
What Is Wrong with Investment Arbitration? Evidence from a Set of Behavioural Experiments

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Abstract

Investment arbitration has attracted growing criticism both in academia and in the general political debate. The system has been criticized by groups and stakeholders with very different agendas – from academics to anti-globalization activists, from alt-right groups to policy-makers. While sharing a common aversion to such dispute resolution mechanism, these groups do not generally take the same viewpoints, and the same type of criticism could originate from different political and theoretical underpinnings. The current efforts to reform investor-state dispute settlement, undertaken both by the European Union and by the United Nations Commission on International Trade Law, constitute to a large extent an attempt to respond to the aforementioned public criticism. However, in spite of the growing importance of the topic in the public debate, reform discussions have been predominantly, if not exclusively, focused on states and their roles in, and their expectations towards, investment arbitration. Public opinion, conversely, remains largely overlooked. To fill this gap, this research devises an experimental approach to understand the roots of public criticism(s) against investment arbitration. In so doing, it aims to generate a constructive, timely and accessible empirical analysis of the theoretical underpinnings of ISDS criticisms, providing an integrated guide to one of the most heated debates in international economic law today. The main purpose is to understand which are the points of friction (real or perceived) that trigger public criticism against investment arbitration and, in the light of this information, whether this dispute resolution mechanism should be maintained in its current form, partially reformed or rejected entirely. To this end, the article presents the results of the first-ever set of behavioural experiments concerning ISDS and public opinion.

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1 Introduction

Is investment arbitration a feature worth keeping in today's investment agreements? In Europe, the system has become so loathed that investor-state dispute settlement (ISDS) has been labelled as 'the most toxic acronym' by the European Union's (EU) trade commissioner, Cecilia Malmström,¹ and described as 'a full-frontal assault on democracy' by the British environmentalist George Monbiot.² Outside Europe, investment arbitration has not been exempt from criticisms either. The Nobel laureate Joseph Stiglitz has argued that investment arbitration undermines the sovereignty of nations,³ while many academics have pointed to certain dysfunctions of the system⁴ and policy-makers have criticized ISDS more or less explicitly, often declaring that investment arbitration is in need of a change or that it should not be featured in modern investment agreements anymore.⁵ To further complicate the picture, non-governmental organizations (NGOs) have argued that the promises of 'growth and jobs' upon which ISDS clauses are inserted in investment agreements are like a 'Trojan horse' that serves to disguise serious threats to democracy and the rule of law.⁶ Even more interestingly, a fierce opposition to 'the obscure ISDS clause' has been sparked also among the wider public, as displayed in the European Commission's public consultation,⁷ especially when highly publicized cases – for example, *Vattenfall*

¹ Politico, *ISDS: The Most Toxic Acronym in Europe* (2015), available at www.politico.eu/article/isds-the-most-toxic-acronym-in-europe/. Furthermore, Jean-Claude Juncker declared that he 'will not accept that the jurisdiction of courts in EU Member States is limited by special regimes for investors-to-state disputes'. J.C. Juncker, *A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change* (2014), available at https://ec.europa.eu/commission/publications/president-junckers-political-guidelines_en.

² G. Monbiot, 'This Transatlantic Trade Deal Is a Full-Frontal Assault on Democracy', *The Guardian* (4 November 2013), available at www.theguardian.com/commentisfree/2013/nov/04/us-trade-deal-full-frontal-assault-on-democracy.

³ Hundreds of Academics Urge Trump to Remove Controversial Investor-State Dispute Settlement from NAFTA (2017), available at www.citizen.org/system/files/case_documents/press-release-public-citizen-ccsi-isds-professor-letter-oct-2017.pdf.

⁴ M. Waibel et al. (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (2010); R. Howse, 'International Investment Law and Arbitration: A Conceptual Framework', IILJ Working Paper 2017/1 (2017), available at www.iilj.org/wp-content/uploads/2017/04/Howse_IILJ_2017_1-MegaReg.pdf.

⁵ For example, the Trump administration's scepticisms towards investor-state dispute settlement (ISDS) are vividly summed up by the Senate testimony given by the US Trade Representative Robert Lighthizer in June 2018: 'I'm always troubled by the fact that nonelected non-Americans can make the final decision that the United States law is invalid. This is a matter of principle I find ... offensive.' A. Swanson, *A NAFTA Battleground on the Shores of Canada* (2017), available at www.nytimes.com/2017/10/16/us/politics/nafta-united-states-canada.html.

⁶ Siles-Brügge, 'Transatlantic Investor Protection as a Threat to Democracy: The Potency and Limits of an Emotive Frame', 30 (5–6) *Cambridge Review of International Affairs* (2017) 464, at 464.

⁷ According to the European Commission's report on the public consultation, a category of participants 'indicates concerns or opposition with regard to investment protection/ISDS in TTIP'. Public Consultation Commission, Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP), Staff Working Doc. (SWD) 3 final (2015), at 3, available at http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf.

v. Germany,⁸ *Philip Morris v. Uruguay*⁹ – have raised concerns that ISDS could hinder domestic policy goals.¹⁰

The list of stakeholders who have become increasingly hostile to investment arbitration could go on and on; yet, while all of these actors share a common aversion to ISDS, it is not altogether clear what it is that they dislike nor which are the political and theoretical reasons for action that motivate them. In other words, it is unclear what the main problem is (or is perceived to be) and where it originates from: (i) is it because investment arbitration offers a special channel for foreign investors, as compared with the citizens of the host state; (ii) is the problem the fact that arbitral tribunals are not a ‘court-like’, standing system with tenured adjudicators; (iii) is the main point of friction attributable to the nature of the rights protected by investment arbitration; or (iv) is it, more radically, because ISDS is an international jurisdiction, existing outside of the institutional architecture of any single state?

In light of the ongoing processes of reform carried out by the EU, and more globally at the United Nations Commission on International Trade Law (UNCITRAL), understanding what is the problem with investment arbitration is of paramount importance for at least two reasons. First, if we do not understand where exactly the root of public aversion lies, it is not possible to properly design the type of reforms that are most acutely needed. Second, if the paths of reform are not supported and accepted by the public – be it NGOs, policy-makers, activists, academics and so on – chances are that they will be contrasted eventually, leaving the problem unsolved.

In order to shed light on what exactly is ‘wrong’ according to the critics, we fielded a series of behavioural experiments. We sought to target non-specialists, who belong to those groups that have more prominently expressed public (and often critical) opinions about investment arbitration in the recent past. The results of these experiments suggest that public criticism is not triggered by a rejection of international justice *qua* international and that it is possible, in principle, to ameliorate the perception of the system by intervening on the institutional design of the bodies adjudicating investor-state disputes. Yet the current reform efforts (such as the Investment Court System [ICS] proposed by the European Commission) only partially hit the mark.

2 Background

The discussion around the suitability of investment arbitration probably initiated around the beginning of the 2000s, when the number of claims reached the

⁸ ICSID, *Vattenfall AB and Others v. Federal Republic of Germany – Notice of Arbitration*, 31 May 2012, ICSID Case no. ARB/12/12.

⁹ ICSID, *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay – Award*, 8 July 2016, ICSID Case no. ARB/10/7 (formerly *FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*).

¹⁰ Chan and Crawford, ‘The Puzzle of Public Opposition to TTIP in Germany’, 19(4) *Business and Politics* (2017) 683.

four-digit stratosphere,¹¹ and it has materialized in different forms since then. The criticisms are well known and essentially revolve around two main axes. First, investment arbitration allegedly lacks legitimacy, and, according to the critics, this is in large part due to the impermanent nature of the tribunals chosen to decide disputes as well as the perceived potential for arbitrators to have conflicts of interest.¹² The way a small group of international tribunals handles disputes between foreign investors and governments has been further criticized because of inconsistencies in decision-making (complicated also by the absence of a system of binding precedent), the cost and time involved in investment arbitration, the lack of transparency and the very narrow grounds on which arbitral awards can be challenged.¹³ Second, investment arbitration is perceived as an instrument in the hands of multinational enterprises to ‘rein in democracy and to sue governments’.¹⁴ Despite the absence of empirical evidence to support the perception,¹⁵ as others have noted, the assumption that investment arbitration favours the interests of investors constitutes one of the strongholds of ISDS opponents. To corroborate this stance, it has been argued that even the prospect itself of being hit with investment claims has the potential effect of deterring host states from changing their domestic regulatory framework: this phenomenon, also known as ‘regulatory chill’,¹⁶ has contributed to the idea that governments will fail to regulate in the public interest because of concerns about investment arbitration.

