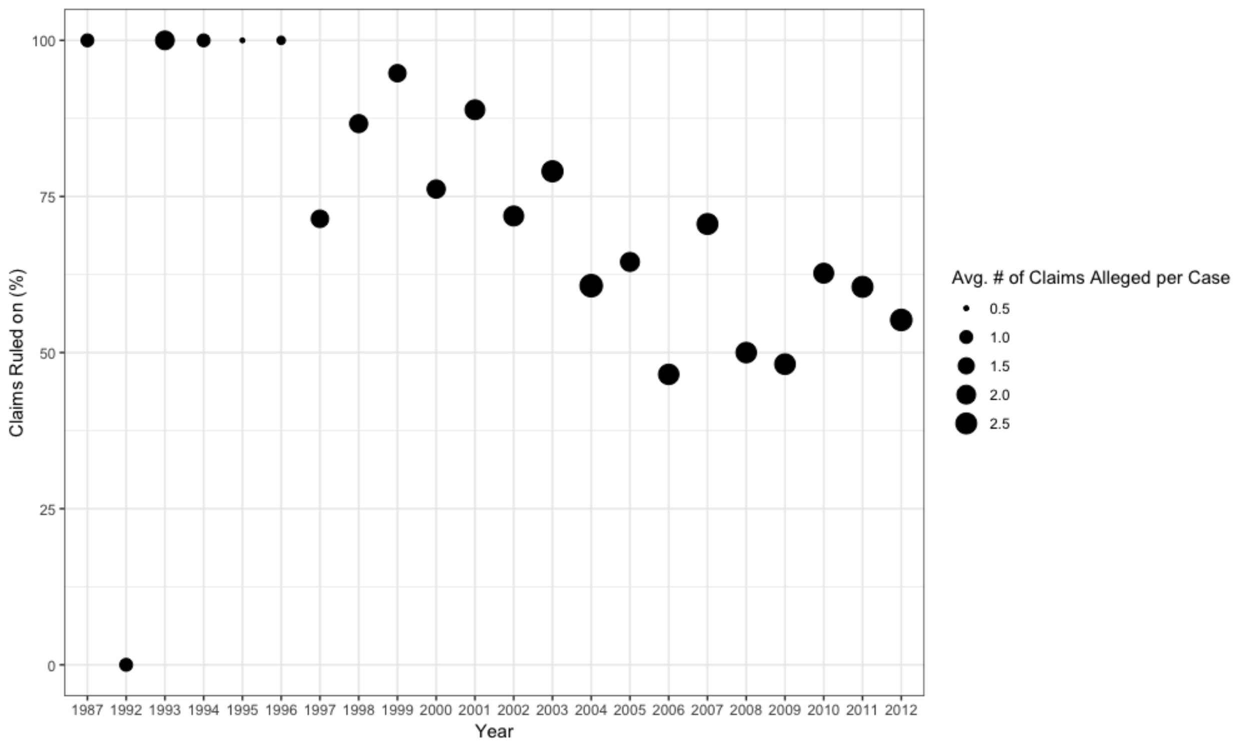

Figure 3: Over time, a lower percentage of alleged claims receive rulings (by year of case filing, 1987-2012)[43]

It is important to emphasize that Figure 3 includes jurisdiction losses; as mentioned previously, none of the alleged claims receive a ruling when arbitrators decide that they lack jurisdiction to try a case. Recall that, in order for judicial economy to be present, at least one of the alleged claims must receive a pro-investor ruling. Thus, in order to be sure that the trend in Figure 3 is attributable to judicial economy, we must make sure that an increase in jurisdiction losses alone is not driving the trend. To do so, Figure 4 presents the same information as Figure 3 but restricts the data to cases in which (1) the tribunal issued a ruling on the merits, and (2) in which the investor won at least one claim. This restriction limits the number of cases from 317 (as in Figure 1) to 154. Here, the pre-trend is even stronger: when jurisdiction losses are excluded, all alleged claims receive rulings through

[43] Recall that only core claims are counted here; averages lower than 1 are possible, as not all cases contain core claims.

2000. Beginning in 2001, however, the proportion of claims that receive rulings generally decreases throughout the 2000s.

