Investment treaty arbitration: a yardstick of the rule of law? An investigation of the correlation between the rule of law and international investment treaty arbitration

René Gayle

Abstract. The high incidence of claims being brought against Latin American and Caribbean parties, coupled with their low rankings on various governance indices, particularly the World Justice Project Rule of Law Index, has given rise to conjecture that there is an interrelatedness between a state's respect for the rule of law and the frequency with which investment arbitration claims are submitted against the state. This article seeks to test this assertion statistically. In doing this, it offers a synthesis of the literature on the relationship between the rule of law and investment treaty arbitration generally, before investigating the unexplored question of whether a country's rule of law deficit will lead to a higher incidence of investment arbitration claims against it.

Keywords. Rule of law; Latin America; Caribbean; Investment Arbitration; World Justice Project Rule of Law Index; ICSID arbitration; Governance; Investment claims against Latin American parties.

Note. This article was adapted from research submitted as part of the requirements for the grant of the Master of Laws (LL.M) in International and Comparative Dispute Resolution at the School of International Arbitration, Queen Mary, University of London for the academic year 2011–2012. The author would like to thank Norah Gallagher for her supervision and Lisa Richman for her comments. All mistakes are that of the author.

Wherever law ends, tyranny begins
John Locke,
Second Treatise on Government
(Cambridge 1988) 400.

I. Introduction

The rule of law has become the standard by which modern democracies are judged. It has garnered almost universal appeal, and has made its way into new dimensions, such as international law, and more specifically, international investment law. As a result, the ways

in which the rule of law interacts with and affects the international investment arbitration regime has gained increased attention. For example, several studies have examined the relationship between the rule of law, investment treaties and economic development. The results of these studies largely demonstrate that the three concepts are necessarily intertwined. More specifically, investment treaties act as signals of a state's commitment to the rule of law, and when this is combined with favourable economic conditions, and the presence of strong rule of law institutions, then this provides the most suitable environment for economic growth. States have therefore been encouraged to strengthen the rule of law domestically, not only as an end in itself, but also as a means of providing the right climate for investors.

Very few studies have however considered the relationship between the incidence of investment treaty disputes against a state and its respect for the rule of law. This article therefore aims to fill this lacuna in current legal scholarship, by offering an empirical analysis of the extent to which a state's respect for the rule of law appears to have an impact on the number, nature, and outcome of investment treaty arbitration cases brought against it, which is referred to as its "treaty arbitration record". This warrants investigation as governments, policy analysts, advocates for rule of law reform, among others, are likely to be interested in whether a state can reduce the number of investment arbitration claims brought against it by improving its adherence to the rule of law. Similarly, investors may be keen to know as part of their due diligence, whether having regard to rule of law factors may decrease the chances that their investments will be injured by the host state and result in a costly dispute.

In carrying out this investigation, specific attention has been given to Latin America and the Caribbean, considering that this region alone accounts for the largest percentage of the caseload of ICSID by region, and at the same time, has some of the lowest ranked countries on the World Justice Project Rule of Law Index. Focus has also been placed on ICSID arbitration since it provides for the broadest state membership and accounts for the majority of investment treaty arbitration cases. However, cases brought before other investor-state dispute settlement mechanisms have also been presented for comparative analysis.

This article is divided into four sections. This introduction comprises Part I and the conclusion is presented in Part IV. Part II provides an appraisal of previous research conducted on the relationship between the rule of law, investment treaty arbitration and economic

development. Part III introduces the World Justice Project and its Rule of Law Index and presents the results of the research on the correlation between a state's respect for the rule of law and its treaty arbitration record.

II. The interaction between the rule of law and investment treaty arbitration

The rule of law is a centuries old constitutional principle recognised in the majority of legal systems of the world, albeit under varying nomenclature, such as the French état de droit, the Spanish *estado de derecho*, or *Rechtsstaat* in German jurisprudence. Several developments in recent years, particularly the promotion of the rule of law on the international plane, have served to entrench its universality. The rule of law plays an integral role in investment treaty arbitration. At the epicentre of their relationship is the idea that international investment law seeks the attainment of economic development and cooperation through the promulgation of the rule of law. Stemming from this, the two concepts intermingle in several ways. First, the rule of law plays a role in economic development, which is the chief objective of investment treaties. Secondly, investment treaty arbitration, in its effort to achieve economic development for contracting states, promotes both the international and domestic rule of law.

The extent to which each of these notions holds true has been the subject of substantial debate and analysis. Many have questioned whether: (i) the rule of law (a) in and of itself, or (b) through BITs and other investment treaties, aids in the achievement of economic development; and (ii) whether investment treaty arbitration does in fact promote the rule of law, or rather, stifles it. Empirical studies have been performed examining the former question—the correlation between investment treaties and increased FDI—while the latter question has arisen as part of the debate surrounding the legitimacy of the international investment arbitration regime. This section presents an analysis of the interaction between the investment treaty arbitration regime, economic development and the rule of law.

A. Investment Treaty Arbitration And The Rule of Law

There are three primary ways in which international investment law furthers the rule of law. First, the overall scheme of international investment law promotes the rule of law. Secondly, BITs are an expression of a state's willingness to respect the rule of law. Thirdly, the resolution of investor-state disputes in an international forum serves as an administrative review process that ensures states' respect for both the domestic and international rule of law. These propositions will be examined in turn.

1. The overall scheme of international investment law promotes the rule of law

The chief objective of the international investment arbitration regime is the protection and promotion of foreign direct investment. This is borne out in the preambles of several investment treaties.[1] As will be demonstrated, both objectives necessitate the advancement of the rule of law. The protection of investments requires that they operate within a framework of clear, stable laws, and administrative practices that are transparent, free from arbitrariness, follow due process and meet the legitimate expectations of the investor—that is, investors are only truly protected when the host state abides by the rule of law. Furthermore, the stability and lower political risk afforded by the rule of law serve to promote increased foreign direct investment. Accordingly, the rule of law is a necessary by-product of the regime's efforts to secure economic development.