In response to these criticisms, different paths of reform have been pursued. The EU has attempted to move from arbitration towards the ICS, which now features in a number of international investment agreements – notably, in the Comprehensive Economic and Trade Agreement (CETA) with Canada (2017), the EU-Singapore Investment Protection Agreement (2018) and the EU-Vietnam Investment Protection

¹¹ Between 1987 and 1998, only 14 bilateral investment treaty-based cases had been brought before the International Centre for Settlement of Investment Disputes (ICSID), and only two awards and two settlements had been issued. United Nations Conference on Trade and Development (UNCTAD), (1998), at 140. Since the late 1990s, the number of cases has grown enormously. The cumulative number of treaty-based cases had risen to at least 219 by November 2005. UNCTAD, *Investor-State Disputes Arising from Investment Treaties: A Review* (2005), available at https://unctad.org/en/Docs/iteiit20054_en.pdf.

¹² See in this sense Langford, Behn and Hilleren Lie, ‘The Revolving Door in International Investment Arbitration’, 20(2) *Journal of International Economic Law (JIEL)* (2017) 301; Lanford and Behn, ‘Managing Backlash: The Evolving Investment Treaty Arbitrator?’, 29(2) *European Journal of International Law (EJIL)* (2018) 551.

¹³ United Nations Commission on International Trade Law (UNCITRAL), *Investor-State Dispute Settlement Reform*, available at https://uncitral.un.org/en/working_groups/3/investor-state.

¹⁴ See e.g. Eberhardt and Olivet, *Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are Fueling an Investment Arbitration Boom* (2012), available at www.tni.org/files/download/profitfrominjustice.pdf.

¹⁵ Stone Sweet, Yunsuck Chung and Saltzman, ‘Arbitral Lawmaking and State Power: An Empirical Analysis of Investor–State Arbitration’, 8(4) *Journal of International Dispute Settlement (JIDS)* (2017) 579; Franck and Wylie, ‘Predicting Outcomes in Investment Treaty Arbitration’, 65 *Duke Law Journal* (2015) 459.

¹⁶ See, among others, Tienhaara, ‘Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement’, 7(2) *Transnational Environmental Law* (2017) 229.

Agreement (2018) and, in principle, in the agreement with Mexico.¹⁷ The ICS still combines elements typical of investment arbitration as we have known it so far, especially as far as enforcement is concerned, with some significant adjustments such as (but not limited to) the standing status of the tribunal, the imposition of a code of conduct on its members and the members' tenured position.

At the international level, UNCITRAL has taken stock of the debates concerning ISDS, which have proved highly controversial in a number of states also outside the EU, and, in 2017, it decided to entrust the Working Group III with a broad mandate to work on the possible reform of ISDS. The mandate is articulated in three stages, and Working Group III is expected to (i) identify concerns regarding ISDS; (ii) consider whether reform is desirable; and, if so, (iii) develop recommendations.¹⁸ Even the International Centre for Settlement of Investment Disputes (ICSID) launched an amendment process in 2016, aiming to modernize its rules and regulations based on case experience.¹⁹ Although ICSID has not indicated that the current amendment process is a response to particular criticisms, given that over 60 per cent of all known investor-state disputes have been filed at ICSID,²⁰ such case experience will no doubt encompass many of the issues that have been raised elsewhere.

The need for reform in the field of investment arbitration has thus become 'something of a mantra in political, diplomatic, and legal circles',²¹ with reform discussions being focused exclusively on states and their roles in, and their expectations towards, investment disputes.²² Anthea Roberts, for example, has grouped states into three main camps (incrementalists, systemic reformers and paradigm shifters) according to the positions they

¹⁷ European Union–Canada Comprehensive Economic and Trade Agreement (CETA) (signed 30 October 2016, not yet in force), available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf; Free Trade Agreement between the European Union and the Republic of Singapore (entered into force 8 November 2019), Investment Protection Agreement, Framework Agreement on Partnership and Cooperation (signed 19 October 2018, not yet entered into force) available at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=961>; Free Trade Agreement between the European Union and the Republic of Vietnam, Investment Protection Agreement (signed 30 June 2019, not yet entered into force) available at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>; New EU-Mexico Agreement (as of 21 April 2018) available at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1833>.

¹⁸ UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fourth Session, UN Doc. A/CN.9/930/Rev.1, 19 December 2017, 2–3, para 6.

¹⁹ ICSID, Proposals for Amendment of the ICSID Rules (2019), available at https://icsid.worldbank.org/en/Documents/Vol_1.pdf.

²⁰ As of 31 December 2018, ICSID had registered 706 cases under the ICSID Convention and Additional Facility Rules, out of 942 known treaty-based arbitrations. ICSID, The ICSID Caseload Statistics (Issue 2019-1) (2019), available at [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1\(English\).pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1(English).pdf); UNCTAD Investment Policy Hub, *New ISDS Numbers: Takeaways on Last Year's 71 Known Treaty-Based Cases* (2019), available at <https://investmentpolicy.unctad.org/news/hub/1609/20190313-new-ids-numbers-takeaways-on-last-year-s-71-known-treaty-based-cases>.

²¹ Boisson de Chazournes, 'Introduction to the Symposium on Sergio Puig and Gregory Shaffer, "Imperfect Alternatives: Institutional Choice and the Reform of Investment Law"', 112 *American Journal of International Law (AJIL)* (2018) 1; Anthea Roberts, 'Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration', 112 *AJIL* (2018) 228.

²² Pearsall refers to states' roles as the 'ISDS trinity', to be understood as shorthand for the state's systemic role as (i) law giver; (ii) protector of investment; and (iii) respondent. Pearsall, 'The Role of State and ISDS Trinity', 112 *AJIL* (2018) 249.

have taken within UNCITRAL's Working Group III.²³ Sergio Puig and Gregory Shaffer have offered a comparative assessment of the range of institutional alternatives faced by states for resolving investment disputes.²⁴ Robert Howse has developed a conceptual framework to evaluate the critiques and defences of the existing system of investor protection in international law.²⁵ Alexander Thompson, Tomer Broude and Yoram Haftel have investigated the effect of ISDS experiences on state decisions to adjust their treaties.²⁶

Very little, however, is known about the opinions and perceptions of non-state actors on investment arbitration. The role played by public opinion, which has often been limited to anecdotal value by the supporters of the *status quo*, constitutes a topic largely unexplored in investment law, despite its crucial impact on international adjudication and investment law-making. In other words, we do not currently know why people manifest against investment arbitration, nor do we know which are the factors that make investment arbitration particularly disturbing or difficult to accept.

A *Does Public Opinion Matter?*

One might wonder whether public opinions and perceptions are indeed important in the discussion around the suitability of investment arbitration. It appears they are for many states. In the course of the 35th session of UNCITRAL's Working Group III, for example, Australia argued that, with respect to ISDS, both facts and perceptions matter because states 'are all accountable to the public and need to consider public perceptions to be ... fundamentally relevant to the discussion'.²⁷ Still along these lines, other countries, including Mauritius and South Africa, concurred that 'perception matters greatly for it is a basic tenet of the rule of law that justice must not only be done, it must be seen to be done'.²⁸ In more radical terms, other states (Bolivia, Ecuador and Venezuela) have withdrawn from ICSID amidst public outcries over decisions that assigned large damages to multinational corporations or have significantly revised their investment policy, like India.

One convincing explanation of the importance of public opinion in investment arbitration is that public opinion plays a crucial role in supporting and enabling international adjudication because it ensures the legitimacy necessary to its orderly functioning. Given the paucity of research addressing this aspect in investment arbitration, in drawing this assumption, we tend to lean on theories that have recognized the importance of general public support for international adjudication as a whole. Robert Keohane describes this legitimacy in normative and sociological terms.²⁹ An

²³ Roberts, 'Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration', 112 *AJIL* (2018) 410.