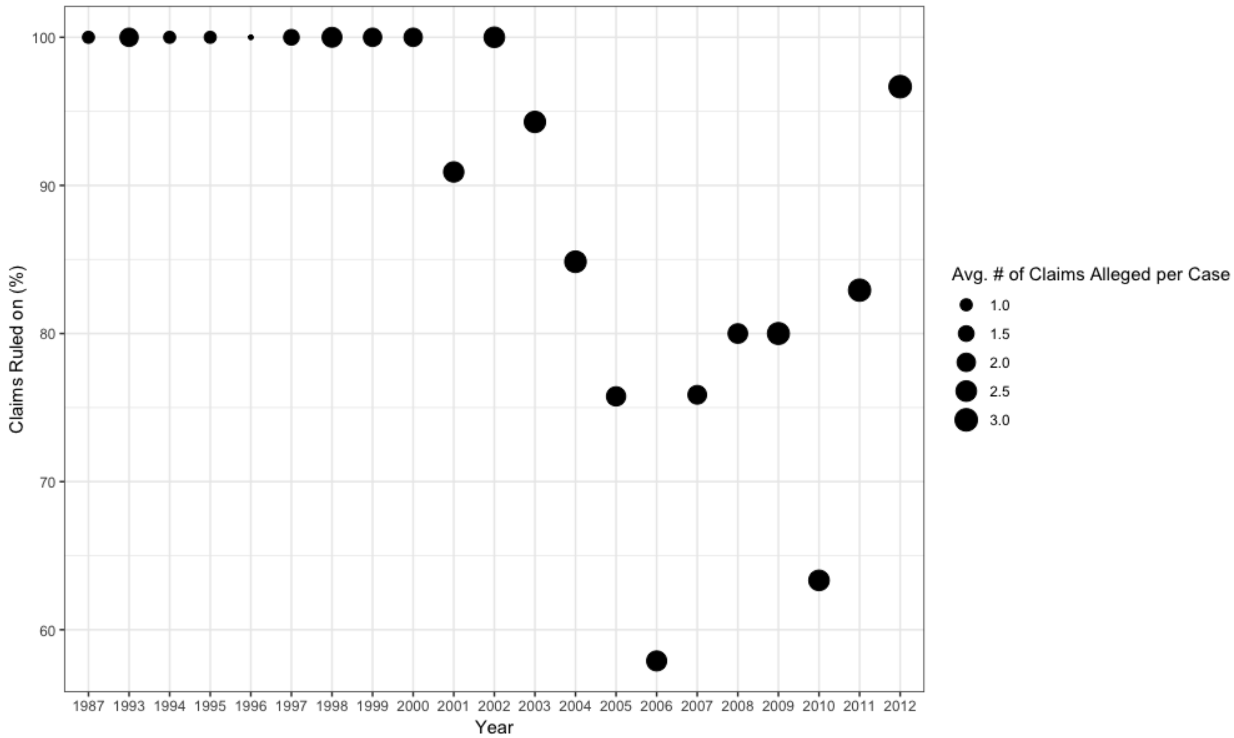

Figure 4: Evidence of judicial economy: Since 2000, a lower percentage of alleged claims receive rulings, conditional on investor victory (by year of case filing, 1987-2012)

Because all of the cases included in Figure 4 were victories for the investor, the declining proportion of claims that receive rulings can be solely attributed to judicial economy; arbitrators issue rulings on only the claims that are relevant for calculating the compensation owed to the investor. Indeed, pro-investor rulings are virtually the only cases in which judicial economy is exercised. Of the 74 cases with pro-state public merits rulings filed between 1994 and 2012, only two contain claims that were not ruled on for non-jurisdictional reasons. This finding makes sense when one considers the rationale behind judicial economy: arbitrators economize by passing over claims that, even if ruled in favor of the investor, would not affect the financial compensation owed to them.

However, states are not awarded compensation even when claims are ruled in their favor; thus, the legal reasoning motivating the use of judicial economy in pro-investor rulings is not applicable to pro-state rulings.

Figure 4 illustrates the problem with treating claims that do not receive rulings as equivalent to losses for the investor: even in cases that investors win, arbitrators commonly do not to rule on many of an investor's claims. In 2010, for example, arbitrators issued rulings on fewer than 65 percent of claims made in cases won by investors. Crucially, the decision not to rule on a claim can tell us nothing about how the tribunal would have ruled, and thus can tell us nothing about the quality of the claim. For this reason, treating non-ruled claims as equivalent to claims that were ruled in the state's favor is inappropriate. We cannot infer the quality of the case from the absence of a ruling.

