

# Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study

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## Abstract

*Investor–state arbitration, also called investment arbitration, is often accused of harming developing states facing economic hardship for the benefit of a wealthy few from the Global North. Its proponents respond that it is the only available means to resolve disputes impartially, and that its increased use clarifies international law. In this article, the authors investigate the empirical manifestations of the uses and functions of investment arbitration, with an original dataset that compiles over 500 arbitration claims from 1972 to 2010. The study reveals that until the mid-to-late 1990s, investment arbitration was mainly used in two ways. On the one hand, it was a neo-colonial instrument to strengthen the economic interests of developed states. On the other, it was a means to impose the rule of law in non-democratic states with a weak law and order tradition. But since the mid-to-late 1990s, the main function of investment arbitration has been to provide guideposts and determine rights for investors and host states, and thus to increase the predictability of the international investment regime. In doing so, however, it seems to favour the ‘haves’ over the ‘have-nots’, making the international investment regime harder on poorer than on richer countries.*

## 1 Introduction

A backlash is raging against investment arbitration.<sup>1</sup> The wrath of those preoccupied by the fate of developing nations is fuelled by a perception that investment arbitration is a powerful sword in the hands of the economic interests of rich, developed states,

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<sup>1</sup> See, e.g., Osgoode Public Statement on the International Investment Regime, 31 Aug. 2010, and M. Waibel, A. Kaushal, K.-H.L. Chung, and C. Balchin (eds), *The Backlash Against Investment Arbitration* (2010).

which use it to harm weaker economies of poorer, developing states. Actors from within the system object that the number of investment claims continues to rise and that, as a consequence, investment arbitration must fulfil *some* useful societal function. The ships, of course, are passing in the night here. As a consequence the battleground often moves to individual cases, which are criticized or praised or excused. This is admirable and exciting and makes the headlines, but it tells us little about what we should think, in the grander scale of things, about investment arbitration, which is what matters when it comes to backlash stories.

At the level of theory, we can easily mark out a few bottom-line roles or functional effects of arbitration. For some it is a vehicle for domination that ‘followed in the wake of foreign invasion and occupation’<sup>2</sup> and ‘imposes a “neoliberal rule of law” that promises predictability and certainty at the expense of democratic politics’.<sup>3</sup> It would really be an example of neo-colonialism. For others, investment arbitration promotes ‘democratic accountability and participation ... , good and orderly state administration and the protection of rights and other deserving interests’.<sup>4</sup> Here the view has the hallmark of rule-of-law ideals, which are being fostered in the state hosting the investment. By another reckoning, ‘[t]hrough publicly available and widely studied awards, investor-State arbitral tribunals are helping to define specific principles of global administrative law and set standards for States’.<sup>5</sup> The idea of rule-of-law ideals is still there, but the focus is more squarely on the international level, beyond individual unruly states. Clearly, these are root-and-branch differences of view about what investment arbitration does in fact achieve, and thus of its moral-political worth.

Perhaps surprisingly, it is seldom asked whether these and kindred theories are plausible in view of empirical evidence. There admittedly is a burgeoning literature on investment flows and treaties,<sup>6</sup> but our focus is specifically on the arbitration aspects

<sup>2</sup> G. Van Harten, *Investment Treaty Arbitration and Public Law* (2007), at 17.

<sup>3</sup> This is the view of D. Schneiderman, *Constitutionalizing Economic Globalization* (2008), as summarized by J.E. Alvarez, *Public International Law Regime* (2011), at 451.

<sup>4</sup> Kingsbury and Schill, ‘Public Law Concepts to Balance Investors’ Rights with State Regulatory Actions in the Public Interest – The Concept of Proportionality’, in S. Schill (ed.), *International Investment Law and Comparative Public Law* (2010), at 75.

<sup>5</sup> Kingsbury and Schill, ‘Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law’, Institute for International Law and Justice, NYU Law School, Working Paper 2009/6 (Global Administrative Law Series), at 1, available at: [www.iilj.org/publications/documents/2009-6.KingsburySchill.pdf](http://www.iilj.org/publications/documents/2009-6.KingsburySchill.pdf).

<sup>6</sup> See, e.g. (studies on optimal rational design perspective), Tobin and Busch, ‘A BIT is Better Than a Lot: Bilateral Investment Treaties and Preferential Trade Agreements’, 62 *World Politics* (2010) 1; Büthe and Milner, ‘Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis’, in K.P. Sauvant and L. Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (2009), at 171; Elkins, Guzman, and Simmons, ‘Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000’, 60 *Int’l Org* (2006) 811; Kerner, ‘Why Should I Believe You? The Costs and Consequences of Bilateral Investment Treaties’, 53 *Int’l Studies Q* (2009) 73; Jandhyala, Henisz, and Mansfield, ‘Three Waves of BITs: The Global Diffusion of Foreign Investment Policy’, 55 *J Conflict Res* (2011) 1047; (study on reputational effects of the existence of disputes on investments): Allee and Peinhardt, ‘Delegating Differences: Bilateral Investment Treaties and Bargaining over Dispute Resolution Provisions’, 54 *Int’l Studies Q* (2010) 1; (study on learning effects of facing legal claims on further signing of BITs): Allee and Peinhardt, ‘Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment’, 65 *Int’l Org* (2011) 401.

of the situation: is there statistically significant evidence to corroborate concerns about the functional effects of investment arbitration? Or to contradict them? To what extent and in what respect do the drivers of the backlash comport with reality? In this study we seek to provide some empirical large-scale evidence on these questions, drawing on the analysis of a set of 541 investment arbitration claims filed between 1972 and 2010.

As we take such an approach, a caveat must be first entered: there clearly are limitations to large-scale empirical studies, on investment arbitration just as on any other legal question. The criticism has already been made that such approaches ‘reduce complex social and legal phenomena to numbers and equations’.<sup>7</sup> With empirical methods, we only achieve fragmentary knowledge, which tends to reinforce or weaken intuitions we already have. Pioneering empirical works on investment arbitration have been castigated for overreach in their conclusions: one prominent study extended quite specific findings – lack of statistical relationship between development status of presiding arbitrators or host countries with outcome – to an unwarranted ‘powerful narrative that there is procedural integrity in investment arbitration’ and to the conclusion that ‘the investment treaty arbitration system, as a whole, functions fairly’.<sup>8</sup> To be sure, the point of empirical studies is not to assert, *en bloc*, that investment arbitration is fair or unfair, biased or unbiased, commendable or deplorable. Greater specification and focus are indispensable in selecting hypotheses for empirical examination.

We consider three main hypotheses about the functional effects of investment arbitration. They form three models or candidate-theories of the functions that investment arbitration may empirically have: (1) investment arbitration serves to champion and strengthen the interests of economic powers of developed states to the detriment of political powers of developing states, in a form of neo-colonialism; (2) investment arbitration serves to make up for deficient rule of law in the host state; and (3) investment arbitration serves to strengthen the international rule of law.

Our data tend to support the following hypotheses: investment arbitration appears to have been used as a replacement for dysfunctional domestic courts in countries with a weak rule of law tradition until the mid-to-late 1990s, but since then it seems to have served this function increasingly less; in parallel, investment arbitration appears to have been used, until the mid-to-late 1990s, as a sword in the hands of the economic interests of investors from rich countries against governments of poorer countries, but has since then also been used significantly by investors from rich countries

<sup>7</sup> Verdirame, ‘“The Divided West”: International Lawyers in Europe and America’, 18 *EJIL* (2007) 553, at 561. See also Koskeniemi, ‘Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization’, 8 *Theoretical Inquiries in L* (2007) 9, at 30.

<sup>8</sup> Franck, ‘Development and Outcomes of Investment Treaty Arbitration’, 50 *Harvard Int’l LJ* (2009) 435. The castigation is, for instance, in Van Harten, ‘The Use of Quantitative Methods to Examine Possible Bias in Investment Arbitration’, 3 *Yrbk Int’l Investment L & Policy* (2011) 859. See also Gallagher and Shrestha, ‘Investment Treaty Arbitration and Development: A Re-Appraisal’, Global Development and Environment Institute Working Paper No. 11-01 (May 2011).

against other rich governments. So the overall picture of investment arbitration seems to have changed in the mid-to-late 1990s, when the system shifted from what may best be described as a neo-colonial instrument to an instrument that on the whole appears (appears, hedging is apposite here) to promote the international rule of law. Reservations, however, are appropriate about the extent to which this latter function is really carried out.

