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Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration

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Abstract: Is investment treaty arbitration (ITA) tarnished by a bias against developing states? The international investment regime relies heavily on arbitration for the enforcement of its substantive rules but critique has risen as the number of foreign investor claims have stacked up in recent years. Current empirical research is ambiguous in its evaluation of ITA outcomes, but an interesting strand finds that the difference in treatment afforded to developed and developing respondent states in ITA seems to be explained by a conflation of democratic governance and economic development status. We present an elaboration of this conflation theory and, using the largest dataset of ITA cases compiled to date, we conduct a more thorough empirical test of its tenets. Our findings importantly determine that, instead of an anti-developing state bias disfavoring less developed respondent states in ITA, there appears to be a strong pro-developed state bias favoring more developed respondent states in ITA. That is, higher economic development at the respondent state level is associated with lower claimant-investor success rates in ITA. However, we also find partial support for the conflation theory. While a state's overall democratic governance levels per se do not explain the pro-developed respondent state favoritism in ITA, we find that two particular governance aspects—the strength of a state's ability to protect property rights and the degree to which a state maintains impartial bureaucracies—can possibly explain higher degrees of respondent state success in defending against ITA claims. The strength of these state-level governance institutions also possibly explains why relatively wealthy respondent states fare better in ITA than other respondent states.

I. INTRODUCTION

The use of investment treaty arbitration (ITA) continues to be at the forefront of many debates in international economic law and policy. The majority of the more than 3500 international investment agreements (IIAs) signed in the past 60 years include investor-state dispute settlement (ISDS) provisions.[1] By giving foreign investors standing to bring direct claims against states hosting their investments, the regime has produced over 800 ITA claims to date,[2] and the enthusiasm for litigation shows no sign of abating.

In parallel with the growth of ITA cases, there has been an equally significant backlash against its use by a range of vocal states, scholars, and civil society actors. One of the claims is that ITA tribunals disproportionately favor the private property interests of foreign investors over host states' space to regulate and legislate in the public interest. Another critique focuses on how ITA exhibits implicit and explicit biases in both its structure and decision-making processes.[3] Two more particular critiques hold that ITA is inadequately deferential to respondent states and that this results in either a pro-investor or anti-developing state bias. The pro-investor concern is that foreign investors are illegitimately favored in ITA regardless of the particular respondent state that is being sued.[4] The anti-developing state critique holds that foreign investors are more successful when litigating against developing

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[1] Jonathan Bonnitcha, Lauge S.N. Poulsen & Michael Waibel, THE POLITICAL ECONOMY OF THE INVESTMENT TREATY REGIME 94 (2017) (showing that ISDS provisions can be found in over 90 percent of all investment treaties). See also the *International Investment Agreement Navigator*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), http://investmentpolicyhub.unctad.org/IIA/mappedContent#iiaInnerMenu (showing that of the 2572 treaties they have mapped for legal content, 2441 have ISDS clauses).

[2] See PLURICOURTS INV. TREATY ARB. DATABASE (PITAD), https://jus-pitad01.uio.no.

[3] MICHAEL WAIBEL ET AL., THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY (2010) (establishing the term "legitimacy crisis"); *see also* Malcolm Langford & Daniel Behn, *Managing Backlash: The Evolving Investment Treaty Arbitrator*, 29(2) EUR. J. INT'L L. (2018 forthcoming) (outlining a historical overview of the narrative of the "legitimacy crisis" relating to ITA).

[4] *See* José Alvarez & Gustavo Topalian, *The Paradoxical Argentina Cases*, 6 WORLD ARB. & MEDIATION REV. 491 (2012) (distilling the following legitimacy concerns: tribunals show insufficient deference to national law and the right of sovereign states to regulate in the public interest; tribunals fail to respect the rights of states to take national emergency action in response to fundamental national security threats; ITA outcomes are skewed in favor of investors, ITA is a "one trick pony" that protects investment at the expense of all other policy goals; ITA disputes that should only be heard in public forums are erroneously privatized; and, as a species of global administrative law, ITA fails to reflect the rule of law values found in national administrative and constitutional law. The result is an underlying singularity: "the investment regime is the enemy of the state."); *see also* DANIEL BEHN, OLE KRISTIAN FAUCHALD & MALCOLM LANGFORD, EDS., EMPIRICAL PERSPECTIVES ON THE LEGITIMACY OF INVESTMENT TREATY ARBITRATION (forthcoming 2018) (showing how these concerns have attracted a healthy doctrinal-normative debate and increasingly empirically oriented analyses of various shades).

respondent states than developed respondent states. This latter critique is of a more recent pedigree. It initially emerged in the wake of relatively successful litigation against a few Latin American states in the mid-2000s[5] but increased with the expanding reach of ITA.[6]

So far, there have only been a few tentative efforts towards empirically assessing such outcome asymmetries in ITA, and the results are mixed. One study analyzed the nature of arbitrator decision-making authority in 140 ITA cases, and found that tribunals were more likely to engage in expansive interpretation favoring foreign investors when the respondent is a developing state.[7] Another study looked at outcomes in ITA cases through 2010 and found that less developed respondent states were twice as likely to lose an ITA case in comparison with cases defended by developed respondent states.[8]

On the other hand, a series of empirical studies by Franck and colleagues consistently find that there is no demonstrable relationship between a respondent states' development status and outcomes in ITA.[9] Most importantly, these studies put forth an interesting theoretical argument: the perceived relationship between respondent state development status and ITA

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[5] Particularly with the flood of ITA cases against Argentina in the wake of its economic crisis of 2000–01, as well as a significant number of ITA cases against other states in the region (e.g., Ecuador, Bolivia) in the same period. See Zoe P. Williams. *What, When, Where and Why? Patterns in Investor-State Arbitration, in* RETHINKING BILATERAL INVESTMENT TREATIES. CRITICAL ISSUES AND POLICY CHOICES (hereafter RETHINKING BITs) 32 (Kavaljit Singh & Burghard Ilge ed., Both Ends/Madhyam/SOMO, 2016); Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L. L.J. 446, 448 (2009) (discussing the suggestion that mostly poor countries get caught up in investor-state disputes, and doubts over the impartiality of the system in certain Latin American countries) and Kevin Gallagher & Elen Shrestha, *Investment Treaty Arbitration and developing Countries: A Re-Appraisal,* 12 J. WORLD INVESTMENT & TRADE 911 (2011) (making the argument that relative to their proportion of global investment, developing countries are more at risk than developed countries under ITA).

[6] The oft-repeated anecdote in this regard is the correct claim that the United States has never lost a case when sued in ITA. See Rachel L. Wellhausen, *Recent Trends in Investor–State Dispute Settlement* 59.2 JOURNAL OF CONFLICT RESOLUTION 15 (2015). See also the *Investment Dispute Settlement Navigator*, UNCTAD, http://investmentpolicyhub.unctad.org/ISDS (showing that of the 16 treaty-based ITA cases the United States had been a respondent in as of April 2018, they had lost none).

[7] Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, 50 OSGOODE HALL L.J. 211, 213 (2012).

[8] Thomas Schultz & Cedric Dupont, *Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study*, 25 EUR. J. INT'L L. 1147, 1167–68 (2014) (finding ITA to remain as a largely neo-colonial instrument that "favours the 'haves' over the 'have-nots,' allowing or making the international investment regime to be harder on poorer countries than on richer countries").

[9] *See* generally Susan Franck & Linsey Wylie, *Predicting Outcomes in Investment Treaty Arbitration*, 65 DUKE L.J. 459 (2015); Susan Franck, *Conflating Politics and Development: Examining Investment Treaty Outcomes*, 55 VA. J. INT'L L. 13, 14 (2014); Susan Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435, 487 (2009).

outcomes may have conflated development concerns with concerns relating to democratic governance or respondent states' internal governance practices. In short, they point to the fact that because economic development and domestic governance are such interdependent phenomena, any anti-developing state bias in ITA may actually stem from developing states' poor domestic governance structures as opposed to its relative wealth or poverty.

If this notion of conflation is correct, it may not only help us understand outcome patterns in ITA—it also lessens the normative concerns with the international investment regime as a whole. If asymmetries in ITA outcomes are an artefact of poor respondent state quality of governance, we should be less perturbed than if it stems from respondent state economic development levels. ITAs are in fact designed to trigger litigation in response to poor host state governance.[10] However, if an asymmetry in ITA outcomes is unmediated by the quality of a respondent state's domestic governance, we should be more worried. A system of international adjudication that disfavors economically disadvantaged states for no other reason than their relative levels of wealth or poverty would be deeply troubling.

However, we believe the studies cited above are limited in two key respects. They are severely undertheorized in terms of understanding what may drive biases or conflation, and the empirics are hampered by poor data and sample size issues. This article seeks to make amends on both accounts.

The first objective of this article is therefore to provide a theory-grounded explanation for potential outcome asymmetries in ITA as based on respondent state characteristics. While the overarching aim is to test the conflation hypothesis formulated by Franck and colleagues, we discuss potential reasons for why both respondent state development and domestic quality of governance levels may matter for ITA outcomes. However, because overall levels of democratic governance (which is the only domestic governance aspect assessed by Franck and colleagues) is such a multivalent concept, we present a more disaggregated theory.[11] More specifically, we discuss whether the following *six* respondent state-level characteristics may more accurately

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[10] The most common ITA claims brought by foreign investors as based on IIA breaches include: state failure to compensate for expropriations (both directly and indirectly), failures to provide fair and equitable treatment (FET) or full protection and security (FPS), arbitrary and discriminatory treatment, failure to provide most-favored nation (MFN) treatment and/or national treatment. *See* Bonnitcha, Poulsen & Waibel, *supra* note 1, 94 (listing the frequency of alleged and found breaches in ITA).

[11] *See* Daniel Behn & Malcolm Langford, *Trumping the Environment: An Empirical Perspective on Investment Treaty Arbitration*, 18 J. World Inv. & Trade 14 (2017) (discussing that democratic governance has multiple components, which may sometimes push in different directions in relation to foreign investor protection. For example, a healthy participatory democracy provides ample space for populist-driven interference with foreign investors. We have, for example, tracked levels of public protest in ITA cases concerning environmental measures. In some cases, protests seem to be motivated by populism rather than environmental concerns).

explain a state-level bias in ITA: political regime stability, degrees of executive constraints, bureaucratic quality, strength of property rights protection, quality of the judiciary, and levels of political corruption. Equally, the relationship between respondent state economic development status and ITA outcomes has not been fully unpacked. For example, the current discourse views bias as a prejudice against less developed respondent states, but it is equally relevant to assess whether ITA may favor more developed respondent states.[12] Further, if either claim is correct, then it is important from a policy perspective to better understand if there are particular aspects of a less or more developed states' domestic quality of governance that is actually driving this tendency (as opposed to its general levels of economic development).

Our second objective is to test our expansions of Franck and colleagues' conflation hypothesis against a larger, up-to-date sample of ITA case outcomes.[13] and a broader set of state level indicators. In line with our disaggregated approach to the conflation theory, we apply more specific quality of governance indicators, an improved measure for capturing democratic governance at the general level, and a continuous variable—as opposed to a categorical variable—for measuring a state's economic development levels. It should be noted that our focus in this article is to reach a better understanding of the relationship between respondent state characteristics, including both economic development indicators and quality of governance indicators, and ITA outcome. While we leave important variation in the quality of legal claims at the case level untouched, we include an extensive set of controls attempting to capture some of this non-state-related variance. However, herein there are many opportunities for future research.

The article proceeds as follows. After providing a brief introduction on the rise of the international investment regime and the explosion of treaty-based arbitration (Section II), we set out our expanded conflation theory and discuss how a respondent state's economic development status on the one side, and its quality of governance on the other, might affect ITA outcomes (Section III). Next, we introduce our unique PluriCourts Investment Treaty Arbitration Database (PITAD) dataset[14] and discuss various ways in which ITA outcomes and respondent state characteristics can be operationalized (Section IV). We then present our analysis of how respondent state characteristics relate to outcomes in ITA (Section V). Our primary emphasis is on testing the viability of the conflation thesis, but we also discuss some interesting findings from our control variables. Finally, we conclude with some caution and suggest how future studies could focus on further examining the causal mechanisms that explain ITA outcomes (Section VI).

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[12] See for example Wellhausen, *supra* note 6 (on the case of why the United States has never lost a ITA case).

[13] *See* PITAD, *supra* note 2.

[14] *See* PITAD, *supra* note 2.

II. THE INTERNATIONAL INVESTMENT REGIME AND ITA

There are two related explanations for the emergence of the international investment regime. The first account focuses on how IIAs are devices for attracting foreign direct investment (FDI).[15] by acting as mechanisms for overcoming host states' problems of *time inconsistency* and *credible commitments.*[16] The idea is that because FDI often includes substantial sunk costs, a host states' preferences of conduct vis-à-vis foreign investors are *time inconsistent*. Before the investment is made, host states may attempt to attract foreign investors by way of FDI-friendly policies and promises. After the investment is made, opportunistic host states might renege on their pre-investment commitments. These preference inconsistencies can pose serious risks to foreign investors. For poorly governed states, IIAs with ISDS provisions provide a mechanism for making *credible commitments* that are time consistent to foreign investors. They signal that foreign investors will be treated as promised after they have made their investment, and the *ex ante* commitment to ISDS in IIAs makes these commitments enforceable ex post.

[15] *See* Todd Allee & Clint Peinhardt, *Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment*, 65 INT'L ORG. 401 (2011); *see also* Jennifer Tobin & Susan Rose-Ackerman, *When BITs Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties*, 6 REV. INT'L ORGS. 1 (2010); *see also* Jason Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment: Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 371 (2010–11); *see also* Eric Neumayer & Laura Spess*, Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 WORLD DEV. 1567 (2005); *see also* Peter Egger & Michael Pfaffermayer, *The Impact of Bilateral Investment Treaties on Foreign Direct Investment*, 32 J. COMP. ECON. 788 (2004) (showing that the risk-reducing and thereby cost-reducing function of IIAs and formalized systems for dispute resolution also lie at the base of most analyses of the economic effects of IIAs).

[16] Stephan Kobrin, *Testing the Bargaining Hypothesis in the Manufacturing Sector in Developing Countries*, 41 INT'L ORG. 609 (1987) (stating that the notions of time inconsistency and credible commitment are derived from the early works of Vernon and Kobrin.); *see* RAYMOND VERNON, SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF U.S. ENTERPRISES (1971).

Figure 1. IIAs Signed by Year (1959-2016)[17]
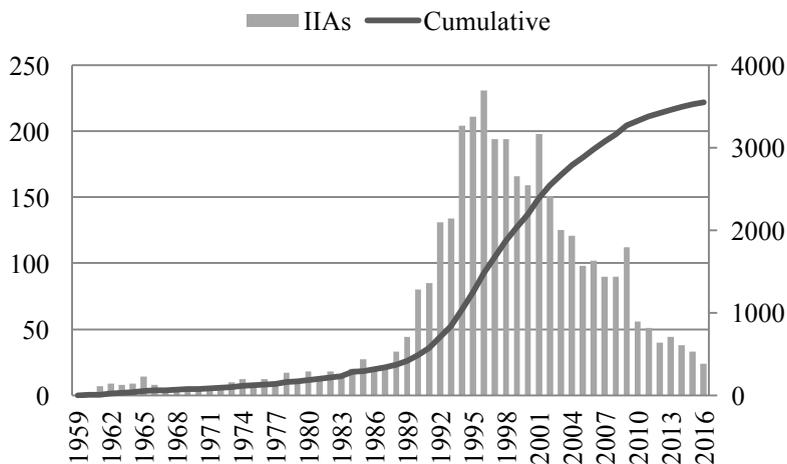
However, partially as a reaction to instances of 'gunboat diplomacy' and their subjugation under colonial rule, a number of less developed states have long argued that foreign investors should not be privileged with rights exceeding what is available to similarly situated nationals.[18] However, this concern dissipated as the competition for foreign investment rose.[19] In the 1990s, less developed states moved *en masse* from their earlier principled opposition to IIAs and foreign intervention during the era of the "New International Economic Order" in the 1970s.[20] Some have explained this move by the fact that it was strategic for less developed states to maintain a collective and principled opposition to the regime at the global level and instead defect bilaterally and sign IIAs in an attempt to gain a competitive advantage over their peers.[21] This causal narrative might also be reflected in the legal development of the

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[17] *International Investment Agreement Navigator,* UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTD), http://investmentpolicyhub.unctad.org/IIA.

[18] Patrick Juillard, *Calvo Doctrine/Calvo Clause*, OXFORD PUB. INT'L L., http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e689 (This notion is embodied in the Calvo doctrine, which "rests upon one core proposition: aliens should not be entitled to any rights or privileges not accorded to nationals. The consequence inevitably follows that, since nationals are entitled to seek redress for their grievance only before local authorities, aliens should not be entitled to seek redress for their grievances before authorities other than local authorities.").

[19] *See* Zachary Elkins, Andrew Guzman & Beth Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*, 60 INT'L ORG. 811 (2006).

[20] *See* G.A. Res. 3201 (S-VI), U.N. Doc. A/RES/S-6/3201 (May 1, 1974).

[21] Andrew Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 978 (1997).

regime. While the first modern IIA was signed in 1959,[22] it was not until a decade later that the first treaty including ISDS provisions was signed;[23] prior to the 1980s less than 10 treaties on average were signed per year. Yet, by the 1990s, there was an explosion in the signing of new IIAs, with more than 200 being signed per year on average (see Figure 1 above).

The second account, on the contrary, holds that developing state interests did not drive the rise of IIAs. Instead, the practice is viewed as driven by the interests of developed capital-exporting states.[24] These states sought to promote IIA programs to support their investors' cause abroad by providing robust protections to those investing in jurisdictions with high political risk, while at the same time providing these investors with direct access to international dispute resolution that liberated home states from having to diplomatically espouse foreign investment disputes.[25] While the capital-exporter state thesis in particular triggers concerns about asymmetries of power (especially when explicitly linked to more developed and wealthier states),[26] what is notable about both theories is their underlying commonality: they both presume that a lower quality of governance or rule of law in less developed states presents higher political and regulatory risks to foreign investors.[27]

While these two theories provide reasonable explanations for how and why a largely bilateral IIA regime has come into existence, they must be con-

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[22] Germany-Pakistan Bilateral Investment Treaty (BIT), Ger.-Pak., Nov. 25, 1959, [1961] Bundesgesetzblatt 793.