Recall that one possible incentive for an investment arbitrator to exercise judicial economy is to reinforce state support for ISDS itself. An arbitrator that does not make an unnecessary ruling can be thought of as deferring to the state and, in the process, forestalling a potential political conflict. Our data allow us to consider whether investment arbitrators are more deferential to some kinds of states than others. Recall that in looking at WTO disputes, Brutger and Morse (2015) find that judicial economy is most likely in rulings against the European Union and United States, which they interpret as evidence that WTO judges moderate their adverse rulings against more powerful states. Our analysis suggests that this trend does not hold in ISDS arbitration. First, judicial economy is not present in any case brought against the United States, as the US has never lost a case and, again, there is scant evidence of judicial economy in pro-state rulings. Second, while some EU member states have lost cases, judicial economy is present in only a handful of those cases. Further, judicial economy is rarely exercised in cases brought against any OECD member states: in 13 out of the 17 years in which cases were brought against OECD states, 100 percent of investors' claims received rulings. Thus, we do not find a correlation between powerful respondent states and judicial economy in ISDS. Given the increasing number of cases against OECD states, we suggest researchers revisit this question in the future, especially as they increasingly lose.

4.3.2 Moving Bars

We have argued that trends in win-rates for individual claims can be partially attributed to the shifting legal standards by which the claims are judged. In particular, we argue that the bar for indirect expropriation claims has risen while the bar for FET claims has lowered, and that this realignment of legal standards has resulted in a substitution effect. An observable implication is that, in cases in which both claims are alleged, arbitrators should increasingly choose to rule on, and to rule in favor of, FET claims instead of indirect expropriation claims. To illustrate this, we present two trends in FET and indirect expropriation claims over time: (1) the percentage of cases in which the claims are alleged, and (2) the percentage of cases in which the claims are ruled on.