The article is in four parts. After a brief presentation of our dataset (2), it provides empirical considerations of the three functions of investment arbitration mentioned above: that is, whether it can be seen as a ‘neo-colonial’ instrument to serve the economic interests of developed states (3), or as an instrument to remedy the problem of an ineffectual rule of law in the host state (4), or as an instrument to further the international rule of law (5).

## 2 The Dataset

Our study draws on a dataset of 541 investment arbitration claims, filed between 1972 (the year the first investment claim was filed with ICSID<sup>9</sup>) and 2010. The unit of analysis used here is claims – not awards, since certain claims end in a negotiated agreement or are withdrawn, and not cases, since that concept has a greater definitional ambiguity.

We deal with investment arbitration or investor–state arbitration, and thus go beyond investment *treaty* arbitration: the dataset includes claims filed on the basis of a treaty, of a contract, or of the domestic investment law of the host state of the investment. Approximately 67 per cent of the 541 claims are based on a Bilateral Investment Treaty (BIT), 13 per cent on a contract between the host state and the investor, 12 per cent on a free trade agreement (North American Free Trade Agreement (NAFTA), Association of Southeast Asian Nations (ASEAN), United States–Dominican Republic–Central America Free Trade Agreement (CAFTA)), 5 per cent on the Energy Charter Treaty (ECT), and 3 per cent on the domestic legislation of the host state.

The study covers claims filed under the rules of all relevant arbitration institutions (mainly the World Bank’s International Center for Settlement of Investment Disputes (ICSID), the Permanent Court of Arbitration (PCA), the International Chamber of Commerce (ICC), the Stockholm Chamber of Commerce (SCC)), as well as *ad hoc* arbitrations (primarily conducted under the rules of the United Nations Commission for International Trade Law (UNCITRAL)). Approximately 60 per cent of claims are ICSID claims and about 30 per cent are UNCITRAL claims.

Based on the experience of the first author and on informal consultations with other researchers and practitioners, this universe of claims appears to be reasonably close to a complete picture of all investment arbitrations filed during that period. It seems reasonable to estimate that no more than 10 per cent of the existing investment claims are missing in our dataset: after all, few such claims remain entirely secret.

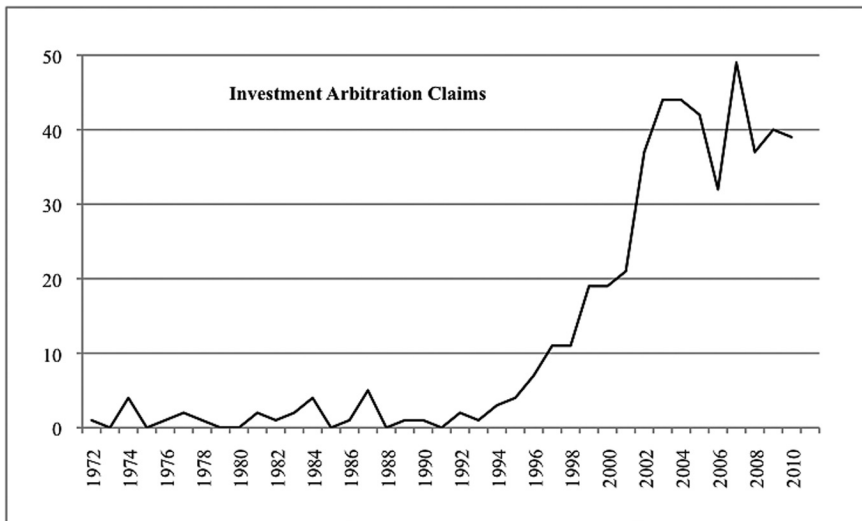
<sup>9</sup> *Holiday Inns S.A. and others v. Morocco*, ICSID Case No. ARB/72/1.

These 541 claims were encoded in the dataset according to the year in which they were filed. Figure 1 shows the evolution of claims filed between 1972 and 2010. It is noteworthy, even if already well known, that the number of claims filed annually significantly increased starting in the mid-to-late 1990s. That increase is correlated, as we will see, to certain functional changes in the system.

The sources of the data collected were as broad as possible, trading heightened reliability and accuracy for scope and statistical relevance. The dataset includes all claims about which information was found either directly in an award, or indirectly in other datasets and reports of law firms and of specialized journalists.<sup>10</sup>

### 3 Neo-colonialism

A first account of the functional effects of investment arbitration may be referred to as neo-colonialism. An alternative, more fashionable designation is to call it the neo-liberal straitjacket view. The idea is that what investment arbitration really does is help (richer) developed and emerging countries to regulate the activities of (poorer) developing countries regarding foreign investments. Investment arbitration is seen as a one-way street, a vector of the exploitation of poor countries by rich countries. As a



**Figure 1:** Number of investment arbitration claims filed per year.

<sup>10</sup> We used the following sources: the ICSID website; the ICSID Reports; the database of investment arbitration cases of UNCTAD; Luke Peterson's 'Investment Arbitration Reporter'; Andrew Newcomb's 'Investment Treaty Arbitration'; Oxford University Press's 'Investment Claims'; the Kluwer Arbitration website; Westlaw; the *Global Arbitration Rev*; the database of the NAFTA Secretariat; Todd Weiler's 'NAFTAClaims.com'; the Dispute Resolution Library of the International Chamber of Commerce; the website of the Stockholm Chamber of Commerce; the website of the Secretariat of the Energy Charter Treaty; the portfolios of law firms and arbitrators; and a variety of small Internet sources identified through web search engines.

conference delegate put it in 1957, it ‘allow[s] private investors to dominate the economic, if not political, affairs of underdeveloped nations’.<sup>11</sup> It is neo-colonial in that its purpose is to allow developed countries to exercise control over and exploit developing countries. The economic interests of investors from richer countries are promoted to the detriment of the regulatory freedom of governments in poorer countries – hence the idea of the straitjacket.

A bit of history helps put this idea into context: A major challenge for the global economic order after World War II was to deal adequately with claims for redress made by former colonies in Asia and Africa, joined by older Latin American countries. These states wanted to end (and sometimes get revenge for) the real or perceived economic exploitation from the former northern colonial powers. The instrument to achieve it was expropriation – a manifestation of sovereignty and of the New International Economic Order of the time. Naturally, there was a reaction to that movement: investment arbitration.<sup>12</sup> Hence, as Gus Van Harten puts it: ‘While investment treaty arbitration is unique, one should not lose sight of its ancestry or fact that early international arbitrations of investment disputes sometimes followed in the wake of foreign invasion and occupation.’<sup>13</sup> Investment treaties are likened to colonial legal regimes and investment arbitral tribunals are analogized to imperial courts and foreign consuls.<sup>14</sup>

There is also a more indirect account of this role of investment arbitration. It proceeds in two stages. First, the investment arbitration system is shown as seeking primarily, if not exclusively, to maximize the protection of the investor.<sup>15</sup> The system would be skewed in favour of investor protection. As Anne van Aaken puts it: ‘It seems fair to say that tribunals have been on the whole rather investor friendly, often explicitly stating that the object and purpose of the BIT was (only) the protection of the investor. In the view of some tribunals, BITs are instruments for the maximization of investor protection; accordingly, uncertainties concerning ambiguous treaty provisions should be resolved in favour of foreign investors.’<sup>16</sup> David Schneiderman is even more radical: the ultimate objective of investment arbitration, he says, is to ‘assign ... to investment interests the highest possible protection’.<sup>17</sup> Even before the ICSID Convention came into force, a review of the investment protection mechanisms envisaged at the time, including investment arbitration, found that ‘[m]ost proposals are one-sided. They provide for the protection of the investor’s interest without attempting to safeguard the host state.’<sup>18</sup>

<sup>11</sup> Claim made by a delegate to one of the conferences that led to ICSID, as reported by Van Harten, *supra* note 2, at 12.