2. Substantive rights in BITS are an expression of the rule of law

Currently, there is a network of over 3000 international investment agreements (IIAs), of which the overwhelming majority are bilateral investment treaties (BITs). Two decades ago, there was a dramatic upsurge in the number of BITs being concluded annually. However, the United Nations Conference on Trade and Development (UNCTAD) has reported that there is currently a trend towards

[1] See for e.g. Chinese Model BIT (2003), preamble: "…intending to create favourable conditions for investment… recognizing that the reciprocal encouragement, promotion and protection of such investment will be conducive to stimulating business initiative of investors and stimulate prosperity for both States".

reduced treaty making in the area of international investment law.[2] In fact, only forty-seven IIAs were concluded in 2011 and only twelve between January and June 2012, whereas previously, the average number of IIAs concluded annually was well in the hundreds.[3] UNCTAD attributes this loss in momentum to a shift towards regional treaty making and to the growing discontent with the investment treaty arbitration regime. [4]

Yet, notwithstanding this, BITs and other IIAs remain the centrepiece of international investment law. Their primary purpose is to protect and promote foreign direct investment by guaranteeing the legal framework within which the investment will operate. The efforts made by states to enhance the legal framework for investments and the nature of the substantive guarantees contained in BITs, both serve to further the rule of law.[5] As stated by Yves Fortier, "... the emergence of BITs has fostered a far more secure and fair investment environment and, indeed, a greater respect for the rule of law".[6]

Similarly, according to Kenneth Vandevelde in his global appraisal of BITs, they all embrace six core principles: access, reasonableness, security, non-discrimination, transparency and due process, which reflect that one of their key functions is the promotion of the rule of law.[7] In this regard, two of the standard substantive guarantees are noteworthy: the fair and equitable treatment standard and the international minimum standard.

---

[2] *World Investment Report 2012: Towards a New Generation of Investment Policies*, (United Nations Publications 2012) 84.

[3] ibid.

[4] ibid.

[5] *cf* Marie-Claire Cordonier Segger and Andrew Newcombe, "Chapter 6: An Integrated Agenda for Sustainable Development in International Investment Law" in Marie-Claire Cordonier Segger, Markus W Gehring, et al (eds), *Sustainable Development in World Investment Law* (Kluwer 2011) 122, who despite arguing that IIAs promote and ensure good governance by providing an enforceable set of international standards to which states commit to act, state that the value-laden nature of concepts such as "good governance" and the "rule of law" means that any analysis of whether they benefit from IIAs can only be made at the anecdotal or conceptual level.

[6] L Yves Fortier, "Investment Protection and the Rule of Law: Change or Decline?"(BIICL 50th Anniversary Event Series, London, March 2009).

[7] See Kenneth Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (OUP 2010).

a). Fair and Equitable Treatment Standard

The fair and equitable treatment standard (FET) is now one of the most common guarantees found in BITs, and the most commonly invoked standard in investment disputes. Its popularity with claimants is largely due to its flexibility and breadth of application. FET encapsulates several broad principles that proscribe a wide range of state action under one convenient heading—much like the rule of law. These principles include good faith, due process, non-discrimination, transparency and proportionality. The striking resemblance of these principles to the constituents of the rule of law, has led some writers to argue that the FET standard is essentially an embodiment of the rule of law.

For example, according to Alexandra Diehl:

> The concept underlying the FET in international investment law is functionally equivalent to the understanding of the contours of the rule of law under domestic legal systems. In both cases, the pillars are the same: certainty, equality, generality and proportionality.[8]

The recognition of the FET standard as an embodiment of the rule of law is not limited to academic scholarship. Several tribunals have also identified a relationship between FET and the rule of law. The International Court of Justice, for example, in the *ELSI Case* defined "arbitrariness" as "something opposed to the rule of law ...."[9] This has been consistently followed and applied by subsequent arbitral tribunals.[10] Additionally, several claimants have fashioned their claims for breaches of the FET standard as violations of the rule of law.[11] Considering the wide practice by academics, jurists, and other

[8] Alexandra Diehl, *The Core Standard of International Investment Protection* (Kluwer 2012) 336. See also Stephan Schill, "Fair and Equitable Treatment, The Rule of Law, and Comparative Public Law" in Stephan Schill (ed) *International Investment Law and Comparative Public Law* (OUP 2010) 23; Stephan Schill, "Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law" (2006) 3(5) TDM.

[9] *Case Concerning Elettronica Sicula S.P.A* (United States of America v Italy) (1989) 15 ICJ Rep para 76 (Decision, 20 July 1989), citing the definition as given by an earlier ICJ tribunal in *Asylum Case* (Colombia v Peru) (1950) ICJ Rep 395 (Judgment, 20 November 1950) <http://www.unhcr.org/refworld/docid/3ae6b6f8c.html> accessed 17 July 2012.

[10] See *Spyridon Roussalis v Romania* ICSID Case No ARB/06/1 (7 December 2011); *Noble Ventures v Romania* ICSID Case No ARB/01/11 (12 October 2005).

[11] See for e.g. *Waguih Elie George Siag and Clorinda Vecchi v Egypt* ICSID Case No ARB/05/15 (1 June 2009) para 453: "Claimants, in their post-hearing submissions, submit that Egypt's

practitioners, to link the FET standard with the rule of law, it can be presumed that there is a general consensus that the two are related.

b). The International Minimum Standard

One of the most intense debates within the discipline of international investment law has surrounded the question of whether the FET standard is an autonomous standard or whether it is a constituent of the international minimum standard. The international minimum standard is "a norm of customary international law which governs the treatment of aliens, by providing for a minimum set of principles which states, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals and their property."[12] The standard is therefore unrelated to that of national treatment as it is does not hinge on the treatment afforded by the state to its own nationals. Rather, it uses international law as the yardstick for assessing state conduct.

There is a belief that fair and equitable treatment, which is also a non-contingent standard, equates to the international minimum standard. This viewpoint however is hotly contested, but the consensus now appears to be that the two are only equated when the relevant treaty expressly links FET with international law.[13] Nevertheless, there are exceptions. For example, while the standard as expressed in the OECD Draft Convention on the Protection of Foreign Property, and Article 1105(1) of the NAFTA Agreement is not linked to international law, both bodies have clarified that in the context of their respective

failure to respect the numerous rulings of its courts in favour of Claimants constituted an "extraordinary violation of the rule law" and "a twelve-year denial of justice," which provided further evidence that the FET standard of the BIT had not been met. The Tribunal agrees with the Claimants" characterisation of Egypt's conduct…'; *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* ICSID Case No ARB/05/22 (24 July 2008) para 338: "BGT's basic expectation was, at least, that the Lease Contract would be performed in good faith and in accordance with due process and the rule of law."

[12] OECD, *Fair and Equitable Treatment Standard in International Investment Law* (2004) 8.