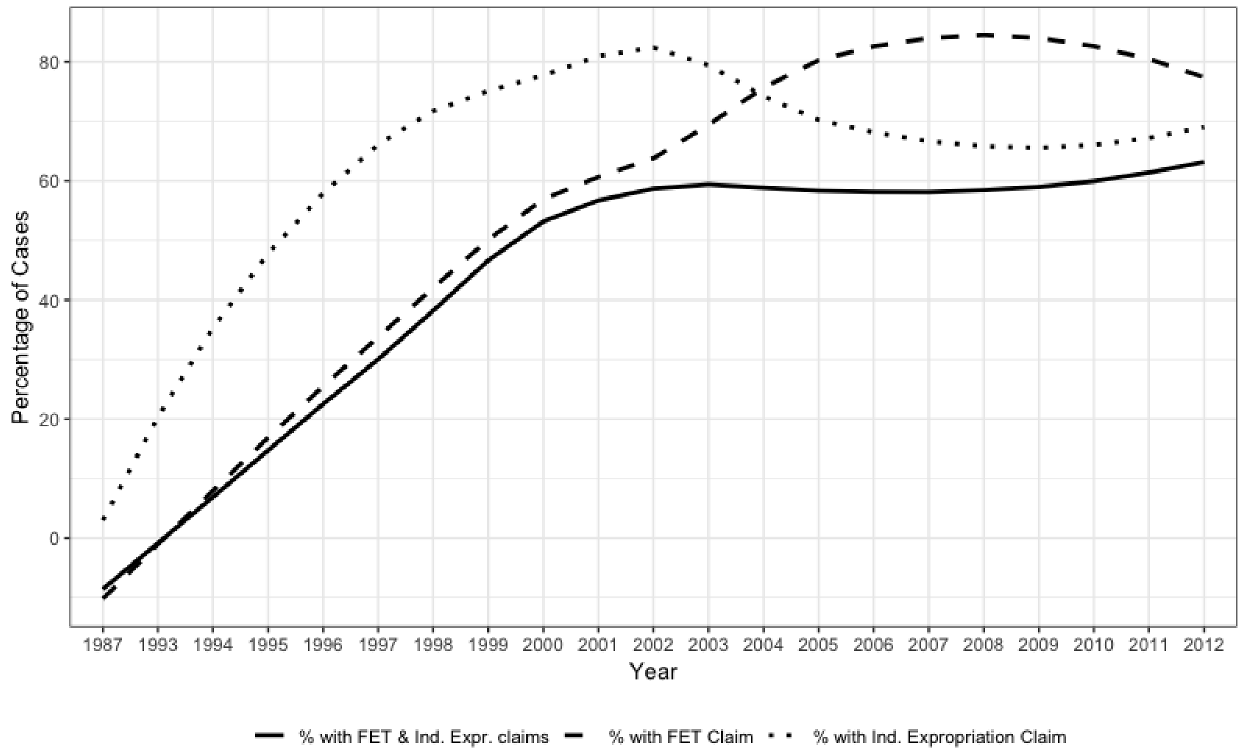

Figure 5: Shifting legal standards over time: Since 2004, investors make FET claims at higher rates than indirect expropriation claims

Figure 5 shows the percentage of ruled cases with FET and indirect expropriation claims. The lines display trends calculated using locally estimated scatterplot smoothing (LOESS). We exclude cases that were thrown out on jurisdiction, because a claim cannot possibly be ruled on if the case does not advance to the merits stage. The graph highlights three trends. First, FET claims became more common than indirect expropriation claims in cases filed in 2004 or later,[44] which corresponds with the jurisdictional history we recounted above. Second, despite the increasing frequency of FET claims, Figure 5 also demonstrates that indirect expropriation continues to be a common claim. In most years since 2004, for example, indirect expropriation claims have been present in well over 50 percent of ruled cases. While the standards for indirect expropriation have been raised,

[44] A one-tailed t-test provides support for this claim (p = .006). In cases filed before 2004, the opposite trend holds: indirect expropriation claims are significantly more common than FET claims (p = .002).

investors have not abandoned the claim in favor of FET. Indeed, why should they? The marginal cost of adding an indirect expropriation claim to a filing is likely often low enough to be outweighed by the expected value of a favorable ruling on the claim, even if such a ruling is a remote possibility. In context of the evolution of jurisprudence on indirect expropriation, we interpret the continued presence of indirect expropriation claims as strategic, and not clearly indicative of the quality of the cases filed.

Third, Figure 5 shows the percentage of cases in which investors alleged both FET and indirect expropriation claims. Here, we see a striking realignment over time: until 2003 almost every FET claim was combined with an indirect expropriation claim, though the converse is not true. As recounted above, arbitrators did not treat FET as an independent standard until the early 2000s, and until that time investors invoked FET primarily as a supplementary claim for expropriation. In the years since 2003, however, the trend has reversed: almost every indirect expropriation claim is paired with an FET claim, though the converse is not true. In this period, the legal community began to treat indirect expropriation more as a subset of FET.

While Figure 5 displays the percentage of ruled cases with FET and indirect expropriation claims alleged, Figure 6 displays the percentage of cases with FET and indirect expropriation claims that receive rulings. Again, the lines displayed are LOESS trends. First, note that ruled FET claims overtake ruled indirect expropriation claims in the mid-2000s, parallel to Figure 5.[45] Taken together, Figures 5 and 6 show that FET claims are

[45] A one-tailed t-test supports the claim that there were significantly more ruled FET claims than indirect expropriation claims beginning in 2004 (p = .054). In cases filed before 2004, the opposite trend holds: ruled indirect expropriation claims are significantly more common than ruled FET claims (p = .02).

alleged and ruled on in a greater proportion of cases than indirect expropriation claims in cases filed since the realignment of the mid-2000s.

