WHY SURRENDER SOVEREIGNTY?

Empowering Non-State Actors to Protect the Status Quo

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ABSTRACT

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Why do states create new judicial tools that severely limit or altogether undermine their sovereignty? Why do some states choose, moreover, to become leading innovators, adopting these new types of enforcement mechanisms significantly earlier than their peers? This dissertation focuses on the creation of investor-state arbitration provisions in Bilateral Investment Treaties (BITs) and the establishment of the International Criminal Court (ICC), especially its independent prosecutor provision. For all their differences, investor-state arbitration provisions and the ICC share three institutional features that, in combination, pose unprecedented constraints on state sovereignty: they are judicial, they entail compulsory jurisdiction, and they grant non-state actors – private investors or an independent prosecutor – the authority to initiate legal proceedings against states and state officials.

The introduction of transnational and supranational judicial mechanisms is a strategy of the strong, not the weak. Contingent on the mobilization of transnational advocacy networks, powerful states turn to sovereignty-constraining tools in response to two core features: an international legal crisis and a relatively empty international judicial landscape. In the aftermath of legal crisis, the creation of sovereignty-constraining tools helps powerful states both to increase the efficacy of legal rules that have been challenged and to validate the authority of legal rules that have been undermined. This argument is counter-intuitive: powerful states turn to costly new judicial mechanisms not to transform but to protect the status quo. To advance this claim I examine both
failed and successful attempts at creating novel judicial mechanisms in investment and international criminal law across the twentieth century. I use qualitative and historical analysis at the global level and statistical cross-national analysis at the state level.

In the case of BITs, developing countries in the 1970s expropriated foreign property on a large scale and challenged traditional investment rules in the United Nations, thus triggering a crisis for the investment regime. In response, powerful states turned to investor-state arbitration provisions, not simply the BITs themselves, as a strategy to protect the existing regime. In the case of the ICC, Nazi Germany’s territorial aggression and the 1990s mass atrocities in the former Yugoslavia and Rwanda prompted legal crises for the territorial integrity principle and the human rights regime respectively. Seeking to bolster territoriality and human rights, powerful states experimented with the establishment of a criminal court. They failed in the 1950s and succeeded in the 1990s.

Transnational Advocacy Networks (TANs) were of critical importance. Their interactions with states were reciprocal and strategic. TANs invented and promoted the two forms of judicial mechanisms at the global level, thus influencing state receptivity; they also molded their strategies and substantive goals to suit state preferences.

A discussion of the effects that crisis and transnational advocates have on the creation of investor-state arbitration provisions and the ICC yields new insights into existing scholarship on transnationalism, credible commitment, legalism, and rational design. This analysis, moreover, has broad implications for our understanding of the forces that can lead to profound political and legal change.
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CHAPTER 1

INTRODUCTION

That sovereignty is foundational to the international political and legal system is an axiom of international relations and international legal scholarship. Sovereignty brings with it international legal standing, territorial jurisdiction, control over a military apparatus, and independence from higher political bodies. That states are on constant guard to protect their sovereignty from intrusion or erosion is almost as axiomatic as the existence of sovereignty itself.

Two developments in contemporary international law present fundamental puzzles for these axioms: the creation of investor-state arbitration provisions in Bilateral Investment Treaties (BITs), and the establishment of the International Criminal Court (ICC) and especially its independent prosecutor. In contrast to the traditional inter-state dispute settlement model, these institutions pose an unprecedented constraint on state sovereignty. They empower non-state actors – private investors and an independent prosecutor – to bring legal claims against states and state officials. Discussing investor-state arbitration, Gus Van Harten explains the implications of investor-state arbitration in these terms: “Simply put, no other system of international adjudications does what investment treaties do to restrain state action through individualized claims.”¹ Similarly, and with respect to the ICC prosecutor, states have never before vested so much power in a single actor, granting him or her the authority to initiate an investigation and request an arrest warrant against a sitting head of state without direct state or Security Council consent.

Why would states creating these entirely new forms of international judicial mechanisms that require them to yield an unprecedented degree of sovereignty? Why do some states choose,

¹ Van Harten and Loughlin 2006, 149.
moreover, to become the leading innovators, adopting or endorsing transnational and supranational judicial mechanisms significantly earlier than their peers? My dissertation examines the creation of investor-state arbitration and the ICC to understand the dynamics that drive these profound legal changes.

Conditional on the mobilization of transnational advocacy networks, I argue, powerful states turn to the creation of sovereignty-constraining judicial mechanisms in response to intense legal upheaval in a relatively empty international judicial landscape. This is a strategy of the powerful to reaffirm threatened international legal rules and to protect the status quo.

**Creating Sovereignty-Constraining Judicial Mechanisms**

Despite their obvious differences, investor-state arbitration provisions and the ICC, with its independent prosecutor, are both judicial outliers, and for the same reason: they share three institutional features, each of which imposes serious constraints on states. Combined into one mechanism, the three features transform how international law is enforced against states, with profound implications for state sovereignty.

First, both the creation of investor-state arbitration and the ICC entail judicialization. States delegate authority to a third party, granting it the power to issue legally-binding decisions. In both investor-state arbitration and the ICC, states relinquish control over legal proceedings and final outcomes. Once an arbitral tribunal has issued an award in an investment dispute, that award is basically automatically enforceable in any of the 158 states that have ratified the International Centre for the Settlement of Investment Disputes (ICSID) Convention, which established the leading
institution for resolving investor-state disputes.\(^2\) The power of third parties to issue final judicial or arbitral decisions against states diverges from a long-standing tradition in which states resolve disputes by themselves, through coercion and compromise. Regardless of how or what states decide, in the traditional model they retain final decision-making authority.

Second, both investor-state arbitration and the ICC provide for compulsory jurisdiction. Once states have ratified the relevant treaties, no additional showing of consent is required for the arbitral tribunal or the ICC to assert jurisdiction. This *ex ante*, one-time expression of general consent differs from the tradition in international law of requiring only specific consent as states submitted to international courts on a case-by-case basis. The creation of compulsory mechanisms under investor-state arbitration and the ICC is part of a broader trend in which states create new international judicial bodies that, once ratified, have compulsory jurisdiction. As legal scholar Cesare Romano points out, the shift from “consensual” to “compulsory paradigms” still maintains a requirement of state consent, but the moment of consent is “so removed in time and substance from the exercise of jurisdiction” as to essentially “transform[ing] it into a pale simulacrum of its old self.”\(^3\)

Finally and most importantly, although international law was once the exclusive terrain of states, investor-state arbitration and the ICC empower non-state actors — private investors and an independent prosecutor — to initiate proceedings directly against states and state officials. State decisions to yield this “triggering authority” mean that they are no longer the deciders about whether and when to enforce law against other states and state officials. Non-state actors are less deterred than their governments from filing claims against foreign governments. The empowerment of non-

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\(^3\) Romano 2007, 795.
state actors is likely to increase both the number and the type of claims filed; and it will lead to unintended consequences in and transformations of international law.\textsuperscript{4} Although non-state actors have obtained standing in regional human rights courts, only investor-state arbitration and the ICC grant them international authority to initiate legal proceedings without requiring the exhaustion of local remedies – a significant barrier that can delay if not preclude cases from reaching international courts.\textsuperscript{5}

Judicialization, compulsory jurisdiction, and the empowerment of non-state actors to initiate legal proceedings signal a sharp divergence from traditional means of enforcing international law against states. For over a century, the dual principles of absolute sovereignty and sovereign immunity have shielded states and state leaders from facing legal claims filed by non-state actors. Absolute sovereignty stipulated that only states could file claims in international judicial forums against other state; non-states actors had no such legal recourse.

The principle of sovereign immunity, moreover, protected states from facing legal claims in foreign courts. Although states gradually restricted immunity for specific types of commercial or “private” activity, most other types of state activity, including state conduct during war- and their regulation of foreign property, have been understood as intrinsically sovereign, and warranting immunity protections. Leaders who committed crimes, conducted campaigns of mass violence, or unjustifiably initiated war, could not be prosecuted under the principle of head of state immunity. Similarly, when states engaged in expropriation, defaulted on debts, or caused non-economic injury to foreign nationals, they were protected under the immunity principle. Nationals who sought remedies from foreign states had to file claims in foreign courts or appeal to their own governments

\textsuperscript{4} Keohane, Moravcsik and Slaughter 2000.