[13] For example, see US Model BIT (2004), Article V: "Minimum Standard of Treatment – (1) Each party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. (2) For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not… create additional substantive rights".

treaties, the standard is meant to incorporate international law.[14] It is therefore submitted that in the absence of clear wording in the treaty, or a subsequent interpretation by the treaty drafters that the FET standard is to be taken to reflect the international minimum standard, the majority position is to be embraced. Pursuant to the rules of treaty interpretation laid down in Article 31 of the Vienna Convention on the Law of Treaties, it is important that where the treaty does not contain an express link between FET and the international minimum standard, then with respect to that treaty the FET standard must be interpreted autonomously.[15] However, even in such cases, it has been pointed out that in terms of practical application, the differences between the two concepts may be more apparent than real.[16]

It follows logically that if the FET standard is seen as a functional equivalent of the international minimum standard, and the FET standard itself is an embodiment of the rule of law, then the international minimum standard is yet another manifestation of the rule of law. The major distinction is that while the rule of law, as understood in domestic legal systems, is to the avail of all persons within the state's territorial jurisdiction, FET and the international minimum standard are emanations of the rule of law afforded to aliens by virtue of international law. Indeed, Patrick Robinson, former President of the International Criminal Tribunal for the former Yugoslavia has identified that there also exists a distinct concept known as the "international rule of law".[17] In this vein, through the FET standard and the international minimum standard, international

[14] The Notes and Comments to Article 1 of the OECD Draft Convention pronounces that "the phrase "fair and equitable treatment", customary in relevant bilateral agreements, indicates the standard set by international law for the treatment due by each State with regard to the property of foreign nationals". Similarly, on 31 July 2001, the NAFTA Free Trade Commission (FTC) issued a binding interpretation stating that 'Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party'.

[15] Article 31(1) of the Vienna Convention on the Law of Treaties provides that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."United Nations, Vienna Convention on the Law of Treaties (23 May 1969) <http://www.unhcr.org/refworld/docid/3ae6b3a10.html> accessed 17 July 2012.

[16] *Saluka Investments BV (The Netherlands) v The Czech Republic* (2006) (Partial Award) 2 TDM para 291.

[17] See Patrick Robinson, "Affirming the International Rule of Law" (2012) 1 EHRLR 32.

treaty arbitration serves to promote not only the domestic rule of law, but also the international rule of law.

c). Procedural rights in BITs promote the rule of law

The greatest novelty of the BIT system is that it allows investors to bring claims directly against host states in an agreed forum, usually the International Centre for the Settlement of Investment Disputes (ICSID). This feature greatly empowers investors as it offers them a neutral, readily available, reliable and effective mechanism for them to directly invoke their rights, without the need to rely on their states of nationality, and without the need to exhaust domestic remedies within the host state. As some have argued, it in effect "permits investors to function in a manner akin to a private attorney general by initiating adjudication to redress inappropriate government conduct".[18] Accordingly, tribunals are able to regulate state conduct that violates the international rule of law and deter future breaches.[19] Additionally, while there have been conflicting arbitral decisions in the past, due to the absence of a doctrine of precedent, the majority of tribunals demonstrate an inclination to pay due regard to the decisions of previous tribunals. Consequently, it can now be said that there is a body of *jurisprudence constante* in the area of international investment law. The development of jurisprudence in the area will also serve to further the rule of law, by ensuring greater stability and predictability of outcome.[20]

d). Investment treaty arbitration stifles the rule of law?

In spite of the preponderance of factors suggesting that investment treaty arbitration promotes the rule of law, a body of literature has emerged positing that it actually has the opposite effect. At the core

[18] Susan D Franck, "Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law" (2007) 19 Global Bus & Dev L J 337, 343.

[19] There is an emerging body of literature that notes the "chilling effect" that this may have on states by contracting their policy space and limiting their ability to regulate in the public interest. See for e.g. Susan D Franck, 'Empirically Evaluating Claims about Investment Treaty Arbitration' (2007) 86 North Carolina L Rev 1; Mark Waibel and Asha Kaushal, et al. (eds) *The Backlash against Investment Arbitration* (Kluwer 2010); Markus Gehring, Marie-Claire Cordonier Segger and Andrew Newcombe (eds) *Sustainable Development in World Investment Law* (Kluwer Law 2011).

[20] Thomas Schultz, 'What is the Role of An Investment Arbitrator?: An OGEMID Discussion' (2012) TDM 3.

of this argument is the contention that its procedures erode the jurisdiction of domestic institutions by providing for an exclusive international forum for the resolution of investment disputes. The effect of this is that it serves as a substitute for ineffective domestic institutions, which prevents domestic court procedures from improving, and inhibits the development of domestic jurisprudence.[21] In this way, BITs provide an "escape clause"[22], or allow foreign investors to 'contract out of the domestic legal system',[23] thereby constituting a "legal enclave in which foreign investors can be largely insulated from the legal and political risks of contracting in the host state and relying on its institutions"[24].

It has also been argued that investors' heavy reliance on BITs make them more complacent and less likely to make demands for stronger institutions in the domestic sphere. According to Professor Ron Daniels:

> [A] neglected aspect of reliance on these enclaves is the extent to which it dulls any interest or incentive on the part of foreign investors to seek to condition their investments in the host developing state on the creation of good rule of law institutions that would be generally accessible to foreign and domestic investors alike.[25]

Moreover, it is also argued that the fact that the guarantees within BITs are only available to foreign investors means that domestic investors are less protected than their foreign counterparts.[26] For example, according to some commentators, domestic investors have no choice but to place their fate in the hands of inadequate domestic

---

[21] Tom Ginsburg, "International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance" (2005) 25 Intl Rev L & Econ 107, 113.

[22] Mark Halle and Luke Eric Peterson, "Investment Provisions in Free Trade Agreements and Investment Treaties: Opportunities and Threats for Developing Countries" (2005) 24 <http://www.snap-undp.org/elibrary/Publications/InvestmentProvisions.pdf> accessed 15 July 2012.

[23] Ron Daniels, "Defecting on Development: Bilateral Investment Treaties and the Subversion of the Rule of Law in the Developing World" (Draft March 23, 2004) 23 <www.unisi.it/lawandeconomics/stile2004/daniels.pdf> accessed 4 July 2012.

[24] ibid.

[25] ibid 25.