²⁴ Puig and Shaffer, 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law', 112 *AJIL* (2018) 361.

²⁵ Howse, *supra* note 4.

²⁶ Thompson, Broude and Haftel, 'Once Bitten, Twice Shy? Investment Disputes, State Sovereignty and Change in Treaty Design', 73(4) *International Organization* (2019) 859.

²⁷ Roberts and Bouraoui, 'UNCITRAL and ISDS Reforms: What Are States' Concerns?', *EJIL: Talk!* (2018), available at www.ejiltalk.org/uncitral-and-isd-reforms-what-are-states-concerns/.

²⁸ *Ibid.*

²⁹ Keohane, 'Global Governance and Legitimacy', 18 *Review of International Political Economy* (2011) 99.

institution is considered legitimate when it has ‘the right to rule’ (normative standpoint) and when ‘it is widely believed to have the right to rule’ (sociological standpoint).³⁰ In more specific terms, Erik Voeten comes to the conclusion that ‘public legitimacy consists of beliefs among the mass public that an international court has the right to exercise authority in a certain domain’.³¹ If the public strongly supports such authority, according to this theory, it may be more difficult for governments to undermine an international court that takes controversial decisions.

Eric Posner and John Yoo’s theory is mainly focused on the interests of states in international adjudication rather than on public opinion. They suggest that, if international tribunals fail to act consistently with the interests of the states that create them,³² states can pressure them or stop using them without bringing down the whole system.³³ Nonetheless, they acknowledge the importance of general public support for international adjudication: in their view, the most effective institutions for international enforcement ‘rely on prior sociological, ideological and institutional convergence toward common norms’.³⁴ Still on this convergence of norms and interests, Laurence Helfer and Anne-Marie Slaughter concede that since social actors (that is, individuals and their lawyers, voluntary associations and NGOs) are ‘the ultimate beneficiaries of the enforcement of international norms and instruments’,³⁵ they constitute a force to deploy for expanding the power and influence of supranational tribunals.³⁶

³⁰ Buchanan and Keohane, ‘The Legitimacy of Global Governance Institutions’, 20 *Ethics and International Affairs* (2006) 405.

³¹ Voeten, ‘Public Opinion and the Legitimacy of International Courts’, 14 *Theoretical Inquiries in Law* (2013) 411.

³² Robinson draws attention to the same point and comments that ‘[t]he general principle of international law that “no State can be compelled to litigate against its will” may be a principle that should be changed, although it is hard to see that happening easily, or soon. Many people in domestic legal systems would prefer not to be subject to the jurisdiction of domestic courts, but they have no choice. The reason political people do not relish compulsory third-party adjudication at the international level is that it reduces their control and the flexibility of their response. In fact, it takes away their power. Whether the political decision maker operates in a domestic democratic framework or something more authoritarian, the pressures are similar. It will be reluctant to surrender to an outside power’. Robinson, ‘Politics and Law in International Adjudication’, 97 *American Society of International Law Proceedings* (2003) 277, at 291.

³³ This, for example, is the case of Bolivia, Ecuador and Venezuela that withdrew from the ICSID Convention in 2007, 2009 and 2012 respectively. Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965, 575 UNTS 159.

³⁴ Posner and Yoo, ‘Judicial Independence in International Tribunals’, 93 *California Law Review* (2005) 1, at 67, quoting Drzemczewski and Meyer-Ladewig, ‘Principal Characteristics of the New ECHR Control Mechanism, as Established by Protocol No. 11, Signed on II May 1994’, 15 *Yale Human Rights and Development Law Journal* (1994) 81, at 82–83.

³⁵ Helfer and Slaughter, ‘Toward a Theory of Effective Supranational Adjudication’, 107 *Yale Law Journal* (1997) 273, at 312.

³⁶ More recently, the presence of a public opinion that cannot be easily ignored featured in the work of Von Bogdandy, Goldmann and Venzke, ‘From Public International to International Public Law: Translating World Public Opinion into International Public Authority’, 28 *EJIL* (2017) 115; A. von Bogdandy and I. Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (2014). These authors contend that the increasing impact of international institutions and network-like structure on domestic constituencies, be it through regulation, deregulation, adjudication, administration or the dissemination of information, has triggered public mistrust of international institution policies that can be redressed, in their view, only through a shift towards an international public law framework.

Even the European Commission has placed great importance on public opinions, up to the point of embarking on a process of public consultations in the context of the 2014 Transatlantic Trade and Investment Partnership (TTIP) negotiations.³⁷ Albeit not ISDS-centred, this consultation constitutes one of the first attempts to grasp the position of the public with respect to investment-related matters. The EU is not alone in this public opinion-seeking process: other countries (for example, Canada, New Zealand and the USA) have devised different tools to sound out citizens' reactions to recently negotiated free-trade agreements.³⁸ While these consultations signal that public opinion matters for policy-makers, they also present inner limits to successfully gathering non-specialist views over a controversial matter like investment arbitration. In the context of the TTIP consultations, for example, the European Commission received about 150,000 replies, one-third of which were answered by NGOs with the following general statement: '[N]o comment – I don't think that ISDS should be part of TTIP.'³⁹ Space constraints prevent this article from elaborating more on the difficulties in identifying a representative community and ascertaining its prevailing or illustrative opinion. It suffices to recognize for present purposes that, while the intention of understanding public opinion remains praiseworthy, content analysis on the comments obtained through the EU's consultations has proven to be problematic. The genuine rationale behind the consultations risks, in fact, being overshadowed by problems of fair representation in the public will, with certain players (NGOs in the earlier example) holding a bigger voice in providing their own views or in 'putting forward a deliberately obstructive (and unsubstantiated) critique of a proposed negotiation'.⁴⁰ Hence, the need arises to devise original and more effective approaches to understanding the roots of public criticism(s) against investment arbitration, as discussed in the following subparts.

3 Empirical Approach

A Choice of Research Method

To shed light on the reasons for the public aversion to ISDS, we designed a set of experiments. The tendency to test hypotheses concerning international law and arbitration through experiments is, to a large extent, a consequence of the rise of behavioural economics and its subsequent cross-fertilization with the field of law.⁴¹ Behavioural economics has attracted significant attention over the past decade, especially in light of its ability to offer a convincing account of a human behaviour alternative to the rational

³⁷ Transatlantic Trade and Investment Partnership (TTIP) (draft dated 12 November 2015).

³⁸ Marceddu, 'Implementing Transparency and Public Participation in FTA Negotiations: Are the Times a-Changin'?', 21(3) *JIEL* (2018) 681.

³⁹ Public Consultation Commission, *supra* note 7, at 10.

⁴⁰ Marceddu, *supra* note 38, at 701.

⁴¹ Dunoff and Pollack, 'Experimenting with International Law', 28(4) *EJIL* (2017) 1317.

choice model.⁴² Behavioural economics relies heavily on the notion of ‘cognitive bias’ – that is, on the idea that humans tend to depart from optimal decision-making when exposed to different types of blinders that trigger biased judgment. The explanatory power of such a mechanistic account of decision-making can hardly be denied in settings where reasons for action and outcomes are determined by, or may be translated into, a deterministic model. In other words, this approach is likely to lead towards conclusive results whenever the ‘malfunction’ that the experiment seeks to verify is constituted by the failure to resolve a problem with only one correct solution.⁴³ This approach has persuaded a part of the arbitration scholarship, which suggests that the recent wave of public scepticism and open criticism against investor-state arbitration may be the result of a collective cognitive bias: according to this narrative, the judgment of the general public would be obfuscated by the exposure to incorrect information and, hence, simply wrong.⁴⁴

It seems, however, that this theoretical framework should not be uncritically transposed to fields where decision-making may function according to significantly different patterns. The ‘existential dilemma of investment arbitration’ (whether investor-state arbitration should be maintained, reformed or abandoned altogether) is, in fact, an open problem, with numerous arguments being put forth on both sides.⁴⁵ More specifically, the questions around which the ISDS debate revolves (for example, whether investment arbitration should be excluded from international investment agreements and whether arbitrators should be replaced with tenured judges) are not susceptible to being solved with a single ‘rational’ answer, to the exclusion of all the other ‘irrational’ ones. Even putting aside the uncertainties concerning the correlation

⁴² One particularly meaningful field of application of behavioural economics is finance, where the notion of cognitive bias offers explanatory tools for market phenomena (such as the ones leading to the 2007–2008 financial crisis), which cannot be fully explained through the rational choice model. See Ritter, ‘Behavioral Finance’, 11(4) *Pacific-Basin Finance Journal* (2003) 429. For a groundbreaking application of behavioural economics to law and regulation, see R.H. Thaler and C.R. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (2008).