\textsuperscript{5} The ICC does, however, have a complementarity provision, allowing the ICC to assert jurisdiction only in cases where the relevant state is “unwilling or unable.”
to advance claims through legal or diplomatic channels. Their governments were, and continue to be, under no obligation to accept such requests.

The introduction of investor-state arbitration and the ICC with its independent prosecutor render this traditional model, for these two issue areas, obsolete. It comes as no surprise, then, that these new judicial tools are the exception, not the rule. Although regional institutions have become more diverse, the inter-state dispute settlement model continues to dominate international law and politics. Only states may bring claims against foreign governments at the World Trade Organization (WTO); a broad swath of treaty- and custom-based disputes are filed at the ICJ, which is accessible only to states; and most disputes continue to be resolved through diplomatic and political channels.

By integrating judicial, compulsory and transnational/supranational features into a single mechanism, investor-state arbitration and the ICC stand as important outliers in international law and politics.\(^6\)

**INVESTOR-STATE ARBITRATION AND THE ICC IN HISTORICAL PERSPECTIVE**

Although it was only in the 1990s that BITs and the ICC gained salience as new judicial tools, attempts to create mechanisms that depart from the inter-state model date back decades — to the 1950s in the case of BITs and to the interwar period in the case of the international criminal court. In both issue areas transnational advocacy networks (TANs), primarily from Continental Europe, invented new judicial mechanisms and then mobilized to persuade states to adopt them. In

\(^6\) One final point needs emphasis at the outset. I am interested in truly global mechanisms that any state can be subjected to. My expectation is that the dynamics at the regional level are distinct from those at the global level. Recent scholarship, for instance, suggests that state motives for creating regional courts are shaped by emulation of and learning from other regions as well as region-specific dynamics. This is reflected partly in the concentration of tribunals established in Europe and Latin America and the dearth of such tribunals in Asia. Alter 2009; Alter and Helfer 2010; Voeten 2010. I expect that the barriers to the creation of novel judicial mechanisms at the regional level are lower. One simple reason is numbers: the likelihood that states will adopt global judicial mechanisms generally decreases as their number increases. States may view global mechanisms as more sovereignty-undermining than regional ones; after all, more foreign parties are involved in global than regional negotiations and more foreign judges or third-parties are involved once the mechanism is put to use at the global rather than regional level. I thank Karen Alter for alerting me to this point.
the area of investment, transnational advocates were mostly lawyers and bankers; in international
criminal law, they were lawyers and scholars. In both cases, transnational groups proposed
substantive treaties that contained innovative enforcement tools.

States initially resisted these proposals. Although the Organization for Economic
Cooperation and Development (OECD) drafted and circulated a multilateral convention for
investment soon after the mobilization of transnational advocacy group, it never attempted to host
multilateral treaty negotiations. In the domain of international criminal law, the League of Nations
refused to even consider TAN proposals for an international criminal court.

With the passing of time, however, states eventually gave both proposals serious
consideration. Starting in the early 1970s, after a decade of signing BITs that contained traditional,
inter-state dispute settlement provisions, states began to incorporate into BITs provisions granting
investors standing to file arbitration claims directly against the capital-importing state. I refer to
BITs with such provisions as “hard” BITs and those without as “soft.” Generally speaking, both
types of BITs include substantive obligations that protect foreign investment from discrimination,
require international minimum standards of property protection, recognize a right to repatriate
profits, and provide for access to due process. Most BITs also contain a provision requiring
prompt, adequate and effective compensation in cases of expropriation. A vast surge and rapid
diffusion of hard BITs did not occur until the early 1990s. Since the first claim was filed in 1987, and
as of 2012, there have been 220 known BITs-based investor-state arbitral hearings.\footnote{UNCTAD 2012, 3.}

States first seriously considered the idea of an international criminal court in the early 1950s.
But it was not until half a century later that they adopted the Rome Statute establishing the ICC.
The Rome Statute grants the court jurisdiction over crimes against humanity, war crimes, genocide,
and aggression. It provides for the court’s jurisdiction to be triggered by three referral routes: via the Security Council, a state party, and at the initiative of the Prosecutor, conditional on approval of the pre-trial judicial chambers. The court may assert jurisdiction only in cases where the accused is a national of a state that is party to the Statute, or in cases where the crime occurred on the territory of a state party, and only when the state proves either “unwilling or unable” to conduct prosecutions. Despite this complementarity provision, which many treaty drafters considered critical to securing state support for the court, the ICC remains a landmark institution in challenging traditional notions of state sovereignty. Currently, there are eighteen cases on the ICC’s docket, involving Sudan, Uganda, the Democratic Republic of Congo, the Central African Republic, Kenya, Libya, Côte d’Ivoire, and Mali. 

**INTERNATIONAL LEGAL CRISIS**

The central argument of this dissertation holds that in times of crisis, powerful states become more amenable to introducing new types of compulsory judicial mechanisms to protect existing legal rules. Legal crises are sudden and severe events that violate an existing international rule and have international effects. For reasons of strategy, efficacy and legitimacy powerful states respond to such crises with the creation of new transnational or supranational rather than more traditional inter-state mechanisms.

The role of crisis in motivating powerful states to create sovereignty-constraining judicial tools is influenced by the institutional context in which the crisis occurs, specifically the international

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8 The aggression provision will enter into force after 2017, and after 30 states have ratified and two-thirds of state parties have voted in support of the court exercising jurisdiction over it. Review Conference of the Rome Statute 2010, 19.

9 International Criminal Court (last accessed March 29, 2013).
judicial landscape. When powerful states have access to existing, compulsory judicial mechanisms, they will refrain from creating new, innovative ones. In that case, inertia prevails. By contrast, in the context of an empty judicial landscape, a legal crisis makes states more receptive to institutional experimentation.

States’ willingness to experiment depends also on the prior mobilization of a transnational network that includes, in addition to NGOs, some combination of lawyers, investors or bankers, and scholars. These advocacy networks invent new types of enforcement mechanisms and place them on the menu of institutional design options that states subsequently can use. It thus takes a relatively rare convergence of factors – international legal crisis, sparse international judicial landscape, and a mobilized TAN – for states to introduce costly judicial mechanisms. This argument is not meant to suggest that legal crisis is the only path towards the creation of sovereignty-constraining mechanisms; rather when a legal crisis occur, the creation of such mechanisms becomes more likely.

I also evaluate two other explanations that highlight, respectively, credible commitment and legalist incentives. Both are potentially compatible with the crisis and TAN arguments. Institutionalists argue that states turn to international institutions primarily to solve cooperation dilemmas rooted in the absence of an overarching authority that can hold states to their promises. Institutions help states signal their intent to adhere to their legal obligations. Both investor-state arbitration and the independent prosecutor of the ICC are costly mechanisms that allow states to convey their credibility to other states as well as to domestic audiences. Constructivists highlight the importance of state identity in the creation of international institutions. They contend that liberal democracies committed to the rule of law will take the lead in creating powerful mechanisms for holding states accountable at the global level.  

10 In the following chapters, I use the terms “global” and “international” interchangeably.
ROAD MAP

Chapter 2 elaborates on the international legal crisis and TLN arguments and outlines in greater detail the credible commitment and legalist explanations. For each of the four explanations I extract observable implications pertaining to the timing of the creation of transnational or supranational judicial mechanisms, the substantive content of the relevant treaties, and the identity of the first states to adopt the mechanisms, hereafter referred to as “innovators.” By evaluating observable implications across these three dimensions, my goal is to understand the complex dynamics leading to the creation of highly-constraining judicial mechanisms within two distinct legal domains.

Chapter 3 focuses on investor-state arbitration and uses both across- and within-case analysis to evaluate the crisis, TAN, and credible commitment explanations. As the crisis argument anticipates, powerful states turned to the establishment of investor-state arbitration in the 1970s as they responded to the legal crisis posed by the G-77’s opposition to the traditional foreign investment regime. Powerful states influenced not only the timing but also the substantive content of new BITs. A descriptive analysis suggests, moreover, that powerful states that were susceptible to the crisis emerged as innovators, adopting hard BITs before their peers. Besides creating investor-state arbitration provisions, TLNs were also key actors. They crafted their agendas to appeal to states and influence the substantive content of BITs. In sharp contrast, the credible commitment argument receives little support. Although correct about the timing of the crisis, states most in need of signaling their credibility were not in the forefront of creating these new costly enforcement tools.