[23] Indonesia-Netherlands BIT, Indon-Neth., July 7, 1968, 1971 U.N.T.S. 17.

[24] See generally BONNITCHA, POULSEN & WAIBEL, *supra* note 1, 181-206 (on how developed countries' investment treaty programmes promoted investment treaties to defend business interests abroad, de-politicize investment disputes, push back the New International Economic Order, and promote foreign policy agendas).

[25] *Ibid* 1, 181-206.

[26] Todd Allee & Clint Peinhardt, *Evaluating Three Explanations for the Design of Bilateral Investment Treaties*, 66 WORLD POL. 47 (2014); Beth Simmons, *Bargaining over BITS, Arbitrating Awards: The Regime for Protection and Promotion of International Investment*, 66 WORLD POL. 12 (2014) (claiming that due to its bilateral structure the IIA regime is particularly prone to the (ab)use of power by economically and otherwise strong states); *see* LAUGE POULSEN, BOUNDED RATIONALITY AND ECONOMIC DIPLOMACY: THE POLITICS OF INVESTMENT TREATIES IN DEVELOPING COUNTRIES (2015); *see also* DAVID SCHNEIDERMAN, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY'S PROMISE (2008) (discussing the role of ITA in reinforcing power inequalities).

[27] See Zachary Elkins, Andrew T. Guzman and Beth A. Simmons, *supra* note 19 (for the link between quality of governance and investor's willingness to commit FDI). See BONNITCHA, POULSEN & WAIBEL, *supra* note 1, 193-198 (for the theory of how developed countries sought to de-politicize disputes their outgoing investors may experience in poorly governed developing countries). See also Geoffrey Gertz, Srividya Jandhyala and Lauge S.N. Poulsen, *Legalization, diplomacy, and development: Do investment treaties de-politicize investment disputes?*, WORLD DEV. 107 (2018) (for an empirical analysis of the whether investment treaties actually have de-politicized investment disputes).

siderably nuanced given current practice. It is unlikely that a single theoretical explanation for the growth of the IIA regime over the past 60 years is possible. While it still appears that many of the incentives for a state's IIA program continue to be largely driven by the capital-exporter state thesis, a select group of these same traditionally capital-exporting states have also more recently sought to curtail the foreign investor protections found in their early IIAs.[28] The explanation for these choices is not that traditionally capital-exporting states have become less concerned with the risks that their foreign investors face in capital-importing states, but out of fear that—given the reciprocal nature of these agreements—they might themselves become subject to ITA claims. Furthermore, there is increasing practice over the past decade showing that less developed states are signing IIAs with other less developed states[29] and that a number of traditionally capital-importing states are now promoting new and revamped IIA programs.[30] Overall, these shifts have resulted in an IIA regime that might be changing across time and is less likely to be explicated by a single phenomenon.

However, one of the most distinct features of the international investment regime over the past decade is the explosion of ITA litigation. As the annual number of new IIAs signed annually has declined, the number of ITA cases registered each year grows steadily (Figure 2 below). It is relatively clear that the major catalyst driving changes within the IIA regime is not concern with the substantive provisions in the treaties per se but the incidence of ITA cases based on the ISDS provisions embedded within them. There were only a small number of ITA cases registered annually prior to the year 2000—

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[28] *See* generally Anne van Aaken, *International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis*, 12.2 J. INT'L ECON. L. 535 (showing how countries like New Zealand, Norway, Japan, Australia, and the US have moved towards substantive clauses that cater for more flexibility to regulate on the part of states). See also Gilbert Gagné and Jean-Frédéric Morin, *The Evolving American Policy on Investment Protection: Evidence from Recent FTAs and the 2004 Model BIT*, 9.2 J. INT'L ECON. L. (showing how the US, as a response to the raft of ITA claims under NAFTA, sought to limit some of the substantive protections under their model BIT); Roos van Os, *Dutch Investment Treaties: Socialising Losses, Privatising Gains, in* RETHINKING BITS 171, *supra* note 5 (showing that Dutch authorities has started a review of IIAs with developing countries because they are perceived as too investor friendly); Burghard Ilge, *An Account of the EU's Engagement with Bilateral Investment Treaties in* RETHINKING BITS 171, *supra* note 5 (showing how the EU has swung towards a more balanced international property rights policy in their recent investment policy).

[29] *See* Lauge Poulsen, *The Significance of South-South BITs for the International Investment Regime: A Quantitative Analysis*, 30 NW. J. INT'L L. & BUS. 101, 101 (2010).

[30] *See* Junianto J. Losari and Michael Ewing-Chow, *Assessment of Indonesia's Recent Investment Policies and Reccomendations for its International Investment Agreements*, *in* RETHINKING BITS 129, *supra* note 5; Martin Brauch, *Brazil's Cooperation and Investment Facilitation Agreements with Mozambique, Angola, and Mexico: A Comparative Approach, in* RETHINKING BITS 141, *supra* note 5; Prabash Ranjan, *India's Bilateral Investment Treaty Programme – Past, Present and Future in* RETHINKING BITS 101, *supra* note 5.

See the recent IIA negotiations and practice of China, India, Brazil, Russia, Turkey and many South-East Asian states in particular.

with no cases arising prior to 1987.[31]—and these early cases raised few concerns and went largely unnoticed by the broader international legal community. This changed in the 2000s as the annual number of ITA cases surged: from an average of five cases registered annually in the 1990s, to an average of 40 cases per year in the 2000s, and 50 cases per year in the 2010s (Figure 2 above). As of January 1, 2017, 804 ITA cases have been registered; 270 of which remain pending (34%). Of the registered cases, 358 have been concluded (44%);[32] 175 have either been settled or discontinued (22%). In the 804 registered ITA cases,[33] 111 different states have acted as respondents, compared with claimant-investors from 67 different home states.[34]

Figure 2. ITA Cases Registered by Year (1987-2016) [35]

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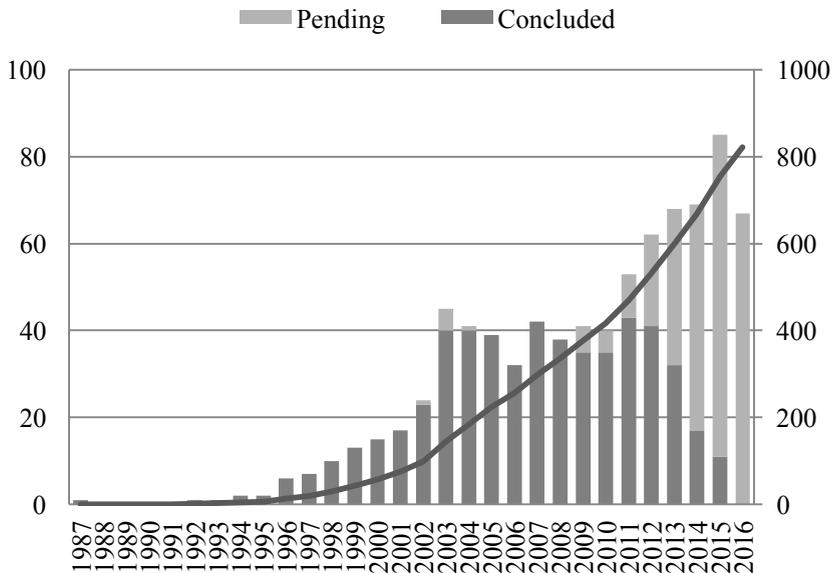
[31] *See* Asian Agric. Prod. Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award, ¶ 18 (June 27, 1990) (the first treaty-based arbitration was registered in 1987 and decided in 1990.).

[32] A concluded ITA case is one where the claimant has either won on the merits or lost on jurisdiction or the merits. It does not include discontinued or settled ITA cases. *See* PITAD, *supra* note 2.

[33] This number includes all treaty-based cases that have been registered. It does not include contract-based or foreign investment law-based cases; and it does not include ITA cases where a threat of arbitration is known or where a notice of intent to arbitrate has been filed. *See* PITAD, *supra* note 2.

[34] *See* PITAD, *supra* note 2.

[35] *See* PITAD, *supra* note 2.

Without delving into detail at this stage, it is clear that the use of ITA has become a global phenomenon. It has also become a prominent and lucrative area of international adjudication, while at the same time coming under increased scrutiny from a number of states, scholars and civil society actors.[36] While claimant-investor success rates in ITA appear on their face to be balanced (foreign investors winning 46% of concluded ITA cases so far),[37] it should be noted that the vast majority of foreign investors registering ITA cases come from states whose levels of development eclipse that of their host state.[38] This type of claims structure lies at the heart of many critiques against the international investment regime and ITA. In the next section, we elaborate on how a development bias in relation to ITA outcome may work, and we discuss different aspects of host states governance structures that may be conflated with this development bias.

III. RESPONDENT STATE CHARACTERISTICS

The question that Franck and colleagues pose in their empirical work is in short: is the higher loss rate for less developed respondent states a function, all else being equal, of these states' economic development levels or is it a natural function of these states' levels of democracy?[39] The question stems from the fact that since economic development and democracy is so inherently interlinked, statistical explanations of ITA outcomes may end up conflating the two if both aspects are not controlled for. This is a timely question. However, we believe that to get a better grip of the actual mechanisms at

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[36] *See* Pia Eberhardt & Cecilia Olivet, PROFITING FROM INJUSTICE**.** HOW LAW FIRMS, ARBITRATORS AND FINANCIERS ARE FUELLING AN INVESTMENT ARBITRATION BOOM (2012).

[37] Note however that this success rate is dramatically higher than for claimants in cases before the European Court of Human Rights (ECtHR), but much lower than for claimants in cases before the World Trade Organization (WTO) Dispute Settlement Mechanism (DSM). See *The ECHR in Facts and Figures 2017*, European Court of Human Rights, March 2018, https://www.echr.coe.int/Documents/Facts_Figures_2017_ENG.pdf. In 2017, the ECtHR resolved 85,951 applications, out of which 908 resulted in judgments finding at least one violation of the European Convention on Human Rights. In the WTO system, complainant states win 90 per cent of their disputes: Dan Ikenson, *US Trade Law and the Sovereignty Canard*, FORBES, 9 May 2017. However, the percentage of all specific claims won (there can be more than one claim per case) is slightly lower at 56-65%: Bernard Hoekman, Henrik Horn and Petros C. Mavroidis, *Winners and Losers in the Panel Stage of the WTO Dispute Settlement System*, IFN Working Paper, No. 769, Research Institute of Industrial Economics (IFN), Stockholm. However, note that in our study we determine success as at least one successful claim – so the comparable WTO figure is 90%.

[38] See UNCTAD *supra* note 6 (showing that the top ten home states of investors filing ITA cases are: the US, the Netherlands, United Kingdom, Germany, Canada, France, Spain, Luxembourg, Italy, and Turkey)

[39] *See* Susan Franck, *Conflating Politics and Development: Examining Investment Treaty Outcomes*, 55 VA. J. INT'L L. 13 (2014).

play, one has to understand both how a development bias may manifest itself, and how respondent states' quality of governance (including levels of democracy) can affect outcomes in ITA. We begin by looking at possible explanations for the development bias, before we discuss how respondent states' levels of democracy may actually be too broad of a governance concept to capture conflation. Instead, we provide a set of six disaggregated quality of governance indicators that we theorize could be conflated with a respondent state's economic development levels when analyzing outcome patterns in ITA.

A. Economic Development Bias

In our view, there are at least four mechanisms through which respondent states' economic development levels may matter for ITA outcomes: (1) equality of arms; (2) unequal claims calculus; (3) structure of IIAs; and (4) arbitrator biases. This spectrum of reasons follows not only the trajectory of litigation but it also roughly tracks the degree of legitimate normative concern with the role of economic development in ITA more broadly.

First, states may, based on their relative wealth, face an uneven field of play when faced with the task of defending against an ITA claim.[40] The most basic issue is that since the litigation costs associated with ITA cases are particularly high, less developed states may have problems in adequately funding their defenses. A recent survey found that the costs for a respondent state in defending against an ITA claim is on average 4.5 million US dollars (USD) per case, and that in some cases total litigation costs exceed 30 million USD.[41] The Organization for Economic Cooperation and Development (OECD) reports the average cost of defense in ITA to be as high as eight million USD.[42] This cost threshold in itself might severely hamper poorer states' ability to retain adequate counsel in ITA cases. It may also be compounded by a lower number of qualified in-house lawyers with expertise in international economic law—a deficiency that has long frustrated less developed states in trade negotiations. In sum, the high cost of litigating an ITA case should result in a higher likelihood that the poorer the respondent state

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[40] *See* Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change, in* THE STRUCTURE OF PROCEDURE (Robert Cover & Owen Fiss, ed., Foundation Press, 1969) (outlining the classic exposition of this advantage of the privileged).

[41] *See* Matthew Hodgson, *Counting the Costs of Investment Treaty Arbitration, in* RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM (Jean E. Kalicki & Anna Joubin-Bret, ed., Brill Nijhoff, 2015) (providing an overview of costs associated with ITA cases). *See also* Susan Franck, *Rationalizing Costs in Investment Treaty Arbitration*, 88 WASH. U. L. REV. 777 (2011).

[42] *See* David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, Org. for Econ. Co-operation and Dev. [OECD], Working Paper on International Investment, OECD Doc. 2012/03 19 (2012), http://dx.doi.org/10.1787/5k46b1r85j6f-en.

is, the less likely that state will be able to adequately fund its defense, which in turn would result in a higher likelihood that less developed respondent states would lose in ITA.

Second, developing states in particular may lack the resources to compensate aggrieved foreign investors for expropriations and other alleged IIA violations at the pre-dispute stage. Thus, even if a poor state was willing to provide compensation to a foreign investor through domestic processes, the level of compensation offered might be so low that the foreign investor chooses to initiate an ITA case instead. Moreover, the foreign investor may presume that they have a structural advantage in the litigation (on the grounds of either superior legal capacity or the strength of IIA provisions, as discussed below) and may thus be more likely to bring a weak claim against a less developed state. The choice of whether to initiate claims against developing and developed states respectively should thus not be equal.

Third, less developed states may be disadvantaged due to the rules applied in arbitration—the structure and provisions of the IIAs they have ratified.[43] Various studies suggest that more developed states have historically been the 'rule-makers' and less developed states the 'rule takers' in IIA negotiations—leaving developing states with much more diversity and inconsistencies among their IIAs than developed states (whose IIAs are fairly uniform in content and scope).[44] These large variations in IIA commitments may make adherence to the rules more difficult for less developed states in particular. Moreover, it has been shown that developing states signed up to IIAs with strong investor protection provisions prior to the rise of ITA litigation (believing that the benefit of increased FDI flows would outweigh the negligible risk of ITA litigation).[45] The result of this power differential between less and more developed states in the negotiating and signing of IIAs (combined with less developed states' miscalculation about the risk of ITA) has created a universe of treaties that may be structurally set up to disadvantage less developed states when faced with an ITA claim.[46]

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[43] *See* Galanter, *supra* note 34 (noting this rule disadvantage as central to Galanter's theory on why the 'haves' come out ahead).

[44] *See* Wolfgang Alschner & Dmitriy Skougarievsky, *Mapping the Universe of International Investment Agreements*, 19 J. INT'L ECON. L. 561 (2016) (giving the example that most of the United Kingdom's (UK) BITs are very similar in content, while the majority of Burundi's BITs are vastly different and divergent in content and scope).

[45] *See* Lauge N. Skovgaard Poulsen, BOUNDED RATIONALITY AND ECONOMIC DIPLOMACY: THE POLITICS OF INVESTMENT TREATIES IN DEVELOPING COUNTRIES (Cambridge U. Press, 2015); Lauge N. Skovgaard Poulsen & Emma Aisbett, *When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning*, 65 World Pol. 273 (2013).

[46] See the *Mapping BITs project, http://mappinginvestmenttreaties.com/* (visualizing how developing states have largely signed on to developed states' model BITs); POULSEN *supra* note 45 (showing that the terms developing countries signed often were the result of flawed assumptions about potential costs and benefits). See also Kate Miles, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF

Fourth, we might expect that developing states may be more likely to lose in an ITA case due to some form of implicit arbitrator bias and/or foreign investor selection bias. Posner and Figueredo find that International Court of Justice (ICJ) judges are on average 24% more likely to vote for disputing states that share similar levels of economic development with their state of nationality.[47] We could plausibly extend these findings to ITA arbitrators, where arbitrators from OECD states constitute 69% of all appointments to first instance ITA tribunals.[48] If the identification mechanism unveiled in the ICJ is at play, the disproportionate representation of more developed OECD member state arbitrators in the system may lead to more deference being paid to the arguments of defense by more developed respondent states (favoritism) or less deference being paid to developing respondent states (prejudice). This phenomenon may also be inflected by the fact that most foreign investors originate in developed (mostly OCED) home states.[49]

Thus, while there seems to be good arguments as to why ITA outcomes could differ based on varying levels of economic development among re-spondent states, we now turn to the alternative explanations. The conflation theory expects any demonstrable development bias in ITA to be a function of the close connection between a respondent states' levels of democracy and their economic development status. After discussing the relevance of using democracy as a proxy for good governance, we expound on the conflation theory by showing how six different aspects of a respondent states' quality of governance may matter for outcomes in ITA.

B. *Expanding the Conflation Theory*

Levels of democracy and the economic development status of states are often highly correlated, and previous empirical analyses of ITA outcomes[50] hold that regime type is the most relevant domestic institution in this context. But little is said about why and how.

One argument in favor of foregrounding democracy is that democratic states on average are governed in more open and transparent manner than non-democracies.[51] If a foreign investor's interests are negatively affected by

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CAPITAL (2013) (on the historical inequality in investment treaties).

[47] Eric A. Posner & Miguel F.P. de Figueiredo, *Is the International Court of Justice Biased?* 34 J. Legal Stud. 599 (2005).

[48] *See* PLURICOURTS INVESTMENT TREATY ARBITRATION DATABASE (PITAD), https://jus-pitad01.uio.no.

[49] See UNCTAD, *supra* note 38.

[50] *See* Franck, *supra* note 33; Susan Franck & Linsey Wylie, *Predicting Outcomes in Invest-ment Treaty Arbitration*, 65 DUKE L.J. 459 (2015). *See also* Krzysztof Pelc, *What Explains the Low Success Rate of Investor-State Disputes* 71 INT'L ORG. 578 (2018).