⁴³ It is telling that the first example Thaler and Sunstein deploy, in order to introduce the notion of cognitive bias, concerns the measurement of two pieces of furniture, where an optical illusion may trick the observer into thinking that one table is longer than another one, when they are in fact identical. Thaler and Sunstein, *supra* note 42, at 17–19. In the field of international arbitration, the same postulate was implicitly relied upon in a recent experiment in which arbitrators took the Cognitive Reflection Test. Franck *et al.*, ‘Inside the Arbitrator’s Mind’, 66 *Emory Law Journal* (2017) 1117, at 1137–1142. For an application of these ideas to the field of international law, where law abidance is assumed as the single rationality postulate, see Shereshevsky and Noah, ‘Does Exposure to Preparatory Work Affect Treaty Interpretation? An Experimental Study on International Law Students and Experts’, 28(4) *EJIL* (2017) 1287.

⁴⁴ Strong, ‘Truth in a Post-Truth Society: How Sticky Defaults, Status Quo Bias and the Sovereign Prerogative Influence the Perceived Legitimacy of International Arbitration’, 533 *University of Illinois Law Review* (2018).

⁴⁵ It must incidentally be noted that the question of whether individual political preferences and opinions can be the result of exposure to demonstrably wrong information, with a bias-inducing effect on behaviour, is discussed in the literature. Nyhan and Reifler, ‘When Corrections Fail: The Persistence of Political Misperceptions’, 32(2) *Political Behavior* (2010) 303; Wood and Porter, ‘The Elusive Backfire Effect: Mass Attitudes’ Steadfast Factual Adherence’, 1 *Political Behavior* (2019) 135.

between the conclusions of investment treaties, including a standing offer to arbitrate, and the increase in the inflow of foreign direct investment (FDI) in favour of the contracting state parties,⁴⁶ there is a host of reasons why every single individual may form an opinion in favour or against investor-state arbitration. These opinions may be grounded not only in economic observations (for example, identifying the maximization of FDI inflow as a goal)⁴⁷ but also in a wide range of other political, cultural, moral, religious or otherwise personal preferences.

Given the open-ended nature of the existential dilemma of investment arbitration, we have adopted a methodology that does not assume the existence of any correct or wrong answer. At a theoretical level, this resonates with an attempt to preserve politics as a space for the pluralistic discussion and ever-shifting construction of different – and even radically different – potential futures.⁴⁸ Consistently with these premises, we started by exploring some possible determinant factors that may have triggered criticism against investment arbitration.⁴⁹ Having identified four likely determinant factors, we created concrete stories concerning the resolution of disputes between a private investor and a state. The subjects taking part in the experiments were instructed to read the stories and respond, indicating the extent to which they agreed or disagreed with a given outcome or feature of the story. On the basis of the responses (none of which was deemed to be *per se* correct or incorrect), the study then proceeded to draw inferences, trying to determine what is more or less likely to trigger concerns about and criticism of investment arbitration and, therefore, potentially require reform.

⁴⁶ See, e.g., and without any pretence at exhaustiveness, Yackee, 'Do BITs "Work"? Empirical Evidence from France', 7(1) *JIDS* (2016) 55; Yackee, 'Do Bilateral Investment Treaties Promote Foreign Investment? Some Hints from Alternative Evidence', 51 *Virginia Journal of International Law* (2011) 397; Neumayer and Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?', in K.P. Sauvant and L.E. Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (2009) 225; Yackee, 'Do We Really Need BITs? Toward a Return to Contract in International Investment Law', 3 *Asian Journal of WTO and International Health Law and Policy* (2008) 121.

⁴⁷ On the relationship between foreign direct investment (FDI) increases and benefits from the host state (or lack thereof), see Bonnitcha, 'Foreign Investment, Development and Governance: What International Investment Law Can Learn from the Empirical Literature on Investment', 1 *JIDS* (2016) 31.

⁴⁸ Political science has long acknowledged that policy does not result from binary rationality judgments but, rather, from the shifts of a given idea across an evolving spectrum of political acceptability. N.J. Russel, *An Introduction to the Overton Window of Political Possibilities* (2006), available at www.mackinac.org/7504#_ftn1. The same idea, therefore, may be perceived in different ways over time, for example, progressively moving from unacceptability to a level or popularity warranting its translation into policy or vice versa. For this reason, the acritical adoption of the single rationality postulate in the field of political behaviour entails the risk of imposing an end to the interpretive process lying at the heart of democratic politics. Van der Walt, 'When One Religious Extremism Unmasks Another: Reflections on Europe's States of Emergency as a Legacy of Ordo-Liberal De-hermeneuticisation', 24(1) *New Perspectives* (2016) 79, with references to G. Agamben, *Il tempo che resta: Un commento alla Lettera ai Romani* (2000). In the words of Mark Greif, '[d]emocratic imagination desires that which is unlikely, unfitted to itself, unfit'. M. Greif, *Against Everything* (2016), at 53–54.

⁴⁹ For a discussion of non-reductionist methodologies for the study of human behaviour, see Mullet, 'The Superfluous Postulate of Human Rationality', 3 *Rivista Internazionale di Scienze Sociali* (2012) 269.

B Case Selection

We decided to explore four factors to explain the public aversion to investment arbitration: (i) the international nature of ISDS; (ii) the type of rights protected by investment arbitration; (iii) the institutional design of investment arbitration; and (iv) the different legal standing that investment arbitration accords foreign, but not domestic, investors. Obviously, these frequently invoked factors in the ISDS reform debates do not address all possible reasons triggering criticism against investment arbitration. Driven by the aim to set ‘a floor, not a ceiling’, we based our study on these factors for two reasons. First, we believe that narrowing down the choice is likely to generate more concrete views than exposing respondents to many general options. Second, we intentionally avoided making the respondents’ participation in the experiments excessively long. While it is rather obvious that the more questions that are asked, the more accurate the data will be, there is a crucial counterpoint in terms of respondent retention: if the respondents’ interest lapses, there may be no data at all. We concluded that in *medio stat virtus* and decided to start with four hypotheses to be tested, hoping to conduct further experiments in the future.

The first experiment scrutinized one of the most radical forms of opposition to investment arbitration: the idea that international adjudication, in general, is problematic simply because it is international – that is, detached from the institutional architecture of any single state. The basic notion underlying this type of claim is that investor-state disputes often raise delicate problems, and the authority to resolve these problems is expected to be conferred upon domestic judges, who share/recognize the values of the national constituency they affect, rather than upon international adjudicators. The results of this experiment set the scene for the rest of the investigation, clarifying whether an international investment protection regime enjoys, in and of itself and irrespective of its characters, a lower level of public support, as compared to the public perception of municipal courts.

The second experiment considered arguments touching upon the nature of the rights protected by investment arbitration. According to these voices, investment treaty arbitration would be problematic not only for procedural reasons but also for the substantive protections granted to international investments. While this type of critique can vary considerably in intensity (depending, *inter alia*, on the commentator’s position on the political spectrum), the basic rationale concerns the undesirability of a special and particularly favourable regime of protection for foreign investors (often multinational corporations), as compared to universally available protections afforded by other regimes, such as human rights law. The results of this study help locate the trigger of criticism, by clarifying whether it is possible to improve the reaction of the general public by altering the dispute settlement system or whether the reformers’ focus should shift to substantive investment law instead.