Chapter 4 uses statistical analysis to evaluate more systematically the identity of innovators by examining the adoption of hard BITs during the period of legal crisis (1968-1980). It yields more
nuanced findings that are consistent with Chapter 3. Of the powerful (here, capital-exporting) states, only those that were most susceptible to legal crisis were innovators. A specific threshold of susceptibility needed to be crossed before states included investor-state arbitration provisions in their BITs. As in Chapter 3, the analysis yields minimal support for the credibility argument. States with little credibility were no more likely than their peers to adopt investor-state arbitration provisions. Although investor-state arbitration is widely considered to be the core feature enabling BITs to serve as credibility mechanisms, credible commitment does not explain the creation of these provisions, nor why some states emerged as the earliest adopters of them.

To determine whether the crisis, TAN, and legalist accounts provide insight into the creation of the ICC, Chapter 5 evaluates two important attempts to establish a criminal court, a failed effort in the 1950s and the successful attempt in the 1990s. Building on the findings of Chapter 3, the analysis shows that powerful states turned to innovation of a criminal court in response to the dual conditions of international legal crisis and a relatively sparse international judicial landscape. Germany’s territorial aggression in the 1930s and 1940s posed a crisis for the territorial integrity principle and was the driving force of attempts to create an international court in the 1950s; ultimately, however, Cold War politics led states to abandon this effort. In the 1990s, the violence in the former Yugoslavia and Rwanda posed a crisis for the human rights regime that facilitated the successful creation of the ICC, albeit indirectly. As before, TLNs were central in proposing and placing the idea of an independent criminal court with an independent prosecutor onto the global agenda. The proposals of TLNs both shaped and were shaped by state receptivity towards the idea of establishing a court. Legalist states were important in both the 1950s and 1990s. I focus on the former case, and there it is difficult to distinguish whether legalist norms, incentives to protect the threatened status quo, or both, were the main motives driving the attempt at innovation. Although I do not examine it here, in the 1990s legalist states were the clear innovators; they dominated the
group of Like-Minded States, which was an early proponent of the independent prosecutor provision.

In the concluding chapter I summarize the most important findings about the creation of investor-state arbitration and the ICC and underline three unanticipated findings: states’ tendency to expand substantive law during the process of innovation, the importance of non-compulsory judicial mechanisms, and the distinction between the preferences of the hegemon and other powerful states. I discuss the implications of the crisis argument for two areas of international relations scholarship, rational institutional design and transnational advocacy, and reflect on one general insight: even if they remain outliers, the implications of the creation of investor-state arbitration and the ICC are profound – for weak and powerful states alike and for the theory and practice of state sovereignty.
CHAPTER 2

CREATING SOVEREIGNTY-CONSTRAINING MECHANISMS TO PROTECT THE STATUS QUO

In November of 2006, a group of Italian nationals filed with the ICSID a BITs-based arbitration claim against South Africa. They alleged that a recently adopted statute, The Black Economic Empowerment Act, which set minimum criteria for black employment in and management and ownership of the mining industry, constituted an indirect expropriation in violation of an Italian-South African BIT.\(^1\) This claim was unprecedented. As far as has been disclosed,\(^2\) states had never before been required to defend themselves from foreign claims for adopting legislation that aims to promote reparations for human rights violations within their own territory. Over two years later, in March 2009, the judicial chambers of the International Criminal Court (ICC), granting the Prosecutor’s application, issued an arrest warrant for incumbent President al-Bashir of Sudan on charges of war crimes, crimes against humanity, and genocide.\(^3\) The indictment was also unprecedented. It marked the first time that a permanent international criminal court has pressed criminal charges against a sitting head of state.

For all their differences, the investor-state provision in BITs and the independent prosecutor at the ICC share this: they empower non-state actors to initiate legal proceedings against states and state officials. In doing so, they depart from a long-standing tradition in which states decided whether and when to turn to international judicial forums. Because these mechanisms impose significant constraints on sovereignty, only powerful states have the capacity to create them at the

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1 Foresti v. Republic of South Africa 2010.

2 Because investor-state arbitration cases often occur behind closed doors, without disclosure requirements, it is impossible to know whether such claims had been filed before.

global level. Their interest in doing so is rare. To understand the dynamics of creating such
sovereignty-constraining tools, I focus on relatively infrequent crisis conditions. It is the acute
insecurity and uncertainty of crisis that can open the door to legal creativity.

International legal crisis is defined by three characteristics: it is sudden and severe; it has far-
flung effects; and, most importantly, it violates a legal rule or regime. To varying degrees each of
these three elements is subjective. An event that appears severe from some vantage points may
seem moderate from others. The legal status of some specific rules may be more contested than the
legal status of others. Because it is powerful rather than weak states that decide whether to innovate,
my analysis classifies events as crises from the vantage point of powerful states.

In response to international legal crises powerful states turn to the creation of new-style,
costly judicial tools as a strategy to protect existing legal rules. This claim is counter-intuitive:
powerful states turn to sovereignty-constraining innovation not to transform but to preserve
traditional rules. What on casual inspection looks like progressive institutional change is in fact a
conservative impulse to protect the legal and political status quo.

Not all international legal crises inspire sovereignty-constraining innovation. How powerful
states respond to a legal crisis depends on the international judicial landscape. If the relevant legal
rule is not backed by compulsory judicial mechanisms, states are prone to create new, more costly
ones. Otherwise the incentive for experimentation is much lower. As shorthand, I refer to this dual
focus on crisis and judicial landscape as the “crisis argument.”

TANs are also crucial. They “invent” new judicial mechanisms and place them on the
international menu of enforcement provisions, often before the onset of a crisis. Without TAN
mobilization states may create new institutions in response to crises, but these will replicate existing
ones rather than break with them. I refer to this as the “TAN argument.” In evaluating TANs, I do
more than simply show that TANs are important for the creation of transnational and supranational
judicial mechanisms. Rather, I ascertain the nature of their influence: whether TANs are able to facilitate innovation of sovereignty-constraining judicial tools in the absence of a crisis, whether and how they influence the timing and content of innovation, and whether and how — in promoting their proposals — they not only shape but are shaped by states.

In this chapter I develop my argument in three parts. I first introduce the power-based perspective, the concept of international legal crisis, the role of crisis in motivating the introduction of costly judicial mechanisms, and the TAN argument. For both the crisis and TAN arguments, I then extract observable implications that focus on the timing and content of innovation, and the identity of innovators. Finally, I introduce two alternative explanations, credible commitment and legalism.

CREATING NEW-STYLE JUDICIAL MECHANISMS

The Foundational Premise of Power

The crisis argument is premised on a power-oriented conception of international law and politics. It defines power in traditional, realist terms of military capability and market size. By this definition, powerful states include the US and the European states – the UK, Germany, and France. It also includes smaller European states, such as Belgium, Switzerland, and the Netherlands, particularly when they are acting as part of the EU. This definition of power is based on the conventional view that the US, UK and EU member states have been the main shapers of the international legal system during the twentieth century.

The introduction of transnational and supranational judicial mechanisms is a strategy of the powerful, not the weak. As political scientists Joseph Jupille and Duncan Snidal explain, powerful states are well equipped to establish innovative and costly institutions for two reasons. They can
more easily overcome collective action problems, and they are better able to assume the institutional risk that is involved in creating new mechanisms. If they disagree, powerful states, moreover, are generally able to veto proposals for the creation of new mechanisms by weaker states. The starting premise of the crisis argument is therefore that power is important for, but no guarantee of, the creation of costly judicial mechanisms.

Powerful states turn to international institutions to lock in, uproot, or circumvent the status quo. John Ikenberry, for instance, argues that the US created the post-World War II institutional order as a strategy to lock in its hegemonic status. He focuses on the aftermath of war as a key moment when dominant states engage in “constitutional politics” as they construct new “rules of the game.”