[51] *See* James R. Hollyer, B. Peter Rosendorff & James R. Vreeland, *Democracy and Trans-parency,* 73.4 J. OF POLITICS 1200-1202 (2011) (demonstrating that democracies are more transparent than non-democracies).

the acts of democratic governments, the state should therefore be better able to demonstrate in ITA that the foreign investor was treated fairly and reasonable, afforded sufficient due process, and that any negative affect on the foreign investor is justifiable as a proportionate measure taken in the public interest. Accordingly, even if the foreign investor's rights are negatively affected, democratic states may be more likely to affirm and prove that their actions do not constitute a breach of an IIA than non-democracies.

Another argument for why levels of democracy might matter for ITA outcome is that democracies have better levels of representation and participation than non-democracies, and that democratic executives—to a larger degree than non-democratic executives—are dependent on taking countervailing domestic voices and interests into account to remain in office.[52] They should therefore be assumed to treat foreign investors more fairly than non-democracies.

However, it is not clear that the effect of democracy is unidirectional. In fact, there are both theoretical and empirical reasons for thinking that the notion of democracy does not suffice to capture the institutions that actually matter to foreign investors. Stable autocratic governments might for example outperform democracies in constraining public, bureaucratic or domestic interference with foreign investors.[53] With higher levels of centralized coordination and less space for public uproar, benevolent autocracies may create less risk of political and regulatory instability, and foreign investors tend to care about risk and instability.[54] Moreover, some of the most famous ITA cases were indeed driven by bottom-up public agitation against foreign investors in electoral democracies.[55]

Moreover, there are no guarantees that a democratically elected majority will always adhere to their popular mandate. Studies find that democracy is curvilinear related to levels of corruption.[56] In some cases, democratization

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[52] *See* Bruce Bueno de Mesquita, Alastair Smith, Randolph M. Sivertson and James D. Morrow, THE LOGIC OF POLITICAL SURVIVAL (2004) (launching the 'selectorate theory,' which proposes that in democracies the winning coalition comprises a larger part of the electorate than in autocracies. Therefore, democratic leaders need to take into account a wider array of voices than autocratic leaders.)

[53] *See* Adam L. Resnick, *Investors, Turbulence, and Transition: Democratic Transition and Foreign Direct Investment in Nineteen Developing Countries,* 27 INT'L INTERACTIONS 393-395 (2001) (showing that the turmoil associated with democratic transitions effects FDI negatively).

[54] This is the core assumption in the credible commitments theory. *See* Elkins, Guzman & Simmons, *supra* note 19.

[55] *See* e.g. *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015); *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000).

[56] *See* Gabriella R. Montinola & Robert W. Jackman, *Sources of Corruption: A Cross-Country Study*, 32 BRITISH J. POL. SCI. 147 (2002).

is found to worsen impartiality in the exercise of public power,[57] whereas certain non-democratic states have been successful in curbing corruption and building relatively impartial bureaucracies.[58] The point is that democracy is a multifaceted concept and one that is very difficult to define conceptually.[59] We therefore depart from the notion of democracy as driving an alleged bias in ITA outcomes and focus on what has been labelled variously as quality of democracy or quality of governance.[60] In short, we are more concerned with the actual performance of governments in their exercise of authority vis-à-vis foreign investors, than the system in which they are elected. We believe instead that particular types of governance quality (those that measure the impartiality to which public is authority is exercised) to be of importance to outcomes in ITA. Impartiality in the public exercise of power in this context builds on the legal notion of impartiality, and is defined by Rothstein and Teorell as "when implementing laws and policies, government officials shall not take into consideration anything about the citizen/case that is not beforehand stipulated in the policy or the law."[61] Thus, "impartiality is first and foremost an attribute of the actions taken by judges, civil servants, politicians and the like."[62] This notion of impartiality captures most, if not all, concepts about the rule of law as well.

The question then becomes: what aspects of governance matter? One useful place to start is the literature analyzing the determinants of FDI.[63] In

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[57] *See* John McMillan & Pablo Zoido, *How to Subvert Democracy: Montesinos in Peru*, 18 J. ECON. PERSP. 69 (2004) (providing an example of Peru under democratically-elected President Fujimori).

[58] *See* Francis Fukuyama, POLITICAL ORDER AND POLITICAL DECAY: FROM THE INDUSTRIAL REVOLUTION TO THE GLOBALIZATION OF DEMOCRACY, 66–80 (Macmillan, 2014) (giving the historical example of the Prussian state); Hilton Root, SMALL COUNTRIES, BIG LESSONS: GOVERNANCE AND THE RISE OF ASIA (Oxford U. Press, 2014) (providing more current examples of Hong Kong and Singapore). *See also* Charles Kurzman, Regina Werum & Ross E. Burkhart, *Democracy's Effect on Economic Growth: A Pooled Time-Series Analysis, 1951-1980*, 37 STUD. COMP. INT'L DEV. 3 (2002) (showing that democracies also have very patchy track-records in producing well-esteemed social outcomes such as economic growth); Michael Ross, *Is Democracy Good for the Poor?* 50 AM. J. POL. SCI. 860 (2006) (human development); Håvard Hegre et al., *Toward a Democratic Civil Peace? Democracy, Political Change and Civil War, 1916–1992*, 95 AM. POL. SCI. REV. 33 (2001) (civil peace).

[59] *See* Leonardo Morlino, *What is a 'Good' Democracy?* 11 DEMOCRATIZATION 10 (2004); David Beetham et al., Assessing the Quality of Democracy: A Practical Guide (Int'l IDEA, 2008); Daniel Levine & Jose Molina, *Measuring the Quality of Democracy, in* THE QUALITY OF DEMOCRACY IN LATIN AMERICA 21–37 (Daniel Levine & Jose Molina, ed., Lynne Rienner Pub., 2011).

[60] *Id.*

[61] Bo Rothstein & Jan Teorell, *What Is Quality of Government? A Theory of Impartial Government Institutions*, 21 GOVERNANCE 165, 170 (2008).

[62] *Id.*

[63] *See* Stephan Knack & Philip Keefer, *Does Social Capital Have an Economic Payoff? A Cross-Country Investigation*, 112 Q. J. ECON. 1251 (1997); Christopher Clague et al., *Contract-Intensive Money: Contract Enforcement, Property Rights and Economic Performance*,

short, foreign investors tend to value property rights protection, fair and accessible domestic courts and stable and predictable political, legal and regulatory regimes. We have therefore chosen to focus on impartiality and the quality of governance in all branches of government: the executive, the legislative and the judicial branches. In addition, we discuss how stability and predictability may be affected by dramatic changes in governments across time, and how overarching and pervasive partiality often results from varying levels of political corruption. Below we discuss six qualities of governance aspects: (1) political regime stability; (2) legislative and judicial constraints on the executive; (3) impartial and meritocratic bureaucracies; (4) strength of property rights protection; (5) judicial independence and quality; and (6) political corruption. We expound on each aspect in turn.

First, one of the goals of the international investment regime is to increase the *stability* and predictability of the domestic legal and regulatory regimes governing FDI projects in states hosting these types of investments. As such, it is reasonable to assume that the political regime stability in host states governments across time would play an important role both in attracting ITA claims, but also in accounting for differences in ITA outcomes. An unstable host state's political regime would increase the likelihood of dramatic changes in that host state's legal and regulatory regimes as well. This type of volatility would in turn increase the chances that promises made to foreign investors under one regime would not be honored by a subsequent regime. This classic type of political risk has been the underlying cause in a number of ITA cases.[64] A state whose political system is highly unstable would thus be more likely to lose an ITA case when compared to a similarly situated respondent state whose political system is highly stable.

Second, many of the ITA cases brought under IIAs involve foreign in-

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4 J. ECON. GROWTH 185 (1999); Peter Evans & James E. Rauch, *Bureaucracy and Growth: A Cross-National Analysis of the Effects of "Weberian" State Structures on Economic Growth*, 64 AM. SOC. REV. 748 (1999); Robert E. Hall & Charles I. Jones, *Why Do Some Countries Produce So Much More Output per Worker than Others?* 114 Q. J. ECON. 83 (1999); Daron Acemoglu, Simon Johnson & James A. Robinson, *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 AM. ECON. REV. 1369 (2001); William Easterly, The Elusive Quest for Growth: Economists' Adventures and Misadventures in the Tropics (MIT, 2001); Dani Rodrik, Arvind Subramanian & Francesco Trebbi, *Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development*, 9 J. ECON. GROWTH 131 (2004).

[64] See for example many of the ITA cases arising in South American states (in particular the recent example of Venezuela) where regime change dramatically shifted the treatment of foreign investors under the subsequent regime. Yessika Monagas, U.S. Property in Jeopardy: Latin American Expropriations of U.S. Corporations' Property Abroad. HOUS. J. INT'L L., 34(2), 455 (2012); *see also* Daniel Behn, The Performance of Investment Treaty Arbitration in Theresa Squatrito et al, The Performance of International Courts and Tribunals (CUP, 2018).

vestors claiming wrongdoing by the executive branch of their host state government.[65] The most obvious claims might relate to direct or indirect expropriations where an executive branch decision, decree or order is responsible for the physical taking of a foreign investor's property. While expropriations often arise out of executive decree, there are a whole host of claims that also could arise under an applicable IIA that relate to unfettered or arbitrary executive action. This indicates that host states' ability to constrain the actions of their executive may matter for outcomes in ITA. Well-crafted *legislative and judicial constraints* on the executive branch could reduce the likelihood of arbitrary or discriminatory executive action that would both diminish a foreign investor's investment and violate or breach an IIA.[66]

Third, *impartial* bureaucracies should be more efficient in carrying out and overseeing laws and regulations than bureaucracies that experience frequent political interference.[67] The simple idea is that if a state regulates by law, without having to consider (erratic and arbitrary) political preferences, it will be more likely to succeed in coordinating adherence with its international commitments.[68] Moreover, a *meritocratic* recruitment structure in the civil service, rather than one based on clientelism, is likely to create a bureaucracy less prone to neopatrimonialism and corruption.[69] More generally, a strong and impartial domestic bureaucracy that is autonomous from political pressure should be better at governing in a stable manner across time. This would therefore minimize the risk of abrupt policy changes that might negatively affect foreign investors, or give preferential treatment to national investors.[70]

Another issue relating to the relationship between ITA outcome and the impartiality of bureaucracies is the type of evidence required for a respondent state to successfully defend itself in an ITA case. We would expect that impartial and transparent bureaucracies would afford foreign investors higher levels of due process relating to actions that might diminish the value of their

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[65] *See* Williams 32, *supra* note 5.

[66] There are ITA cases where allegations of arbitrary or illegal decisions of the executive branch failed when challenged by the judicial branch; or that were rubberstamped by the legislative branch. See e.g. Marion Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/08/1, AWARD: *Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award.

[67] *See generally* Rothstein & Teorell, *supra* note 61.

[68] Id.

[69] *See* Peter Evans & James E. Rauch, *Bureaucracy and Growth: A Cross-National Analysis of the Effects of "Weberian" State Structures on Economic Growth*, 64 AM. SOC. REV. 748 (1999) (providing an empirical analysis of how a meritocratic recruitment structure in developing states affects regulatory efficiency and levels of corruption).

[70] *See* Occidental Exploration & Production Co. v. Republic of Ecuador (I), LCIAAC Case No. UN 3467, Final Award (July 1, 2004) (giving an exampling showing preferential treatment given to national investors over foreign investors through politically-motivated decisions by allegations of partial bureaucracies).

investments. This is a critical issue in ITA as most of the substantive protections afforded to foreign investors under IIAs relate directly to *how* a foreign investor was treated.[71] Well-functioning bureaucracies should also be more capable of providing a paper trail demonstrating how any given foreign investor was treated in a manner that did not breach a relevant provision of an IIA. In sum, we expect that the more impartial and meritocratic respondent state bureaucracies are, the more likely that a respondent host state will be able to successfully defend itself in an ITA case.

Fourth, one of the most important issues for foreign investors and their investments is that a host state will both recognize and protect private *property rights*.[72] The level to which a state secures private property rights is said to be crucial for economic prosperity and growth; and states with weak property rights protections are more likely to struggle to develop strong economic markets.[73] However, not all property protection regimes are equal. For the purpose of our theorizing, there are two distinct strands relating to a state's ability to protect private property: the extent to which private property is compensated in the case of expropriations (property rights institutions); and the extent to which the legal and regulatory regime of the state is able to protect and secure contractual rights (contractual rights institutions). We assume that a host state with high quality and robust institutions of these two types will be less likely to violate their IIA obligations. As most IIA obligations relate to the treatment of a foreign investor's property rights,[74] we would assume that states with advanced and sophisticated regimes for the protection of property rights would be less likely to be sued in ITA and more likely to successfully defend itself against an ITA claim in the event that they are sued.

Fifth, the *judicial quality* of host states—that is, a host state's ability to secure that all individuals, groups and legal entities are treated in an equal, fair and non-discriminatory manner before the law—may also matter for ITA outcomes.[75] Judicial quality in this context is specifically tied to a properly

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[71] *See* Bonnitcha, Poulsen & Waibel 95-117, *supra* note 1 (detailing how most relative and absolute substantive standards in IIAs relate to treatment of some kind).

[72] *See* Douglass North, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990) (for property rights in general); Pamela J. Smith, *How do foreign patent rights affect U.S. exports, affiliate sales, and licenses?* 55.2 J. OF INT'L ECON. (2001) (for intellectual property rights).

[73] *Id*.

[74] There are numerous examples where an ITA case arose out of a respondent state's failure to provide adequate protection to a foreign investor's contractual and/or physical property rights. See for example ITA cases involving uncompensated direct expropriations such as: *Burlington v. Ecuador* (DECISION ON LIABILITY), *ConocoPhillips v. Venezuela* (FINAL AWARD), *Border Timbers v. Zimbabwe* (FINAL AWARD), *von Pezold v. Zimbabwe* (FINAL AWARD).

[75] Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 INTERNATIONAL REVIEW OF LAW AND ECONOMICS 1 (2005).

functioning judiciary, one that is independent and screened from various forms of political influence and that will apply the law equally and in a non-discriminatory fashion no matter the party to the dispute. In most instances, the levels of judicial quality and independence in a host state will be used for assessing the likelihood that an ITA claim will arise (as foreign investors typically try to avoid low functioning domestic judiciaries), but the quality, or lack thereof, of a host state's judiciary may also be a determinant in predicting outcome in certain types of ITA cases, especially those involving denial of justice claims. While it is true that the number of denial of justice claims in ITA are limited, it is reasonable to assume that a host state with poorly functioning judiciaries might be more likely to deny justice to a foreign investor.[76] At the same time, a host state with a highly functioning judiciary should be more capable of applying the law in an impartial manner that is consistent with both thin and thick notions of the rule of law. We would therefore assume that proper judicial functioning in a host state is a good benchmark for assessing the likelihood that an IIA breach might occur.

Sixth and finally, levels of *political corruption* in a host state may affect ITA outcomes. At a general level, corruption concerns the abuse of public office for personal gain, and may occur in all three branches of government.[77] The type of political corruption that we are concerned with "involves a holder of public office violating the impartiality principle in order to achieve private gain."[78] The norm violated through corruption as defined in this manner is the impartiality principle in the exercise of government authority. We would expect a government with high levels of political corruption to be less capable of achieving high levels of impartiality in all levels of governmental activity. In the context of ITA, one might expect host states with high levels of political corruption to be less capable of providing a secure and stable environment for foreign investments. A highly corrupt government might be more likely to behave arbitrarily and to act discriminatorily—or alternatively, more favorably—in relation the treatment of certain types of (both foreign and national) investors. Higher levels of political corruption tend to destabilize expectations and can lead to disparate, non-transparent and negative treatment

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[76] *See Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction & Liability (Aug. 24, 2015) (finding that an irregular decision by the respondent state's courts improperly deprived the claimant-investor from the ability to sell its assets).

[77] *See* Siri Gloppen, *Courts, corruption and judicial independence*, in CORRUPTION, GRABBING AND DEVELOPMENT. REAL WORLD CHALLENGES (Tina Søreide & Aled Williams ed., 2013) (for judicial corruption); Joseph S. Nye, *Corruption and Political Development : A Cost-Benefit Analysis* 61 AM. POL. SCI. REV. (1967) (for political corruption); Caroline Van Rijckeghem & Beatrice Weder, *Bureaucratic corruption and the rate of temptation : do wages in the civil service affect corruption, and by how much?* 65 J. OF DEV. ECON. (2001) (on corruption in the civil service).

[78] Oskar Kurer, *Corruption: An Alternative Approach to Its Definition and Measurement*, 53 POL. STUD. 222, 230 (2005).

of foreign investors. Under such a scenario, we could imagine that a respondent state with high levels of corruption would be less likely to successfully defend itself against a claim by a foreign investor.[79] Thus, any asymmetries in outcome in ITA might be explained by the degree to which respondent states effectively control political corruption.

IV. DATA

In this section, we present all sources of data used in the analyses presented in Section V. After a discussion of how outcomes in ITA are best captured, we discuss the independent variables used to measure economic development, democracy and quality of governance respectively. Descriptive statistics for all variables, as well as bivariate correlations between the independent variables are listed in Table A1 and Table A2 in the Appendix.

A. Dependent Variable

Our unit of analysis are ITA outcomes[80] for all concluded cases[81] known as of January 1, 2017. The complete set of available cases has been collected and gathered from a wide array of sources and coded in PITAD. We only include cases that are based on an IIA (as opposed to a contract or a state's foreign investment law), and each case was coded by a minimum of two researchers.[82] To our knowledge, PITAD is the most extensive database of all known ITA cases.

Before discussing how ITA outcomes are measured, there are two specific issues that may create sample selection bias when using ITA data. There are cases that are not publicly available,[83] and there are cases that end before

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[79] Cf. *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Final Award (Oct. 4, 2013) (exemplifying that a highly corrupt government may be able to avoid a breach of its IIA obligations if the respondent state can show that the investment was procured through corrupt practices. There are of course many cases where corruption was not central to the ITA claim, but was lurking in the background and was a contributing factor to the alleged IIA breach).

[80] All cases are coded from the perspective of whether the claimant-investor won or lost the ITA case.