[26] *cf* Susan Franck, "The Nature and Enforcement of Investor Rights under Investment Treaties: Do Investment Treaties Have a Bright Future?" (2005) 12 U C Davis J Intl L & Policy 47, 63.

institutions, whereas foreign investors have the benefit of international dispute settlement mechanisms.[27] Additionally, considering that BITs provide for both national treatment and most-favoured nation treatment (MFN) then where the treatment meted out to local investors is less favourable than that of foreign investors, the foreign investor may choose to invoke the MFN provision as opposed to the national treatment standard, resulting in less incentives for states to improve domestic systems generally.

In spite of such vehement criticisms, the idea that investment treaty arbitration hinders the promulgation of the rule of law is unconvincing. These commentators neglect the fact that the desire to prevent future claims and the risk of being liable to pay hefty sums of compensation give states a strong incentive to be responsive to arbitral awards.[28] To this end, states are likely to improve their domestic legal infrastructure and alter their administrative practices as a preventive mechanism. Moreover, while the option to obviate domestic institutions may reduce the need for some foreign investors to push for greater institutional quality, the asymmetry between the protection afforded to some foreign investors who enjoy the benefits of a BIT, and those foreign investors and domestic investors who are not so protected, make it more likely that the unprotected investors will pressurize the government for more equal treatment. Such equal treatment can only be accomplished by improving domestic institutions and administrative practices, thereby enhancing the rule of law.

---

[27] Daniels (n23) 23 - 24.

[28] Gus van Harten, for example, argues that: "Although arbitral tribunals do not have the power to abolish or annul illegal measures, States might feel pressured to introduce policy or legislative changes in light of the pronouncements of arbitral tribunals and the liability flowing therefrom. If one believed such a possible effect to be of crucial importance, one would have to conclude that one of the principal purposes of signing investment treaties would be to impose discipline on governmental behaviour and thereby foster a heightened respect for the rule of law." See Gus Van Harten, 'Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law' in Stephen Schill (ed), *Investment Law and Comparative Public Law*, (OUP 2010) 627–657. See also Benedict Kingsbury and Stephan Schill, "Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law" (2009) IILJ Working Paper 2009/6 (Global Administrative Law Series) finalised 19 August 2009.

III. Research findings and analysis

Part II of this article provided a qualitative analysis of the academic discourse surrounding the inter-relatedness of the rule of law, investment treaty arbitration and economic development. This section seeks to build on such scholarship by presenting the methodology and results of independent quantitative research that addressed the novel question of whether a state's perceived respect for the rule of law—as evinced by its ranking on the World Justice Project's Rule of Law Index—bears any statistical relationship with the number and outcome of investment treaty arbitration cases brought against it.

A. Reliability of The World Justice Project Rule of Law Index

The World Justice Project (WJP) is a non-profit organisation dedicated to the promotion of rule of law reform. The World Justice Project Rule of Law Index (WJP Index) is arguably the most authoritative and comprehensive guide as to the extent to which a country respects the rule of law in practice. The WJP Index measures a country's rule of law compliance using nine indicators that are further broken down into 52 sub-factors. The nine indicators are: (i) limited government powers, (ii) absence of corruption, (iii) order and security, (iv) fundamental rights, (v) open government, (vi) effective regulatory enforcement, (vii) effective civil justice, (viii) effective criminal justice and (ix) informal justice.

The definition of the rule of law utilised by the WJP espouses four principles: (i) the government and its officials and agents are accountable under the law; (ii) the laws are clear, publicized, stable, and fair, and protect fundamental rights; (iii) the process by which the laws are enacted, administered, and enforced is accessible, efficient, and fair; and (iv) justice is delivered by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.

The WJP Rule of Law Index is one of a kind. At present, it is the only index that measures a country's adherence to the rule of law in practice, rather than merely in theory. This was accomplished through the use of a general population poll of 1,000 residents in the three largest

cities of each country and through a close-ended questionnaire issued to local experts qualified in a range of areas including academia, law, law enforcement, and public health. This allows for the perceptions of both experts and ordinary residents to be taken into account and balanced against one another. The findings are later crosschecked against international data sources to identify errors and biases.

The WJP acknowledges that their methodology may be affected by sampling errors, missing data, and weighting. However, such limitations are inherent in any multi-dimensional study and should not be considered inhibitive of their use and implementation. In fact, the European Commission Joint Research Centre completed a statistical audit that concluded that the WJP index is statistically coherent and methodologically robust.

According to the WJP:

> The WJP Rule of Law Index® 2011 is the culmination of over four years of development, intensive consultation, and vetting with academics, practitioners, and community leaders from over 100 countries and 17 professional disciplines. The Index team regularly maintains dialogue with scholars, leaders, and practitioners from multiple disciplines to ensure that the Index is methodologically sound and applicable to societies with diverse social, political, and legal systems.[29]

On this basis, the WJP Rule of Law Index may be accepted as a reliable tool for comparing rule of law adherence across countries.

B. Methodology

As illustrated above, the WJP Rule of Law Index was utilised in this research as the indicator of a state's perceived respect for the rule of law on the basis of its robustness, comprehensiveness and authoritativeness. The WJP Rule of Law Index 2011 ranks sixty-six countries, of which twelve Latin American and Caribbean countries are covered: Argentina, Bolivia, Brazil, Chile, Colombia, the Dominican Republic, El Salvador, Guatemala, Jamaica, Mexico, Peru, and Venezuela.[30] As a result, this

[29] World Justice Project, *Frequently Asked Questions* <http://www.worldjusticeproject.org/?q=rule-of-law-index/index-faq> accessed 9 July 2012.

[30] According to the UN's Regional Country Groupings, "Latin America and the Caribbean" consists of the following thirty-three countries: Antigua and Barbuda,

research provides data only for these twelve "assessed" countries, but in some cases, draws on anecdotal evidence in relation to the remaining eleven Latin American and Caribbean countries. Accordingly, while the findings may just be true for the twelve assessed countries, they may still form a basis for comparisons and generalisations across the wider Latin America and Caribbean region.

The ranking of the twelve assessed countries were juxtaposed with the total number of pending and concluded investment arbitration cases brought against them before ICSID. Focus was placed on ICSID because, owing to its higher levels of transparency, it provided the most accessible and complete database of investor-state arbitral claims. On the other hand, awards rendered by virtue of *ad hoc* arbitration or under the administration of non-ICSID institutions are not widely available in the public domain, and where available, are usually only provided in redacted or anonymised form, primarily from secondary-source bulletins, rather than directly from the institution itself. Accordingly, it was considered imprudent to include the few published non-ICSID awards since their piece-meal inclusion may skew the data by not providing a full picture of all claims brought before that institution. It should also be noted that the data presented is not limited to cases arising under the Washington Convention, but also includes cases brought under the ICSID Additional Facility Rules for alleged breaches of either the NAFTA or DR-CAFTA Agreements. Consequently, while the research focuses primarily on ICSID, it still allows for cross-institutional comparison.