Jupille and Snidal suggest an alternative argument: powerful states are “generally more inclined to substantial institutional action when the status quo is unfavorable.” They argue that such incentives for engaging in institutional redesign are relatively rare. “More powerful actors are often already favored by the status quo institutions and, in those cases, will be reluctant to abandon them.” Eyal Benevisiti and George Downs contend that powerful states create international institutions and “even actively promote” the fragmentation of international law as a strategy to circumvent institutions that favor weaker states. The existence of overlapping regimes, these authors hold, enables powerful states to select venues in which they can advance their interests and

5 Ikenberry 1998, 150.
6 Ibid. at 155
7 Jupille and Snidal 2006, 24.
8 Ibid.
9 Benvenisti and Downs 2007, 595.
“preserve their dominance.”\textsuperscript{10} Taken together, these accounts suggest that powerful states create international institutions for diverse reasons, all of which serve the ultimate goal of maintaining or increasing their strength. All three accounts, however, fall short of explaining \textit{why} powerful states are drawn to some institutions rather than others—why, for example, they would choose legal over political institutions or judicial over non-judicial ones.

To remedy this shortcoming I turn to the work of Nico Krisch.\textsuperscript{11} He argues that powerful states use international institutions, specifically international law, for reasons of both stabilization and pacification.\textsuperscript{12} Because international legal institutions are less susceptible than political bargains to shifts in the distribution of power, powerful states use them to stabilize their status in the international order.\textsuperscript{13} International law is a particularly appealing stabilizer because legal rules are effective at “projecting dominant states’ visions of world order into the future … once they are transformed into international law, the backward-looking character of international law makes them reference points for future policies.”\textsuperscript{14} Compared to their political counterparts, international legal institutions also have a pacifying effect; they induce voluntary compliance by giving weaker states a voice in shaping rules. The participation of weaker states gives international law a degree of legitimacy that distinguishes it from other institutions.\textsuperscript{15} International law’s legitimacy also stems from its “focus on the past,” its rootedness in tradition, and its long-standing acceptance by others.\textsuperscript{16}

As Krisch writes, “stable systems of rules, both domestically and internationally, usually involve

\textsuperscript{10} Ibid.

\textsuperscript{11} I rely particularly on Krisch’s 2005 article, \textit{International Law In Times of Hegemony}, in which he outlines an argument about why powerful states are drawn specifically to legal (over political) institutions.

\textsuperscript{12} Krisch points to regulation as a third function of multilateral institutions. Krisch 2005, 371.

\textsuperscript{13} Ibid. at 373.

\textsuperscript{14} Ibid. at 377.

\textsuperscript{15} Ibid.

\textsuperscript{16} Ibid.
more than mere self-interest; they are based on authority. Once dominance is regarded as legitimate – and thus turns into authority – obedience is not based on calculation, but on conviction that it is necessary and right.\textsuperscript{17}

To be viewed as legitimate and to therefore be useful for stabilization and pacification, international law must maintain some distance from powerful states. International law thus is a tool for both exercising and limiting power.\textsuperscript{18} As Krisch notes, these two functions are inextricably connected. Without some independence from power, international law would lose its capacity to stabilize and pacify. And without this capacity powerful states would derive little benefit from international law. With this conceptualization of power and law Krisch then proposes a four-part typology of powerful states’ treatment of international law: instrumentalization and withdrawal are two extreme responses, reshaping and replacing are moderate ones. Powerful states use international law instrumentally, to secure and improve their position.\textsuperscript{19} In sharp contrast, they sometimes choose to withdraw from international law by circumventing or limiting legal obligations.\textsuperscript{20} In reshaping, powerful states use international law selectively to refashion the international legal order in ways that favor their position.\textsuperscript{21} Finally, powerful states occasionally replace international with domestic law as a strategy to regulate others.\textsuperscript{22}

The international crisis argument builds on Krisch’s insightful work while addressing two of its limitations. First, Krisch does not differentiate between various types of international legal institutions, including those that are procedural and substantive. Furthermore, Krisch refrains from

\textsuperscript{17} Ibid. at 374.

\textsuperscript{18} Ibid. at 408. For a work that focuses on the second dimension, how law constrains power, see Byers1999.

\textsuperscript{19} Krisch 2005, 382.

\textsuperscript{20} Ibid. at 385

\textsuperscript{21} Ibid. at 389.

\textsuperscript{22} Ibid. at 400.
taking on the larger task of specifying whether and how powerful states' attitudes toward the status quo may influence their decisions to resort to one or another of the four institutional strategies.

The crisis argument addresses the relationship of powerful states to institutional type and institutional strategy. It holds that powerful states turn to the innovation of *procedural* institutions, here compulsory transnational and supranational judicial mechanisms, when a legal rule or regime is in upheaval and powerful states want to protect it: they innovate to protect the status quo. As discussed below, states turn to the creation of such tools as a response to legal crisis for reasons of efficacy, strategy, and legitimacy.

**The International Legal Crisis Argument**

*The Concept of International Legal Crisis.* With concepts such as “formative events,”23 “exogenous shocks,”24 “turning points,”25 and “critical junctures,”26 scholars from a broad range of disciplines have long recognized the importance of crises for institutional development. Although each of these terms has a distinct meaning, the general idea is the same: radical events often usher in waves of institutional innovation and transformation.

International relations scholars have focused on the role of international crises, although not specifically legal crises, in fostering institutional creation and change.27 They have proposed four logics linking crises to institutionalization. A power-based explanation suggests that crises shift the distribution of capabilities among states, which leads to new alliances and opportunities for

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25 Abbott 1997; see also Widmaier, Blyth, and Seabrooke 2007, 756.

26 See, for example, Capoccia and Kelemen 2007; Hogan and Doyle 2009.

27 Crises in these accounts tend to consist of two types of events: war (or military confrontations) and economic meltdowns. See Kahler and Lake 2013; Widmaier, Blyth and Seabrooke 2007.
institution building.\textsuperscript{28} A rational interest-based approach claims that crises change states’ cost-benefit calculations and that this can trigger profound political and social change.\textsuperscript{29} A hybrid of both arguments, referred to here as the hegemonic argument, holds that crises influence the cost-benefit calculations of the most powerful state. In order to lock in the status quo, the hegemon will create and join multilateral institutions even though it must yield substantial autonomy to do so.\textsuperscript{30} Finally, sociologically-inclined scholars focus on international norms and argue that it is the interpretations of crises, not the crises themselves that help explain institutional change.\textsuperscript{31} As a group of IR scholars put it, “World War II did not cause the Bretton Woods agreements. Rather, what agents thought caused World War II caused the Bretton Woods Agreements to take their particular form.”\textsuperscript{32} To understand the connection between crises and subsequent institutional change, one must understand how the meanings of crises are constructed by both governments and non-state actors.\textsuperscript{33}

Despite their differences, all of these accounts confront a similar definitional critique: in retrospect, any historical event can qualify as a turning point or crisis. Explanations that refer vaguely to some “radical event” become unfalsifiable.\textsuperscript{34} Rather than discard a good idea, the proper response is to clarify the concept in a way that allows for a systematic and ex ante determination of

\textsuperscript{28} Gilpin 1981, 15 (hegemonic war has served as “the principal mechanism of change throughout history”); Cooper et al. 2008, 503; Krasner 1984, 341.

\textsuperscript{29} Kahler and Lake 2013.

\textsuperscript{30} Ikenberry 2012, 11–13, 28; Ikenberry 1998, 150 (“[O]rder formation in international relations has tended to come at dramatic and episodic moments, typically after great wars.”).

\textsuperscript{31} Widmaier, Blyth and Seabrooke 2007, 748 (“Neither state nor societal agents can react to material changes until they have interpreted them through diverse frameworks of understanding.”). Hence, the title of the article: “Exogenous Shocks or Endogenous Constructions? The Meanings of Wars and Crises.” For an example of a sociological interpretation of crisis, see Weldes 1999, 35.

\textsuperscript{32} Widmaier, Blyth and Seabrooke 2007, 749 n.6.

\textsuperscript{33} Widmaier, Blyth and Seabrooke 2007, 752 (“Stress[ing] the role of scientific and policy elites in not simply reshaping policy frameworks, but even engendering ‘the transformation of identities and interests.’” (quoting Adler 1991).