[81] A concluded case is distinct from a fully resolved case. Concluded ITA cases are all cases where, in the first instance, a tribunal either finds in favor of the claimant-investor on the merits; or where the claimant-investor loses on jurisdiction or the merits. Concluded ITA cases exclude settled and discontinued cases, whereas the category of fully resolved cases includes all settled and discontinued cases in addition to concluded cases. See PITAD, supra note 2.

[82] *See* UNCTAD Investment Dispute Settlement Navigator, http://investmentpolicy hub.unctad.org/ ISDS (during the coding, all disagreements between coders were resolved through dialogue between coders and a senior researcher; all data entries have been quality checked by the same senior researcher and matched against UNCTAD data on ITA cases).

[83] Although evidence suggests that as time has passed, most awards now tend to become public. See Daniel Behn, The Performance of Investment Treaty Arbitration in Theresa Squatrito et al, THE PERFORMANCE OF INTERNATIONAL COURTS AND TRIBUNALS (CUP,

a final award is rendered (i.e. cases that are discontinued or settled). The sample bias introduced by case confidentiality is difficult to circumvent, but given that we have most information on registered cases that are settled or discontinued before a final award is rendered, we can—in different ways—control for the effect of ITA cases that do not reach a final award. At this point, we simply robustness check our results by counting settled ITA cases as a claimant-investor win, and discontinued ITA cases as a claimant-investor loss.[84]

In measuring ITA outcomes, there are many ways to Rome. In previous empirical studies of ITA outcomes, two main approaches have been discussed and applied. The first entails using an absolute, categorical outcome measure that captures a claimant-investor win or loss, based on whether the ITA tribunal found a breach or violation of the relevant IIA.[85] The second approach allows for the assessment of relative claimant-investor success, either through using a claimed-to-awarded damage ratios, an assessment of how many substantive IIA breaches a claimant-investor claimed compared to how many IIA provisions the ITA tribunal actually found to have been breached,[86] or an assessment of the extent to which an foreign investor is made 'whole' by an award.

2018). For example, in our PITAD dataset of registered ITA cases that have been concluded, approximately 20% of ITA awards are not publicly available. However, the number of cases where the outcome is unknown (i.e. whether the claimant-investor one or lost) is limited to two ITA cases. In other words, if the ITA case is known to exist, and even if the actual award is not publicly available, the outcome of the case often enters into the public domain at some point. Furthermore, we estimate that there might be an additional universe of approximately 5% of registered ITA cases that are not known at all (out of 804 ITA cases that are known): Behn, ibid.

[84] There is good reason to assume that—if taken together—many, if not most, of the ITA cases that are known to have settled resulted in at least a partial win for the claimant-investor. Discontinued cases on the other hand are more likely to signal a loss for the claimant-investor. While some discontinued cases may actually be settlements that are unknown, a large percentage of known ITA cases that are discontinued are dropped because the claimant-investor either abandoned the claim or ran out of resources to pursue it further. While we admit that coding these cases for robustness checks in this way is not perfect, we think that it will allow us to measure if there is any structural difference in these types of cases that might be skewing the results when looking only at the concluded cases. Out of the 804 registered ITA cases in the dataset, 175 of the ITA cases have been either settled (117 ITA cases) or discontinued (58 ITA cases). Of the 533 ITA cases that have been fully resolved (358 concluded cases + 175 settled/discontinued cases), settled and discontinued cases account for 33% of all ITA cases that have been fully resolved to date. Another way of tackling the selection bias that might be occurring in relation to settled and discontinued cases is to apply a two-stage selection model that accounts for case-specific factors that increase or decrease any given case's chance of reaching a final award, as performed by Pelc in a recent study of frivolous litigation in ITA. See Pelc, supra note 42.

[85] Behn, *supra* note 84.

[86] See Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration and the Rule of Law*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 337 (2007).

We have chosen to apply a binary claimant-investor win-loss measure in our main analysis, but also use a relative measure in our robustness checks (an index that weights partial and full wins differently—the latter relative assessment).[87] In our main analysis, we code each concluded case as (0) if the claimant-investor loses the case and (1) if the claimant-investor wins at least one significant claim on the merits. With these conditions in place, the primary dataset includes 358 concluded cases. Of these concluded cases, the claimant-investor won in 165 (46%) instances and lost in 194 (54%) instances. Out of the 194 ITA cases where the claimant-investor lost, 91 (47%) were lost on jurisdiction and 103 (53%) were lost on the merits.

B. Independent Variables

The core of our study is to examine whether a respondent states' economic development levels has an effect on a foreign investors' chances of succeeding in an ITA case, or if a potential effect of a respondent state's development status is in fact caused by the same states' quality of governance. In this section, we present one general and six specific quality of governance measures for each of the state-level domestic governance aspects that we expounded upon in Section III above. But first, we discuss how to best capture the economic development status of respondent states.

1. Economic Development

Defining a states' economic development status is difficult,[88] and so is finding reliable and adequate economic development data.[89] In their empirical analysis of the conflation hypothesis, Franck and colleagues use three different measures for development status: OECD membership, the World Bank's four-category income groups (WBIGs) and the Human Development

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[87] The idea of assessing a partial or relative win for a claimant-investor is attractive, but is often very difficult to do objectively. We will apply a three-category outcome variable that codes for full win (2), partial win (1) and loss (0) in our robustness checks. However, due to the problems associated with claimant-investors over-claiming on both compensation and alleged treaty breaches in their pleadings, we do not choose to assess relative or partial win on the basis of these variables. Instead, we use a measure for full win as to whether the claimant-investor is made whole by the outcome, even if the investor does not succeed on all claims or is not awarded the same amount of compensation that is claimed. A partial win is where the claimant-investor is not made whole by the outcome, meaning the claimant-investor is only awarded damages on some parts of the investment or where the damage assessment is equal to zero but the tribunal found a breach of the underlying IIA. While there is a risk that coding full and partial wins in this manner includes an element of subjectivity, we have sought to mitigate this risk by doubling coding these decisions by ITA specialists.

[88] See Marc Busch & Eric Reinhardt, *Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement*, 37 J. WORLD TRADE 719 (2003).

[89] See Morten Jerven, *Poor Numbers: How We are Misled by African Development Statistics and What to Do about It* (Cornell U. Press, 2013).

Index (HDI).[90] However, because our theoretical expectations (directly and/or indirectly) revolve around how development and ITA outcomes stem specifically from states' levels of *economic* development, we have chosen instead to apply *gross national income (GNI) per capita*,[91] as reported per state-year by the World Bank.[92] While the WBIGs (which are frequently used in statistical studies on economic development) are in fact based on *GNI per capita*, we have chosen to use the underlying continuous measure as it retains more information. However, for visual representation and estimating predicted probabilities we also use the WBIGs towards the end of our analysis.[93] Due to the inherent skewness in *GNI per capita*, we choose to apply a standard log-transformed version of the variable in our analysis.

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[90] See Susan Franck, *Conflating Politics and Development: Examining Investment Treaty Outcomes*, 55 VA. J. INT'L L. 13 (2014); Susan Franck & Linsey Wylie, *Predicting Outcomes in Investment Treaty Arbitration*, 65 DUKE L.J. 459 (2015)

[91] We use GNI per capita as opposed to the other frequently used measure, gross domestic product (GDP) per capita for consistency with earlier empirical studies by Franck and colleagues; and also to permit our use of the WBIGs (which are based on GNI per capita). However, for statistical purposes, GNI per capita and GDP per capita correlate at 99%. They are essentially the same measures when used for statistical purposes.

[92] See generally Indicators, The World Bank, http://data.worldbank.org/indicator? tab=all (2018) (providing indicators that help calculate GNI per capita; GNI per capita is gross national income divided by midyear population; GNI is the sum of value added by all resident producers, plus product taxes not included in the output valuation, plus net receipts of primary income from abroad, data are in constant 2010 USD). The state with the lowest GNI per capita in our sample of concluded cases Burundi (e.g. *Goetz I v Burundi, Goetz II v. Burundi*) and the state with the highest GNI per capita is the United Arab Emirates (UAE) (e.g. Soufraki v. UAE).

[93] See generally New Country Classifications, The World Bank, http://data.worldbank.org/news/new-country-classifications-2015 (2018) (WBIGs are used to determine states lending eligibility. They are calculated using the World Bank atlas method, essentially a way of smoothening out the impact of fluctuations in prices and exchange rates on the state-year estimates. In practice the World Bank applies a conversion factor that averages a state's exchange rate for a given year and the two preceding years, while adjusting for differences in rates of inflation between the state and a basket of developed state economies. Economies are split into four categories: (1) low-income; (2) lower-middle-income; (3) higher-middle-income; and (4) high-income. The thresholds between each category vary by year, but in 2014 a GNI per capita of less than 1045 USD puts a state in the low-income category, a GNI per capita between 1045 USD and 4125 USD puts a state in the lower-middle-income category, GNI per capita between 4125 USD and 12736 USD places a state in the upper-middle-income category and a GNI per capita of above 12736 USD puts a state in the high-income category.).

2. Quality of Governance

Assessing states' quality of governance and levels of democracy is also a complicated task.[94] While the go-to measure for democracy in political science—the *Polity IV* index[95]—is often used as a proxy for general levels of quality of governance, we have proposed a much more disaggregated approach in the preceding section. Our goal is to pinpoint the more specific, underlying traits of governance quality. For referencing the previous contributions in the field however, we start with a general measure of the levels of democracy in respondent states. Instead of using the *Polity IV* index here, we instead use an indicator that includes the levels of democracy in a state along with other measures relating broadly to a state's governance quality: the *liberal democracy* index from the Varieties of Democracy (V-Dem) Project.[96] This *liberal democracy* index fits well with our theoretical focus on governance quality as stemming from the impartiality of domestic institutions. In addition to taking into account levels of electoral democracy, it measures quality of democracy by the limits placed on government through constitutionally protected civil liberties, strong rule of law, independence of the judiciary and effective checks and balances that limit the exercise of executive power.[97] The index ranges from (0) to (1), where higher values correspond with higher quality liberal democracy.[98]

Our first specific quality of governance indicator seeks to capture *political regime stability*.[99] As a stable polity may be better at governing in ac-

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[94] See Carl Henrik Knutsen, *Measuring Effective Democracy*, 31 INT'L POL. SCI. REV. 109 (2010).

[95] See Monthy Marshall, Ted Gurr & Keith Jaggers, POLITY™ IV PROJECT: POLITICAL REGIME CHARACTERISTICS AND TRANSITIONS, 1800–2015, DATASET USERS' MANUAL (Center Sys. Peace, May 2016) (outlining the Polity IV Project as based on the competitiveness of political participation, the openness of executive recruitment and constraints on the chief executive).

[96] See V-DEM PROJECT: VARIETIES OF DEMOCRACY, https://v-dem.net/en (last visited May 2, 2017) (showing that the V-Dem Project represents a new approach to conceptualizing and measuring democracy. The project supplies open access to both aggregated indices and disaggregated state-year data on a wide variety of aspects pertaining to quality of governance).

[97] See Michael Coppedge et al., *Measuring High Level Democratic Principles using the V-Dem Data*, 37 INT'L POL. SCI. REV. 580 (2015).

[98] See *Yaung Chi Oo Trading Pte. Ltd. v. Gov't of the Union of Myanmar*, 42 ILM 540, Final Award (March 31, 2003) (The lowest score on the liberal democracy index in our sample of concluded ITA cases is given to Myanmar.). See also *Glamis Gold Ltd. v. U.S.*, Final Award (June 8, 2009); *Methanex Corp. v. U.S., Final Award on Jurisdiction & Merits* (Aug. 3, 2005); *Loewen Grp., Inc. & Raymond L. Loewen v. U.S.*, Case No. ARB(AF)/98/3 Final Award (June 26, 2003) (And the highest score on the liberal democracy index is given to the U.S.).

[99] Note that political regime stability is distinct from political change. We are interested with the frequency with which a state is subject to dramatic and fundamental changes in the way it is governed. While electoral democracies often experience frequent changes in the ruling party, this would not constitute an unstable political regime in most cases. We want to capture

cordance with its IIA commitments, we simply use the *regime durability* indicator from Polity IV Project.[100] *Regime durability* is measured as the number of years since the last regime change, or the end of a transition period that was characterized by a lack of stable political institutions.[101] Due to the fact that this variable is heavily skewed, and because we believe that the marginal effect of stability diminishes as polities grow older, we use a log-transformed version of the *regime durability* indicator in our analysis.

 Our second specific quality of governance aspect concerns legislative and judicial constraints on the executive; that is, the degrees to which states succeed in curbing executive power. Here we also utilize data from the V-Dem Project and create an *executive constraints* index. Because we are interested in both judicial and legislative constraints on the executive branch, we estimate an unweighted average of the two following indices: the *judicial constraints on the executive* index,[102] and the *legislative constraints on the executive* index.[103] Both indices range from (0) to (1), where higher values correspond with higher levels of executive constraint.[104]

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the idea that a state whose fundamental shifts in its political systems of governance (i.e. going from democracy to military dictatorship) is both frequent and is also likely to affect major changes to these states' underlying legal and regulatory regimes.

[100] See Monthy Marshall, Ted Gurr & Keith Jaggers, POLITY™ IV PROJECT: POLITICAL REGIME CHARACTERISTICS AND TRANSITIONS, 1800–2015, DATASET USERS' MANUAL (Center Sys. Peace, May 2016).

[101] See *Compagnie International de Maintenance* (CIM) v. Ethiopia, UNCITRAL, Award (2009) (not public); *CIM v. Ethiopia; Tradex Hellas S.A. v. Republic of Albania*, Case No. ARB/94/2, Final Award (Apr. 29, 1998) (States with low scores on regime durability indicator.). The states with the most durable polities on the regime durability indicator are the US, Canada, Costa Rica and Belgium.

[102] See Michael Coppedge et al., V-DEM CODEBOOK v6., (Varieties of Democracy Project, 2016) (showing that the judicial constraints on the executive index taps into the extent to which the executive respects the constitution and complies with court rulings).

[103] *See id*. (showing the legislative constraints on the executive index captures the extent to which the legislature and government agencies are capable of questioning, investigating and exercising oversight over the executive).

[104] See *Luigiterzo Bosca v. Republic of Lithuania*, PCA Case No. 2011-05 Final Award (May 17, 2013); *Parkerings-Compagniet v. Republic of Lithuania*, Case No. ARB/05/8 Final Award (Sept. 11, 2007) (Some of the states in our sample that receive the highest scores on our combined executive constraints index are Lithuania); *Glamis Gold Ltd. v. U.S.*, Final Award (June 8, 2009); *Methanex Corp. v. U.S.*, Final Award on Jurisdiction & Merits (Aug. 3, 2005); *Loewen Grp., Inc. & Raymond L. Loewen v. U.S.*, Case No. ARB(AF)/98/3 Final Award (June 26, 2003) (the United States); *Oko Pankki Oyj et al. v. Republic of Estonia*, Case No. ARB/04/6 Final Award (Nov. 19, 2007); *Alex Genin et al. v. Republic of Estonia*, Case No. ARB/99/2 Final Award (June 25, 2001) (Estonia). See also *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1 Final Award (July 2, 2013); *İçkale İnşaat Ltd. Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24 Final Award (Mar. 8, 2016) (States that score lowest on our combined executive *constraints index are predominantly from Central Asian states such as Turkmenistan); Romak* S.A. v. Republic of Uzbekistan, PCA Case No. AA280 Final Award (Nov. 26, 2009); *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3 Final Award (Oct. 4, 2013) (Uzbekistan).

Our third quality of governance aspects concerns *impartial bureaucracies* in respondent states. We are especially interested in capturing the degree to which civil servants are free from political influence, and whether the recruitment structure in the civil service is based on merit. We therefore apply the *bureaucratic quality* index from the International Country Risk Guide (ICRG).[105] The index ranges from (0) to (4), where high scores indicate autonomous bureaucracies with a meritocratic recruitment structure and the strength and expertise to govern without drastic changes in policy or interruptions in government services. Low scores indicate bureaucracies that are prone to political interference and arbitrary regulation and administration.[106]

The fourth quality of governance aspect we are interested in is the degree to which respondent states are able to secure *property rights protection*. We are interested in both property rights institutions and contractual rights institutions, and therefore apply the *investment profile* index from the ICRG.[107] This index assesses factors affecting the risk to investments that emanates from contract viability, profits repatriation and expropriation; and ranges from (0) to (12). Higher scores equate lower risks to the private property interests of investors in these states.[108] However, it should be noted that both ICRG indices (the *bureaucratic quality* index and the *investment profile* index) have been challenged for the nature of their subjective assessments.[109]

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[105] See INTERNATIONAL COUNTRY RISK GUIDE CODEBOOK, (The ICRG is compiled by the Political Risk Services Group, a for-profit organization supplying a wide variety of annual state risk measures to prospective investors and academics.).

[106] See *Patrick H. Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7 Excerpts of Final Award (Feb. 9, 2004); *African Holding Co. of Am, Inc. & Société Africaine de Construction au Congo S.A.R.L v. Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Award on the Objections to Jurisdiction & Admissibility (July 29, 2008) (States that receive the highest score on the bureaucratic quality index are the US, Hungary and Canada, while the only state that is accorded the lowest score on the bureaucratic quality index is the Democratic Republic of Congo.).

[107] See INTERNATIONAL COUNTRY RISK GUIDE CODEBOOK.

[108] See *Border Timbers Ltd. et al. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25 (July 28, 2015); *Bernhard Friedrich Arnd Rüdiger von Pezold et al. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15 Final Award (July 28, 2015) (States that receive highest scores on the investment profile index in our sample of respondent states are the US, Canada, Hungary and the Czech Republic. States that receive the lowest scores on the investment profile index are Zimbabwe); *Patrick H. Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7 Excerpts of Final Award (Feb. 9, 2004); *African Holding Co. of Am, Inc. & Société Africaine de Construction au Congo S.A.R.L v. Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Award on the Objections to Jurisdiction & Admissibility (July 29, 2008) (Democratic Republic of Congo).