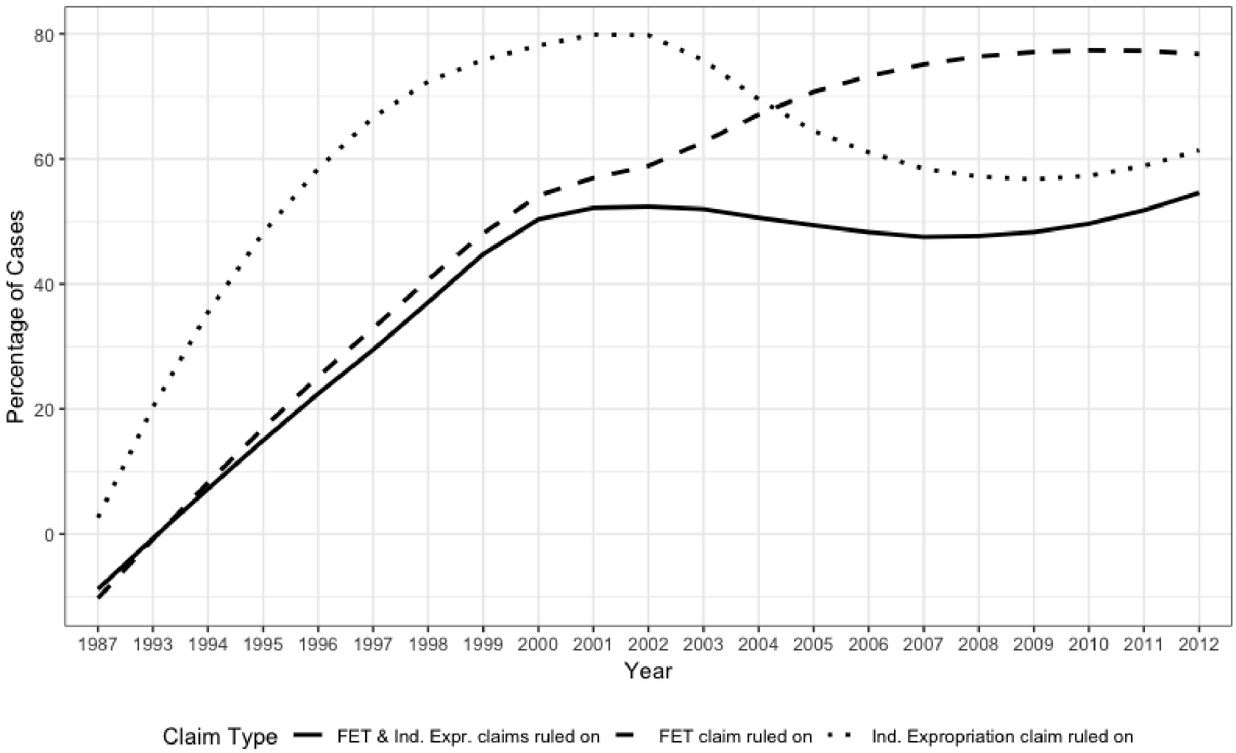

Figure 6: Shifting legal standards over time: Since 2004, arbitrators rule on FET claims more often than indirect expropriation claims

If the rise of judicial economy were the only change occurring in international investment arbitration during this time period, this result would be somewhat puzzling; we might expect an upswing in the frequency of alleged FET claims to be met with an equalizing downswing in the proportion of FET claims that receive rulings. However, the finding can be understood when viewed in the context of shifting legal standards. The FET standard has been broadened over time to include protection against state actions that would constitute indirect expropriation, and arbitrators have been attempting to limit the scope of the indirect expropriation standard. Thus, arbitrators have incentive to rule on FET claims first before deciding whether it is necessary to rule on additional claims, as the finding that a state has violated the FET standard can allow them to economize by opting not to rule on (and potentially expand the interpretation of) indirect expropriation claims.

One notable trend in Figure 6 is in the percentage of cases with both FET and indirect expropriation rulings over time. Figure 6 shows that beginning in 2003, a gap began to form between the percentage of cases with ruled indirect expropriation claims and the percentage of cases in which both FET and indirect expropriation claims are ruled on.[46] This gap represents the substitution effect between FET and indirect expropriation: indirect expropriation claims are highly likely to be paired with FET claims, but they are increasingly less likely to be ruled on alongside FET claims. Again, the substitution effect can be explained by shifting legal standards. As the FET standard is broadened to protect investors from state actions that constitute indirect expropriation, we would expect virtually all indirect expropriation claims to be paired with an FET claim. However, for reasons previously mentioned, arbitrators have incentives to rule on FET claims and economize on indirect expropriation claims, thus awarding the investor the damages owed to them while avoiding further expansion of the indirect expropriation standard.