\textsuperscript{34} See, e.g., Hogan and Doyle 2009, 211.
whether an event qualifies as a crisis. Relevant criteria should be based on a set of characteristics a class of events shares rather than whether the event is followed by a process of institutional change.

International legal crises have three defining features. They are severe and sudden; they violate an existing rule or regime; and, they are truly international, not just domestic or regional. Each of these elements is, to varying degrees, subjective. In classifying events as legal crises, I adopt the perspective of powerful states for it is powerful states that decide whether to innovate.

Severity and suddenness motivate states to cooperate in the recreation of some form of stability. Severity acts as an antidote to states’ inertia and tendency to adhere to a narrow conception of self-interest. Suddenness ensures that most or all actors experience the upheaval simultaneously. It prevents them from being able to make gradual or minor adjustments that can mute the catalyzing effect of crisis. The experience of suddenness and severity is subjective. For instance, imperialist powers may have experienced as sudden the wave of demands for independence in the 1950s and 1960s. Colonies, in contrast, may have experienced the same process of decolonization as gradual, the culmination of decades of occupation and resistance.

An international legal crisis violates an existing legal rule or regime. Without this legal component, there is little reason to expect that a crisis will expose the need for more effective judicial tools. The status of a rule as “legal,” however, always remains contestable. For instance, it is conceivable that some governments may begin to argue that the Responsibility to Protect is a nascent international legal norm, while others may view the principle in exclusively moral or political, but not legal, terms. Or some governments may argue that there is a nascent legal rule withdrawing immunity from states that commit violations of jus cogens norms. Others may argue that the traditional immunity rule persists, even in jus cogens cases. In the case of de jure – or formal – crises, described below, the status of a legal rule will likely be, by definition, contested. States that

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35 For a comprehensive effort at formulating an ex ante definition, see Ibid.
formally oppose the rule will generally argue that it either never obtained legal status or that it is no longer legally binding. In cases where legal rules are contested, I adopt the position of powerful states.

Finally, because my focus is on explaining the creation of truly global judicial mechanisms that can be used by or applied against any state, a legal crisis needs to be international rather than domestic or regional. At a minimum, an international legal crisis must have effects across two regions, thus precluding an intraregional response. It is the widespread nature of the crisis that inspires powerful states to turn to a collective, global response.

In evaluating the presence or absence of a legal crisis, I evaluate how powerful states viewed and discussed the events at the time they occurred. Did these states focus on the legal implications of crisis or were they solely concerned with its political or humanitarian impact? If they were preoccupied by the legal consequences then it is reasonable to classify the event as a legal crisis. It is powerful states’ perception of a legal crisis, and not the accuracy of that perception, that matters for understanding the appeal of new types of costly judicial mechanisms.

What shapes powerful states’ views of crisis in the first place? The answer to this question is complicated. One part of crisis perception is shaped by the broader normative context in which states operate. How powerful states conceive of their own interests and how they seek to present themselves to other states on the global stage also matters. Even more importantly TANs contribute to the perception of crisis both directly and indirectly. Directly, TANs may frame or

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36 In most cases, the classification of an event as cross-regional is perhaps the most straightforward of the three features. Nonetheless, even here there are hard cases. Consider the 2010 BP Deepwater Horizon explosion. It occurred in US waters, but ecological damage was also inflicted on Mexico. Should the event then be classified as international? Furthermore, although neither BP nor the United States was in violation of codified international law, at least some have tried to argue that the United States, by not enforcing regulations more carefully, violated customary international law as reflected in the United Nations Convention on the Law of the Sea (UNCLOS). Kass 2010.

37 Wohlfarth 1988. Alternatively, one could follow a “hard test-case” approach and classify the event in the direction that poses the greatest challenge for the crisis argument, thus setting a high bar for evaluating its validity. This would mean leaning toward being inclusive and coding the BP oil spill as an international legal crisis. This coding shifts the burden onto the argument to explain why an international court was not constructed.
discuss the event in terms of a legal crisis once it occurs, thus shaping both public and state perceptions. Indirectly, TANs usually help to construct the legal regime that undergoes crisis in the first place.

International legal crisis can be either de jure or de facto or both. In de jure crises states formally and explicitly reject existing legal rules and often seek to replace them. *De jure* rejections are expressed in formal legal or political venues, for example through General Assembly resolutions, treaties, declarations, “soft” principles and the issuing of policy statements, all of which explicitly challenge existing rules. *De jure* rejections therefore require that some states oppose the current legal regime. *De facto* crises, in contrast, can occur when states or non-state actors reject existing legal rules simply through their actions, without formal justification, or even acknowledgment, of their violations. Opponents of the legal rule will engage in unmasked, blanket violations, but will not seek to challenge or replace the rule by entering into softer agreements or proposing new resolutions or principles.

*De jure* and *de facto* crises can be distinguished from one another by the discourse that violators of the legal rule use.\(^{38}\) In *de jure* crises, opponents will argue that the regime is not legitimate, often because it is inherently unjust, or conditions that initially justified it have since changed. They may ground their opposition in terms of other legal regimes and principles. In *de facto* crises, in contrast, opponents will contend that they are in compliance with the legal rule or that the legal rule is legitimate and binding, but that their case is an exception. *De jure* crises occur less frequently than *de facto* ones.

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\(^{38}\) Although *de jure* oppositions entail formal rhetorical rejections of the existing rules, they are also behavioral – adopting resolutions or even expressing opposition poses a challenge to customary legal rules, and also undermines codified rules.
For example, from the perspective of powerful states, the access-to-medicines campaign constituted both a de facto and de jure crisis for the intellectual property rights regime.\(^3\) It first emerged as a de facto crisis in which, from the perspective of powerful states like the US, countries such as South Africa and Brazil were violating the TRIPs agreement by issuing compulsory licenses for the production of generic drugs.\(^4\) It became a de jure crisis as a transnational network of NGOs launched the Access to Medicines (Access) campaign, and began to challenge patent protections on specific pharmaceuticals. For example, the Access campaign argued that public health emergencies constituted an exception to patents under Article 30 of the TRIPs agreement. Powerful states such as the US initially viewed the campaign as posing a crisis for the legal rules protecting the pharmaceutical industry. The US quickly changed its views and its position, however, in response to the mobilization of transnational and domestic groups.\(^5\) This example illustrates how a de facto crisis can transform into a de jure crisis. Even more importantly, it illustrates both the construction of an international legal crisis, and how powerful states’ perceptions of crises are both subjective and dynamic.\(^6\)

The distinction between de jure and de facto crises matters because the type of crisis influences the form that innovation takes: bilateral or multilateral. Because de jure crises entail formal state opposition, reaching consensus on a multilateral treaty will be difficult if not impossible. States

\(^3\) The converse is also true: from the perspective of weaker states, intellectual property rights could be seen as triggering a legal crisis for the human rights regime, and the right to health.

\(^4\) Negotiated in 1994, the TRIPs agreement requires WTO members to take a set of extensive measures to protect intellectual property rights. Sell and Prakash 2004.

\(^5\) Ibid.

\(^6\) Ibid. The US and other developed states did not turn to the creation of such judicial mechanisms in this case because neither TAN mobilization nor an empty judicial landscape, were in place. But a third reason is also important; US interest in protecting intellectual property rights (and therefore its perception that the access to medicine campaign constituted a legal crisis) changed over time, in response to transnational and domestic constituencies that mobilized against IPR protections.
seeking to protect existing rules may therefore be drawn toward bilateralism. In contrast, in _de facto_ crises states will be better able to reach multilateral agreement and establish innovative treaties.

_The Logic of the Crisis Argument._ International legal crises move states to turn to judicial instead of political or other types of institutional mechanisms for three reasons: efficacy, strategy, and legitimacy. The precise combination of state motives will vary according to a number of factors, including whether the crisis is primarily _de jure_ or _de facto._

International legal crises expose international legal rules and regimes as inefficacious, even irrelevant. Powerful states expect new supranational or transnational judicial mechanisms to offer stronger enforcement than traditional inter-state methods or purely political responses. Judicial mechanisms provide a general, adaptive response to specific legal problems. Besides addressing past grievances, they also shape future interactions, including who can initiate legal proceedings and who can be held accountable, when and for which actions.