<sup>12</sup> T. Wälde, *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (1996), at 208.

<sup>13</sup> Van Harten, *supra* note 2, at 17.

<sup>14</sup> *Ibid.*

<sup>15</sup> Kaushal, ‘Revisiting History: How the Past Matters for the Present Backlash against the Foreign Investment Regime’, 50 *Harvard Int’l LJ* (2009) 491, at 510–514.

<sup>16</sup> Van Aaken, ‘Fragmentation of International Law: The Case of International Investment Protection’, 17 *Finnish Yrbk Int’l L* (2006) 91, at 126.

<sup>17</sup> Schneiderman, *supra* note 3, at 4.

<sup>18</sup> Fatouros, ‘An International Code to Protect Private Investment – Proposals and Perspectives’, 14 *U Toronto LJ* (1961) 77, at 100–101.



The second stage of the account builds on the assumption that foreign investors are predominantly from rich, developed states, and to a lesser extent from strong emerging economies, and commit capital in poorer, developing states, whose governments they then sue.<sup>19</sup> By maximizing investor protection, investment arbitration maximizes the protection of the economic interests of 'neo-colonial' powers, that is, of countries with a high level of economic development.

But is this true? Two empirical manifestations of such neo-colonialism would in this case be likely. First, if the dominating function of the investment arbitration system is indeed to allow developed countries to exercise control over and exploit developing countries, then one would expect to see the following: investment arbitration would be directed by investors from developed countries against governments of developing countries. The hypothesis of the neo-colonial function is plausible, for instance, if a large part of arbitration claims is filed by investors from developed countries against governments of developing countries.

Secondly, if the claim that investors dominate the system is correct, and furthermore if it is correct that the system serves to maximize the protection of investors from developed countries, then one would expect to see investors bulk large in the outcomes, they should win a large share of the cases. Or let us reverse the statement: if we see a dominance of investors from developed countries in the outcomes, then – *at least* then – the neo-colonial accounts are plausible.

One clarification and two caveats are in order. The clarification is that such findings would say strictly nothing about any perception of bias, which is a different question altogether, and possibly a more important one from the point of view of the political viability of the system, which calls for its own distinct remedies.<sup>20</sup>

The first caveat is that host states are in principle respondents in investment arbitration. They are the claimant in less than 1 per cent of the claims and accordingly we consider such situations to be statistically irrelevant.<sup>21</sup> As a general rule, host states seek to obtain from the tribunal a decision of non-liability for compensation or damages.<sup>22</sup> They only win in defence. In and of itself, this is a significant element of asymmetry in the system. But that asymmetry is not terribly relevant: as José Alvarez puts it, one justification for it is that it 'compensate[s] [investors] for exposure to the host State as contract party, regulator, sovereign and judge by having a forum for disputes that is not controlled by the host State. The apparent asymmetry of investment treaties is thus nothing but the reverse mirror image of the investor's exposure to the host state's [sovereign regulatory power].'<sup>23</sup>

<sup>19</sup> Sornarajah, 'Toward Normlessness: The Ravage and Retreat of Neo-Liberalism in International Investment Law', 2 *Yrbk Int'l Investment L & Policy* (2010) 595, at 618ff.

<sup>20</sup> Van Harten, 'Perceived Bias in Investment Treaty Arbitration', in Waibel *et al.* (eds.), *supra* note 1, at 433.

<sup>21</sup> On claims filed by the host state see Toral and Schultz, 'The State, a Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations', in *ibid.*, at 577.

<sup>22</sup> Counterclaims by host states are statistically insignificant, are rarely won by states, and to the authors' knowledge have never led to an award of damages or compensation in favour of the host state: see Crawford, 'Treaty and Contract in Investment Arbitration', 24 *Arb Int'l* (2008) 351, at 359–366.

<sup>23</sup> Alvarez, *supra* note 3, at 117.

The second caveat is more troublesome. Again in José Alvarez's words: 'A win record of [x per cent] for investor tells us nothing whether, objectively, investors deserved to win these cases or only half as many.'<sup>24</sup> The point is taken, but it raises an important question of feasibility. Determining the rightful winner of a case requires a detailed knowledge of the particulars of the case, including its precise facts, which may differ from the facts as described by the tribunal in its decision. Even the deplorable character of the legal reasoning of certain cases is not perforce an indication that the outcome was wrong, so even a review of egregious cases is inconclusive in this regard.<sup>25</sup> A partial solution to this difficulty is embraced by a current qualitative project conducted by Michael Waibel and Yanhui Wu:<sup>26</sup> they determine the legal strength of a select number of cases based on the opinion of a panel of five practitioners with an immediate knowledge of the case. (To be precise, they test the straightforwardness of the legal issues of the cases, but neither the clarity of the facts nor the compelling character of the evidence.) But this solution appears hardly realistic for a set of 541 claims, some of which are 40 years old. Between discarding studies based on winning rates entirely and taking them with a grain of salt, we favour the latter: such studies appear more valuable for the approximate determination of facts than general perceptions (not that perceptions are less important, but they form a distinct problem), in particular if we can report evolutions over time of success rates.

### A Geometry of Claims

Let us consider the question of the geometry of the claims: What is the development status of investors and host states? How do they relate to each other?

It is true, as the neo-colonial hypothesis would predict, that most investment arbitrations are filed by investors from developed states: Figure 2 shows that the home state of the investor is in 88 per cent of cases ranked, in the year of filing, as a high income country according to the World Bank metric.<sup>27</sup> In a further 9 per cent of the cases, it is an upper-middle income country.<sup>28</sup> In only 3 per cent of the cases is the home state of the investor a middle-income, lower-middle income, or low-income country.

Contrary to the neo-colonial hypothesis, however, the claims are not systematically filed against developing countries. Figure 3 shows that nearly half of the claims are brought against states that were, in the year the claim was filed, either high-income

<sup>24</sup> *Ibid.*, at 390–391.

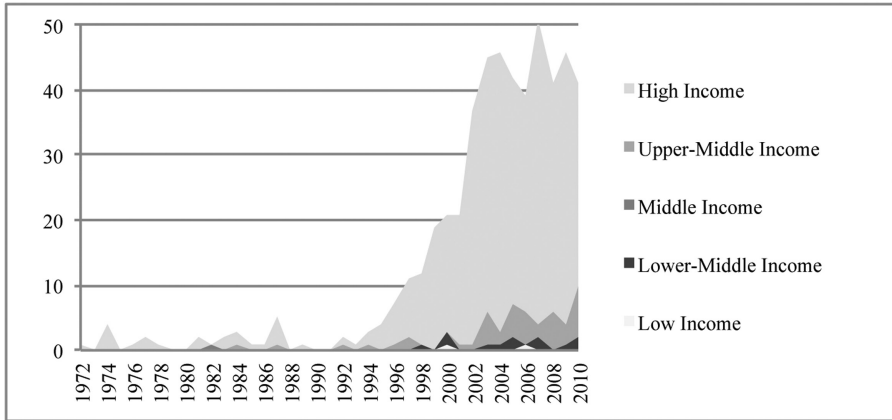
<sup>25</sup> For a selective review of such cases see Ortino, 'Legal Reasoning of International Investment Tribunals: A Typology of Egregious Failures', 3 *J Int'l Dispute Settlement* (2012) 31.

<sup>26</sup> Waibel and Wu, 'Are Arbitrators Political?' (2012), available at: [www.wipol.uni-bonn.de](http://www.wipol.uni-bonn.de).