[109] *See* Indicators of Governance and Institutional Quality, http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/IndicatorsGovernanceandInstitutionalQuality.pdf ("Beginning with Knack and Keefer (1995), numerous studies have used the International Country Risk Guide (ICRG) indicators. The widespread use of ICRG is due largely to its broad coverage both across countries (130+) and over time (1982 to currently) . . . Be-

Of particular importance, various studies indicate that expert assessors may be in fact influenced by a state's levels of GDP when tasked with assessing a state's institutional quality.[110] As we are trying to avoid precisely such conflation, this index may present some problems for our analysis; but as there are no other viable options for the moment that can be applied, we use them with this strong caveat in mind.

To capture the fifth governance aspect we are interested in—*judicial quality*, we use the unweighted average of two indicators from the V-Dem Project that relate to measures of judicial independence: the *high court independence* indicator and the *lower court independence* indicator.[111] These indicators measure the degree to which respondent states have judiciaries that are independent from political influence. The *judicial quality* index that we create from these two indices ranges from (0) to (1), where higher values corresponding with higher levels of judicial quality and independence.[112]

In operationalizing our sixth, and final, quality of governance aspect—*political corruption*—we are interested measuring corruption within the respondent states' political realm. We therefore apply the *political corruption* index from the V-Dem Project.[113] The index captures how pervasive political corruption is, and factors in public sector corruption, executive corruption, legislative corruption and judicial corruption.[114] Conceptually, the index taps into both petty and grand corruption, both bribery and theft, and both corruption aimed at influencing law making as well as implementation of policy.[115]

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cause the ratings are subjective assessments by experts, it is possible that the ratings are influenced by knowledge of recent economic performance; for example, an 'expert' who is asked to rate a country about which he/she knows very little might surmise that corruption must not be too severe in country X because it has been growing so rapidly and attracting so much investment.")

[110] *See id*. at 6.

[111] *See* Michael Coppedge et al., V-DEM CODEBOOK V6., (Varieties of Democracy Project, 2016).

[112] *See Philip Morris Asia Ltd. v. Commonwealth of Australia*, PCA Case No. 2012-12 Award on Jurisdiction and Admissibility (Dec. 17, 2015) (States that score high on our judicial quality index in the sample are: Australia); *Victor Pey Casado (I) v. Republic of Chile*, ICSID No. ARB/98/2 Award (May 8, 2008); *Victor Pey Casado (II) v. Republic of Chil*e, ICSID No. ARB/98/2 Final Award (Sept. 13, 2016) (Chile). See also *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1 Final Award (July 2, 2013*); İçkale İnşaat Ltd. Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24 Final Award (Mar. 8, 2016) (States that scored especially low on the judicial quality index are: Turkmenistan); *Romak S.A. v. Republic of Uzbekistan*, PCA Case No. AA280 Final Award (Nov. 26, 2009); *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3 Final Award (Oct. 4, 2013) (Uzbekistan).

[113] *See* Michael Coppedge et al., V-DEM CODEBOOK V6., (Varities of Democracy Project, 2016). *See also* Kelly McMann et al., *Strategies of Validation: Assessing the Varieties of Democracy Corruption Data*, (V-Dem Institute, Working Paper Series 2016:23, 2016)).

[114] *See id.*

[115] *See id.*

The *political corruption* index originally ranges from (0) to (1), where high scores indicate high levels of corruption. For the ease of interpretation, we reverse the scale so that high scores indicate low levels of political corruption.[116]

Due to the deep-rooted complementarity of domestic institutional evolution,[117] analyzing specific institutional governance aspects together introduces multicollinearity in statistical models.[118] In practice, that means we can only analyze our quality of governance indicators sequentially.

3. Control Variables

One problematic issue with early attempts at analyzing outcomes in ITA has been the sample size. As the number of ITA outcomes prior to 2010 has been relatively restricted, researchers have not had big enough sample sizes to introduce sufficient control variables.[119] However, the sample size has doubled itself the last five years, allowing for a more extensive control environment. Because the focus of our article is to assess explanatory factors at the respondent state level, most of our controls seek to address potentially confounding factors that also stem from respondent state characteristics. Yet, as there is still much work to be done on other areas of variation, we also include a number of additional controls that pertain to the claimant-investor and to some in-case dynamics. In our analysis in Section V below, we first apply a parsimonious set of controls, then a more extensive set.

First, we have identified six controls that capture respondent state

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[116] States with the lowest levels of political corruption according to the political corruption index in our sample are Canada, Uruguay and Belgium. *See Sistem Mühendislik İnşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award (Sept. 9, 2009) (States with the highest levels of political corruption according to the political corruption index are predominantly from Central Asian states, such as Kyrgyzstan); *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, AISCC Case No. V (064/2008), Final Award (June 8, 2010) (Tajikistan); *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1 Final Award (July 2, 2013); *İçkale İnşaat Ltd. Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24 Final Award (Mar. 8, 2016) (Turkmenistan).

[117] *See* Peter Hall & David Soskice, VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (Oxford U. Press, 2003); Bruno Amable, THE DIVERSITY OF MODERN CAPITALISM (Oxford U. Press, 2003); See Douglass North, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (Cambridge U. Press, 1990); Daron Acemoglu & Simon Johnson, Unbundling Institutions, 113 J. Pol. Econ. 949 (2005).

[118] See the relatively high bivariate correlations between all democracy and quality of governance measures in Table A2 in the Appendix.

[119] *See* Susan Franck & Linsey Wylie, Predicting Outcomes in Investment Treaty Arbitration, 65 DUKE L.J. 459 (2015) (utilizing a universe of cases analyzed varied between 144 and 44 cases across models); Susan Franck, Conflating Politics and Development: Examining Investment Treaty Outcomes, 55 VA. J. INT'L L. 13 (2014) (conducting analyses with a maximum of two independent variables at a time.).

characteristics—beyond our quality of governance variables—that we consider might also influence ITA case outcome. We begin with an *economic volatility* variable that controls the extent to which a respondent state's economic stability across time. As was the case in Argentina in the early 2000s in particular, economic instability may severely affect states' ability to stay compliant with its IIA commitments. A respondent state with severe *economic volatility* may thus be more likely to lose an ITA claim. We therefore apply a measure of growth volatility, understood as average five-year standard deviation of GDP growth in the respondent state prior to the year that the ITA claim is registered.[120] We also introduce a *case cluster* variable to control for the potentially large effect single events at the respondent state level might have on our estimates.[121] We identify *case clusters* as instances where five or more ITA claims are registered against a particular respondent state within a given calendar year.[122]

We also apply an *OECD member state* variable that controls for the fact that OECD states were early movers in developing and promulgating the international investment regime.[123] As such, they may have more expertise in both writing IIAs and defending themselves in ITA cases. To control for the disproportionately high numbers of ITA cases filed against South American states and the frequent voices of discontent against ITA in the same region,[124]

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[120] *See* Fernando Bizzarro et al., Party Strength and Economic Growth, V-Dem Institute Working Paper Series 2015: 10 (Sept. 2015) (working paper) (giving an example of the use of this type of economic volatility measure); Dani Rodrik, ONE ECONOMICS, MANY RECIPES: GLOBALIZATION, INSTITUTIONS, AND ECONOMIC GROWTH (Princeton U. Press, 2008) (discussing the general importance of economic stability to institutional quality).

[121] Prominent events that spurred a significant number of ITA cases include, inter alia: the Argentine economic crisis of 2000–01; changes in the renewable energy sector in the Czech Republic and Spain in 2011–14; the 2011 uprisings in Egypt and Libya; Russian annexation of Crimea in 2014; and Venezuelan nationalizations 2010–11. *The Guardian, Timeline*: Argentina's economic crisis: How did Argentina get into this mess? Here are the key dates in its tale of woe, https://www.theguardian.com/world/2001/dec/20/argentina; *Ismaeel Naar*, Timeline: Arab Spring: A detailed review of major events looking back at three years of Arab Uprisings across the region, Al-Jazeera, https://www.aljazeera.com/indepth/interactive/2013/12/timeline-arab-spring-20131217114018534352.html; Joe Tirado & Alejandro Garcia, Rise of renewable energy claims, Renewable Energy Focus (2015); Yessika Monagas, U.S. Property in Jeopardy: Latin American Expropriations of U.S. Corporations' Property Abroad. HOUS. J. INT'L L., 34(2), 455 (2012); Timur Bondaryev, et al., Protecting investments in Crimea: Does Ukrainian or Russian law apply? Int. L. News, 14 (2015).

[122] The state-cluster-years we identify in the full sample of registered ITA cases via this method are: Argentina (2003, 2004, 2005, 2007), Czech Republic (2005, 2013, 2014), Egypt (2013), India (2004), Poland (2014), Russia (2015), Spain (2014, 2015), Ukraine (2008, 2015) & Venezuela (2011, 2012).

[123] *See* Stephan Schill, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 89–91 (Cambridge U. Press, 2009).

[124] *See* Susan Franck, The ICSID Effect? Considering Potential Variations in Arbitration Awards, 51 VA. J. INT'L L. 825 (2011) (showing that Latin or South American respondent states has also been common in previous analyses of ITA outcomes). See also Efraim

we introduce a *South American state* variable to control for whether the respondent state is a South American state or not. Next, to control for the effect of resource-dependence at the respondent state level, we apply a *natural resource rents* control variable that measures annual total natural resource rents as a percentage of GDP.[125] Given that a significant number of ITA cases deal with the natural resource sector, we might assume that a state that is heavily dependent on resource rents to be more likely to attract ITA claims, but also to be more frequent losers in ITA cases because of the types of alleged IIA breaches that typically arise when a state modifies its rules governing natural resource extraction (i.e. nationalizations leading to uncompensated expropriations). Finally, to control for a state's dependence on FDI, we apply an *FDI inflows* variable, measured as net annual FDI inflows as a percentage of GDP.[126] We might assume that a respondent state with a high dependence on FDI inflows would be more likely to treat foreign investors more fairly and impartially than a state that is less dependent on *FDI inflows*, and would be therefore more likely to successfully defend itself when an ITA case arises.[127]

Second, we include eight controls that pertain more closely to the claimant-investor and to other specific in-case dynamics that may influence ITA outcome patterns. We introduce a *state learning* variable that counts the number of ITA cases a respondent state has had to defend itself against across time.[128] The general idea is that respondent states will learn case-by-case how to defend themselves in ITA, and that they over time these frequently sued respondent states will become better at ensuring that state measures and

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Chalamish, Book Review; Do Treaties Matter? On Effectiveness and International Economic Law, 32 MICH. J. INT'L L. 325 (2011) (describing the deep-rooted feeling across many Latin American states that ITA is biased in favor of foreign investors).

[125] *See* THE WORLD BANK, Total Natural Resources Rents (% of GDP), http://data.worldbank.org/indicator/NY.GDP.TOTL.RT.ZS?%20view=chart (last visited Aug. 19, 2017) (Total natural resources rents are the sum of all natural resource rents: oil, natural gas, coal, minerals and forestry).

[126] *See* THE WORLD BANK, Foreign Direct Investment, New Inflows (% of GDP), http://data.worldbank.org/indicator/BX.KLT.DINV.WD.GD.ZS?view=chart (last visited Aug. 19, 2017) (Net FDI inflows is estimated annually as new investment minus disinvestment). To account for skewness, we choose to log-transform the FDI data. However, because FDI as a percentage of GDP sometimes takes on negative values, we had to apply a modified version of the log-transformation: $y = \ln(x + \sqrt{x^2 + 1})$. This transformation is commonly used when working with FDI data. E.g., Matthias Busse & Carsten Hefeker, Political Risk, Institutions and Foreign Direct Investments, 23 EUR. J. POL. ECON. 397 (2007).

[127] There is some evidence that a state's dependence on FDI might lead it to be more cautious in its dealings with foreign investors. See Graeme B. Robertson & Emmanuel Teitelbaum, Foreign Direct Investment, Regime Type, and Labor Protest in Developing Countries, 55 AM. J. POL. SCI. 665 (2011) (giving an example showing how the dependence on FDI may have an effect on the quality of a state's governance).

[128] This variable counts every ITA claim that has been registered against a particular respondent state, regardless of outcome. That is, the cumulative count includes ITA cases that were settled or discontinued as well.

actions are in line with their IIA commitments on the one hand,[129] and that these states will likewise become better at defending themselves in ITA cases through more sophisticated litigation tactics and improved strategies in arbitrator appointment choices[130]. As we expect that the marginal effect of learning to decrease over time, we apply a log-transformed version of the *state learning* variable. Relatedly, we add *two* controls that capture whether the respondent state or the claimant-investor has an advantage in ITA cases as determined by the quality of their legal representation. For the *claimant law firm advantage* variable, we provide a control as to whether only the claimant-investor has retained legal counsel from a Global 100 law firm.[131] For the *respondent law firm advantage* variable, we provide a control as to whether only the respondent has retained legal counsel from a Global 100 law firm. In cases where both or neither of the parties have retained a Global 100 law firm, no advantage is coded.

Next, we control for the nationality of arbitrators in ITA cases using an *OECD member state panel* variable that identifies ITA tribunals that include two or more arbitrators whose nationalities are OECD member states. The idea is to provide a crude control variable to identify whether a majority of arbitrators from OECD member states would be more or less likely to find in favor of foreign investors considering that the vast majority of claimant-investors in ITA cases come from OECD member home states. We also add *two* controls that focus on the legal basis of ITA cases. We add a *NAFTA case* variable to control for ITA cases arising out of the *North American Free Trade Agreement* (NAFTA); and an *ECT case* variable to control for ITA cases arising out of the *Energy Charter Treaty* (ECT). Combined, these multilateral IIAs are the most frequently invoked IIAs in the universe of ITA cases (through January 1, 2017, there have been 101 ITA cases based on the ECT; and 69 ITA cases based on the NAFTA), and as such we suspect that

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[129] *See* Lauge Poulsen, BOUNDED RATIONALITY AND ECONOMIC DIPLOMACY: THE POLITICS OF INVESTMENT TREATIES IN DEVELOPING COUNTRIES 147–8 (Cambridge U. Press, 2015) (discussing the state-level learning process that resulted from the Metalclad v. Mexico case).

[130] Malcolm Langford, Daniel Behn and Ole Kristian Fauchald, Backlash and State Strategies in International Investment Law in Tanja Aalberts and Thomas Gammeltoft-Hansen, THE CHANGING PRACTICES OF INTERNATIONAL LAW (CUP 2018).

[131] For this variable, we used the 2015 list of Global 100 law firms from the American Lawyer. For the list, see 2015 Global 100: Top-Grossing Law Firms in the World: 2015 Global 100, The American Lawyer, (Sept. 28, 2015). *available at* www.americanlawyer.com/id=1202471809600/2015-Global-100-TopGrossing-Law-Firms-in-the-World-?slreturn=20161018054444 (last visited May 2, 2017). While this list only provides the top 100 law firms (by revenue) for 2015 and that this list has of course changed over time, we believe that these controls should capture a sufficient amount of variation to warrant its use. In ITA cases where the identity of the respondent state or claimant-investor counsel is unknown, we assume it is not from a Global 100 law firm. This is to not overshoot the effect of quality legal counsel. Finally, we count a Global 100 law firm only if such counsel represented a party at some stage of the first instance proceedings. We exclude known counsel for annulment proceedings and other domestic set-aside proceedings.

there may be particularities pertaining to these types of cases that require control.

Finally, we have identified two controls that relate to claimant-investors and ITA case subject-matter. To control for the particularities of foreign investments in the extractive industries,[132] we include an *extractive industry case* variable that measures whether an ITA case involves a dispute relating to the extractive industries or not. The high levels of sunk costs and overall political sensitivity of many foreign investments made in the extractive industries may make these types of investments more prone to IIA violations. Further, there are structural reasons as to why a respondent state in an extractive industries-related ITA case would be more likely to lose.[133] The second control variable measures the claimant-investor's *home state GNI per capita*. The general idea is that foreign investors from prosperous capital-exporting states may be more likely to carry certain power-based advantages when litigating ITA cases—such as various forms of diplomatic or governmental support from their home states—that may not be available to foreign investors hailing from less prosperous home states.

V.   RESULTS

In this section, we present the results from our analyses in four steps. First, we examine some of the descriptive tendencies in our data. Second, we examine the potential conflation of quality of governance and economic development as predictors of ITA outcomes. We estimate one set of parsimonious models, and one set of extensive models. Third, we examine whether there are certain groups of respondent states that drive our results, and we estimate predicted probabilities based on two of our models. Fourth, we present a set of robustness checks to assess the sensitivity of our analysis to model specification, operationalization and influential observations.

   A. Methodology

Due to the fact that our main dependent variable is dichotomous (win-loss), we apply a simple logistic regression model in our main analyses. We

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[132] *See* Stephen Cohen, MULTINATIONAL CORPORATIONS AND FOREIGN DIRECT INVESTMENT: AVOIDING SIMPLICITY, EMBRACING COMPLEXITY 78–9 (Oxford U. Press, 2007) (finding that factors include particularly the low local integration, high levels of sunk costs, as well as the relatively high expected marginal return on investment).

[133] In many ITA cases involving the extractive industries, the claims may not concern respondent state liability for an IIA violation but rather the correct level of compensation for a direct expropriation or nationalization. In these cases, the failure to pay adequate compensation is a de jure violation of most IIAs, and as such, the claims structure of these cases makes a claimant-investor win much more likely than in other types of ITA cases. Daniel Behn, Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: empirically evaluating the state-of-the-art. 46 GEO. J. INT'L L., 363, 392 (2015) (noting that cases involving the extractive industries are more successful than the general success rate of cases).

lag all time-variant variables one year from the year of case registration to accommodate a proper cause-effect relationship, and we cluster standard errors on respondent states to account for intra-group correlation in respondent states' error-terms. As there might be year-specific or period-specific trends in ITA outcomes, we also include year-fixed effects in all models. Further, and because the independent variables have various degrees of coverage, the ITA cases actually included in the applied sample vary somewhat between models. For both the parsimonious and the extensive quality of governance models, we have noted which ITA cases drop out of the respective samples in Table A4 and Table A5 in the Appendix.

B. Descriptive Findings

We start by looking at whether there are observable tendencies relating to the types of respondent states that are most frequently sued in ITA cases across time. Figure 3 below shows the shares of annual ITA claims registered as per respondent states' WBIGs from the first year that more than 10 ITA cases were registered in a single year (in 1998) up through 2016.