The third experiment explored critiques based on investment arbitration’s institutional design. Since the debate surrounding the TTIP started gaining momentum, it has often been argued that arbitration is an ad hoc ‘private’ dispute resolution system and, as such, does not offer the same guarantees of impartiality as a state court. This

type of critique frequently focuses on the mechanisms whereby arbitral tribunals are constituted and, more specifically, on the parties' right to appoint one member of the tribunal. This discourse is particularly relevant not only because it touches upon one of the historically distinctive features of arbitration (the disputants' power to select their own adjudicators) but also because it feeds into the ICS proposal.

The last experiment took into account critiques concerning the undesirability of discriminations based on nationality, whereby domestic investors are generally prevented from accessing investment arbitration. This type of opposition may be grounded on different political reasons for action, ranging from the rejection of allegedly neo-colonial approaches to economic arguments concerning the lower volatility of domestic direct investments as compared to its foreign counterpart.⁵⁰ In a nutshell, however, the argument is the same: if and inasmuch as foreign investors are entitled to bring a claim against the host state before an international jurisdiction, domestic investors should be given the same right.

The study relies on the assumption that each of these factors entails different consequences and has the potential of affecting the ongoing ISDS reform process in divergent ways. By way of example, if the criticism against investment arbitration is triggered by the appointment mechanism, then the efforts to establish a standing court with tenured adjudicators would effectively alleviate public concerns. Vice versa, if the same criticism is triggered by a blanket rejection of international adjudication *qua* international (as epitomized in the description of the first factor above), then a further institutionalization and judicialization of ISDS would likely exacerbate public opposition. It is hence particularly desirable to conduct an empirical investigation of the factors triggering the criticism against investment arbitration in general public opinion.

C Subject Recruitment

Our experiments were conducted using the Qualtrics platform. The questionnaire was freely available in five languages (English, French, German, Spanish and Italian) so as to reach a wide audience; the same participant was prevented from taking the survey multiple times and thus distorting the results. The questionnaire was officially launched on 22 May 2017 and closed on 16 May 2018. The anti-ISDS front was the main target population, from which we drew the subset of participants. Specifically, we secured the participation of individuals who were expected to: (i) be close to social groups/circles that have publicly expressed an opinion, often critical, concerning ISDS in the recent past – that is, academics, policy-makers, NGO activists and journalists – and (ii) not be experts in international investment law. For example, when approaching academics, we sent invitations to participate to those affiliated with departments such as arts and humanities or natural sciences, conversely excluding those affiliated with law faculties. Without neglecting the opinions of those supportive

⁵⁰ On the negative effects of FDI volatility on economic growth, see Lensink and Morrissey, 'Foreign Direct Investment: Flows, Volatility, and the Impact on Growth', 14(3) *Review of International Economics* (2006) 478.

of investment arbitration, we opted for these two criteria as they resonate well with our main purpose to grasp what exactly is ‘wrong’ with investment arbitration according to the critics.

Given the importance of individualized interaction, we sent a total of 19,543 customized invitations, rather than collective messages. We administered our experiment to a sample of 684 adults predominantly from those areas where public opposition to investment arbitration is more acute – notably Europe,⁵¹ North America⁵² and Latin America.⁵³ One potential critique of the study is the low rate of response and the fact that it is heavily European in terms of participants involved in the survey. Although the emails were distributed in different geographical areas, European contributors appeared to be more responsive than others. This can also be explained by the difficulties we encountered in reaching out to certain regions and by the lack of contact details available online, particularly in the Asian region. While almost all European countries’ parliaments have a contact list of their members of parliament available on the parliaments’ websites (as well as Canada and Australia, for instance), the same does not apply to other countries, like the USA. As a result, it becomes more difficult to reach a wider audience or certain sectors.⁵⁴

While committed to equality, it is important to acknowledge that the study ends up being somewhat EU focused and that the experiments are not based on an equally distributed sample, not only in terms of geography but also of age,⁵⁵ political orientation,⁵⁶ affiliation⁵⁷ and occupational background.⁵⁸ This implies that the results can be considered accurate for the EU but are less telling of the perceptions towards investment arbitration in Asia. To mitigate this selection problem, we controlled for these variables through a stepwise regression in each of the experiments. In any case, the insights resulting from the experiments should not be taken as definitive evidence but,

⁵¹ 43.17% of respondents were located in Europe.

⁵² 9.16% of respondents were located in Canada, and 6.83% of respondents were located in the USA.

⁵³ 18.32% of respondents were located in Latin America. The other respondents were located in Africa (5.12%), Asia and Middle East (7.92%), Australia and New Zealand (9.32%) and Central America (0.16%).

⁵⁴ When it comes to non-governmental organizations, for example, their websites provide for a contact form or a contact person to be reached. Although the referees promise us to forward the message to their members, there was no way for us to check that our message had actually been distributed.

⁵⁵ When asked to indicate their age, 0.33% of the participants answered ‘0–20’, 3.76% answered ‘20–24’, 7.52% answered ‘25–29’, 24.67% answered ‘30–39’, 23.86% answered ‘40–49’, 26.80% answered ‘50–60’ and 13.07% answered ‘60+’.

⁵⁶ When asked to indicate their political orientation, 7.50% of the participants answered ‘conservation’, 30.62% answered ‘neutral point of view’ and 61.88% answered ‘progressivism’.

⁵⁷ When asked to indicate their political affiliation, 28.34% of the respondents answered ‘left’, 35.67% answered ‘centre-left’, 20.03% answered ‘centre’, 12.54% answered ‘centre-right’ and 3.42% answered ‘right’.

⁵⁸ When asked to indicate their occupation, 53.13% of the respondents answered ‘academic’, 0.33% answered ‘homemaker’, 0.82% answered ‘journalist’, 0.16% answered ‘military’, 0.33% answered ‘out of work and looking for work’, 0.16% answered ‘out of work but not currently looking for work’, 17.27% answered ‘politician’, 3.45% answered ‘retired’, 4.44% answered ‘student’, 4.44% answered ‘self-employed’, 0.16% answered ‘unable to work’, 2.30% answered ‘employed in an NGO’, 8.39% answered ‘employed in the public sector’ and 4.61% answered ‘employed in the private sector’.

rather, as the first step towards a systematic empirical investigation of the public perception of investment arbitration. As always with empirical studies, replication is key to the attainment of robust results.

D Experiment Design

The experiments consisted of two mutually exclusive sets of four questions designed to provide four possible explanations for the criticism. The questionnaire opened with a welcome message, followed by five prompts (geographical location, age, political orientation, political affiliation and occupation). For each experiment, the participants were randomly divided into two groups. The two groups were presented with two slightly different versions of the same ‘story’ – that is, a short case scenario (normally less than 10 lines long) inspired by real life cases or by a feature of the investment system as it currently exists. More specifically, the two versions were identical in all but one aspect. Participants were assigned randomly to the different versions of the stories; each participant was thus randomly exposed to a fixed set of four scenarios out of the eight existing ones (the order of which does not correspond to the one adopted in the following subparts). In addition, no reference to the cases that the stories are loosely based on was made in the questionnaire; those references are only provided in this article so that readers can understand our story’s drafting process and the nature of the assumptions we tested. In fact, the participants were not even informed about which elements of the story were real and which ones were fictional, once again to avoid framing. The experiments did not emphasize the individual/corporation dichotomy (in Experiment 1 we referred to ‘companies’; in Experiment 2 to ‘an investor’; in Experiments 3 and 4, reference was made to ‘foreign investors’), as we preferred to concentrate the analysis on other possible factors to explain the legitimacy crisis of investment arbitration.

Having read the story, the participants were asked to rate their agreement/disagreement with the outcome of the case or to indicate the extent to which they found the outcome of the presented case acceptable/unacceptable. The respondents were then given the opportunity to rate their agreement or disagreement on a 10-point Likert scale, with 0 signifying complete disagreement/rejection and 10 complete agreement/acceptance. Hence, by measuring whether the participants’ reactions in the two groups differed, it is possible to evaluate whether the factor at hand is indeed significant in the perceptions of investment arbitration. At the end of the questionnaire, each contributor was given the opportunity to add comments and ask to be kept informed of the results.