The research not only considered the number of pending and concluded cases brought before ICSID, but also examined the outcomes of the concluded cases. These outcomes were categorised into: "favourable", "unfavourable" and "neutral". "Favourable" represents cases where the claims of the claimant investor were dismissed in their entirety, or failed at the jurisdictional phase. "Unfavourable" covers cases where the state was held liable to the investor whether for some or all claims raised by the investor. It does not however include jurisdictional losses—that is, cases where the respondent state's

Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, Uruguay, and Venezuela. See <http://www.un.int/wcm/webdav/site/gmun/shared/documents/GA_regionalgrps_Web.pdf>

preliminary objections were denied. The rationale for this is that a failure of the state to raise a successful jurisdictional objection does not amount to a "win" to the investor because it does not provide them with the essence of what they seek: compensation. In the same vein, a loss to the investor at the jurisdictional phase is a "true loss" because it prevents the investor from obtaining compensation. Put more simply, the investor wins and the state loses when the state is found liable to pay compensation, and *vice versa*. Cases that were discontinued and withdrawn by the parties were categorised as "neutral". This is for several reasons. First, it is not always clear whether the discontinuance of a case is as a result of the parties reaching a settlement. In fact, discontinuance may occur as a result of a bare request of a party, without opposition from the other party, pursuant to Rule 44 of the ICSID Arbitration Rules, or by virtue of a settlement, *or otherwise*, pursuant to Rule 43(1). Moreover, even if it could be ascertained whether the discontinuance was by virtue of a settlement or not, a state's willingness to settle cannot be taken as illustrative of its liability, without having further knowledge of the terms of the settlement. Accordingly, cases that were discontinued before an award was rendered were categorised as "neutral" since they do not speak to the liability or non-liability of the state, but still provide useful insight into the existence and nature of an investment dispute.

C. Findings

1. Rankings on the WJP Rule of Law Index

The WJP Index provides the following comparative chart of the regional rankings of Latin American and Caribbean countries:

Table 1. Latin America and the Caribbean.

Country	Factor 1: Limited Govemment Powers	Factor 2: Absence of Corruption	Factor 3: Order and Security	Factor 4: Fundamental Rights	Factor 5: Open Govemment	Factor 6: Regulator y Enforcement	Factor 7: Access to Civil Justice	Factor 8: Effective Criminal Justice
Argentina	9/12	8/12	9/12	5/12	9/12	10/12	4/12	9/12
Bolivia	11/12	12/12	3/12	11/12	6/12	11/12	10/12	10/12
Brasil	3/12	2/12	5/12	3/12	5/12	3/12	2/12	5/12
Chile	1/12	1/12	1/12	1/12	1/12	1/12	1/12	1/12

Table 1. Continues.

Country	Factor 1: Limited Govemment Powers	Factor 2: Absence of Corruption	Factor 3: Order and Security	Factor 4: Fundamental Rights	Factor 5: Open Govemment	Factor 6: Regulator y Enforcement	Factor 7: Access to Civil Justice	Factor 8: Effective Criminal Justice
Colombia	4/12	5/12	12/12	8/12	2/12	2/12	3/12	6/12
Dominicana Republic	8/12	9/12	10/12	7/12	8/12	8/12	7/12	4/12
El Salvador	5/12	4/12	2/12	6/12	10/12	10/12	6/12	8/12
Guatemala	10/12	6/12	6/12	9/12	7/12	7/12	9/12	7/12
Jamaica	6/12	3/12	8/12	4/12	12/12	12/12	5/12	2/12
Mexico	7/12	10/12	7/12	10/12	4/12	4/12	11/12	11/12
Peru	2/12	7/12	4/12	2/12	3/12	3/12	8/12	3/12
Venezuela	12/12	11/12	11/12	12/12	11/12	11/12	12/12	12/12

Source: World Justice Project

The chart demonstrates that Chile is the clear regional leader for rule of law adherence, topping the chart with respect to every factor assessed. While not as consistent as Chile, Brazil and Peru also fall within the top tier. At the other end of the spectrum is Venezuela, which falls within the bottom two for every factor. Bolivia and Argentina round off the worst offenders. Guatemala, Jamaica, Mexico and the Dominican Republic form the lower-middle tier, while Colombia, and El Salvador account for the upper-middle tier.

On a more global scale, the following chart presents the rankings of each Latin American and Caribbean country assessed, compared to that of all sixty-six countries surveyed, for seven of the nine indicators.

Table 2.

Country	Factor 1: Limited Govt Powers	Factor 2: Absence of Corruption	Factor 3: Order and Security	Factor 4: Fundamental Rights	Factor 5: Open Govt	Factor 6: Regulatory Enforcement	Factor 7: Access to Civil Justice
Argentina	47	46	56	33	44	54	31
Bolivia	56	60	49	49	34	55	54
Brazil	26	24	51	25	30	26	24

Table 2. Continues.

Country	Factor 1: Limited Govt Powers	Factor 2: Absence of Corruption	Factor 3: Order and Security	Factor 4: Fundamental Rights	Factor 5: Open Govt	Factor 6: Regulatory Enforcement	Factor 7: Access to Civil Justice
Chile	17	18	44	18	16	20	18
Colombia	27	34	64	42	18	27	29
Dominican Republic	46	49	57	35	39	52	39
El Salvador	32	32	48	34	47	24	37
Guatemala	53	42	52	43	38	46	51
Jamaica	38	25	55	31	58	41	36
Mexico	40	53	53	45	27	35	57
Peru	23	45	50	24	20	28	49
Venezuela	66	54	62	53	55	60	60

The global rankings, when compared with the regional rankings, demonstrate that overall the majority of Latin American and Caribbean countries fall within the bottom-half worldwide in terms of rule of law compliance. Even the region's top performers (Chile, Brazil, and Peru) have mediocre rankings on the global level. Moreover, the region's worst performers (Venezuela and Bolivia) are also among the worst performers globally, falling within the bottom ten for most factors.