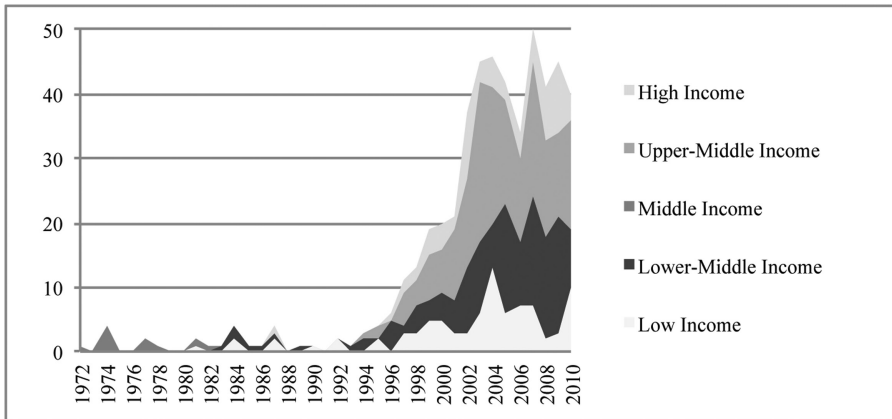
<sup>27</sup> The World Bank's metric, or country classification, based mainly on gross national income (earlier gross national product) *per capita*, has four categories of states: high income countries, upper-middle income countries, lower-middle income countries, and low income countries. The distinction between lower-middle and upper-middle income was introduced in 1983; until then there was just one 'middle income' category.

<sup>28</sup> These findings roughly corroborate an earlier study by Franck, 'Empirically Evaluating Claims about Investment Treaty Arbitration', 86 *N Carolina L Rev* (2007) 1, at 29, who found that, out of 107 claims, '[n]early 90% ... were brought from investors in "high income" countries'.





**Figure 2:** Number of investment arbitration claims filed per year, by development status of investor's home state.



**Figure 3:** Number of investment arbitration claims filed per year, by development status of host state.

or upper-middle income states on the World Bank scale. In other words, nearly half of the 541 investment claims we reviewed, filed between 1972 and 2010, were filed against developed countries.<sup>29</sup>

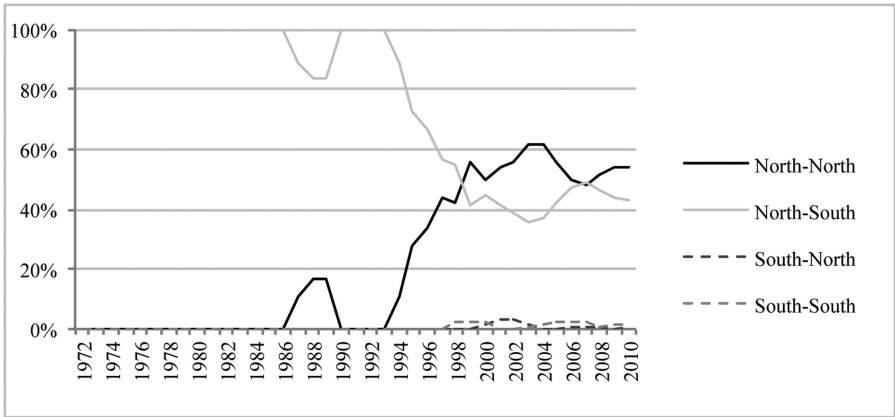
<sup>29</sup> These findings roughly corroborate *ibid.*, at 32, who found that, out of 82 investment treaty cases publicly available before 2006, 18% were filed against high income states, 45% against upper-middle income states, 28% against lower-middle income states, and 8.5% against low income states.

The findings are, however, in accord neither with the study by Tallent, 'State Responsibility by the Numbers: Towards an Understanding of the Prevalence of the Latin America Countries in Investment Arbitration', *Transnat'l Dispute Management* (2010) 38 (finding that high income and upper-middle income countries 'have been subject to substantially more arbitral demands than countries with smaller economies'), nor with the study of UNCTAD, IIA Issue Note: Recent Developments in Investor-State Dispute Settlement, No. 1, May 2013, at 4 ('At least 95 governments have responded to one or more investment treaty arbitration: 61 developing countries, 18 developed countries and 16 countries with economies in transition'). Roughly simplified, where Tallent finds that arbitrations are primarily filed against developed countries and UNCTAD that they aim primarily at developing countries, we find a rather even balance between developed and developing countries as respondents.

The position of developed and developing countries in the arbitration system veered in fact in the mid-to-late 1990s. Until then, investment arbitration was indeed a ‘rich vs poor’, ‘developed vs developing’ instrument, therefore arguably serviceable for neo-colonial purposes. Since the mid-to-late 1990s, however, investment arbitration has been a mixed ‘developed vs developed’ and ‘developed vs developing’ instrument, with a slight preponderance of ‘developed vs developed’ claims. This shift in geometry tends to undermine the neo-colonial argument for the period after the mid-to-late 1990s. When the system gets traction, in the second half of the 1990s (recall [Figure 1](#)), it becomes used more often to settle disputes among developed countries than to settle disputes between an investor of a developed country and a government of a developing country.

As evidence of this shift, consider that almost every year since 1997 investors from developed states have filed more claims against other developed states than against developing states ([Figure 4](#)). In order to keep the charts readable, we consider that high income and upper-middle income countries (according to the World Bank metric, determined in the year of filing) represent developed states, while lower-middle income and low-income countries represent developing states.<sup>30</sup>

The shift of positions of developed and developing countries, however, is not a reversal of roles: investors from developing countries almost never file arbitration claims against governments of developed states: the highest percentage of such claims, out of the total number of claims filed in a given year, is 3 per cent in 2001 and 2002. There has been no ‘revolt’ of ‘former colonies’ against ‘former colonialists’. As [Figure 4](#) shows, while investors from developed states file a lower percentage of their claims against developing states than before the investment arbitration boom of the mid-to-late 1990s, investors from developing states have not taken



**Figure 4:** Percentage of claims filed per year, by developed/developing pairs (three-year moving average).

<sup>30</sup> States with a middle-income status (a status used until 1983, when it was split into lower-middle and upper-middle) are considered southern countries – they represent just five investment arbitration claims in total.

up that sword against developed host states. If we look at investment arbitration from a specific developed vs developing perspective, it very much remains a one-way street.

Notice, moreover, that our data does not support the idea that investment arbitration is extending to developing vs developing relations. As Figure 4 shows, investors from developing states very rarely file arbitrations against governments of developing states. The shift of the system is this: it was a developed vs developing instrument; it now is a developed vs developed/developing instrument.

A word of caution is appropriate with regard to the development status of the investor's home state, because of the malleability of the investor's nationality. We classify the investor's home state, in the World Bank categories of economic development, according to the investor's nationality. The nationality is taken from determinations made in the arbitrations. The problem is that these determinations, and the ensuing classification in the World Bank metric, are vulnerable to legal manipulation of the investor's 'real' economic nationality by corporate structuring (also called treaty shopping or nationality planning).<sup>31</sup> However, we estimate that such manipulations represent a very limited number of cases. And in any event, corporate structuring is an intricate process, many aspects of which are not public. Second-guessing nationality determinations made by arbitral tribunals in order to test their statistical significance would require a full-scale separate study.

All in all, while the neo-colonialist argument may seem to fit with the data about the geometry of claims for the period preceding the mid-to-late 1990s, it does not seem to fit for later periods.

## B Outcomes

Let us move beyond initiation dynamics and consider the outcomes of the arbitrations. When we address this question, we must keep in mind the limitations of such an approach, as we said at the outset of this main section: We only know whether a given case was won and by whom or if it settled. Who should objectively have prevailed in any given case is not ostensible and apprising ourselves of the real legal strength of every case would hardly be feasible. So we are ignorant of the benchmark of rightful winners and of departures from the benchmark. Nevertheless, an examination of outcomes of arbitrations and of trends therein over the last 40 years may be taken, with a grain of salt, as a useful complement to other investigations inasmuch as it corroborates or weakens the findings of such other investigations.

The neo-colonial perspective, more specifically in its two-stage variant (recall: the system seeks predominantly to maximize the protection of investors and investors are from neo-colonial powers), is congruent with an expectation that investors rather dominate in the outcomes, and win a rather large proportion of cases. The greater the share of cases that investors win, the more such a finding adds to the plausibility of the neo-colonial hypothesis. Uneven winning rates of investors and host states,

<sup>31</sup> Schreuer, 'Nationality of Investors: Legitimate Restrictions vs. Business Interests', 24 *ICSID Rev* (2009) 521.

if investors clearly have the upper hand, may be construed as support for the neo-colonial perspective.