4 Experiments

A Experiment 1: Aversion to International Adjudication

The first experiment measured whether a controversial decision concerning an investor-state dispute is perceived differently depending on whether it is issued by a domestic or international jurisdiction. The participants were randomly divided into two

groups (Group A⁵⁹ and Group B⁶⁰) and presented with two slightly different versions of a story based on a judgment rendered in December 2016 by the German Federal Constitutional Court (GFCC) in the context of the *Vattenfall* saga.⁶¹ The story explained that in 2011, after the Fukushima disaster, Germany enacted a new law concerning nuclear energy, accelerating the transition to renewable energy. The participants were told that, for this reason, the companies that owned and managed nuclear power plants were forced to terminate their activities. The story then explained that some of these companies commenced proceedings against Germany, arguing that the state's decision to anticipate the discontinuation of nuclear energy violated their property rights. Finally, the participants were told that Germany was found to be in violation of the investors' property rights, and the investors were therefore entitled to appropriate compensation.

Group A was presented with a version of the story where the investors brought their claim before a fictional international jurisdiction, the 'International Economic Court' (IEC). The IEC was described as a 'permanent institution, constituted with the purpose of resolving all disputes concerning international economic law'. It was specified that 'the judges are appointed by states for a period of 5 years'. Group B, instead, read a version of the story where the investors brought their claim before the GFCC. The GFCC was described as 'the supreme constitutional court of the Federal Republic of Germany'. The null hypothesis, in this case, was that the participants would have the same reaction, irrespective of whether the decision was issued by the IEC or by the GFCC. The decision rendered by the GFCC in the *Vattenfall* case has polarized public opinion, as it epitomizes the tension between the state's right to regulate in the public interest and the need to protect private investors' fundamental rights of property and legitimate expectations. It is particularly interesting, therefore, to measure whether the reaction of the participants to the decision changes depending on whether the judgment is rendered by a domestic or international jurisdiction. There was no statistically relevant difference between the reactions of the two groups ($t = 0.603$; $p = 0.547$). The participants in both groups reacted in an overall similar way, giving an average rating of respectively 4.6515 (Group A) and 4.8219 (Group B) (see [Table 1](#)).

Furthermore, we ran a stepwise regression, using the reaction to the story as the dependent variable and the participants' political orientation, political affiliation, age, occupation and geographical location,⁶² as well as the division of respondents into Groups A and B, as predictors. The only two statistically significant predictors of the dependent variable that the regression could find were political orientation

⁵⁹ N = 241.

⁶⁰ N = 247.

⁶¹ Federal Constitutional Court (Germany), *E.ON Kernkraft GmbH, RWE Power AG, Kernkraftwerk Krümmel GmbH & Co. oHG, Vattenfall Europe Nuclear Energy GmbH*, 1 BvR 2821/11, 1 BvR 1456/12, 1 BvR 321/12, Judgment, 6 December 2016. Notoriously, Germany's decision to phase out nuclear energy in the wake of the Fukushima disaster also gave rise to investor-state arbitration under the Energy Charter Treaty. *Vattenfall AB and Others*, *supra* note 8.

⁶² For a definition of these variables, see notes 56–59 above.

and political affiliation.⁶³ More specifically, participants identifying their political affiliation as ‘left’ or ‘centre-left’ had a significantly more negative reaction than those identifying their political affiliation as ‘right’ or ‘centre-right’. Within both of these subsamples, however, the circumstance that participants were assigned to Group A or Group B was not statistically significant. In other words, on the basis of our experiment, there is no empirical support for the claim that controversial decisions are accepted more favourably by the general public for the fact itself of having been issued by a domestic court forming part of the institutional architecture of a state. Needless to say, this result should be interpreted not as a demonstration that the participants’ reaction to the two versions of the story is identical but, simply, as an indication that the null hypothesis (whereby the reactions of the two groups do not differ) cannot be rejected (see [Tables 2](#) and [3](#)).

B Experiment 2: Rights Protected by the System

The goal of the second experiment was to assess whether people criticize investment arbitration because they disagree with the substantive rights that it protects. The answer to this question is crucial in order to determine what part of the regime a legitimacy-oriented reform should focus on. More specifically, if the general public takes issue with the substance of international investment law rather than with the institutional features of the adjudicative bodies applying that law, then a reform focusing on the latter would necessarily miss the mark.

Table 1: Overall results of Experiment 1

	Mean	Standard deviation	Variance	N
Group A	4.6515	3.18769	10.16136	241
Group B	4.8219	3.05116	9.30957	247

Table 2: Experiment 1: Participants identifying their political affiliation as ‘left’ or ‘centre-left’

	Mean	Standard deviation	Variance	N
Group A	3.6948	2.97336	8.84086	154
Group B	4.0491	2.92246	8.54077	163

Table 3: Experiment 1: Participants identifying their political affiliation as ‘right’ or ‘centre-right’

	Mean	Standard deviation	Variance	N
Group A	7.0588	2.72965	7.45098	34
Group B	6.3846	2.73962	7.50551	39

⁶³ Adjusted $R^2 = 0.171$. Political affiliation (standardized Beta = 0.340; $p < 0.001$) and political orientation (standardized Beta = 0.121; $p = 0.014$) were found as significant predictors.

The participants were randomly divided into two groups (Group A⁶⁴ and Group B⁶⁵) and presented with two slightly different versions of a story based on a European Court of Human Rights (ECtHR) case, *Brogan and Others v. United Kingdom*.⁶⁶ The story presented the case of an individual who had been arrested by the police; after having been questioned for over six days, he was released without being charged and without having been brought before a judge. For this reason, the individual commenced proceedings against the state, seeking compensation, and the behaviour of the police was found to be in violation of the right to be brought promptly before a judge after the arrest. Group A was presented with a version of the story where the individual being arrested and questioned by the police was an investor, and the claim was brought before an arbitral tribunal. Arbitral tribunals were described as 'temporary adjudicatory bodies, constituted with the purpose of resolving a specific dispute between a private investor and a state'. It was specified that 'normally, in arbitral tribunals composed of three members, the private investor and the state have the right to choose one arbitrator each'. Group B, instead, was presented with a version of the story where the individual brings the same claim before the ECtHR. The ECtHR was described as 'an international court constituted with the purpose of resolving disputes concerning human rights'. It was specified that 'judges are elected for a term of nine years'. The null hypothesis here was that when investment arbitration defends a right enjoying widespread public support (such as the right to liberty and security), the general public considers it to be as useful as the ECtHR; criticism, in other words, would subside if arbitration simply protected different substantive values.

Both groups gave an overall positive evaluation of the usefulness of the adjudicative body protecting the right to be brought promptly before a judge after the arrest. This result is in itself unsurprising, as it is reasonable to expect a relatively high level of support in public opinion for the protection of the right to liberty and security (as enshrined, *inter alia*, in Article 5 of the European Convention on Human Rights). Interestingly, however, there was a statistically significant difference between the reactions of the two groups, with Group A giving, on average, a less positive evaluation than Group B (see Table 4).

First of all, it is meaningful that the standard deviation for Group A (2.81922) is higher than the one for Group B (1.84480); in other words, while both groups gave a positive evaluation, the opinions expressed by the members of Group B were less varied and more consistently positive than the ones expressed by the members of

Table 4: Overall results of Experiment 2

	Mean	Standard deviation	Variance	N
Group A	6.2598	2.81922	7.948	254
Group B	8.2549	1.84480	3.40328	255

⁶⁴ N = 254.

⁶⁵ N = 255.

⁶⁶ ECtHR, *Brogan & Ors v. United Kingdom*, Appl. no. 11209/84, 11234/84, 11266/84, 11386/85, Judgment of 29 November 1988.

Group A. More specifically, none of the members of Group B gave a score lower than two, while some members of Group A gave a score of zero. Even more interestingly, the difference between the mean score for the two groups is statistically significant ($t = 9.443$; $p < 0.0001$). The null hypothesis, hence, can be rejected.