2. Cases brought before ICSID

According to the 2012 ICSID Caseload Statistics, Latin American and Caribbean states together accounted for thirty-seven per cent (37%) of cases brought before ICSID.[31] This figure however does not account for cases involving Mexico, which according to the World Bank's classification system is a part of North America. Nevertheless, this figure still accounts for the largest percentage of cases brought against any region. Indeed, Argentina is the most frequent state-

[31] ICSID, *The ICSID Caseload – Statistics* (Issue 2012-1) 11 <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English31> accessed 20 July 2012.

respondent before ICSID, but in terms of pending claims, has been superseded by Venezuela.

The following table presents the total number of pending and concluded claims brought against the twelve assessed countries, as well as the outcome of the concluded claims.[32]

Table 3.

Country	Total Number of Cases		Outcome - Concluded Cases		
	Pending Cases	Concluded Cases	Favourable	Unfavourable	Neutral
Argentina	15	27	6	8	13
Bolivia	2	2	0	0	2
Brazil	N/A	N/A	N/A	N/A	N/A
Chile	1	3	2	1	0
Colombia	0	0	0	0	0
Dominican Republic	N/A	N/A	N/A	N/A	N/A
El Salvador	0	3	1	2	0
Guatemala	2	1	1	0	0
Jamaica	0	3	0	0	3
Mexico	1	13	8	5	0
Peru	5	5	2	2	1
Venezuela	24	7	2	3	2

D. Analysis

A superficial consideration of the data may lead to the *prima facie* conclusion that there is a causative link between lower levels of adherence to the rule of law and the greater involvement of a state as a respondent before ICSID. For example, Venezuela and Argentina are among the lowest ranked Latin American countries on the WJP Rule of Law Index. At the same time, they account for the highest number of cases brought before ICSID. Conversely, Chile, which boasts the

[32] As of August 2012.

highest levels of compliance with the rule of law within Latin America and the Caribbean, has been involved in only four ICSID cases to date—of which it has won two, lost one, and the other remains pending. However, such coincidences cannot be taken as verification of a causal relationship between compliance with the rule of law and a state's investment treaty arbitration record without a deeper investigation as to the existence and role of other causative factors. The presence of anomalies in the data, such as Bolivia's low involvement in investment claims despite being the region's second worst rule of law offender, is indicative of the fact that other factors are indeed at play.

Other likely factors that may affect the frequency with which claims are submitted by investors against a state include: whether the state is a party to the Washington Convention and the duration of time that it has been a state-party; whether it has lodged any reservations limiting the application of the Washington Convention; the breadth of its network of BITs; its FDI net inflows; and the sophistication of its investment dispute settlement capacity. Each of these factors will be considered in turn to determine to what extent they may affect a state's record before ICSID.

1. Duration of time as an ICSID member

The duration of time that a state has been a party to the Washington Convention is an important consideration as it may have a considerable impact on the number of cases brought against that state before ICSID. This is by virtue of the simple fact that the longer a state has been an ICSID member, the longer investors have had the opportunity to bring claims against that state before ICSID. However, this is limited by other factors, such as the knowledge and appreciation by investors of the existence and importance of the host state's membership of ICSID. Indeed, the data illustrates this anomaly: many of the Caribbean states, such as Guyana, Jamaica, and Trinidad and Tobago, were some of the first signatories to the Washington Convention, yet despite almost five decades of ICSID membership, have never had more than three claims brought against any of them. On the other hand, Latin American countries were generally reluctant to embrace investor-state arbitration, until the 1990s when they abandoned the Calvo doctrine, which had required investors to have recourse to local courts rather than seeking redress on the international plane. Yet notwithstanding their late entry into the investor-state dispute settlement regime, the Latin American region has managed to supersede all other regions in

terms of caseload. This demonstrates that the duration of time that a state has been a party to the Washington Convention, while important, is not a decisive factor for the number of cases ultimately brought against that state.

However, a related, but more significant question, is that of whether the state has ever been or has ceased to be a member of ICSID. Of the thirty-three Latin American and Caribbean countries,[33] eight are not state-parties to ICSID: Antigua and Barbuda, Belize, Brazil, Cuba, Dominica, the Dominican Republic, Mexico, and Suriname. This fact therefore accounts for the absence of ICSID claims against these countries. Mexico however, has defended NAFTA claims under ICSID's Additional Facility Rules. Additionally, Bolivia, Ecuador and Venezuela were originally state-parties to the Washington Convention but deposited their notices of denunciation on 2 May 2007, 6 July 2009, and 24 January 2012 respectively. Venezuela's denunciation of ICSID has led to a spike in the number of claims recently filed against it, as injured investors have heeded calls to ensure that their claims were filed before Venezuela's denunciation took effect on 25 July 2012.[34]

This situation arises from the uncertainty surrounding the proper interpretation of Articles 71 and 72 of the Washington Convention, which govern its denunciation. Article 71 provides that a contracting state may denounce the Convention upon giving six months' notice. Article 72 adds that such notice shall not affect the rights or obligations under the Convention of that state that arises out of consent that was given before the denunciation took effect. One view is that the six-months' notice period means that on its expiry no further claims can be brought before ICSID. The opposing view is that the right to bring claims before ICSID only terminates when the state's unilateral offer to arbitrate through ICSID is terminated, which is subject to a sunset period in many BITs. The fact that this debate remains far from settled has spurred most investors to be cautious by registering their claims before the deadline for Venezuela's denunciation—and in the case of Transban Investments Corp., just a day before the deadline.

It is unsurprising that investors have now become cautious, as many investors in Bolivia felt the ill effects of failing to register their claims

---

[33] This is according the UN's Regional Country Groupings, which may be found here: <http://www.un.int/wcm/webdav/site/gmun/shared/documents/GA_regionalgrps_Web.pdf>

[34] See Ben Holland and Nicolas Belfort, 'Time's up!' (GAR, 25 July 2012); Sebastian Perry, 'Car importer brings last-minute Venezuela claim' (GAR, 25 July 2012); Barrie Sander, 'Venezuela: The consequences of ICSID denunciation' (GAR ,14 February 2012).

before the expiry of the notice period. For example, in 2010, ICSID registered a claim by a subsidiary of British Petroleum, Pan American Energy, over two years after Bolivia's denunciation had taken effect. Despite the successful registration, a tribunal is yet to be constituted. It is the fact that investors in Venezuela have had the opportunity to learn from the lessons of Bolivia that perhaps accounts for the greater levels of claims filed by investors after the announcement of Venezuela's denunciation compared to that of Bolivia, which was the first time that ICSID was faced with a denunciation. It is therefore probable that future denunciations may follow a similar pattern, until the ambiguity regarding Articles 71 and 72 is resolved.