5 Conclusion

In this article, we argue that observable trends in legal filings and rulings can give us little concrete evidence of the quality of cases brought under modern international investment law. Specifically, we cannot use this data to conclude whether legal claims made in ISDS cases have, over time, trended toward lower (or higher) merit. Contra arguments in

[46] A one-tailed t-test supports the claim that, beginning in 2004, there were significantly more cases with ruled indirect expropriation claims than cases with both ruled FET and indirect expropriation claims ($p < .001$). Prior to 2004, however, there is no significant difference between the number of cases with ruled FET claims and the number of cases with both ruled FET and indirect expropriation claims ($p = .31$).

the vein of Pelc (2017), we cannot know that frivolous cases are on the rise without changing the focus of our analysis and research methods. In general, we advocate caution for activists and scholars who believe that the quality of cases justifies reform or abandonment of ISDS (e.g. Lencucha 2016). The de facto international investment regime is controversial for a variety of reasons, but there remains a strong business, diplomatic, and scholarly constituency in favor of ISDS. These observers focus on the ability of the regime to reinforce rule of law across national boundaries that, in turn, may reinforce the willingness and ability of economic actors to engage in international commerce.[47] As political scientists, we aim to provide compelling arguments and accurate information about what arguments, on either side, are substantiated by the evidence. With reference to the quality of cases, we contend that it is a problem to overlook the role of judicial economy. We also contend that it is a problem to overlook the fact that legal standards change, even over a relatively short period of time such as that at play here. The realized strategies of arbitrators and lawyers do not provide clear evidence of the actual egregiousness of adverse state action or the extent to which investors inflate its egregiousness.

Having established the problem that current approaches cannot isolate trends in the quality of ISDS cases, we look forward to contributing to a reevaluation of trends in the merit of cases in future work. If claims and rulings cannot provide evidence of the quality of cases, what can? We suggest a research agenda that focuses on domestic political and international market reactions to cases and rulings. Our contention is that, to understand

[47] Wellhausen (2019) establishes that in approximately 31 percent of cases (1990-2016), claimant investors either remain invested in the host state or leave and return to the host state after ISDS arbitration. The implication is that ISDS sometimes enables a return to cooperation consistent with standard goals of the law.

the political economy of the law and systematic biases in the system, we need to focus on how host states and investors might change their behavior as a result of these cases. Moreover, we see considerable, untapped richness in the jurisprudential history of international investment law for political scientists interested in understanding the effects of ISDS.

References

Betz, Timm and Amy Pond. "Foreign Financing and the International Sources of Property Rights." *World Politics* (forthcoming).

Bhala, Raj. "Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)." *Geo. Wash. Int'l L. Rev.* 33 (2000): 873.

Blandford, Andrew C. "The History of Fair and Equitable Treatment before the Second World War." *ICSID Review-Foreign Investment Law Journal* 32.2 (2017): 287-303.

Broude, Tomer, Yoram Haftel, and Alexander Thompson. "Legitimation Through Renegotiation: Do States Seek More Regulatory Space in Their BITs?." Hebrew University of Jerusalem Legal Research Paper 17-1. 2018.

Brunetti, Maurizio. 2003. "Indirect Expropriation in International Law." *Internatioanl Law FORUM du droit international* 5: 150-154.

Brutger, Ryan, and Julia C. Morse. "Balancing law and politics: Judicial incentives in WTO dispute settlement." *The Review of International Organizations* 10.2 (2015): 179-205.

Busch, Marc L., and Krzysztof J. Pelc. "The politics of judicial economy at the World Trade Organization." *International Organization* 64.2 (2010): 257-279.

Davey, William J. "Has the WTO dispute settlement system exceeded its authority? A consideration of deference shown by the system to member government decisions and its use of issue-avoidance techniques." *Journal of International Economic Law* 4.1 (2001): 79-110.

Davis, Christina L., and Sarah Blodgett Bermeo. "Who Files? Developing Country Participation in GATT/WTO Adjudication." Journal of Politics 71.3 (2009): 1033–49.

Diependaele, Lisa, Ferdi De Ville, and Sigrid Sterckx (2019) Assessing the Normative Legitimacy of Investment Arbitration: The EU's Investment Court System, New Political Economy 24.1 (2019): 37-61.

Dolzer, Rudolf. "Indirect expropriations: new developments." *NYU Envtl LJ* 11 (2002): 64.

Dolzer, Rudolf and Felix Bloch. 2003. "Indirect Expropriation: Conceptual Realignments." *International Law FORUM du droit international* 5: 155-165.