Transnational and supranational judicial mechanisms do even more than this. Because they are accessible to non-state actors, states cannot dictate when the mechanisms are put to use. It is for this reason that political scientists Robert Keohane, Andrew Moravcsik, and Anne-Marie Slaughter predict that once created, transnational judicial institutions will be used more frequently than inter-state ones. The efficacy motive is particularly relevant for _de facto_ crises, when most states support existing rules and want to deter blanket violations.

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43 In contrast, non-legal crises can expose gaps in the law, but not the need for stronger enforcement. A gap suggests the need for codification rather than the creation of new enforcement tools. Admittedly, in reality states will often respond to international legal crises not only by creating new enforcement tools but by engaging in additional codification so as to make the law more comprehensive and precise. And states will respond to non-legal crises not only by codifying new rules, but by considering different types of provisions for treaty enforcement. But—and this is the key claim—the inclusion of enforcement provisions in a treaty is distinct from the creation of an international court. It takes a crisis involving international legal rules for the establishment of international courts to become, at the very least, a possibility.

44 Keohane, Moravcsik and Slaughter 2000.
States may also be drawn toward the innovation of supranational or transnational judicial mechanisms for strategic reasons.\textsuperscript{45} During \textit{de jure} crises in particular, and because reaching a multilateral consensus on substantive rules is exceedingly difficult, states are more likely to focus on procedure. Focusing on procedure may generate fewer distributional concerns than changes in the substantive rules themselves.\textsuperscript{46} Procedural mechanisms can offer a veneer of neutrality, especially when the enforcement mechanisms are designed to be applied equally to all states. The introduction of innovative costly judicial mechanisms may also be less divisive when divorced from negotiations over the substantive content of rules, a strategy I later refer to as “splitting.” Separation between substance and procedure can create useful ambiguity about which rules the new judicial tool will enforce.

Finally, states are also drawn to the creation of sovereignty-constraining judicial mechanisms for reasons of legitimacy. International legal crises, whether \textit{de jure} or \textit{de facto}, undermine the authority of the relevant legal rule or regime. States may be drawn towards

\textsuperscript{45} Other scholars have recognized that states engage in strategies like forum-shopping, regime shifting, or turning to a different form of law as a way to advance their interest. In their article \textit{Hard Law, Soft Law}, Mark Pollack and Gregory Shaffer note that when states are in deep conflict over legal rules or norms, they may turn to a different \textit{form} of substantive law to advance their agenda, relying on soft law to dilute hard law obligations and hard law to eliminate soft law norms. They write that “distributive conflict provides an incentive for states and other actors to contest, undermine and possibly replace legal provisions – hard and soft – to which they object.” Shaffer and Pollack 2009, 744. This type of state maneuvering occurs also in relation between custom and treaty. Writing about the law of the sea, Lawrence Howard, for instance, notes that states turned to treaties as a way to “circumvent” the three mile limit of customary international law, which established the outer limit of states’ territorial waters. Howard 1981, 321, note 2.

\textsuperscript{46} The proposition that procedural design questions are less controversial than substantive ones is bound to be met with skepticism. The conventional wisdom suggests precisely the opposite: consensus on legal substance is easier to ascertain than consensus on monitoring and enforcement. In his analysis of the regulation of transnational crime, for instance, Ethan Nadelmann writes that procedural extradition rules “often prove essential to the effective functioning of the substantive prohibition regimes,” but that “consensus on procedure in criminal justice matters often proves more elusive than consensus on substance.” Nadelmann 1990, 482-84 (explaining why there is no multilateral extradition treaty). Other scholars have similarly argued that the politics of procedure is equally if not more divisive than substantive political conflicts. See for instance Lawrence Howard 1981, noting that delegates to the first UN Conference on the Law of the Sea chose to keep the dispute settlement provision optional and separate, so as not to risk states rejecting the four conventions altogether. While it is true that procedural issues, especially about enforcement, can be deeply controversial, and possibly more so than substantive issues, my claim is that context matters. In the more extreme situations of legal crisis, it is arguably easier for the defenders and challengers of a legal order to agree on the nature of enforcement tools rather than the content of the rules to be enforced, especially when the two are negotiated in separate contexts.
establishing new tools because they expect the supranational or transnational nature to have a legitimizing effect, validating the legal rule or regime that has been discredited.\textsuperscript{47} The term legitimacy is used here in its sociological rather than normative or philosophical sense, and is defined as the “perceived right to rule.”\textsuperscript{48} As Krisch argues with respect to international law more broadly, part of the legitimacy of judicial mechanisms is a function of the degree to which they are perceived as not simply a tool of powerful states.\textsuperscript{49} Supranational and transnational judicial mechanisms are likely to be more legitimate than inter-state dispute settlement mechanisms given that non-state actors, rather than states themselves, determine whether and when states are held accountable.

Although the creation of sovereignty-constraining judicial tools holds the possibility of enhancing a legal rule’s efficacy and legitimacy, it is not an inevitable response to crisis. Rather, their innovation is conditional on two other factors: international judicial landscape and transnational advocacy.

\textit{International Judicial Landscape.} I examine judicial instead of other types of landscapes because I am focused on judicial mechanisms.\textsuperscript{50} I concentrate on the availability of compulsory mechanisms because their non-voluntary nature makes them costly for states. Powerful states turn to the innovation of new forms of judicial mechanisms if crisis occurs when the international judicial landscape is empty; they are discouraged from innovating when compulsory judicial mechanisms

\textsuperscript{47} It is worth pointing out that judicial mechanisms are able to have this legitimating effect only to the extent that they themselves are perceived as fair and in some sense distinct from international power politics.

\textsuperscript{48} “[T]o say that an institution is legitimate in the normative sense is to assert that it has \textit{the right to rule}.’ In contrast, ‘an institution is legitimate in the sociological sense when it is widely \textit{believed} to have the right to rule.” Beisheim and Dingwerth 2008, 8 (quoting Buchanan and Keohane 2006, 405). For a brief discussion of other definitions and approaches to understanding legitimacy, see Grossman 2009, 115 (defining legitimate body as “one whose authority is perceived as justified,” and discussing legal and sociological legitimacy), with Buchanan and Keohane 2006, 408-09 (defining the term as “justification of authority” and discussing the concept’s normative and subjective dimensions).

\textsuperscript{49} Krisch 2005, 408.

\textsuperscript{50} If my focus were on the first-time creation of non-judicial mechanisms, such as new types of international monitoring bodies, then I would analyze the landscape of traditional monitoring mechanisms.
exist. The logic of the landscape argument holds that states will resist creating new-style judicial tools when compulsory traditional ones are available. Inertia or satisficing will prevail. Figure 2-1 illustrates the two-pronged crisis argument.

**Figure 2-1: International Legal Crisis Argument**

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<tr>
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<th>International Judicial Landscape Sparse</th>
<th>International Judicial Landscape not Sparse</th>
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<tbody>
<tr>
<td><strong>International Legal Crisis</strong></td>
<td>Creation of sovereignty-constraining judicial mechanisms is most likely</td>
<td>Creation of sovereignty-constraining judicial mechanisms is less likely</td>
</tr>
<tr>
<td><strong>No International Legal Crisis</strong></td>
<td>Creation of sovereignty-constraining judicial mechanisms is less likely</td>
<td>Creation of innovative judicial mechanisms is least likely</td>
</tr>
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*Judicial mechanisms refers to investor-state arbitration and the ICC

Other scholars have also emphasized that state decisions about the creation and design of institutions are heavily influenced by institutions that are already in place. Some claim that the influence of existing institutions is positive and encourages the creation of new ones. Others suggest that existing institutions have an inhibiting effect on innovation. Political scientists Tonya Putnam and Mark Copelovitch, for instance, highlight the importance of institutional context in shaping institutional design (but not institutional creation). They focus on the presence of prior agreements between states that are potential partners in institutional creation and find that

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51 Scholars have used the logic of inertia to explain why private actors as well as states refrain from revising boilerplate contracts, even when the standard version is sub-optimal. For analyses discussing these issues with respect to sovereign bond contracts (and the use of litigation rather than arbitration provisions), see Choi and Gualti 2004 and Gelpertn and Gulati 2008. The argument is similar to those contending that state actors engage in satisficing, rather than optimizing.
institutional context (measured by the number of agreements between states) correlates positively with some design features (time limitations) and negatively with others (exit clauses and dispute-settlement provisions). Jupille and Snidal theorize more broadly about the institutional context. As the institutional setting becomes more suitable for addressing cooperation problems, they argue, states are more likely to use “status quo-preserving strategies such as institutional use and selection.” As institutional context becomes less suitable for solving cooperation problems, states will turn to “costlier and riskier strategies such as institutional change and creation.”