2. Reservations

In international law, a reservation to a treaty allows the reserving state to limit the legal effect of a specific provision of the treaty or to prevent the application of the treaty in certain specified circumstances. Article 25(4) of the Washington Convention permits contracting states to notify ICSID of any classes of disputes that it would not consider submitting to ICSID's jurisdiction. Several Latin American and Caribbean countries have lodged such reservations: Guatemala has restricted claims for damages caused by armed conflict or civil disturbances from being brought before ICSID, and Guyana and Jamaica have reserved disputes arising from investments in mineral or natural resources. Other Latin American countries, such as Costa Rica and Guatemala, have made the exhaustion of local remedies a pre-condition for jurisdiction, as permitted by Article 26 of the Washington Convention.

Such prerequisites and limitations placed on the classes of disputes that may be submitted to ICSID may potentially limit the number of claims brought against the state. This is especially so where the reservation made affects industries with greater levels of FDI. Taking Jamaica as an example, bauxite mining and tourism traditionally attract the highest levels of FDI. In fact, all three claims that were ever brought against Jamaica were related to the bauxite industry and are collectively referred to as "the bauxite cases".[35] In the bauxite cases, Jamaica sought to unilaterally withdraw its consent to ICSID jurisdiction by lodging the mining and natural resources reservation. However, the tribunal

[35] See *Alcoa Minerals of Jamaica v Jamaica* (1979) Decision on Jurisdiction and Competence (6 July 1975) 4 Yearbook Comm Arb 206; *Kaiser Bauxite Company v Jamaica* (1993) Decision on Jurisdiction and Competence (6 July 1975) 1 ICSID Rep 296; *Reynolds Jamaica Mines Limited and Reynolds Metals Company v Jamaica* ICSID Case No ARB/74/4 (unreported).

ruled that consent, once given, is irrevocable, and reservations could only have prospective effect. However, while the reservation did not affect those claims, the fact that Jamaica has not had another claim brought against it since lodging its reservation may be indicative, at least at an anecdotal level, of the restrictive impact the reservation has had on future disputes. Accordingly, it may be said that states with reservations affecting major industries are likely to have a less than expected number of claims brought against them as a result of their limitation on the scope of application of the Washington Convention.

3. Network of BITs

One of the most significant contributing factors to the number of ICSID claims brought against a state is the breadth of its network of BITs. The greater the number of BITs that a country has in force, the greater the number of protected investors. Argentina and Bolivia may be contrasted for illustration of the potential impact of a state's network of BITs. While Argentina and Bolivia are both poor performers in rule of law terms, Argentina has had a significantly greater number of cases brought against it before ICSID. The answer may possibly lie in the fact that whereas Argentina has fifty-six BITs—forty-seven of which are currently in force—Bolivia has only ratified nineteen BITs.[36]

As significant as the total number of BITs that a state has ratified is the number of BITs that the state has with capital-exporting states, as the higher levels of outward investment from capital-exporting states will, in most cases, substantially increase the pool of protected investors. For example, many of the claims brought against Argentina as a result of its financial crisis arose under the Argentina-US BIT.[37]

Brazil and Colombia, neither of which has defended a claim before ICSID, provide an even more vivid illustration of the necessity of BITs as a basis of consent to investor-state dispute settlement, and the role they play as a factor affecting the number of investment claims brought against a state. Brazil is not a contracting party to ICSID and

[36] See http://www.unctadxi.org/templates/DocSearch.aspx?id=779 for Bolivia's list of BITs and http://www.unctadxi.org/templates/DocSearch.aspx?id=779 for Argentina.

[37] See for e.g., *CMS Transmission Co v Argentine Republic*, ICSID Case No ARB/01/8, Award (12 May 2005); *LG&E Energy Corp v Argentine Republic*, ICSID Case No ARB/02/1, Decision on Liability (3 October 2006); *Enron Corp v Argentine Republic* ICSID Case No ARB/01/3, Award (22 May 2007); *Sempra Energy v Argentine Republic*, ICSID Case No ARB/02/16, Award (28 September 2007).

is signatory to fifteen BITs, none of which has entered into force.[38] Many of Brazil's BITs would have allowed for arbitration under ICISD's Additional Facility had they been in force.[39] On the other hand, Colombia is a state-party to ICSID, but its consent to ICSID's jurisdiction is greatly limited by the fact that it has only ratified four of the twelve BITs to which it is a signatory.[40] Taken together, the examples of Australia, Bolivia, Colombia and Brazil confirm that a state's network of BITs is an important factor contributing to a state's investment treaty arbitration record.

This factor is however of declining significance, since the growing awareness of the importance of BITs has led many investors to structure their investments in a way that affords them optimum BIT protection, usually by incorporating a company in a third state that benefits from a BIT and channelling the investment through that shell corporation. However, as tribunals increasingly scoff at this practice of "treaty shopping", a state's network of BITs is likely to regain greater significance in affecting the number of investment claims against that state.[41]

4. FDI inflows

One would expect that countries with lower FDI inflows would not be as heavily involved in investment claims because of their comparatively lower numbers of investors. This is due to the assumption that the

---

[38] A list of Brazil's BITs may be found here: http://www.unctadxi.org/templates/DocSearch.aspx?id=779.

[39] See for e.g., Acuerdo entre El Gobierno de La Republica de Chile y El Gobierno de La Republica Federativa de Brasil para La Promoción y Protección Reciproca de Inversiones ("Chile-Brazil BIT"), article VIII(4)(i) <http://unctad.org/sections/dite/iia/docs/bits/chile_brazil_sp.pdf> accessed 22 July 2012.

[40] Colombia has BITs in force with Peru, Mexico, Spain and Switzerland. For a list of Colombia's BITs, see: http://www.unctadxi.org/templates/DocSearch.aspx?id=779.