A win in arbitration may be defined in at least two ways, one a legal definition, the other an attempt to compensate for the asymmetry of roles in the investment arbitration system. The straightforwardly legal, and more conservative, definition focuses on the first final award in the arbitration, disregarding possible subsequent challenges and annulments. A win by the investor is, then, an arbitral decision awarding the investor compensation or damages, regardless of the amount awarded. A win by the host state is an arbitral decision that either declines jurisdiction or denies the investor any compensation or damages. We do not count as host state victories proceedings that were discontinued (17 instances), nor proceedings that never began (20 instances), since both of them may in fact reflect either that the parties settled or that the claimant dropped the case without obtaining anything in return. We will call this the legal definition of a win.

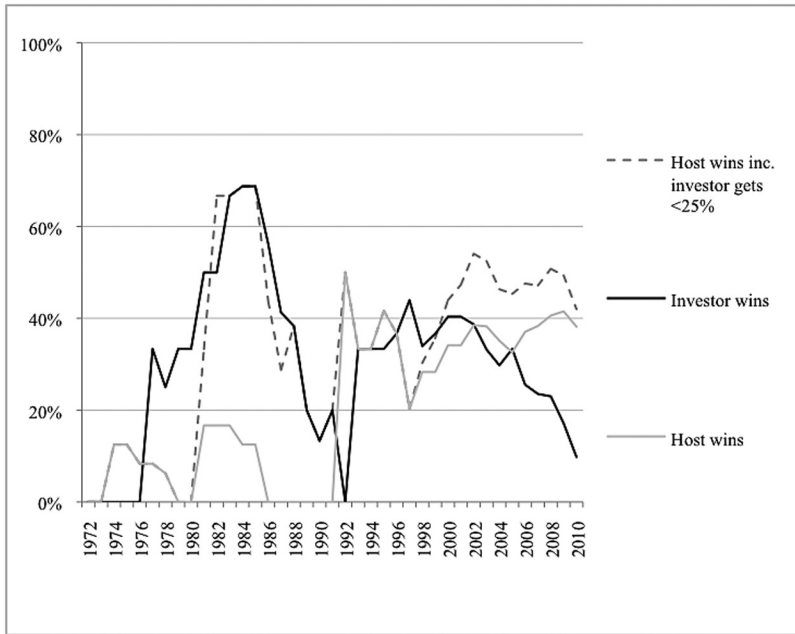
The alternative definition of a win considers that a claim has in fact petered out when it ends in damages or compensation representing only a small part of what was sought. We regard the host state as having prevailed when the investor obtains less than 25 per cent of what it claimed. So now, for an investor, arbitration success is an arbitral decision awarding it 25 per cent or more of the figure it has claimed. For a host state, winning is obtaining an arbitral decision that either declines jurisdiction, or denies the investor any compensation or damages, or awards the investor damages or compensation representing less than 25 per cent of the claim. We call this the legal-economic definition of a success.

The legal-economic definition of a win, however, should only be used as an additional indicator of limited authoritativeness, useful only in its complementarity with other indicators. Indeed, claimants can ask for more upfront in order to factor in an expected 'discount' applied by arbitral tribunals. In practice, such strategies can be controlled for only with great difficulty, if at all.

Regardless of the definition used, investors cannot in fact boast victory in significantly more cases than host states, in particular since the end of the 1990s. Our data on arbitration outcomes does not contribute to the plausibility of the neo-colonial perspective after the late 1990s. Even with a conservative, legal definition of a win, we find that investors do not win massively more cases than host states (Figure 5). On the whole investors have in fact won fewer cases (87 in the 1972–2010 period) than host states (102 in the same period).<sup>32</sup>

The nosedive of investor wins in recent years should be taken with an additional grain of salt. Host states may win cases more quickly than investors, by having the claim kicked out at the earlier stage of jurisdiction, whereas investors need to go all the way to a decision on the merits in order to secure a win. Accordingly, more recent claims are more likely to produce an outcome that is a win for the host state than to produce an outcome that constitutes a win for the investor, simply because of the time needed to produce these two types of outcomes.

<sup>32</sup> Our findings thus differ slightly, but not markedly, from Franck, *supra* note 28, at 49, who found that '[o]ut of the fifty-two awards finally resolving treaty claims, there were twenty awards (38.5%) where investors won and tribunals awarded damages. By contrast, there were thirty awards (57.7%) where governments paid investors nothing'.

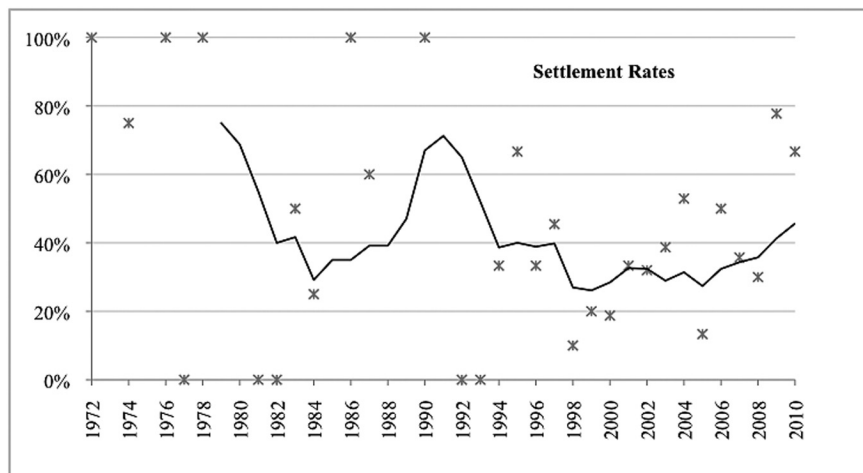


**Figure 5:** Winning rates, by year of filing (five-year moving average).<sup>33</sup>

If we shift to the legal-economic definition of success (recall: fault line at 25 per cent of the claim), we see that since the end of the 1990s host states have generally won almost half of the claims filed against them (Figure 5). Here again, our chart shows a progressive shift in winning rates occurring between 1997 and 2002, at roughly the same time as the system changed from a ‘developed vs developing states instrument’ to a ‘developed vs developed/developing states mechanism’. The distribution of winning rates and their shift starting in the late 1990s, considered in conjunction with the change in initiation dynamics, contributes to the plausibility that the functional effects of investment arbitration shifted towards the end of the 1990s: the neo-colonial flavour of the system started to fade.

Let us now consider settlements. As shown in Figure 6, claims that settle without an arbitration award have amounted to roughly 30 per cent of all concluded claims. This is quite a significant number of claims. A limitation applies however: with regard to the last few years, the settlement rates are likely to be increasingly over-representative as we advance in time, because claims have a comparatively higher chance, within a

<sup>33</sup> Outcomes are determined as of May 2011. Cases concluded later are not included. In the percentage, the magnitude of the whole (what forms the 100%) is determined by the cumulated numbers of cases that were won by the investor, the host state, and the cases that settled. The magnitude of the whole does not include cases that are still pending (151), proceedings that were discontinued (17), proceedings that never began (20), claims whose outcome could not be determined with sufficient certainty (52), claims that were consolidated (3), making a total of 243 excluded claims. This means that the statistics on outcomes are based on an all-time total of 298 claims, out of the 541 that our dataset contains for the 1972–2010 period. Investors have won 87 cases in total; host states have won 102 cases in total; and 109 cases settled.



**Figure 6:** Percentage of arbitrations that settled, by year of filing (eight-year moving average).<sup>34</sup>

shorter period of time, of ending in a settlement than of being decided by a tribunal. (For instance, a case concluded within 18 months, even two years, of filing was more likely settled than decided.) However, this time effect should be relatively limited, given that we use an eight-year moving average in Figure 6.