Some scholars argue that institutions, specifically judicial ones, evolve along an incremental and linear path. In this view, states create judicial mechanisms that are increasingly costly and constraining on state sovereignty. Legal scholar Cesare Romano and his co-editors, for example, suggest that international judicial institutions have developed along a progressive path, from temporary and voluntary to permanent and compulsory. Political scientists Scott Cooper and his co-authors contend that states are more likely to establish institutions with strong judicial enforcement mechanisms when the regime has a substantial and lengthy institutional history. Institutional experience, they propose, builds trust among states, creates existing constituencies that have a vested interest in building on commitments, and reduces uncertainty and transaction costs.

Although it begins also from the premise that institutional context is important, the international judicial landscape argument diverges from the dominant expectation that institutional development is linear. Instead, I suggest that the existence of institutions can discourage the creation of new, more sovereignty-constraining ones. In the context of crisis, I expect that states are

52 Putnam and Copelovitch 2007.
53 Jupille and Snidal 2006.
54 Ibid. at 3.
55 Mackenzie, Romano, Shany, and Sands 2010, x-xi. See also Romano 2007.
56 Cooper, Hawkins, Jacoby, and Nielsen 2008.
more likely to turn to innovation when the international judicial landscape is empty, rather than replete. If a legal rule is in crisis and compulsory judicial mechanisms, such as an ICJ provision, exist, then states will have less incentive to create entirely new mechanisms even if the innovative ones are superior. The reason is simple. Innovation can be costly. Even when it is not, states may still refrain due to inertia or their proclivity to satisfice.

An example helps illustrate the difference between the crisis argument and the more typical, linear explanation for innovation. In the case of the WTO, for instance, I expect that innovation of a transnational or supranational judicial mechanism to be more likely when there is an international crisis and states are proceeding under the GATT framework, in which there was basically no compulsory inter-state mechanisms (given that every state had veto power), than under the WTO framework, which contains inter-state compulsory judicial mechanism (the Dispute Settlement Body). The linear approach expects the reverse.

*Antecedent Causes and Limits of the Argument.* The international legal crisis argument is limited in two important respects. First, it bypasses the question of why legal crises emerge. The lack of theorizing about antecedent causes may seem problematic because it leaves open the possibility that crises are the product of other factors and therefore do not exert an independent effect on innovation. Instead, the conditions that lead to crises also drive innovation.

While admitting that international legal crises may at times be endogenous to other factors, it is important to remember that only some strains of endogeneity matter for a coherent argument about the dynamics leading to the creation of investor-state arbitration and the ICC. Counterfactual analysis is useful for thinking through whether such endogeneity is a problem in specific cases. For example, it would be difficult to argue that the forces driving Germany’s aggression in the 1930s and 1940s (a fragile economy, a fascist ideology, and a charismatic, psychotic leader) that posed a *de facto* crisis for the territorial integrity principle also drove the attempts to create new,
soverignty-constraining judicial mechanisms. If Germany had not launched its expansionist campaign, the underlying forces of a fragile economy, for instance, would not have motivated governments to attempt to establish an international criminal court.

In other cases, endogeneity may be more problematic. For instance, one could plausibly argue that international legal crises occur when international legal rules are weakly codified. If this argument is correct, then it is the weakness of the rules, not the crisis itself, which is the driving force behind innovation. I am attentive to this possibility in the following chapters. It seems unlikely, however, that in the absence of legal crises, weak rules regulating expropriation or genocide would have led to the establishment of costly new judicial tools. Instead, governments probably would have adhered to traditional templates and created inter-state dispute settlement provisions. It is also questionable that weak legal rules are the source of legal crises – or conversely that stronger rules prohibiting genocide or expropriation would have prevented a legal crisis from occurring. Even if states codify legal rules for solving cooperation problems, such rules do not necessarily have that effect under all conditions, particularly volatile ones.

The crisis argument also does not explain the interests of powerful states – specifically why they seek to protect some legal rules but not others. State attitudes toward the legal status quo are rooted in multiple forces, such as security concerns, normative commitments, and domestic politics, and their combination will vary by issue area. Rather than propose a comprehensive and, to date, elusive theory about the origins of state interests, I consider this question on an ad hoc basis. My goal is to assume interests and to explain the establishment of transnational and supranational judicial tools.

The alternative to this ad hoc approach entails proposing a theory that explains the origins of legal crises – including events as diverse as Germany’s aggression in the 1930s, the wave of expropriations in the 1970s, the US use of drones in the 21st century. This type of theorizing is beyond the scope of this project.

57 The alternative to this ad hoc approach entails proposing a theory that explains the origins of legal crises – including events as diverse as Germany’s aggression in the 1930s, the wave of expropriations in the 1970s, the US use of drones in the 21st century. This type of theorizing is beyond the scope of this project.
Summary of Observable Implications. To evaluate the crisis argument about the innovation of costly judicial tools, I present observable implications for three dimensions of innovation: the timing of innovation, the content of innovation, and the identity of innovators. If the international legal crisis argument is correct, two observable implications about timing follow for the two legal domains examined here. First, the legal crisis should closely precede the creation of the transnational and supranational judicial mechanisms. Second, at the time of innovation, the international judicial landscape should be relatively sparse. Even though the sequencing of events does not establish causality, I focus on timing because it can provide plausible evidence supporting the crisis argument and strong evidence disconfirming it.

Because an analysis of timing does not shed much light on the logic of crisis — the reasons why governments accept new types of sovereignty-constraining mechanisms — I focus also on the content of treaties with innovative enforcement mechanisms. If the logic of the crisis argument is correct, then treaties that contain such mechanisms should preserve or strengthen existing obligations rather than transform or dilute them. The substantive obligations of innovative treaties should reaffirm the status quo.

Finally, if the crisis argument is correct, then powerful states that are most susceptible to the crisis should emerge as innovators. To evaluate susceptibility, I identify states that have the greatest stake in both preserving existing legal rules and that lack access to compulsory judicial mechanisms. I examine this expectation both descriptively, in the analysis of innovation at the international level (by states as a collective), and, in one chapter, statistically, in an analysis of innovators at the state level (analyzing cross-national adoption BITs with investor-state arbitration provisions).

(1) International legal crisis will closely precede the innovation of sovereignty-constraining judicial tools.

(2) At the time that states introduce such tools, the legal rule in crisis will lack compulsory judicial mechanisms.

(3) The relevant treaty will reaffirm the substantive legal rules that are in crisis.
(4) Powerful states that are most susceptible to the crisis will emerge as innovators of sovereignty-constraining judicial tools.

Transnational Advocacy Networks

Even when combined with an empty international judicial landscape, legal crisis alone will not trigger the establishment of costly judicial tools. TANs are also important. In the original formulation, TANs encompassed principled non-state actors, working in coalitions across state boundaries, to usher in some form of ethical change. This early wave of scholarship focused on explaining why, when, and how principled transnational actors successfully persuade states to follow new norms, particularly when those norms conflict with states’ material interests.

Since that first wave of TAN scholarship, some scholars have expanded the concept to encompass a broader range of non-state actors, including those who hold “instrumental” or non-normative goals, such as multinational corporations and epistemic communities. Susan Sell and Aseem Prakash, for example, use a TAN approach to analyze the mobilization of both NGOs and business groups on the issue of access to HIV-related drugs. They contend that the two key transnational groups are motivated by both principle and self-interest, employ the same types of strategies to advance their agendas (such as norm grafting and coalition building), and should therefore be treated as analogous. While NGOs surely differ from businesses interest groups in some respects, I agree with Sell and Prakash that the two types of groups can be analyzed profitably.