Given the general perception that foreign investors use ITA against less developed states in particular, it is interesting to note that most of the ITA claims in the past 20 years have come against respondent states from the upper echelons of the less developed state groupings – the WBIG's two middle-income categories.[134] The poorest states in the world are largely excluded from the system of ITA. On the other hand, the only other discernible trend in the claims structure is a slight increase in the share of ITA claims received by high-income states across time. While this could be a function of more IIAs between developed states coming into force during this time period, it is more likely to be directly attributable to the massive number (over 50 ITA cases) of ECT claims initiated against Spain, Italy and the Czech Republic in relation to the revocation of renewable energy subsidies over the same time period (2011-2015).

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[134] *See* Andy Sumner, Global Poverty and the New Bottom Billion: What if Three-Quarters of the World's Poor Live in Middle-Income Countries?, IDS Working Paper 349 (Nov. 2010) (showing that even though these numbers may be a function of the general increase in the number of middle-income states).

Figure 3. Percentage of ITA Cases Registered by Respondent State WBIGs (784)
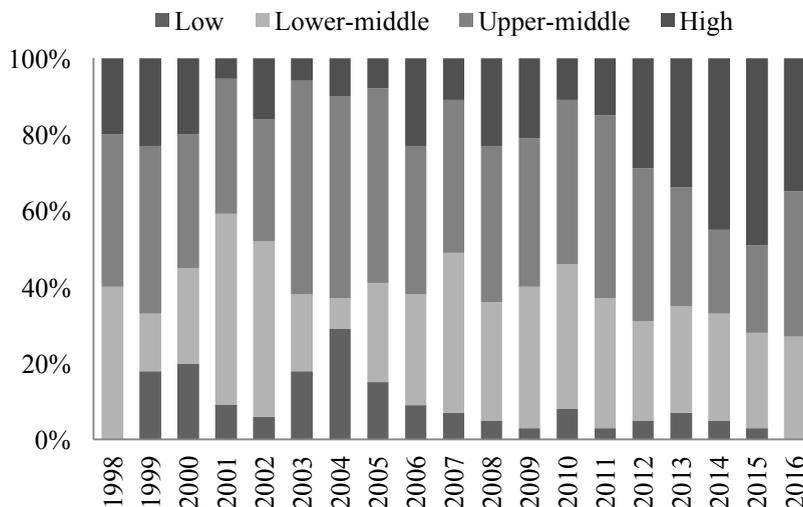
Next, we consider the descriptive claimant-investor win rates in our sample of concluded ITA cases. It is often held that ITA should be viewed as legitimate exactly because foreign investors and respondent states, on average, win and lose equally often.[135] However, recent evidence suggests that these claimant-investor win rates look quite different when examined against particular groups of respondent states.[136] The figures below show average foreign investor win rates, as well as win rates across the WBIGs. We include both our binary measure of concluded ITA case outcomes as measured by foreign investor win versus loss (Figure 4 below), and the same win rates when counting settled cases as a claimant-investor win (Figure 5 below).

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[135] *See* Section II above.

[136] *See* Thomas Schultz & Cedric Dupont, Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study, 25 EUR. J. INT'L L. 1147 (2014).

Figure 4. Investor Win Percentages for Concluded ITA Cases (358)
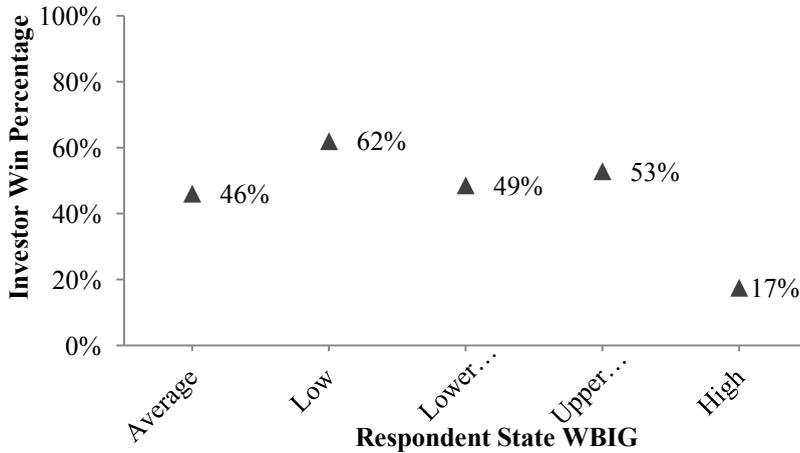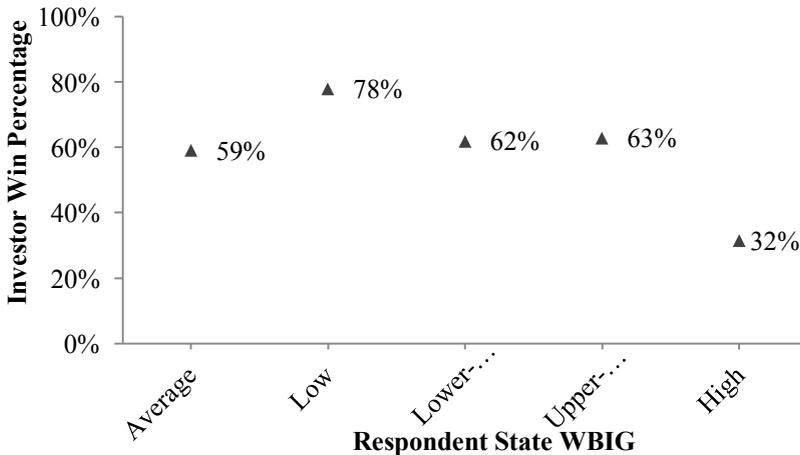

Figure 5. Investor Win Percentages for Concluded (358) + Settled (117) ITA Cases

The first thing to observe is that the average foreign investor win rate in our sample sits at 46% overall (165 wins out of 358 ITA cases). When counting settled cases as a foreign investor win, the average win rate jumps to 59% (282 wins out of 475 ITA cases). But more interesting are the foreign investor win rates as viewed across respondent state WBIGs. While claimant-investor win rates against the two middle-income groups in both Figures lie close to the average, the claimant-investor win rates against high-income and low-income states, respectively, diverge radically from the mean. When only

looking at win rates in concluded ITA cases (Figure 4 above), foreign investors win in only 17% of the ITA cases brought against high-income respondent states, but in 62% of ITA cases brought against low-income respondent states. This means that foreign investors have a more than four times better chance of winning against a low-income respondent state than a high-income respondent state.

It is also interesting to see that when including settled cases as a claimant-investor win, the win rates rise between 13% and 15% against low-income and high-income respondent states respectively (Figure 5 below). That may indicate that both of these income groups of respondent states are equally willing to settle ITA cases. This would go against our hypothesis that less developed states are more likely to settle ITA cases. Nevertheless, the fact that foreign investors either win or settle close to 80% of all ITA cases against low-income states remains striking.

The main takeaway from our descriptive statistics is that average claimant-investor win rates seem to be masking a structural tendency towards polarization in overall foreign investor win rates. Claimant-investors win often against low-income respondent states, and rarely against high-income respondent states—while they win and lose evenly against middle-income states. However, that is not to say that foreign investors are predatorily targeting less developed respondent states. Over time, high-income respondent states have received a larger share of ITA claims and low-income states a lower share. However, if the conflation theory is correct, we should be able to explain these differences in claimant-investor win rates with respondent states' quality of governance levels.

C. Main Analysis

In this section, we present two sets of models that probe the conflation theory—one set of models with a parsimonious control environment (Table 1 below) and one set of models with the all controls (Table 2 below). In both Tables, Model 1 is the baseline model where we assess the effect of economic development on ITA outcomes without controlling for the quality of governance indicators. In Models 2 through 8, in both Tables, we enter our quality of governance indicators sequentially.[137] In the parsimonious model (Table 1), we find that higher levels of economic development (as measured by *GNI per capita*) at the respondent state level is associated with lower claimant-investor win rates in ITA cases. The result is significant at the 10% level in the parsimonious models (Table 1) and almost significant at the same level

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[137] The correlation between our six quality of governance indicators is too high to run them in the same model. In all instances when we attempted to run the models together, we received problematic levels of variance-inflation. See all bivariate correlations in Table A2 in the Appendix.

in the extensive models (Table 2). So, the strong bivariate relationship between economic development and ITA outcomes discussed in the descriptive findings are notably moderated when introducing our control environment.

Table 1. Quality of Governance and Development in ITA— *Parsimonious Models*

ITA case outcome (investor win)	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6	Model 7	Model 8
Respondent state GNI per capita	-0.354*	-0.428**	-0.332*	-0.351*	-0.0728	0.0206	-0.374*	-0.368*
	(0.184)	(0.214)	(0.181)	(0.193)	(0.202)	(0.185)	(0.203)	(0.207)
Liberal democracy		1.017						
		(0.961)						
Regime stability			-0.201					
			(0.151)					
Executive constraints				0.321				
				(0.762)				
Impartial bureaucracies					-0.252			
					(0.190)			
Property rights protection						-0.158***		
						(0.0519)		
Judicial quality							0.111	
							(0.148)	
Political corruption								0.236
								(0.717)
Natural resource rents %GDP	0.106	0.205	0.115	0.158	0.132	0.0991	0.185	0.141
	(0.105)	(0.152)	(0.106)	(0.139)	(0.120)	(0.118)	(0.147)	(0.126)
Extractive industry case	0.809**	0.840**	0.853**	0.840**	0.625	0.530	0.856**	0.819**
	(0.392)	(0.406)	(0.396)	(0.414)	(0.422)	(0.438)	(0.415)	(0.400)
State learning	0.328**	0.282	0.392**	0.318*	0.437**	0.298*	0.316*	0.333**
	(0.161)	(0.177)	(0.158)	(0.174)	(0.177)	(0.164)	(0.169)	(0.165)
Claimant law firm advantage	-0.398	-0.797	-0.423	-0.844	-0.950	-0.848	-0.873	-0.825
	(0.616)	(0.603)	(0.654)	(0.627)	(0.640)	(0.630)	(0.633)	(0.621)
Respondent law firm advantage	-0.817**	-0.854**	-0.707*	-0.836**	-0.823**	-0.826**	-0.843**	-0.835**
	(0.367)	(0.371)	(0.387)	(0.370)	(0.406)	(0.404)	(0.367)	(0.368)
OECD majority panel	-0.144	0.00670	-0.0299	-0.0294	0.000750	0.0608	-0.0284	-0.0462
	(0.477)	(0.495)	(0.496)	(0.486)	(0.502)	(0.536)	(0.477)	(0.484)
Home state GNI per capita	-0.239	-0.295	-0.169	-0.283	-0.250	-0.269	-0.299	-0.287
	(0.234)	(0.249)	(0.226)	(0.246)	(0.280)	(0.270)	(0.248)	(0.247)
Constant	4.233	5.293*	3.586	4.851*	1.147	1.410	5.288*	5.146*
	(2.811)	(2.988)	(2.669)	(2.907)	(3.196)	(2.984)	(3.017)	(2.971)
Year fixed effects	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Observations	313	302	297	302	291	291	302	302
Pseudo R^2	0.138	0.144	0.154	0.141	0.158	0.169	0.142	0.141

Logistic regression models. Outcome: (0) = investor loss, (1) = investor win. Standard errors clustered on respondent state in parentheses. All time variant independent variables are lagged one year from the year of ITA case registration. * $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$.

The most significant control variables are the *respondent law firm advantage* (associated with a lower chance of a foreign investor win) and *extractive industry case* (associated with a higher chance a foreign investor win). In the parsimonious baseline model (Model 1 in Table 1 above) the

effect of *state learning* is significant, but actually associated with a higher chance of a foreign investor win. It is unclear why a respondent state would not get better at defending itself the more cases it has against it, but one possible explanation is that this effect is not a product of a respondent state's ability to learn how to litigate an ITA case, but is rather a product of its habitual pattern of violating its IIA obligations. As hypothesized, the *case cluster* effect is positive and significant in the extensive baseline model (Model 1 in Table 2 below), meaning that foreign investors fare better if their ITA case is one of many initiated based on the same underlying state-level event.

When we control for our broad measure of democratic governance (the *liberal democracy* index), the relationship between economic development and ITA case outcomes actually becomes both stronger and more significant. This finding is contrary to the general assumption in the conflation theory. Controlling for *liberal democracy* actually strengthens the relationship between economic development and ITA outcomes. In our view, this underlines the problems of using broad indicators of a state's levels of democracy as proxies for good governance when explaining ITA outcomes.

Table 2. Quality of Governance and Development in ITA—Extensive Models (All Controls)

ITA case outcome (investor win)	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6	Model 7	Model 8
Respondent state GNI per capita	-0.316	-0.368*	-0.336*	-0.29	-0.083	0.0153	-0.301	-0.350*
	(0.197)	(0.206)	(0.197)	(0.200)	(0.214)	(0.212)	(0.199)	(0.205)
Liberal democracy		1.204						
		(0.798)						
Regime stability			-0.136					
			(0.144)					
Executive constraints				0.644				
				(0.643)				
Impartial bureaucracies					-0.00045			
					(0.242)			
Property rights protection						-0.109		
						(0.102)		
Judicial quality							0.156	
							(0.132)	
Political corruption								0.657
								(0.724)
Natural resource rents %GDP	0.045	0.147	0.0882	0.119	0.0883	0.0792	0.129	0.0996
	(0.107)	(0.157)	(0.124)	(0.148)	(0.137)	(0.131)	(0.144)	(0.133)
Extractive industry case	0.876**	0.908**	0.866*	0.922**	0.72	0.672	0.912**	0.889**
	(0.440)	(0.449)	(0.443)	(0.461)	(0.471)	(0.473)	(0.462)	(0.447)
State learning	0.177	0.129	0.192	0.143	0.263	0.236	0.145	0.172
	(0.203)	(0.219)	(0.213)	(0.216)	(0.229)	(0.223)	(0.214)	(0.211)
Claimant law firm advantage	-0.198	-0.601	-0.289	-0.649	-0.724	-0.724	-0.681	-0.617
	(0.565)	(0.564)	(0.612)	(0.575)	(0.604)	(0.601)	(0.573)	(0.573)
Respondent law firm advantage	-0.744*	-0.758*	-0.683*	-0.742*	-0.758*	-0.777*	-0.755*	-0.753*
	(0.409)	(0.413)	(0.415)	(0.416)	(0.439)	(0.436)	(0.413)	(0.409)
OECD majority panel	0.0629	0.2	-0.00598	0.179	0.257	0.287	0.157	0.154
	(0.494)	(0.507)	(0.497)	(0.504)	(0.562)	(0.569)	(0.498)	(0.507)
Home state GNI per capita	-0.251	-0.307	-0.188	-0.295	-0.278	-0.269	-0.313	-0.302
	(0.231)	(0.246)	(0.227)	(0.244)	(0.286)	(0.283)	(0.245)	(0.244)

Economic volatility	0.0578	0.0785	0.0795	0.0771	0.0535	0.0201	0.0776	0.0847
	(0.0804)	(0.0815)	(0.0805)	(0.0806)	(0.0870)	(0.0890)	(0.0810)	(0.0854)
South American respondent state	0.305	0.116	0.234	0.205	0.312	0.207	0.215	0.162
	(0.443)	(0.448)	(0.430)	(0.439)	(0.429)	(0.476)	(0.442)	(0.454)
Case cluster	0.707*	0.639*	0.648	0.649*	0.59	0.509	0.654*	0.67
	(0.400)	(0.378)	(0.422)	(0.386)	(0.374)	(0.392)	(0.387)	(0.408)
NAFTA case	-0.579	-0.556	-0.371	-0.64	-0.759	-0.669	-0.561	-0.607
	(0.850)	(0.710)	(0.909)	(0.731)	(0.767)	(0.774)	(0.730)	(0.718)
ECT case	0.0245	0.0702	0.1	0.0541	-0.158	-0.15	0.0627	0.0306
	(0.351)	(0.348)	(0.358)	(0.349)	(0.379)	(0.388)	(0.347)	(0.345)
OECD respondent state	0.0184	-0.0799	0.183	-0.0282	-0.0183	0.108	-0.115	-0.0301
	(0.442)	(0.519)	(0.470)	(0.499)	(0.484)	(0.499)	(0.523)	(0.500)
FDI inflows %GDP	-0.054	-0.192	-0.107	-0.172	-0.114	-0.0228	-0.172	-0.146
	(0.181)	(0.181)	(0.182)	(0.182)	(0.200)	(0.220)	(0.182)	(0.181)
Constant	4.162	5.313*	3.945	4.68	1.079	0.906	5.299*	5.293*
	(3.043)	(3.128)	(2.955)	(3.180)	(3.402)	(3.326)	(3.109)	(3.120)
Year fixed effects	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Observations	310	299	295	299	288	288	299	299
Pseudo R^2	0.155	0.163	0.164	0.16	0.176	0.18	0.161	0.16

Logistic regression models. Outcome: (0) = investor loss, (1) = investor win. Standard errors clustered on respondent state in parentheses. All time variant independent variables are lagged one year from the year of ITA case registration. * p < 0.10, ** p < 0.05, *** p < 0.01.

However, the picture changes considerably when we control for the other six disaggregated quality of governance indicators. In the parsimonious models (Table 1 above), all quality of governance indicators reduces the magnitude of the effect from respondent state economic development levels on ITA outcomes. Most importantly, the models including measures for a respondent state's *impartial bureaucracies* and *property rights protection* completely wipes out any significant link between economic development and ITA case outcomes. In addition, the *property rights protection* indicator as measured by the ICRG *investment profile* index has an independent negative and strongly significant link (at the 1% level) with ITA case outcomes. In short, the better respondent states are at protecting property rights, the worse foreign investors fare in ITA cases against those states. These effects are largely mirrored in the extensive models (Table 2 above) – but here, controlling for a states' ability to curb their executives (the *executive constraints* index) and the quality and independence of their judiciaries (the *judicial quality* index) also renders the relationship between economic development and ITA case outcomes insignificant (but only narrowly so).