The meaning of settlements is not straightforward with regard to the power play between the parties. A settlement does not by necessity mean, and arguably it often does not mean, that the outcome is an equal split between the parties, that in these cases the system favoured neither of the parties. For now, let us merely take note of their statistical magnitude. We will return to settlements when discussing the international rule of law: settlements are, in their contrariness to adjudication, instances of non-operativeness of the rule of law, since no legal rule is applied, properly speaking, to resolve the dispute.

## 4 Substituting for the Rule of Law in the Host State

The second account of the functional effects of investment arbitration is that it serves to make up for deficient rule of law in the host state. The rule of law is taken, here, in the meaning of *Rechtsstaat* (literally, 'law state') which in a nutshell means that the government wields its power through law and in accordance with the law.<sup>35</sup> It is a principle of legality in the acts of the state.<sup>36</sup> With regard to courts, it means application of the law in competent and impartial adjudication. The functional effect of investment arbitration is, here, to replace 'dysfunctional' courts in 'unreliable' countries.<sup>37</sup>

<sup>34</sup> Outcomes are determined as of May 2011. Cases concluded later are not included.

<sup>35</sup> Rosenfeld, 'The Rule of Law and the Legitimacy of Constitutional Democracy', 74 *S California L Rev* (2001) 1307, at 1318–1330; B.Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (2004), at 92.

<sup>36</sup> Grote, 'Rule of Law, Rechtsstaat and Etat de droit', in C. Starck (ed.), *Constitutionalism, Universalism and Democracy: A Comparative Study* (1999), at 269, 281.

<sup>37</sup> See Van Harten, 'Five Justifications for Investment Treaties: A Critical Discussion', 2 *Trade L and Development* (2010) 19, at 31–32.



Two clarifications are in order. First, by ‘dysfunctional’ we mean courts in the host state that have limited respect for the rule of law, that allow or support arbitrary and unpredictable interference of their government with an investment. In substituting foul play in domestic litigation with hypothetically non-dysfunctional international adjudication, investment arbitration seeks to improve the regulatory quality of investment protection in the host state, bringing it to firmer adherence with the rule of law.<sup>38</sup>

Secondly, ‘unreliable countries’ refers to states that are in less than full adherence with the principle of legality and thus, arguably, with the *pacta sunt servanda* principle (in a broad, not strictly contractual meaning) in their relations with investors. Put bluntly, the idea is that a government defrauds an investor and its courts back it up, which calls for international arbitration to replace the courts.

Investment arbitration is here akin to administrative<sup>39</sup> or constitutional<sup>40</sup> adjudication, used when such adjudication is deficient in the host country. The investment arbitration system is meant to make up for the failures of national courts, injecting legality where it is wanting because of the dysfunctional character of the adjudication system in place: it seeks to provide the rule of law that national courts fail to provide in certain countries. Hence the claim, mentioned near the outset of this article, that investment arbitration is an instrument serviceable for ‘democratic accountability and participation ... , good and orderly state administration and the protection of rights and other deserving interests’.<sup>41</sup> By ruling on the compatibility of the exercise of public powers with treaty or contract obligations, with domestic or international law, investment arbitration contributes to preventing undue interferences with investments – interferences in breach of the rule of law.

The hypothesis is that such interferences with investments are more likely to be committed by states with unstable legal and political infrastructures.<sup>42</sup> Investment claims would consequently be more likely to be directed against states with unstable legal and political infrastructures. The target of the arbitration system would for the most part be non-rule-of-law, non-democratic states with governments submitted to little or no control by their own courts. Investment arbitration would be used less often against law-abiding, democratic countries.

To test this hypothesis, we used the Polity IV index as a proxy for the level of democratic development and the ICRG Law and Order score to assess the strength of the rule of law in host states.<sup>43</sup> We found that, up to the mid-1990s, our data indeed provide

<sup>38</sup> Paulsson, ‘Enclaves of Justice’, conference paper, Rule of Law conference at University of Richmond School of Law, 12 Apr. 2007, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1707504](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1707504).

<sup>39</sup> Van Harten and Loughlin, ‘Investment Treaty Arbitration as a Species of Global Administrative Law’, 17 *EJIL* (2006) 121.

<sup>40</sup> Schneiderman, *supra* note 3

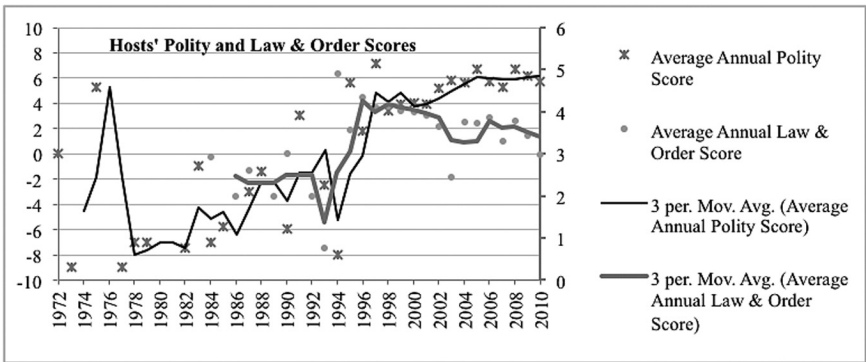
<sup>41</sup> Kingsbury and Schill, *supra* note 5, at 8.

<sup>42</sup> See, for instance, Alvarez, *supra* note 3, at 113.

<sup>43</sup> Marshall and Jagers, ‘Polity IV Project: Political Regime Characteristics and Transitions, 1800–2008’, available at: [www.systemicpeace.org/polity/polity4.htm](http://www.systemicpeace.org/polity/polity4.htm). We use the Polity IV (scale –10 to 10) Country Report 2009 Series and assume that the scores for 2008 and 2009 are identical to 2008. The ICRG ‘Law and Order’ score (International Country Risk Guide, Researcher Dataset (ICRG T3B – Political Risk) is a combination of two factors – namely, ‘Law’, which is an ‘assessment of the strength and impartiality of the legal system’, and ‘Order’, which is an ‘assessment of popular observance of the law’ (ICRG Methodology, available at: [www.prsgroup.com/ICRG\\_Methodology.aspx](http://www.prsgroup.com/ICRG_Methodology.aspx)). The Law and Order variable ranges from 0 to 6, with lower scores indicating a less established legal system.

some support for the idea that investment arbitration served to replace the domestic courts of non-democratic countries with unpredictable governments (see Figure 7). Yet, in the mid-to-late 1990s, when investment arbitration claims became more frequent, the situation shifted somewhat. Since then, investment arbitrations have been filed against governments exhibiting, on average, a relatively high level of democratic development and rule of law (the upper third in the case of Polity IV and the upper half for Law and Order).<sup>44</sup> The plausibility of the ‘substituting for the domestic rule of law’ candidate theory is therefore lower for the post-late-1990s period, inasmuch as we consider investment arbitration globally, as a whole. Yet, over time there has been an increasing tendency toward a skewed distribution of claims, with some clustering at the bottom and upper echelons of the level of democratic government and rule of law. It thus remains plausible that substituting for the domestic rule of law remains a function of certain arbitrations, that one important part of investment arbitration still seeks to replace courts in non-rule-of-law countries, while another important part of investment arbitration targets countries with a high level of respect for the rule of law. In other words, for the post-late-1990s period our data may suggest a dualizing of the function of investment arbitration.

In sum, the hypothesis that investment arbitration provides the rule of law that national courts fail to provide in certain countries seems relatively clear for the period preceding the mid-1990s, but it seems to be a less accurate representation of investment arbitration, taken as a whole, since the late 1990s.



**Figure 7:** Yearly average of Polity and Law & Order scores of host states, by year of filing (three-year moving average).

<sup>44</sup> A parallel may be drawn with Simmons, ‘The International Investment Regime since the 1980s: A Transnational “Hands-Tying” Regime for International Investment’, conference paper, 2011 Annual Meeting of the American Political Science Association, 1–4 Sept. 2011, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1914448](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1914448), who found that the average polity score of states seeking annulment of an ICSID award, up to 2008, was 2 on a scale of 10 (scale and source of information undisclosed in the conference paper), and it shot up to 6 on the same scale after 2008. The parallel has its limits though, since the reasons for a state to file annulment proceedings (Simmons’s study) are starkly different from the reasons for an investor to file a claim (our study).