To further corroborate this finding, we ran a stepwise regression, once again using the reaction to the story as the dependent variable, and the participants' political orientation, political affiliation, age, occupation and geographical location, as well as the division of respondents into Groups A and B, as predictors. The regression found two statistically significant predictors: the division into Groups A and B and the respondents' political affiliation, with the former having a greater influence over the respondents' reaction.⁶⁷ These results suggest that the substance of the values that investment arbitration defends is not enough, in and of itself, to explain the criticism that has been recently levelled against it. Even when investment arbitration protects relatively uncontroversial rights (such as the human right to liberty and security), the respondents tend to perceive it as being less useful than the ECtHR. One possible explanation for these results is that, even when the participants are generally in agreement with the value that the adjudicative body protects, the temporary nature of investment tribunals and the untenured character of the arbitrators have a negative impact on the system's perceived usefulness. Institutional features, according to this interpretation, would have the capacity of shifting public opinion about the usefulness of a court or tribunal, irrespective of the values that the court or tribunal protects with its decisions.

An additional explanation may be that investment arbitration has been less successful than the ECtHR at projecting a positive public image of itself; therefore, even if the former may in one specific case protect values with which the general public agrees, it fails to obtain the same level of public support as the latter. This second explanation resonates with the theory that, at least in Europe, international courts are no longer obscure but enjoy a public visibility comparable to the visibility of national high courts and prominent international institutions, although the level of support they receive is still closely correlated with the popularity of the institutions with which they are most closely associated.⁶⁸

To be sure, these findings do not entail that the nature of the substantive values protected by the system is irrelevant: the likely reason why the participants' overall assessment was positive in both cases is exactly the perceived desirability of redress against the violation of a fundamental right. However, the results indicate that institutional design changes can have significant consequences on its perceived usefulness,⁶⁹ keeping the substance of the redress constant. The question, therefore, is what specific features of the dispute settlement architecture should be modified in order to

⁶⁷ Adjusted $R^2 = 0.158$; the participants' division into Groups A and B (standardized Beta = 0.389; $p < 0.001$), and political affiliation (standardized Beta = 0.106; $p = 0.01$), were found as significant predictors.

⁶⁸ Voeten, *supra* note 31, at 435.

⁶⁹ See also Dimitropoulos, 'Investor–State Dispute Settlement Reform and Theory of Institutional Design', 9(4) *JIDS* (2018) 535.

alleviate public concerns. The third and fourth experiments offer some answers to this question.

C Experiment 3: Mechanisms of Appointment

The third experiment aimed to measure whether the public perception of ISDS is influenced by the mechanism of appointment of the adjudicators. The participants were randomly divided into two groups (Group A⁷⁰ and Group B⁷¹) and presented with a story based on the ICSID case *Foresti v. South Africa*.⁷² The case was chosen because it has been referred to by critics of investment arbitration as an example of the ‘chilling effect’ that the mere filing of an investment claim may have on regulation at the domestic level.⁷³ Any adjudicative system subjecting domestic regulatory measures to judicial review may in principle generate such an effect (that is, deterring the state from enacting changes to the regulatory framework) and, therefore, possibly trigger criticism in public opinion. The null hypothesis in this experiment was that the same type of public reaction is triggered, irrespective of the mechanism whereby adjudicators are appointed.

The story contained a brief description of South Africa’s 2003 launch of the Black Economic Empowerment programme, created with the purpose of addressing the inequalities of apartheid by giving economic opportunities to groups that had been discriminated in the past. The story described how, under the programme, mining companies had the duty to transfer a number of their shares to black investors. The story then explained that a group of foreign investors brought a claim against South Africa, arguing that the programme violated their rights under international law and demanding compensation. Finally, the participants were told that, when faced with this claim, South Africa modified the Black Economic Empowerment programme and agreed to reduce the amount of shares that the investors were required to transfer.

The two groups of participants were presented with slightly different versions of this story. The two versions were identical, apart from one aspect: Group A was told that the foreign investors brought their claim before an arbitral tribunal, while Group B was told that the claim was brought before the fictional IEC. Arbitral tribunals and the IEC were described with the same language as in Experiments 1 and 2; the respondents, hence, were expressly informed that the arbitrators were untenured, while the IEC judges were appointed for a five-year term.

The *Foresti* case is particularly interesting because, on the one hand, it concerns the ‘chilling effect’ issue, but, on the other hand, it relates to controversial domestic legislation entailing discrimination on a racial basis. As such, it is bound to trigger mixed reactions in the general population: the participants could potentially express a positive opinion about the outcome (that is, South Africa’s decision to modify the

⁷⁰ N = 261.

⁷¹ N = 269.

⁷² ICSID, *Piero Foresti, Laura de Carli & Others v. Republic of South Africa – Award*, 4 August 2010, ICSID Case no. ARB(AF)/07/01.

⁷³ Eberhardt and Olivet, *supra* note 14, at 13.

programme) if they consider this type of discrimination always problematic, or a negative one if they hold that South Africa's right to regulate and redress apartheid inequalities is paramount. The results must be interpreted taking into account that the two groups were presented with an identical version of the story, save for the description of the adjudicative body before which the investors brought their claim: any relevant change in reaction, hence, is likely attributable to the description of the adjudicators' appointment mechanism. There was a statistically significant difference ($t = 2.821$; $p = 0.005$) between the reaction of the two groups, with Group A expressing a more negative opinion than Group B. The null hypothesis, hence, can be rejected (see Table 5).

We performed a stepwise regression to assess whether the reactions to the story may be influenced not only by the respondents' division into Groups A and B but also by the respondents' political orientation, political affiliation, age, occupation and geographical location. The regression found that the respondents' political affiliation and orientation, as well as the circumstance that they were assigned to Group A or B, were statistically significant predictors of their reaction to the story.⁷⁴ In a nutshell, all other things being equal, a controversial outcome is perceived less negatively when a standing court with tenured judges (rather than an arbitral tribunal) is involved.⁷⁵ Notably, this is the case even if the standing court does not enjoy any type of positive reputational effect (Group B was presented with a fictional international court that no respondent could have heard or had any experience of before).

D Experiment 4: Access to International Justice and Discrimination on the Basis of Nationality

The purpose of the fourth experiment was to determine whether the respondents react differently to a dispute settlement mechanism that is only available to foreign investors, as compared to a system that is available to domestic ones as well. The participants were randomly divided into two groups (Group A⁷⁶ and Group B⁷⁷) and

Table 5: Overall results of Experiment 3

	Mean	Standard deviation	Variance	N
Group A	3.8659	2.64307	6.98581	261
Group B	4.5353	2.81316	7.91386	269

⁷⁴ Adjusted $R^2 = 0.167$; the predictors included in the model were political orientation (standardized Beta = 0.290; $p < 0.001$); political affiliation (standardized Beta = -0.157 , $p = 0.001$) and the division into Groups A and B (standardized Beta = 0.101; $p = 0.012$).

⁷⁵ This result is particularly notable when considering that, historically, the rationale justifying the use of arbitration (rather than a standing court) for the resolution of disputes involving states was that the temporary nature of the tribunal and the presence of party-appointed arbitrators would make the imposition of a constraint on national sovereignty easier to accept. See M. Indlekofer, *International Arbitration and the Permanent Court of Arbitration* (2013), at 50–51, with reference to the establishment of the Permanent Court of Arbitration.

⁷⁶ N = 248.

⁷⁷ N = 249.

presented with the short descriptions of two adjudicative bodies. In both descriptions, the participants were informed that the bodies are ‘constituted with the purpose of resolving disputes between private investors and states’. Both descriptions also explained that ‘if an investor thinks that his/her rights have been violated by the state, he/she can sue that state’.

Group A was presented with a description of the fictional IEC. The description specified that, since the purpose is to protect and encourage all types of investments, the court does not make any differentiation between domestic and foreign investors. The participants were hence told that ‘all investors ... can bring a claim, irrespective of their nationality’. Group B was presented with a description of investment arbitration. The description explained that the purpose is to protect and encourage foreign investment, and, thus, ‘this type of arbitration is only available to investors who come from a foreign state’, while domestic ‘investors cannot use arbitration to bring a claim against their own state of nationality’. The null hypothesis, here, was that the two features would receive the same evaluation.