Donaubauer, Julian and Peter Nunnenkamp. 2018. „EU Investors versus EU States: International Arbitration of Investment Disputes." *Journal of Common Market Studies* 56(6): 1376-1393.

Dumberry, Patrick. "Has the Fair and Equitable Treatment Standard Become a Rule of Customary International Law?." *Journal of International Dispute Settlement* 8.1 (2016): 155-178.

Franck, Susan. 2019. *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration.* Oxford, UK: Oxford University Press.

Guzman, Andrew T. "Is international antitrust possible." *NyUL Rev.* 73 (1998): 1501.

Hafner-Burton, Emilie M., Zachary C. Steinert-Threlkeld, and David G. Victor. "Predictability versus flexibility: Secrecy in international investment arbitration." *World Politics* 68.3 (2016): 413-453.

Haftel, Yoram Z. and Alexander Thompson. 2018. "When do states renegotiate investment agreements? The impact of arbitration." *The Review of International Organizations* 13(1): 25-48.

Haeri, Hussein. "A Tale of Two Standards:'Fair and Equitable Treatment'and the Minimum Standard in International Law: The Gillis Wetter Prize." *Arbitration International* 27.1 (2011): 27-46.

Heiskanen, Veijo. "The Contribution of the Iran-United States Claims Tribunal to The Development of the Doctrine of Indirect Expropriation." *International Law FORUM du droit international*. Vol. 5. No. 3. 2003.

Helfer, Laurence R. "Exiting treaties." *Va. L. Rev.*91 (2005): 1579.

Jandhyala, Srividya, Witold J. Henisz, and Edward D. Mansfield. "Three waves of BITs: The global diffusion of foreign investment policy." *Journal of Conflict Resolution* 55.6 (2011): 1047-1073.

Jiminez, Maximo Romero. "Considerations of NAFTA Chapter 11." *Chi. J. Int'l L.* 2 (2001): 243.

Johns, Leslie. 2014. "Depth versus Rigidity in the Design of International Trade Agreements." *Journal of Theoretical Politics* 26(3): 468-495.

Johns, Leslie. 2015. *Strengthening International Courts: The Hidden Costs of Legalization* Ann Arbor, MI: University of Michigan Press.

Johns, Leslie and Francesca Parente. 2019. "Of Hacking and Human Rights: Designing the International Law of State Responsibility" UCLA Working Paper.

Johns, Leslie and Krzysztof Pelc (2016) "Fear of Crowds in World Trade Organization Disputes: Why Don't More Countries Participate?" *Journal of Politics* 78 (1): 88-104.

Johns, Leslie and Krzysztof Pelc (2018) “Free-Riding on Enforcement in the WTO” *Journal of Politics* 80 (3): 873-889.

Johns, Leslie, Krzysztof Pelc, and Rachel Wellhausen (2019) “How a Retreat from Global Economic Governance May Empower Business Interests” *Journal of Politics* 81 (2): 731-738.

Kalicki, Jean, and Suzana Medeiros. "Fair, Equitable and Ambiguous: What is Fair and Equitable Treatment in International Investment Law?." *ICSID Review* 22.1 (2007): 24-54.

Knahr, Christina. 2007. “Indirect Expropriation in Recent Investment Arbitration.” *Austrian Review of International and European Law* 12: 85-102.

Lencucha, Raphael. 2017. “Is It Time to Say Farewell to the ISDS System? Comment on ‘The Trans-Pacific Partnership: Is it Everything We Feared for Health?’” *International Journal of Health Policy and Management* 6(5): 289-291.

Lowenfeld, Andreas F. *International economic law*. Oxford University Press, USA, 2007 (second edition).

Lupu, Yonatan. "The informative power of treaty commitment: using the spatial model to address selection effects." *American Journal of Political Science* 57.4 (2013): 912-925.

Minor, Michael S. "The demise of expropriation as an instrument of LDC policy 1980–1992." *Journal of International Business Studies* 25.1 (1994): 177-188.

Moehlecke, Carolina. 2018. “International Investment Law and Challenges to Global Policy Diffusion.” Working paper.

Mostafa, Ben. "The sole effects doctrine, police powers and indirect expropriation under international law." *Austl. Int'l LJ* 15 (2008): 267.