To get more traction on this issue, we conducted a deeper statistical analysis,<sup>45</sup> focusing on the 1995–2010 period because the vast majority of investment arbitrations were filed during that period. We tested the link between either the Polity score or the Law and Order score and the variation in the frequency of the number of arbitration claims per year for the set of countries (102) that have faced an investment claim at least once during that time interval (in total using 1,024 country/year observations). We find that the number of claims per country per year is correlated with both indices, but that the significance of this link is not very strong.<sup>46</sup> The correlation signs do correspond to the trends in Figure 7: that is, Polity scores have unexpectedly a positive relation with the number of claims per country/year, whereas Law and Order has a negative relation with the number of claims per country/year. Thus, investment arbitration creates at best a weak rule-of-law effect for countries with a poor record of respect for the rule of law, if we use the Law and Order score as the most relevant indicator.

## 5 Strengthening the International Rule of Law

The third account of the functional effects of investment arbitration is that it serves to strengthen the rule of law on a global scale: the international rule of law. The rule of law has a rather specific meaning in this context, which must be articulated in order to steer clear of a possible misunderstanding of what exactly we are investigating.

In a nutshell, definitions of the rule of law put forward by legal theorists and philosophers range from the *Rechtsstaat* mentioned and used earlier (government acting through and in accordance with law)<sup>47</sup> to the realization of the ‘social, economic, educational, and cultural conditions under which man’s legitimate aspirations and dignity may be realized’,<sup>48</sup> and include the *Etat de droit* (government legally guaranteeing fundamental, constitutional rights<sup>49</sup>), the protection of individual moral and political rights,<sup>50</sup> democratic government,<sup>51</sup> and formal legality.<sup>52</sup> It is in the last meaning, as formal legality, that the rule of law is used in the current discussion. Put succinctly, formal legality requires that rules, in order collectively to amount to legal rules and thus instantiate the rule of law, be set out and applied in such ways as to meet a certain threshold of predictability, which is not clearly definable.<sup>53</sup> This implies, for instance, that rules be formulated in general terms, that they be accessible and understandable

<sup>45</sup> We use ordinal logistic regressions with a categorical dependent variable (consisting of three categories for the number of arbitration claims per country per year), essentially using maximum likelihood estimation.

<sup>46</sup> We ran several different models with different restrictions on the dataset and using a list of traditional control variables. Detailed results are available from the authors upon request.

<sup>47</sup> See *supra* sect. 4.

<sup>48</sup> International Commission of Jurists, *The Rule of Law in a Free Society* (1959), at vii.

<sup>49</sup> J. Chevallier, *L’Etat de droit* (3rd edn, 1999), at 11, 22–31.

<sup>50</sup> Dworkin, ‘Political Judges and the Rule of Law’, 64 *Proceedings of the British Academy* (1978) 259, at 262.

<sup>51</sup> Habermas, ‘On the Internal Relation Between the Rule of Law and Democracy’, 3 *European J Philosophy* (1995) 12.

<sup>52</sup> Tamanaha, *supra* note 35, at 119–122.

<sup>53</sup> M.H. Kramer, *Objectivity and the Rule of Law* (2007), at ch. 2.

by their addressees, and that they be applied coherently, consistently, competently, and impartially. Radically simplified, the point of the rule of law as formal legality is to provide what Lon Fuller calls ‘dependable guideposts for self-directed action’.<sup>54</sup>

### A Providing Guideposts and Determining Rights

So the hypothesis here is that the functional effects of investment arbitration are to sustain or increase the predictability of the international investment regime by providing a forum where the rules are applied in a cognitively reliable way through competent and impartial adjudication.

This hypothesis is in line with the view, expressed for instance by Benedict Kingsbury and Stephan Schill, that investment tribunals contribute to ‘a body of global administrative law that guides State behavior’: that they help to define ‘the world standards of good governance and of the rule of law that are enforceable against [states] by foreign investors’.<sup>55</sup> Investment arbitration, then, is ‘not only a mechanism to settle disputes’ but ‘also a form of global governance’.<sup>56</sup> José Alvarez elaborates: the rules governing foreign investments are ‘becoming increasingly precise over time, not only as a result of ever more detailed provisions in treaty and national law, but also thanks to the ever more elaborate interpretations of relevant law rendered by international arbitrators sitting in investor-state disputes’.<sup>57</sup> These rules now constitute, he continues, a ‘considerable body of law around the once threadbare principles governing States responsibility for injuries to aliens and their property’.<sup>58</sup> With each arbitral decision, Charles Brower and Lee Steven chime in, ‘the rule of law will be realized, and thus strengthened for the future’.<sup>59</sup> For Thomas Wälde, investment arbitration was meant as one of the post-war efforts to ‘create equal rules for all’.<sup>60</sup>

If the hypothesis is correct, two empirical manifestations can be expected. First, one would expect claims to be filed more or less indiscriminately against states with high and low development status. A plausibility probe would support the idea that the system serves to create guideposts for all if it showed that everyone is targeted by the system. Secondly, the guideposts for self-directed action created by the regime are stronger if the settlement rate is lower: the function of strengthening the international rule of law is better served if a smaller proportion of cases settle.<sup>61</sup> Indeed, settlements do not instantiate the rule of law, or at best they do so to a much lesser extent than decisions, because in settlement no rules are applied properly speaking.<sup>62</sup>

<sup>54</sup> L.L. Fuller, *The Morality of Law* (revd edn, 1969), at 229.

<sup>55</sup> Kingsbury and Schill, *supra* note 5, at 2.

<sup>56</sup> *Ibid.*, at 1 (abstract).

<sup>57</sup> Alvarez, *supra* note 3, at 25.

<sup>58</sup> *Ibid.*

<sup>59</sup> Brower and Steven, ‘Who Then Should Judge? Developing the International Rule of Law under NAFTA Chapter 11’, 2 *Chicago J Int’l L* (2001) 193, at 202.

<sup>60</sup> Wälde, ‘The Specific Nature of Investment Arbitration’, in P. Kahn and T.W. Wälde (eds), *New Aspects of International Investment Law* (2007), at 43, 70.

<sup>61</sup> Reisman, ‘International Investment Arbitration and ADR: Married but Best Living Apart’, 24 *ICSID Rev* (2009) 185, at 187.

<sup>62</sup> Fiss, ‘Against Settlement’, 93 *Yale LJ* (1984) 1073, at 1086; Schultz, ‘The Three Pursuits of Dispute Settlement’, 1 *Czech and Central European Yrbk Arbitr* (2011) 227, at 234.

(Rules are of course not completely inoperative in settlements, as they cast their proverbial shadow over negotiations,<sup>63</sup> but their controlling effect on the outcome is much lower.)

As Figures 4 and 6 have shown, our data provide some evidence to support the idea that these two expected manifestations did occur, in the mid-to-late 1990s. We can see a shift, at that time, from claims being filed more often against developing states to a situation where claims are filed roughly equally against developing and developed states. Moreover, we see a decline of the settlement rate occurring between the early 1990s and 1998.

## **B *The Haves and the Have-Nots: The Mood Remains Subjunctive***

The story so far has ignored one possibility: that investment arbitration serves no functional effects at all. It would only serve the direct function of resolving cases.<sup>64</sup> If a dispute settlement system serves only its immediate function of resolving cases, it is entirely the plaything of the parties, because the parties, and nothing beyond, define the realm of its concern. From this perspective, legal mandates and other legal norms coming to expression in individual determinations could vary between two otherwise indistinguishable situations, because the sole objective of the system would be each case taken for itself, not the way it relates to like cases. Given as much, such a system could easily admit of discriminations between groups of addressees. For instance, the haves and the have-nots could come out of the dispute settlement system differently; they could have different winning rates.

If, on the other hand, a dispute settlement system fully serves the function of promoting the rule of law, then the way in which cases relate to like cases becomes a predominant concern. A regime would have to produce sufficiently similar results for all parties in order to be in accord with that logic. The legal norms coming to expression in individual determinations cannot vary between two otherwise indistinguishable situations. The rule of law entails the principle of equality before the law. The haves and the have-nots would have to have sufficiently similar winning rates.