These findings can be interpreted on two levels. On a general level, it seems that there is indeed some sort of conflation between a respondent state's economic development status and its quality of governance levels. However, using a broad measure of democracy (the *liberal democracy* index) does not capture the conflation. On the more specific level of respondent states' quality of governance, it appears that the most significant conflation is occurring in relation to measures relating to the degree to which a respondent state has *impartial bureaucracies* and the strength of a respondent state's *property rights protection* regimes. These two quality of governance indicators, if accepted, cancel out the effects of economic development in both the

parsimonious models (Table 1) and the extensive models (Table 2).[138]

It is also interesting to look at how the control variables perform in both the general *liberal democracy* model (Model 2) and the quality of governance models (Models 3 through 8). In both the parsimonious models (Table 1) and the extensive models (Table 2), the effect of *respondent law firm advantage* remains negative and strongly significant throughout all models. This suggests that at least one element of the economic development hypothesis may be significant and should be addressed in future research. The effect of an *extractive industry case* remained strong and positive in all models except for the two that indicated conflation – the models where we measure a respondent state's *impartial bureaucracies* and *property rights protection* respectively.

None of the three variables controlling for the structure of the respondent states' economies (*natural resource rents as percentage of GDP, FDI inflows as percentage of GDP* and *economic volatility*) seems to have independent effects on ITA outcomes. Neither does it seem to matter whether respondent states are *South American* or *OECD member states*. And while the effect of a law firm advantage is evident for respondent states, it seems as if claimant- However, investors do not gain an advantage from hiring better (or at least expensive) legal counsel. We find no support for an arbitrator bias that would statistically favor foreign investors when there is an *OECD majority panel*.[139] In addition, there is no identifiable relationship between ITA outcomes and the two most commonly invoked IIAs (as measured by the *NAFTA case* and *ECT case* variables) or the relative wealth of the foreign investor's home state (as measured by the *home state GNI per capita* variable).

In sum, our main analysis gives partial support to the conflation theory – and we now have a better understanding about which domestic governance aspects *may* be conflated with a respondent state's level of economic development. In the next section, we dive deeper into whether the same relationships that are found for the full sample of ITA cases is present within different groups of respondent states, as divided by their levels of economic development (i.e. their WBIG categories). In the introduction, we discussed the different ways in which the alleged bias in ITA outcomes may work (as a *prejudice* against less developed respondent states and/or a *favoritism* towards

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[138] We recall the critiques against these two ICRG indicators on the basis that they are subjective measures and possibly influenced by a state's economic development levels.

[139] Future studies would need to look at whether an OECD majority panel favors foreign investors in ITA cases against OECD respondent states. The current control only measures the effect of foreign investor win rates when arbitrating before an OECD majority panel. A better measure would ideally use a variable that measures the effect of a less developed respondent state's (as measured by GNI per capita) ability to successfully defend itself in ITA when arbitrating disputes before an OECD majority panel.

more developed respondent states), and while the descriptive statistics discussed above indicate that the relationship between economic development and outcomes in ITA are strongest at the poles (i.e. at the level of low- income and high-income respondent states), we now turn to exploring this phenomenon more closely.

1. Predicted Probabilities

To investigate how the effect of economic development on ITA outcomes operates across the spectrum of economic development levels in respondent states, we re-estimated our extensive quality of governance models above (Table 2 above), but swapped out *respondent state GNI per capita* with respondent state WBIG category (Table 3 below).[140] There are two things to note about our results.

First, it appears that the low rates of claimant-investor success in ITA cases against high-income respondent states are driving the economic development asymmetries in ITA outcomes in the models where we do not find evidence in support of the conflation theory. Whereas there are close to no significant effects on the log odds of foreign investor win rates when going from the low-income WBIG to the two middle-income WBIGs—going from the low-income WBIG to the high-income WBIG has a significant negative effect on the same odds in all but two models (Models 5 and 6).[141] In short, this means that foreign investors' relatively low descriptive win rates against high-income respondent states (17%) is unmitigated by our full set of controls, the *liberal democracy* indicator, and four of our six specific quality of governance indicators (i.e. Models 3, 4, 7 and 8).

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[140] However, instead of using the WBIGs as a linear predictor, we decompose them to a set of indicator variables (dummies), where the low-income category is the reference category. We applied the same control variables that are applied in the extensive models in Table 2, but because they perform very similarly we chose not to report them in Table 3.

[141] On balance, we find the same when setting the two middle-income categories as base levels in the WBIG factor set as well—there is a significant difference in the log odds of foreign investor wins between high-income and both lower-middle-income and upper-middle-income states.

Table 3. Quality of Governance and Development in ITA – Effects across WBIGs

ITA case outcome (investor win)	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6	Model 7	Model 8
WBIG – Lower-middle income	-0.917	-0.96	-0.758	-0.932	-0.429	-0.132	-0.895	-0.976*
	(0.567)	(0.589)	(0.534)	(0.592)	(0.594)	(0.588)	(0.586)	(0.593)
WBIG – Upper-middle income	-0.829	-0.878	-0.711	-0.76	-0.179	0.23	-0.75	-0.911
	(0.639)	(0.661)	(0.594)	(0.653)	(0.640)	(0.692)	(0.650)	(0.667)
WBIG – High-income	-1.819**	-2.072**	-1.687**	-1.733**	-1.067	-0.494	-1.687**	-2.109**
	(0.759)	(0.811)	(0.729)	(0.802)	(0.843)	(0.812)	(0.800)	(0.832)
Liberal democracy		1.308*						
		(0.771)						
Regime stability			-0.0612					
			(0.136)					
Executive constraints				0.659				
				(0.586)				
Impartial bureaucracies					0.0881			
					(0.255)			
Property rights protection						-0.0968		
						(0.107)		
Judicial quality							0.0834	
							(0.121)	
Political corruption								1.051
								(0.768)
Year fixed effects	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Observations	322	310	306	310	292	292	310	310
Pseudo R^2	0.161	0.167	0.162	0.164	0.184	0.186	0.163	0.166

Logistic regression models. Outcome: (0) = investor loss, (1) = investor win. Standard errors clustered on respondent country in parentheses. All time variant independent variables are lagged one year from the year of case registration. Low-income is the reference group for the WBIG variables. * $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$.

The second thing to note concerns the two quality of governance indicators that do affect the odds of a foreign investor winning against a high-income respondent state. As was the case in our parsimonious models above (Table 1 above), the two indicators that capture the level of a respondent state's *impartial bureaucracies* and *property rights protection* regimes respectively, also seems to explain the particular ITA outcome bias that we find in *favor* of high-income respondent states. In other words, the pro-developed respondent state *favoritism* that our other models find are not the product of these respondent states' relative wealth, but rather their ability to secure

strong *property rights protection* and maintain *impartial bureaucracies*.

Another way of visualizing effects is to estimate predicted probabilities. In Figure 6 and 7 below, we have estimated the probability of a foreign investor win across the four WBIGs, as predicted by Model 2 (using the broad *liberal democracy* index) and Model 6 (using the *property rights protection* indicator) from Table 3 above. In both cases, all control variables are held at their means. While the predicted probabilities of a foreign investor win against low-income, lower-middle-income and upper-middle-income respondent states are not distinguishable from each other in both cases, it is striking how the predicted probabilities of a foreign investor win behaves against high-income respondent states. In Figure 6 below, when we control for *liberal democracy,* the predicted foreign investor win rate is 23%—with an upper bound that does not overlap with any of the other predictions.

Figure 6. Probability of Investor Win by Respondent State WBIG +
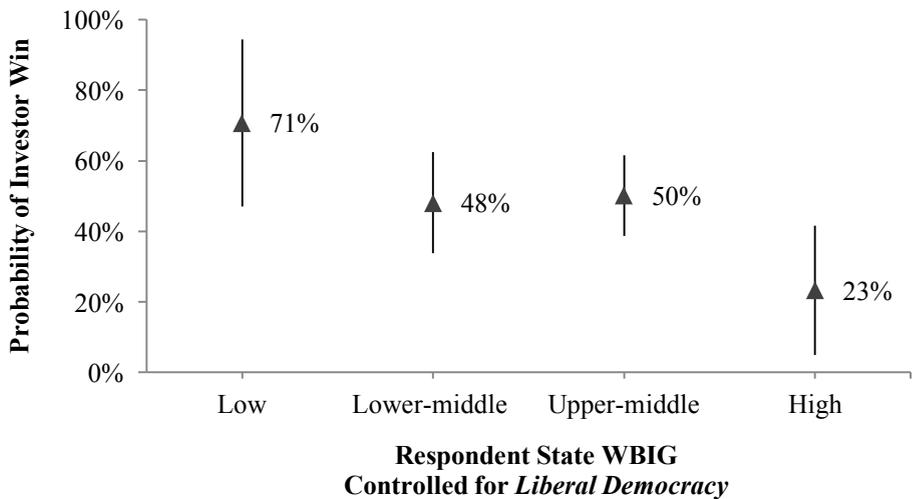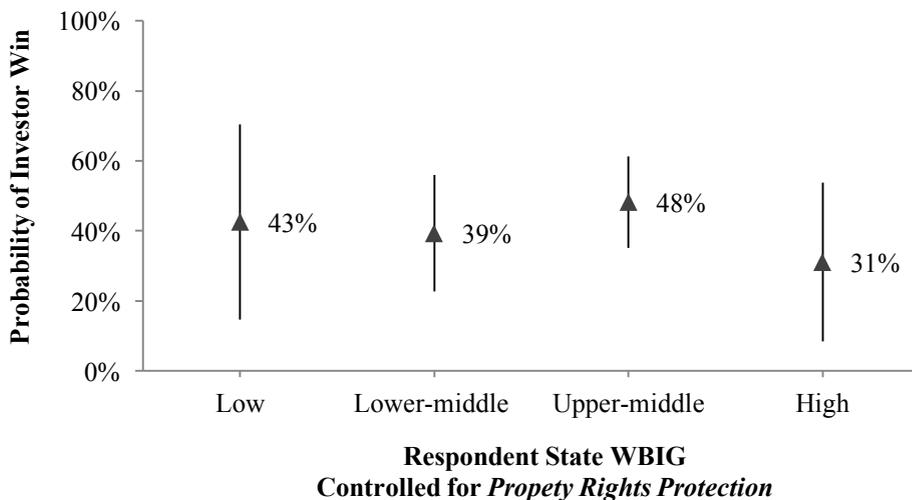**Liberal Democracy**

Figure 7. Probability of Investor Win by Respondent State WBIG + Property Rights

Respondent State WBIG
Controlled for *Propety Rights Protection*

However, when we control for the ability of a respondent state to protect property rights (using the *property rights protection* indicator) instead, the predicted probability of a claimant-investor win rises to 31% against high-income respondent states, but also becomes indistinguishable from the other predictions. What this means is that lower *property rights protection* scores significantly increase a claimant-investor's chance of winning against a high-income respondent state. Overall, the use of these indicators suggests a strong mitigating effect on ITA outcomes that is directly connected to the degree to which a state is able to protect property rights irrespective of the respondent state's relative wealth or poverty.

2. Robustness Checks

We conduct a series of re-specifications to further assess the validity of our results.[142] First, we ran all models using two alternative regression models: ordinary least squares and probit. All results remained robust according to these alternative model specifications. Second, we ran our models without lagging the time-variant indicators. This did not alter our results. Third, we expanded the sample by adding settled cases as a foreign investor win in one set of models—and further adding the discontinued cases as a foreign investor loss in another set of models. In both instances, the indicators for *impartial bureaucracies* and *property rights protection* continued to cancel out the

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[142] At this point, the full results from these robustness checks can be supplied upon request from the authors. All robustness checks were conducted on the parsimonious set of models.

effect of economic development on ITA outcomes. Fourth, we applied an alternative operationalization of ITA outcomes, splitting foreign investor wins into two types: full wins and partial wins.[143] This did not affect any of our results in a significant manner. Fifth, we ran the models using three alternative measures of economic development.[144] When using *GDP per capita*, our results are not altered, but when using pure (i.e. not per capita) state-level GNI and GDP the effect of development on outcomes retains higher significance levels in all but the *impartial bureaucracies* and *property rights protection* models. Overall, our results seem remarkably robust to alternative specifications.

We also attempted to replicate the studies by Franck and colleagues. As we did not have access to their data, we replicated their methodology with our data. Table A3 in the Appendix shows how the relationship between democracy indicators and ITA outcomes looks when using the democracy indicator (the *Polity IV* indicator) that Franck and colleagues advocate in their sample period—ITA case up through 2012 (Models 1 and 2 in Table A3 in the Appendix), as well as the same indicators and our full set of all concluded ITA cases through January 1, 2017 (Models 3 and 4 in Table A3 in the Appendix). Interestingly, we find that respondent state economic development status (using the same four-category WBIGs that Franck and colleagues uses) is significantly associated with lower chances of a foreign investor win even when controlling for levels of democracy (the *Polity IV* indicator)—regardless of control environment or sample analyzed.[145] This is contrary to the findings of Franck and colleagues, but may be a function of differences in the number and type of ITA cases analyzed in combination with the fact that in many instances the relationship between economic development and ITA outcomes in their studies are actually statistically significant at the 10% level or very nearly so. While this is admittedly a low level of statistical significance, it puts many of their findings near the statistically significant level and may explain differences in the results.

Finally, there are still a few additional caveats to be covered. Above, we discussed general sample selection issues. In addition, a reasonable number of ITA cases drop out of our analysis for lack of data reasons (approximately 15%, see Table A4 and Table A5 in the Appendix) and mostly include low-to-middle-income respondent states. This might also introduce a sample bias. Moreover, we lack one key control: a measure for the legal strength of ITA cases.[146] Nonetheless, it is at least plausible at this point to conclude that

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[143] *See* discussion of this alternative operationalization in Section IV above.

[144] All three alternative models were log-transformed to adjust for skewness.

[145] *See* for example the discussion of results that pertain to Table 9 in Susan Franck, Conflating Politics and Development: Examining Investment Treaty Outcomes, 55 VA. J. INT'L L. 13, 58 (2014).

[146] *See* Michael Waibel & Yanhui Wu, Are Arbitrators Political? (unpublished manuscript) (Jan. 2017) (on file with the authors). An assessment of the legal strength of an ITA claim (the

differences in relation to ITA outcomes may be a function of a respondent state's quality of its domestic institutions and not its economic development levels—and the quality of this particular data should be the subject of future research.

VI. CONCLUSION

This article examined recent claims that any propensity for less developing respondent states to lose in ITA cases is better explained by measures of its quality of domestic governance; and that the relative wealth or poverty of a respondent state is not the appropriate measure for explaining differences or variations in ITA outcomes. Our research provides only conditional support for this theory.

With a larger sample size than previous analyses, and expanded control environments, our estimations indicate that the descriptive relationship between a respondent state's economic development and ITA outcomes is not mitigated by controlling for broad measures of good governance (i.e. the *liberal democracy* indicator). We only find partial support for a conflation between economic development status of a respondent state and *certain* specific quality of governance aspects. Specifically, we find that any conflation that might be occurring is a product of the ability of a respondent state to maintain *impartial bureaucracies* and to have strong *property rights protection* regimes as measured by the ICRG.[147]

Thus, on one hand, these results lend some plausibility to the claim for the conflation theory—that differences in ITA outcomes reflect differences in relevant governance attributes, in this case *impartial bureaucracies* and *property rights protection*. Theoretically, this finding should not be too much of a surprise. These dimensions of governance go to the heart of what the international investment regime seeks to remedy against: the risk that a host state will not provide adequate protections to private property rights and that host state bureaucracies will fail to treat foreign investors in an impartial and fair manner. In fact, both of the main accounts of why IIAs became so widespread focus on how ITA provides substitutes for good domestic governance by providing *ex ante* remedies to foreign investors arising out of a host state's poorly governed institutions.

On the other hand, economic development still looms very large in the analysis of ITA outcomes. Development status remained significant in four

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degree to which frivolous claims might be occurring) is a difficult measure to determine, but is important for controlling whether a state's propensity to lose in ITA is a function of its development or quality of governance levels or whether it may be a function of relative strength of the case on its own merits. An attempt has been made to create such a control variable although the data is not yet publicly accessible.

[147] Future research should focus on the reliability and validity of these particular ICRG indicators and determine the extent the creation of these variables is influenced by a state's GDP or GNI per capita levels.

of our six quality of governance models. Moreover, there is a statistical critique against the two indicators that were significant: that their measurement is actually influenced by perceptions about a state's economic development status. This suggests further research is needed on various issues identified in this article. The first area of investigation is in relation to the patterns by which less developed states might be adversely affected by economic development status, with research on the potential role of arbitrator bias, IIA text asymmetries and differing access to legal counsel. Indeed, it is clear from our control variables that access to high quality legal counsel is important. The second area is to test other measures of impartial bureaucracies and property rights protection. The third area relates to our finding that the causal effect of any bias seems to correspond to a pro-developed respondent state *favoritism*, which could be further investigated through various quantitative and qualitative methods. Such additional research is needed when the stakes are high. For example, in the recent ITA case between Ecuador and the American petro-multinational Occidental Petroleum, the former was ordered to pay 11.8 billion USD for damages incurred by the cancellation of an oil-exploration concession.[148] The award was roughly equal to Ecuador's annual health budget.

This article has provided a significant step forward in theorizing, modeling and testing the explanation of ITA outcomes and their relationship to a respondent state's levels of economic development and quality of its domestic governance institutions. We found in this article that while higher economic development (pro-developed respondent state *favoritism*) does seem to matter for ITA outcomes, so does the quality of *certain* domestic governance institutions. However, there is still important research to be done; and with better data on in-case dynamics and even more refined data on host state characteristics, we believe that it is possible to get even closer to understanding all of causal mechanisms that explain outcome variations in ITA.

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[148] *See* Occidental Petroleum Corp., Occidental Exploration & Production Co. v. Republic of Ecuador, ICSID Case No. ARB/06/11, Decision on Annulment of Award (Nov. 2, 2015).