[41] It appears that tribunals have begun to draw a line between pre-dispute and post-dispute treaty shopping, of which the former is considered a legitimate form of investment planning, whereas the latter amounts to an abuse of process. Compare *Aguas del Tunari, S.A. v Republic of Bolivia* ICSID Case No ARB/02/3 Decision on Respondent's Objections to Jurisdiction (21 October 2005) 67; *Saluka Investments BV v The Czech Republic*, UNCITRAL, Partial Award (17 March 2006) 222–242; *ADMC Management Limited v The Republic of Hungary*, ICSID Case No ARB/03/16, Award (2 October 2006) 335–362; *Banro American Resources and Société Aurifère du Kivu et du Maniema S.A.R.L. v Democratic Republic of the Congo* (2002) ICSID Case No ARB/98/7 17(2) ICSID Rev 380; *Phoenix v Czech Republic* ICSID Case No ARB/06/5, Award (15 April 2009).

volume of investment within a state positively affects the volume of claims brought against that state. For example, according to Susan Franck, "it is plausible that high levels of foreign investment are positively correlated with more investment disputes."[42] UNCTAD similarly points out that "more investment may lead to more occasions for disputes—and more occasions for disputes combined with more IIAs are likely to lead to more cases."[43] At a rudimentary level, this assumption is perhaps true. However, it is clear that it does not operate as an isolated factor. On its own, greater FDI inflows bear little significance to the incidence of investment claims, but when coupled with other contributing factors, such as a strong network of BITs and poor rule of law adherence, then it increases the likelihood that that state will witness a higher frequency of investment claims submitted against it. This is illustrated in the table below.

Table 4. Distribution of FDI flows among economies, by range,* 2011.

Range	Inflows	Ouflows
Above $10 billion	Brazil, British Virgin Islands, Mexico, Chile, Colombia.	British Virgin Islands, Chile
$5.0 to $9.9 billion	Peru, Cayman Islands, Argentina, Bolivarian Republic of Venezuela	Mexico, Colombia
$1.0 to $4.9 billion	Panama, Dominican Republic, Uruguay, Costa Rica, Bahamas, Honduras, Guatemala, Nicaragua	Cayman Islands, Panama, Argentina
$0.1 to $0.9 billion	Plurinational State of Bolivia, Trinidad, Tobago, Ecuador, Aruba, El Salvador, Barbados, Paraguay, Jamaica, Haiti, Guyana, Saint Kitts, Nevis, Saint Vincent and the Grenadines, Cuba	Bahamas, Bolivarian Republic of Venezuela, Peru

[42] Susan D Franck, "Empirically Evaluating Claims about Investment Treaty Arbitration" (2007) 86 North Carolina L Rev 1, 30. See also K D Tallent, "State Responsibility by the Numbers: Towards an Understanding of the Prevalence of the Latin America Countries in Investment Arbitration" (2011) 8(1) TDM 4.

[43] UNCTAD, "International Investment Disputes on the Rise" <http://archive.unctad.org/sections/dite/iia/docs/webiteiit20042_en.pdf> accessed 22 July 2012.

Table 4. Continues.

Range	Inflows	Ouflows
Less than $0.1 billions	Turks and Caicos Islands, Belize, Saint Lucia, Curaçao, Antigua and Barbuda, Grenada, Dominica, Anguilla, Montserrat, Sint Maarten, Suriname	Jamaica, Costa Rica, Ecuador, Guatemala, Nicaragua, Curaçao, Turks and Caicos Islands, Aruba, Belize, Sint Maarten, Honduras, Suriname, Uruguay, Dominican Republic, Barbados, Brazil

*Economies are listed according to the magnitude of their FDI flows

Source: UNCTAD, World Investment Report 2012

Considering the data in the above table, if FDI inflows alone could affect the number of claims brought against a state, then Brazil, the BVI, Mexico, Chile and Colombia—being the highest recipients of FDI in Latin America and the Caribbean—would be among the most frequent Latin American and Caribbean respondents before ICSID. The fact that this is not so illustrates the greater significance of the other factors that have affected this relationship. For example, Brazil and Mexico are not contracting states of ICSID; the BVI is also not a contracting state but is a registered constituent of the United Kingdom. On the other hand, while Chile and Colombia are both contracting states of ICSID, Chile has a strong record of rule of law adherence and Colombia does not have a wide network of BITs. These varying factors have therefore played a more influential role in affecting the number of claims brought against the state, proving that FDI inflows alone is not decisive.

5. Sophistication of a state's investor-state dispute settlement capacity

There is substantial divergence among the approaches and resources of states in handling investment arbitration disputes. Some states have specialised government departments and sophisticated government teams that possess the requisite knowledge and expertise to successfully handle investment arbitration cases. The United States

of America for example, has an "Office of Investment Affairs" and an "Office for NAFTA and Inter-American Affairs".[44] However, other states, particularly small developing countries, and those that are not frequently involved in investment arbitration, are not likely to be endowed with such resources. It might be the case that such countries would be more apprehensive about defending investment arbitration claims and are therefore more likely to seek settlements with investors. It is also possible that for those claims that reach the merits phase, the state's ability to adequately and successfully defend the claim is restricted. Accordingly, the sophistication of a state's capacity to successfully handle investment disputes is likely to play a role in its investment treaty arbitration record, though this is difficult to prove.

IV. Conclusion

When one considers that of the 149 cases currently pending before ICSID, more than sixty involve parties from Latin America and the Caribbean, and that compared with other regions, the Latin American and Caribbean region accounts for the highest percentage of concluded ICSID cases, it is natural to ponder on the potential causes. Moreover, given the fact that the rule of law, investment treaty arbitration and economic development appear to be interrelated, then when these figures are juxtaposed with the low rankings of Latin American and Caribbean countries on the World Justice Project's Rule of Law Index, and other governance indicators, the coincidence leads to the inescapable assumption that a causal relationship exists between the two. However, the statistics reveal that while a state's respect for the rule of law is likely to influence its investment treaty arbitration record, there are also several other factors at play. These factors include, but are not limited to: whether the state is a contracting party to the Washington Convention and the duration of time that it has been a state-party; whether it has lodged any reservations limiting the class of disputes that may be brought before ICSID; the breadth of the state's network of BITs, including the number of BITs it has with capital-exporting states; its FDI net inflows; and the sophistication of its investment dispute settlement capacity. It is the confluence of all these factors that largely determines the incidence of investment disputes against a state, making it difficult, and perhaps useless, to

[44] See http://www.state.gov/e/eb/ifd/oia/index.htm.

attempt to isolate individual factors. Accordingly, while a country's investment arbitration record may serve as a loose and informal guide to investors of the political and legal risks involved in investing in that country, it cannot serve as a fool-proof method of risk assessment.