This dichotomous sketch should not obscure the fact that functional effects obtain by degrees: a dispute settlement system more or less serves the strengthening of the international rule of law. Investment arbitration more or less pursues the objective of promoting the international rule of law. The question, of course, is how much or to what extent.

The answer, it seems, is as follows: investment arbitration serves to promote the international rule of law to a relatively limited extent. We base this statement on the observation of the winning rates of the host states, associated with their economic development status (World Bank metric). Three reasons explain the choice of this indicator.

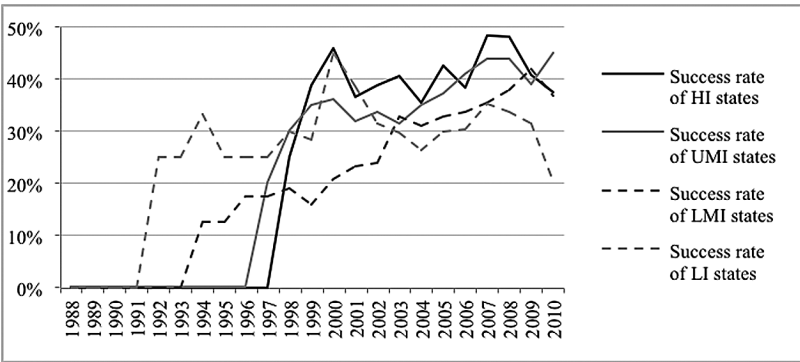
First, as explained above, a systematic prevalence of stronger parties (the 'haves') is taken to correspond to the hypothesis that the rule of law is pursued less

<sup>63</sup> Mnookin and Kornhauser, 'Bargaining in the Shadow of the Law', 88 *Yale LJ* (1979) 950.

<sup>64</sup> On direct and consequential functions of tribunals see Caron, 'International Courts and Tribunals: Their Role Amidst a World of Courts', 26 *ICSID Rev* (2011) 1.

diligently, insofar as any prevalence of such a type of parties is symptomatic of an unequal application of the legal regime. Secondly, the strength of the host states (the extent of their ‘haves’ character, as it were) is taken to be a function of their economic development status, based on the assumption that the richer a state is the better the legal counsel is it can afford. Thirdly, we focus on host states because of the roughly comparable number of claims filed against high income, upper-middle income, lower-middle income, and low income states (Figure 3), which sharply contrasts with the overwhelming majority of high income countries among home states (Figure 2).<sup>65</sup>

Our data (Figure 8) show that the haves (the host states with a higher development status) stand a higher chance of successfully fending off claims than the have-nots (the weaker parties with a lower development status). Economic power disparities seem to be a factor of success.



**Figure 8:** Percentage of claims won<sup>66</sup> by host states (legal definition of success<sup>67</sup>), out of the claims that were filed against states of each economic development status (high income=HI, upper-middle income=UMI, lower-middle income=LMI, loer income=LI) and that were concluded,<sup>68</sup> by year of filing (10-year moving average).<sup>69</sup>

<sup>65</sup> On home states see, for instance, the study by McArthur and Ormachea, ‘International Investor-State Arbitration: An Empirical Study Analysis of ICSID Decisions on Jurisdiction’, 28 *Rev Litigation* (2009) 559, at 563, which found that ICSID tribunals are less likely to dismiss claims by investors from the wealthiest countries.

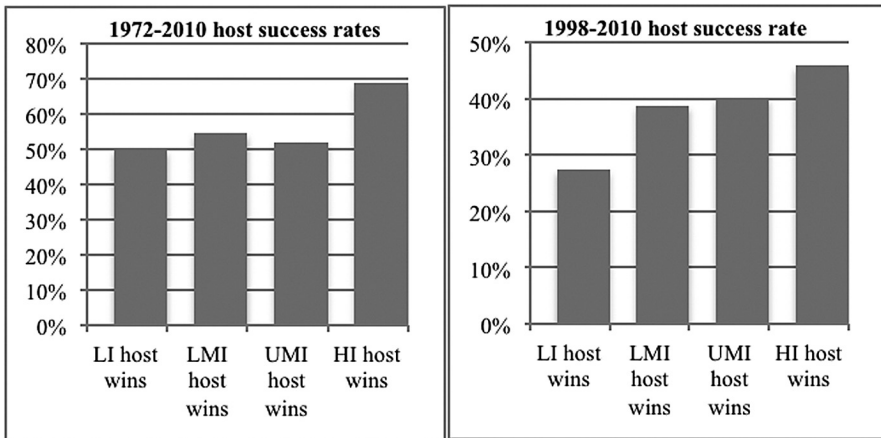
<sup>66</sup> In total, 99 cases were won by HI/UMI/LMI/LI states, and two further cases were won by a middle income country and one more was won by a country with unknown development status.

<sup>67</sup> See *supra* sect. 3B.

<sup>68</sup> The total number of cases filed against states with these four types of development status is 495 (46 further claims were brought against states with no information about their development status or a ‘middle income’ development status). The total number of concluded cases excludes cases that are still pending (151), proceedings that were discontinued (17), proceedings that never began (20), claims whose outcome could not be determined with sufficient certainty (52), claims that were consolidated (3), making a total of 243 excluded claims (of which 212 were brought against HI/UMI/LMI/LI countries and 31 against middle income countries or countries whose development status is unknown).

<sup>69</sup> We used a moving average of 10 years because of the quite significant changes in success rates within shorter periods, which would create noise making the chart unreadable, and because we found no significant variance of success rates during the 1972–2010 period.





**Figure 9:** Percentage of claims won by host states, during the periods 1972–2010 and 1998–2010 (same definition of success as Figure 8)

More precisely, consider the wealthiest and the poorest host states: In the full period surveyed (1972–2010, Figure 9, on the left), low income countries won 50 per cent of the claims that were won by one of the parties (that is, excluding those that settled), while high income countries were successful in 69 per cent of such cases. This difference in success rates becomes proportionally more meaningful in the 1998–2010 period (Figure 9, on the right), which roughly corresponds to the time during which the system has been serving its current functions: low income countries won 27 per cent of all concluded cases (including those that settled) brought against them during that period, while high income states prevailed in 46 per cent of such cases (Figure 9).

This means that in the 1998–2010 period, high income countries were 1.7 times more successful in investment arbitrations than low income countries. The richest countries are almost twice as strong as the poorest countries in what appears to be the current incarnation of the investment arbitration regime.<sup>70</sup> When a dispute settlement system favours the stronger parties to such an extent, the international rule of law is pursued less than fully.<sup>71</sup>

## 6 Conclusion

Three main views structure a significant part of the thinking about the purposes and effects of investment arbitration. It is seen as serving to control developing countries by acting as a neo-colonial instrument for developed states, or as a substitute for the

<sup>70</sup> This does not comport with the findings of Franck, *supra* note 8, at 487: '[t]he statistical analyses consistently showed that, at a general level, the outcome of investment treaty arbitration was not reliably associated with the development status of the respondent state'.

<sup>71</sup> A caveat is in order: we cannot rule out that the legal strength of the cases is on average greater when filed against developed host states than when filed against developing states.

domestic rule of law in the host state of the investment, or to strengthen the international rule of law.

In this article, we have empirically examined specific operative indicators of these three views, as probes of the plausibility of their accuracy. Data drawn from a set of 541 investment arbitration claims, filed between 1972 and 2010, lend support to the following narrative: until the mid-to-late 1990s, investment arbitration was used to a large extent both as a neo-colonial instrument to strengthen the economic interests of developed states and as a means to impose the rule of law on non-democratic states with a weak law and order tradition. Since the mid-to-late 1990s, investment arbitration has seemed more oriented towards serving the function for which most international courts and tribunals are created – that is, to strengthen the international rule of law. However, it still serves this function to a relatively limited extent, given that it favours the ‘haves’ over the ‘have-nots’, allowing or making the international investment regime to be harder on poorer countries than on richer countries.