Olynyk, Stephen. "A Balanced Approach to Distinguishing Between Legitimate Regulation and Indirect Expropriation in Investor-State Arbitration." *Int'l Trade & Bus. L. Rev.* 15 (2012): 254.

Palombino, Fulvio Maria. 2010. “Judicial Economy and Limitation of the Scope of the Decision in International Adjudication.” *Leiden Journal of International Law* 23: 909-932.

Paparinskis, Martins. *The international minimum standard and fair and equitable treatment*. Oxford University Press, 2013.

Parish, Matthew T., Annalise K. Newlson, Charles B. Rosenberg. 2011. “Awarding Moral

Damages to Respondent States in Investment Arbitration." *Berkeley J Intl L.* 29(1): 225-245.

Peinhardt, Clint and Rachel L. Wellhausen. 2016. "Withdrawing from Investment Treaties but Protecting Investment." *Global Policy* 7(4): 571-576.

Pelc, Krzysztof J. "What Explains the Low Success Rate of Investor-State Disputes?" *International Organization* 71.3 (2017): 559-583.

Pelc, Krzysztof J. "The politics of precedent in international law: A social network application." *American Political Science Review* 108.3 (2014): 547-564.

Posner, Richard A. "The meaning of judicial self-restraint." *Indiana Law Journal* 59 (1983): 1-24.

Schill, Stephan W. "The Multilateralization of International Investment Law: Emergence of a Multilateral System of Investment Protection on Bilateral Grounds." *Trade L. & Dev.* 2 (2010): 59.

Shany, Yuval. 2006. "Toward a General Margin of Appreciation Doctrine in International Law?" *The European Journal of International Law* 16(5): 907-940.

Shelton, Dinah. "Righting wrongs: Reparations in the articles on state responsibility." *American Journal of International Law* 96.4 (2002): 833-856.

Simmons, Beth. 2014. Bargaining over BITs, Arbitrating Awards: The Regime for Protection and Promotion of International Investment. World Politics. 66. 12-46.

Sornarajah, Muthucumaraswamy. *The international law on foreign investment*. Cambridge University Press, 2017, third edition.

Sornarajah, Muthucumaraswamy. *The international law on foreign investment*. Cambridge University Press, 2004, second edition.

St John, Taylor. 2018. *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences.* Oxford: Oxford University Press.

Strezhnev, Anton. N.d. "Why Rich Countries Win Investment Disputes: Taking Selection Seriously." Manuscript (September 2017).

Sunstein, Cass R. *One case at a time: Judicial minimalism on the Supreme Court*. Harvard University Press, 2001.

Tucker, Todd N. *Judge Knot: Politics and Development in International Investment Law*. Anthem Press, 2018.

Van Harten, Gus. 2010. Five Justifications for Investment Treaties: A Critical Discussion. Trade, Law, and Development 2(1): 1-32.

Vicuña, Francisco Orrego. "Regulatory authority and legitimate expectations: balancing the rights of the state and the individual under international law in a global society." *International Law FORUM du droit international*. Vol. 5. No. 3. 2003.

Von Stein, Jana. "Do treaties constrain or screen? Selection bias and treaty compliance." *American Political Science Review* 99.4 (2005): 611-622.

Waibel, Michael, Asha Kaushal, Kyo-Hwa Chung, and Claire Balchin, editors. 2010. *The Backlash Against Investment Arbitration: Perceptions and Reality.* Kluwer Law International.

Weiner, Allen S. "Indirect Expropriations: The Need for a Taxonomy of" Legitimate" Regulatory Purposes." *International Law FORUM du droit international*. Vol. 5. No. 3. Brill Academic Publishers, 2003.

Weller, Marc. 2011. "Modesty Can be a Virtue: Judicial Economy in the ICJ." Leiden Journal of International Law 24: 127-147.

Wellhausen, Rachel L. 2015. *The Shield of Nationality: When Governments Break Contracts with Foreign Firms.* Cambridge, MA: Cambridge University Press.

Wellhausen, Rachel L. "Recent trends in investor–state dispute settlement." *Journal of International Dispute Settlement* 7.1 (2016): 117-135.

Wellhausen, Rachel L. 2019. "International Investment Law and Foreign Direct Reinvestment." *International Organization.*

Yackee, Jason Webb. "Controlling the Internatioanl Investment Law Agency." *Harvard International Law Journal* 53.2 (2012): 391-448.