APPENDIX

Table A1. Descriptive Statistics

	Count	Mean	SD	Min	Max
ITA case outcome (investor win)	358	0.4608939	0.499166	0	1
Respondent state GNI per capita	337	8.75336	1.075251	5.356071	11.00723
Respondent state WBIG	357	1.708683	0.8475064	0	3
Polity IV	350	5.554286	5.457433	-9	10
Liberal democracy	342	0.4915696	0.255142	0.0174624	0.9015627
Regime stability	337	2.69279	1.077573	0	5.313206
Executive constraints	342	0.6295656	0.2677871	0.0225749	0.9738088
Impartial bureaucracies	322	2.29854	0.9072285	0	4
Property rights protection	322	8.004255	2.625803	1	12
Judicial quality	342	0.5055435	1.465531	-3.453132	3.295115
Political corruption	342	0.4776569	0.2662359	0.053787	0.9731986
Resource rents %GDP	349	1.451062	1.670425	-5.9465	4.492322
FDI inflows %GDP	352	1.811394	0.8825524	-1.564842	4.62084
Economic volatility	354	2.925985	2.418737	0.2194982	25.71689
OECD respondent state	358	0.2905028	0.4546298	0	1
South American respondent state	358	0.2793296	0.4492977	0	1
Case cluster	358	0.1005587	0.3011644	0	1
State learning	358	1.462176	1.035078	0	3.988984
Extractive industry case	358	0.1759777	0.3813341	0	1
Respondent law firm advantage	358	0.2374302	0.4261036	0	1
Claimant law firm advantage	358	0.1089385	0.3119982	0	1
OECD majority panel	349	0.9111748	0.2848998	0	1
NAFTA case	358	0.1005587	0.3011644	0	1
ECT case	358	0.0837989	0.2774738	0	1
Home state GNI per capita	348	10.41397	0.661707	6.849516	11.40159

Table A2. Correlation Matrix

	GNI per capita	Polity IV	Liberal democracy	Regime stability	Executive constraints	Impartial bureaucracies	Property rights	Judicial quality	Political corruption
Respondent state GNI per capita	1								
Polity IV	0.337	1							
Liberal democracy	0.531	0.823	1						
Regime stability	0.341	0.402	0.503	1					
Executive constraints	0.327	0.812	0.918	0.512	1				
Impartial bureaucracies	0.514	0.494	0.717	0.532	0.677	1			
Property rights protection	0.403	0.413	0.511	0.387	0.599	0.520	1		
Judicial quality	0.377	0.743	0.876	0.474	0.941	0.664	0.653	1	
Political corruption	0.629	0.618	0.865	0.550	0.770	0.770	0.537	0.771	1

Table A3. Replication of Franck (2014) and Franck and Wylie (2015)

	Cases before 2012		Full sample	
ITA case outcome (investor win)	Model 1	Model 2	Model 3	Model 4
Respondent state WBIG	-0.589***	-0.883**	-0.612***	-0.486**
	(0.217)	(0.387)	(0.149)	(0.229)
Polity IV	0.0583	0.0492	0.0408*	0.0872**
	(0.0355)	(0.0567)	(0.0228)	(0.0341)
Economic volatility		-0.117		0.0509
		(0.138)		(0.0728)
South American respondent state		0.683		0.0685
		(0.609)		(0.367)
Case cluster		1.309		0.674
		(0.978)		(0.578)
NAFTA case		-2.092**		-0.824
		(0.877)		(0.590)
ECT case		0.141		0.279
		(0.707)		(0.486)
Natural resource rents %GDP		0.282		0.258*
		(0.216)		(0.140)
Extractive industry case		0.0376		0.825**
		(0.651)		(0.389)
OECD respondent state		1.125		0.132
		(0.763)		(0.497)
FDI inflows %GDP		0.349		-0.0754
		(0.285)		(0.166)
State learning		0.262		0.124
		(0.352)		(0.206)
Claimant law firm advantage		-1.734**		-0.419
		(0.796)		(0.461)
Respondent law firm advantage		-0.972*		-0.638*
		(0.513)		(0.332)
OECD majority panel		0.445		0.188
		(0.693)		(0.479)
Home state GNI per capita		-0.0838		-0.303
		(0.385)		(0.212)
Constant	0.415	-0.958	0.651***	2.102
	(0.319)	(4.284)	(0.251)	(2.293)
Year fixed effects	No	Yes	No	Yes
Observations	191	171	350	318
Pseudo R^2	0.03	0.251	0.037	0.173

Logistic regression models. Outcome: (0) = foreign investor loss, (1) = foreign investor win. Standard errors clustered on respondent state in parentheses. All time variant independent variables are lagged one year from the year of case registration. * $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$.

Table A4. Dropped ITA Cases from the Parsimonious Models

Case Name	Reg.	Dec.	Res.	Models							
				1	2	3	4	5	6	7	8
Achmea II v. Slovakia	2013	2014	Loss		X		X			X	X
African Holding v. DRC	2005	2008	Loss			X					
Al Bahloul v. Tajikistan	2008	2008	Win					X	X		
Al Kharafi v. Libya	2011	2013	Win			X					
Al Tamimi v. Oman	2011	2015	Loss		X		X			X	X
Allard v. Barbados	2010	2016	Loss			X		X	X		
AMT v. DRC	1993	1997	Win	X	X	X	X	X	X	X	X
Ares v. Georgia	2005	2008	Win	X	X	X	X	X	X	X	X
Azinian v. Mexico	1997	1999	Loss			X					
Beck v. Kyrgyzstan	2013	2013	Win					X	X		
Belokon v. Kyrgyzstan	2011	2014	Win			X		X	X		
Biedermann v. Kazakhstan	1996	1999	Win	X	X	X	X	X	X	X	X
Bogdanov II v. Moldova	2005	2006	Loss	X	X	X	X	X	X	X	X
British Caribbean Bank v. Belize	2010	2014	Win		X	X	X	X	X	X	X
CEAC Holdings v. Montenegro	2014	2016	Loss	X	X	X	X	X	X	X	X
Cem Uzan v. Turkey	2014	2016	Loss	X	X	X	X	X	X	X	X
CIM v. Ethiopia	2007	2009	Loss	X	X	X	X	X	X	X	X
Contreras v. Equatorial Guinea	2012	2015	Loss		X		X	X	X	X	X
Corona v. Dominican Republic	2014	2016	Loss	X	X	X	X	X	X	X	X
Crespo v. Poland	2003	2005	Win	X	X	X	X	X	X	X	X
Desert Line v. Yemen	2005	2008	Win	X	X	X	X	X	X	X	X
Devas v. India	2013	2016	Win	X	X	X	X	X	X	X	X
Dogan v. Turkmenistan	2009	2014	Win	X	X	X	X	X	X	X	X
Dunkeld I v. Belize	2010	2016	Win		X	X	X	X	X	X	X
Eastern Company v. Lebanon	2000	2002	Win	X	X	X	X	X	X	X	X
EMV v. Czech Republic	2005	2009	Loss	X	X	X	X	X	X	X	X
Erhas v. Turkmenistan	2013	2015	Loss	X	X	X	X	X	X	X	X
Eureko v. Poland	2003	2005	Win	X	X	X	X	X	X	X	X
Fedax v. Venezuela	1996	1998	Win	X	X	X	X	X	X	X	X
France Telecom v. Lebanon	2002	2005	Win			X					
Fuchs v. Georgia	2007	2010	Win	X	X	X	X	X	X	X	X
Gamesa v. Syria	2011	2014	Win	X	X	X	X	X	X	X	X
Genin v. Estonia	1999	2001	Loss	X	X	X	X	X	X	X	X
Goetz I v. Burundi	1995	1998	Win	X	X	X	X	X	X	X	X
Goetz II v. Burundi	2001	2012	Win					X	X		
Gold Reserve v. Venezuela	2009	2014	Win			X					

Case											
Guardian Fiduciary v. Macedonia	2012	2015	Loss					X	X		
Helnan v. Egypt	2005	2008	Loss			X					
Houben v. Burundi	2013	2016	Win					X	X		
Ickale v. Turkmenistan	2010	2016	Loss					X	X		
Itera I v. Georgia	2008	2009	Loss	X	X	X	X	X	X	X	X
Kardassopoulos v. Georgia	2005	2010	Win	X	X	X	X	X	X	X	X
Karmer Marble v. Georgia	2008	2012	Win	X	X	X	X	X	X	X	X
Kilic Insaat v. Turkmenistan	2010	2013	Loss					X	X		
Lao Holdings v. Lao PDR	2012	2015	Loss	X	X	X	X	X	X	X	X
Maffezini v. Spain	1997	2000	Win			X					
Menzies v. Senegal	2015	2016	Loss	X	X	X	X	X	X	X	X
Metalclad v. Mexico	1997	2000	Win			X					
Metal-Tech v. Uzbekistan	2010	2013	Loss					X	X		
Mitchell v. DRC	1999	2004	Win			X					
MNSS v. Montenegro	2012	2016	Win		X		X	X	X	X	X
Mytilineos I v. Serbia	2005	2009	Loss	X	X	X	X	X	X	X	X
Obchodni Banka v. Slovakia	1997	2004	Win	X	X	X	X	X	X	X	X
OKKV v. Kyrgyzstan	2013	2013	Win					X	X		
Oxus Gold v. Uzbekistan	2011	2015	Win					X	X		
Petrobart v. Kyrgyz Republic	2003	2005	Win					X	X		
Phillip Morris v. Australia	2011	2015	Loss	X	X	X	X	X	X	X	X
Ping An v. Belgium	2012	2015	Loss	X	X	X	X	X	X	X	X
Postova v. Greece	2013	2015	Loss		X		X			X	X
Progas Energy v. Pakistan	2012	2016	Loss	X	X	X	X	X	X	X	X
RECOFI v. Vietnam	2013	2015	Loss		X		X			X	X
Romak v. Uzbekistan	2006	2009	Loss					X	X		
RSM II v. Grenada	2010	2010	Loss	X	X	X	X	X	X	X	X
Saar Papier I v. Poland	1992	1995	Win	X	X	X	X	X	X	X	X
Saar Papier II v. Poland	1996	2000	Loss	X	X	X	X	X	X	X	X
Sana Consulting v. Russia	2012	2015	Loss	X	X	X	X	X	X	X	X
Schaper v. Poland	1998	2001	Win	X	X	X	X	X	X	X	X
Sedelmayer v. Russia	1996	1998	Win	X	X	X	X	X	X	X	X
Siag v. Egypt	2005	2009	Win			X					
Sistem v. Kyrgyzstan	2006	2009	Win			X		X	X		
Soufraki v. UAE	2002	2004	Loss		X		X			X	X
Stans Energy I v. Kyrgyzstan	2013	2014	Win					X	X		
Sutter v. Madagascar	2013	2014	Win	X	X	X	X	X	X	X	X
Swissbourgh v. Lesotho	2012	2016	Win					X	X		
Swisslion v. Macedonia	2009	2012	Win					X	X		
Tanmiah v. Tunisia	2003	2004	Loss	X	X	X	X	X	X	X	X
Tenaris I v. Venezuela	2011	2016	Win	X	X	X	X	X	X	X	X
Tradex v. Albania	1994	1999	Loss	X	X	X	X	X	X	X	X
Transglobal v. Panama	2013	2016	Loss		X		X			X	X
Tvornica Šećera v. Serbia	2013	2015	Loss	X	X	X	X	X	X	X	X
Tza Yap Shum v. Peru	2007	2011	Win	X	X	X	X	X	X	X	X

	Reg.	Dec.	Res.								
Van Riet v. Croatia	2013	2016	Loss		X		X			X	X
Vivendi I v. Argentina	1997	2000	Win			X					
Yaung Chi v. Myanmar	2000	2003	Loss	X	X	X	X	X	X	X	X
Sum of Dropped ITA Cases Per Model				44	55	60	55	66	66	55	55

Table A5. Dropped ITA Cases from the Extensive Models

							Models				
Case Name	Reg.	Dec.	Res.	1	2	3	4	5	6	7	8
Achmea II v. Slovakia	2013	2014	Loss		X		X			X	X
African Holding v. DRC	2005	2008	Loss			X					
Al Bahloul v. Tajikistan	2008	2008	Win					X	X		
Al Kharafi v. Libya	2011	2013	Win	X	X	X	X	X	X	X	X
Al Tamimi v. Oman	2011	2015	Loss		X		X			X	X
Allard v. Barbados	2010	2016	Loss			X		X	X		
AMT v. DRC	1993	1997	Win	X	X	X	X	X	X	X	X
Ares v. Georgia	2005	2008	Win	X	X	X	X	X	X	X	X
Azinian v. Mexico	1997	1999	Loss			X					
Beck v. Kyrgyzstan	2013	2013	Win					X	X		
Belokon v. Kyrgyzstan	2011	2014	Win			X		X	X		
Biedermann v. Kazakhstan	1996	1999	Win	X	X	X	X	X	X	X	X
Bogdanov II v. Moldova	2005	2006	Loss	X	X	X	X	X	X	X	X
British Caribbean Bank v. Belize	2010	2014	Win		X	X	X	X	X	X	X
CEAC Holdings v. Montenegro	2014	2016	Loss	X	X	X	X	X	X	X	X
Cem Uzan v. Turkey	2014	2016	Loss	X	X	X	X	X	X	X	X
CIM v. Ethiopia	2007	2009	Loss	X	X	X	X	X	X	X	X
Contreras v. Equatorial Guinea	2012	2015	Loss		X		X	X	X	X	X
Corona v. Dominican Republic	2014	2016	Loss	X	X	X	X	X	X	X	X
Crespo v. Poland	2003	2005	Win	X	X	X	X	X	X	X	X
Desert Line v. Yemen	2005	2008	Win	X	X	X	X	X	X	X	X
Devas v. India	2013	2016	Win	X	X	X	X	X	X	X	X
Dogan v. Turkmenistan	2009	2014	Win	X	X	X	X	X	X	X	X
Dunkeld I v. Belize	2010	2016	Win		X	X	X	X	X	X	X
Eastern Company v. Lebanon	2000	2002	Win	X	X	X	X	X	X	X	X
EMV v. Czech Republic	2005	2009	Loss	X	X	X	X	X	X	X	X
Erhas v. Turkmenistan	2013	2015	Loss	X	X	X	X	X	X	X	X
Eureko v. Poland	2003	2005	Win	X	X	X	55	X	X	X	X
Fedax v. Venezuela	1996	1998	Win	X	X	X	X	X	X	X	X
France Telecom v. Lebanon	2002	2005	Win			X					
Fuchs v. Georgia	2007	2010	Win	X	X	X	X	X	X	X	X
Gamesa v. Syria	2011	2014	Win	X	X	X	X	X	X	X	X
Genin v. Estonia	1999	2001	Loss	X	X	X	X	X	X	X	X

Goetz I v. Burundi	1995	1998	Win	X	X	X	X	X	X	X	X
Goetz II v. Burundi	2001	2012	Win					X	X		
Gold Reserve v. Venezuela	2009	2014	Win				X				
Guardian Fiduciary v. Macedonia	2012	2015	Loss					X	X		
Helnan v. Egypt	2005	2008	Loss				X				
Houben v. Burundi	2013	2016	Win					X	X		
Ickale v. Turkmenistan	2010	2016	Loss					X	X		
Italy v. Cuba	2003	2008	Loss	X	X	X	X	X	X	X	X
Itera I v. Georgia	2008	2009	Loss	X	X	X	X	X	X	X	X
Kardassopoulos v. Georgia	2005	2010	Win	X	X	X	X	X	X	X	X
Karmer Marble v. Georgia	2008	2012	Win	X	X	X	X	X	X	X	X
Kilic Insaat v. Turkmenistan	2010	2013	Loss					X	X		
Lao Holdings v. Lao PDR	2012	2015	Loss	X	X	X	X	X	X	X	X
Maffezini v. Spain	1997	2000	Win				X				
Menzies v. Senegal	2015	2016	Loss	X	X	X	X	X	X	X	X
Metal-Tech v. Uzbekistan	2010	2013	Loss					X	X		
Metalclad v. Mexico	1997	2000	Win				X				
Mitchell v. DRC	1999	2004	Win				X				
MNSS v. Montenegro	2012	2016	Win		X		X	X	X	X	X
Mytilineos I v. Serbia	2005	2009	Loss	X	X	X	X	X	X	X	X
Obchodni Banka v. Slovakia	1997	2004	Win	X	X	X	X	X	X	X	X
OKKV v. Kyrgyzstan	2013	2013	Win					X	X		
Oxus Gold v. Uzbekistan	2011	2015	Win					X	X		
Petrobart v. Kyrgyz Republic	2003	2005	Win					X	X		
Phillip Morris v. Australia	2011	2015	Loss	X	X	X	X	X	X	X	X
Ping An v. Belgium	2012	2015	Loss	X	X	X	X	X	X	X	X
Postova v. Greece	2013	2015	Loss		X		X			X	X
Progas Energy v. Pakistan	2012	2016	Loss	X	X	X	X	X	X	X	X
RECOFI v. Vietnam	2013	2015	Loss		X		X			X	X
Romak v. Uzbekistan	2006	2009	Loss					X	X		
RSM II v. Grenada	2010	2010	Loss	X	X	X	X	X	X	X	X
Saar Papier I v. Poland	1992	1995	Win	X	X	X	X	X	X	X	X
Saar Papier II v. Poland	1996	2000	Loss	X	X	X	X	X	X	X	X
Sana Consulting v. Russia	2012	2015	Loss	X	X	X	X	X	X	X	X
Schaper v. Poland	1998	2001	Win	X	X	X	X	X	X	X	X
Sedelmayer v. Russia	1996	1998	Win	X	X	X	X	X	X	X	X
Siag v. Egypt	2005	2009	Win				X				
Sistem v. Kyrgzstan	2006	2009	Win				X	X	X		
Soufraki v. UAE	2002	2004	Loss		X		X			X	X
Stans Energy v. Kyrgzstan	2013	2014	Win					X	X		
Sutter v. Madagascar	2013	2014	Win	X	X	X	X	X	X	X	X
Swembalt v. Latvia	1999	2000	Win	X	X	X	X	X	X	X	X
Swissbourgh v. Lesotho	2012	2016	Win					X	X		
Swisslion v. Macedonia	2009	2012	Win					X	X		

Tanmiah v. Tunisia	2003	2004	Loss	X	X	X	X	X	X	X	X
Tenaris I v. Venezuela	2011	2016	Win	X	X	X	X	X	X	X	X
Tradex v. Albania	1994	1999	Loss	X	X	X	X	X	X	X	X
Transglobal v. Panama	2013	2016	Loss		X		X			X	X
Tvornica Šećera v. Serbia	2013	2015	Loss	X	X	X	X	X	X	X	X
Tza Yap Shum v. Peru	2007	2011	Win	X	X	X	X	X	X	X	X
Van Riet v. Croatia	2013	2016	Loss		X		X			X	X
Vivendi I v. Argentina	1997	2000	Win			X					
Yaung Chi v. Myanmar	2000	2003	Loss	X	X	X	X	X	X	X	X
Sum of Dropped ITA Cases per Model				47	58	62	58	69	69	58	58