There was a statistically significant difference ($t = 6.252$; $p < 0.0001$) between the mean score of the two groups, with Group A generally reacting more positively than Group B. The null hypothesis, therefore, can be rejected. This conclusion is corroborated by the fact that a stepwise regression identified the division into Groups A and B and the respondents’ political affiliation as significant predictors of the respondents’ reaction. Interestingly, claimant discrimination on the basis of nationality had a negative impact on the participants’ reaction, irrespective of their political affiliation: the same effect is visible when restricting the sample to the participants that qualified their political affiliation as either ‘left’ and ‘centre-left’ or ‘right’ and ‘centre-right’. Participants who identified their affiliation as ‘left’ or ‘centre-left’ overall expressed

Table 6: Overall results of Experiment 4

	Mean	Standard deviation	Variance	N
Group A	6.2742	3.00294	9.01764	248
Group B	4.5904	3.00149	9.00894	249

Table 7: Experiment 4: Participants identifying their political affiliation as ‘left’ or ‘centre-left’

	Mean	Standard deviation	Variance	N
Group A	5.8471	3.20089	10.24569	157
Group B	4.1890	2.96724	8.80451	164

Table 8: Experiment 4: Participants identifying their political affiliation as ‘right’ or ‘centre-right’

	Mean	Standard deviation	Variance	N
Group A	7.1944	2.29059	5.2468	36
Group B	5.3590	3.05638	9.34145	39

disagreement/rejection, but they reacted better to the IEC version of the story, with no claimant discrimination on the basis of nationality (see Tables 6 and 7).⁷⁸

Conversely, participants who identified their affiliation as ‘right’ or ‘centre-right’ on average expressed agreement/acceptance in both groups, but they reacted worse to the story where ISDS is only accessible to foreign investors. These results suggest that, while participants with different political affiliations may have divergent views as to whether an international mechanism for the resolution of investor-state disputes is desirable, they all tend to react negatively to the exclusion of domestic investors (see Table 8).

5 Inferences and Conclusion

The results detailed above can inform the debate over the reform of ISDS in a number of ways. To begin with, there is no proof of any *a priori* aversion to the creation of an international system for the resolution of investor-state disputes, as opposed to exclusive reliance on domestic courts: the respondents did not appear to react to a controversial decision in more negative terms when this decision was issued by an international (rather than domestic) jurisdiction (Experiment 1). In and of itself, then, the establishment of an international mechanism for the resolution of investor-state disputes entails no automatic loss of public support, as compared to the referral of this type of cases to municipal jurisdictions. The results of the first experiment, hence, provide some degree of support for the ISDS reform projects currently being undertaken: the goal of many of the reformers (that is, the establishment of an international jurisdiction competent to resolve investor-state disputes and enjoying an adequate level of public support) is not *per se* unattainable. The question, however, is which particular changes should be enacted to achieve this objective. The remaining experiments provide some meaningful insights in this respect.

Which area(s) of international investment law should the reform efforts focus on? Any answer to this question hinges, first of all, on the distinction between substantive and procedural law. In principle, it could be hypothesized that criticisms are triggered not by the procedures whereby investor-state disputes are resolved but, rather, by the very nature of the substantive rights that international investment law confers upon investors. If that would be the case, the current reform proposals (which mainly focus on procedural matters) would miss the mark. The results of our second experiment, however, suggest that criticism against ISDS does not seem to be exclusively triggered by the nature of the substantive rights protected by international investment law. For this reason, even in the absence of major changes concerning the substantive law applicable to international investments, the acceptance of ISDS can be improved by altering the institutional design of the adjudicative body. Once again, the results not only come as an encouragement to the reformers but also generate further questions: given that a meaningful gain in terms of public support is attainable through

⁷⁸ Adjusted $R^2 = 0.123$; the predictors included in the model were the division into Groups A and B (standardized Beta = 0.268; $p < 0.001$) and political affiliation (standardized Beta = -0.232 , $p < 0.001$).

institutional design changes, which specific aspects should the reformers concentrate on? The last two experiments aim to answer this question.

The results of the third experiment suggest that the untenured character of arbitrators and the possibility of party appointments are major points of friction, with a negative impact on the system's perceived usefulness regardless of the claims at stake. Namely, the participants perceive the controversial outcome of an investment claim more favourably, if the adjudicators are tenured and not appointed by the disputing parties on a case-by-case basis. In this respect, the ICS proposal appears to move towards the right direction: all other variables being equal, the removal of untenured party-appointed arbitrators seems to have a positive effect on the public perception of ISDS.⁷⁹

There are, however, other aspects of ISDS that affect the system's perceived legitimacy negatively but have not been the focus of the reformers' efforts so far. Experiment 4 offers some evidence in this respect by scrutinizing the effects of the exclusion of domestic investors from the benefits of ISDS. According to the results, discrimination on the basis of nationality is likely to trigger negative reactions, even when it is specified that the distinction between domestic and foreign investors is justified by the rationale of attracting FDI. It seems, however, that policy-makers and international negotiators have overlooked this option of reform, as the possibility to extend ISDS to domestic investors is – for the time being – mentioned nowhere.

In conclusion, according to our results, public criticism against ISDS is not triggered by a rejection of international justice *qua* international, and it is in principle possible to ameliorate the perception of the system by intervening on the institutional design of the bodies adjudicating investor-state disputes. Yet the current reform efforts (such as the ICS proposed by the European Commission) only partially hit the mark. On the one hand, the establishment of a standing body with tenured adjudicators appears to be a step in the right direction. On the other hand, however, other important factors may have been overlooked so far: the fact that domestic investors cannot use arbitration to bring a claim against their own state of nationality is a feature particularly hard to accept. Incidentally, this point, although framed in slightly different terms, was brought to the attention of the Court of Justice of the European Union (CJEU) in Opinion 1/17 by Belgium, which raised doubts as to the compatibility of the ISDS mechanism envisaged

⁷⁹ To be sure, the circumstance that the abolishment of party-appointed arbitrators may have a positive effect on the public perception of ISDS is not the only factor that should be taken into account when deciding whether this type of reform is desirable. Indeed, legal scholars have put forth a number of arguments in favour or against party-appointed arbitrators. See, e.g., Paulsson, 'Moral Hazard in International Dispute Resolution', 25 *ICSID Review* (2010) 339; van den Berg, 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration', in M. Arsanjani *et al.*, *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (2011) 821; Brower and Rosenberg, 'The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption That Party-Appointed Arbitrators Are Untrustworthy Is Wrongheaded', 29(1) *Arbitration International* (2013) 7; Giorgetti, 'Who Decides Who Decides in International Investment Arbitration?', 35 *University of Pennsylvania Journal of International Law* (2013) 431; Puig and Shaffer, *supra* note 24. Nevertheless, the effects of this institutional design choice on the public opinion should not be overlooked.

in CETA with the general principle of equal treatment. The doubts arose out of the fact that EU citizens and companies could not invoke the investment provisions in the EU, whereas Canadian citizens and companies could. For the Court, the key justification for this different treatment was that Canadian investors were able to invest within the Union in their capacity as foreign investors, whereas legal and natural persons of the member states who had invested within the Union were not foreign investors there and, therefore, would not have access to that specific legal remedy.⁸⁰ No clear explanation, however, was provided as to why Canadian investors in the EU were in a different position than the EU investors. A possible explanation could be that the ICS (and investment arbitration in general) offers equivalent protection for EU investors in Canada and that EU investors in the EU can rely on the EU's internal market law.⁸¹ Be that as it may, the results of this study suggest that concerns such as the ones raised by Belgium in Opinion 1/17 are far from isolated, and they should be taken into account when designing ISDS reforms aimed at enhancing the legitimacy of the system.

The question of whether investment arbitration is a feature worth keeping in today's investment agreements requires more nuanced evaluations than a simple yes or no answer. The European Commission's approach resonates with public perceptions as far as the designation of tenured adjudicators is concerned, but this change is unlikely to appease the criticisms entirely. It remains to be seen what the UNCITRAL reform holds, but, at present, the path towards change appears fraught with uncertainties.

⁸⁰ Opinion 1/17 (EU:C:2019:341), paras 179–186.

⁸¹ Steve Peers, 'We *Aren't* the World': *The CJEU Reconciles EU Law with International (Investment) Law* (2019), available at <http://eulawanalysis.blogspot.com/2019/05/we-arent-world-cjeu-reconciles-eu-law.html>.