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58 For a foundational work on transnational advocacy groups, including legal groups, see Keck and Sikkink 1998.

59 Sell and Prakash 2004, 149. Conversely, some scholars apply a rationalist, political economy model to analyze human rights and humanitarian NGOs. Coley and Ron 2002 argue that even if TANs are motivated by normative goals, they are subject to the same market pressures as other organizations, such as competition with other NGOs and the pressures of short-term renewable contracts. They contend this can lead to NGO behavior which produces “dysfunctional outcomes” that undermine rather than promote the collective good.
in one framework. Doing so may offer unique insights into the roles of both types of non-state actors in influencing change.

I focus on TANs working in a legal context. Law-based TANs consist of legal epistemic communities and legal advocacy groups. Legal epistemic communities include lawyers, legal scholars, and judges, as well as legal professional associations (e.g., the American Society of International Law) that exert influence and authority based on their specialized knowledge. By contrast, legal advocacy groups encompass a more diverse set of principled or self-interested actors who share a set of legal goals. By this definition, legal advocates include, among others, NGOs, activists, lawyers, investors and bankers. Their influence and authority derive not from specialized knowledge, but from their political leverage, financial resources, and moral authority.

Because I am focused on the innovation of specifically judicial and not just legal mechanisms, the relevant transnational networks are those that invent and then mobilize around a new judicial tool. TANs “invent” the new transnational and supranational mechanisms, sometimes long before the onset of a legal crisis that moves states to incorporate such mechanisms into treaties. After inventing them, TANs mobilize behind their proposed innovations. Mobilization can include, among other activities, issuing policy statements and press releases, producing scholarship supporting the proposals, lobbying governments or organizations to place the proposed mechanisms on the international agenda, circulating full-fledged proposals or draft treaties, and even participating, directly or indirectly, in treaty negotiations. TAN scholars have generally treated

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60 For a more elaborate definition of an epistemic community, see generally Haas 1992, 3.

61 As some international lawyers belong to both groups, the line dividing epistemic communities and advocacy groups is not always hard and fast. Furthermore, epistemic communities and advocacy groups may form coalitions in promoting the idea of a court. It is worth noting as well that lawyers may also occupy dual roles as government officials and members of epistemic communities. State department lawyers in particular (including Secretaries of State) have historically been closely connected to epistemic communities.

62 For a review of this literature, see Price 2003. For a recent analysis of factors shaping TAN efficacy, see Busby 2010. Busby lists six factors to explain TAN efficacy: permissive international context, focusing events, credible information, low costs, supportive policy gatekeepers, and high cultural match.
TANs as the primary drivers of institutional change. TANs, by this logic, shape whether and when innovation occurs, as well as the substantive purpose for which the innovative tool will be used. Scholars that take this approach focus on how TANs are agents of influence and change, and not on how TANs are shaped by other forces. I refer to this as the *unidirectional* view of TANs.

TAN scholars also propose a more nuanced, but still unidirectional, understanding of TAN influence. They argue that the impact of TANs on policy change, including its timing and form, may depend on other TAN-related factors, such as the group’s framing strategy or moral authority. To examine this more contingent view of TANs, I focus on a factor that scholars highlight as having been particularly important in conditioning TAN influence on treaty design and content: access to treaty drafters. I define access as the degree to which states are receptive to the participation of transnational actors in their policy-making processes and decisions. To be sure, other factors surely condition TAN influence. But access has been crucial to the creation of landmark institutions, like the ICC and the Ottawa Convention Banning Landmines.

Analyzing access provides a particularly effective route for understanding the influence of TANs on the creation of sovereignty-constraining mechanisms: if TANs have direct access to treaty drafters and are unable either to shape when or how innovation occurs or the substantive content of rules, then their lack of influence provides substantial support for a state-centric account of innovation. If access, however, is associated with a high degree of TAN influence, then the argument that states dictate the timing and terms of institutional creation is much less persuasive.

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63 Busby 2010. Scholars highlighted a range of factors that helped TANs promote normative change, including the content of the proposed norm, the norm’s potential for local resonance, the moral authority of members of the TAN advocates, the strategies used for norm promotion, and the TAN’s ability to form alliances with pivotal gatekeepers.

64 At the ICC, 236 NGOs were present and “played a pivotal role” at the Rome Statute negotiations. Schiff 2008, 148. NGOs had a formidable presence at the Ottawa Landmines Convention. In 1996, about 600 NGOs in forty states were actively involved in lobbying for states to adopt the Convention. Raustiala 2012, 158. Other scholars have recognized the importance of TAN access for policy change beyond these high-profile treaty negotiations, while acknowledging that that “[a]ccess does not guarantee impact.” Risse (2002), 268. For other works that analyze the role of transnational access in influencing the efficacy of TAN campaigns, see Risse-Kappen 1995. In this edited volume, contributors focus specifically on the role of domestic structures in providing or limiting access to transnational actors.
Antecedent Causes and Limits of the TAN Argument. The unidirectional TAN approach leaves a number of questions unexplored. First, the TAN explanation does not offer a general theory about why TANs mobilize on some issues but not others, or why, for a given issue, they mobilize around some goals (for instance, seeing the creation of a new judicial mechanism) and not others (for example, the creation of a private-monitoring body). The unidirectional approach also has not systematically examined why TANs participate heavily in institutional creation in some cases while remaining on the periphery in others. This silence may be problematic for an analysis of innovation because it leaves open the possibility that states are influencing TAN decisions about mobilization; this makes state-TAN interactions more complicated than a unidirectional view implies.

A reciprocal view holds that TANs influence and are influenced by states. Some scholars have explored the reciprocal view with specific reference to institutional access. Kal Raustiala, for instance, has argued that states grant access or delegate authority to transnational advocacy groups when doing so advances their own political agenda rather than after they have come under the influence TAN influence. In their edited volume on comparing the organizational structures of the EU and UN, Jutta Joachim and Birgite Locher observe that IGOs have significant autonomy and can influence TAN choices and campaign strategies as much as TANs influence IGOs. On the specific issue of access, they write, “access to international organizations is granted rather than achieved. International organizations select and single out the NGOs they want to cooperate with.”

The reciprocal TAN approach highlights questions about why states choose to grant access to non-state actors in some cases but not others. Although there is no single answer to this

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65 Charli Carpenter’s work is an important exception. See, for e.g., Carpenter 2007a.

66 Joachim and Locher 2009, 14.
question, some scholars have recognized that states become more willing to turn to non-state actors for guidance during periods of upheaval. For instance, Peter Haas argues that during periods of acute uncertainty, state officials (or what he refers to as decision makers) are more likely to turn to epistemic groups. States recognize that epistemic groups can provide insight into the cause and nature of the crisis as well as the consequences that may follow from various policy responses. As Haas puts it, “Decision makers do not always recognize that their understanding of complex issues and linkages is limited, and it often takes a crisis or shock to overcome institutional inertia and habit and spur them to seek help from an epistemic community.” Although Haas focuses exclusively on epistemic actors, states may become more receptive to other types of non-state actors as well, including moral entrepreneurs, such as human rights groups, and transnational business coalitions.

This possibility highlights then the complicated multidirectional interactions between international legal crisis, TANs and states in facilitating the introduction of new-style, costly judicial mechanisms. On the one hand, legal crises may motivate states to turn to non-state actors who then influence states to adopt their proposed innovative mechanisms; on the other hand, non-state actors may help shape state perceptions of the existence of legal crisis in the first place.

In the chapters that follow I focus primarily on the unidirectional view, and evaluate, selectively, the reciprocal view, considering among others the possibility that states influence the terms of TAN participation by inviting them into, or excluding them from, the creation of new enforcement mechanisms. States may also shape TAN decisions about which substantive goals and legal rules to promote. Because I lack adequate cross-national data on the domestic constituencies of transnational networks, I analyze observable implications about the role of TANs only with respect to the timing and content of innovation, omitting the identity of innovators. I expect that

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68 Ibid. at 14.
TAN mobilization will closely precede innovation of judicial tools and that TANs will shape the substantive content of the rules that the innovative mechanisms are designed to enforce.

(5) TAN mobilization will closely precede the innovation of sovereignty-constraining judicial mechanisms.

(6) TAN access to treaty drafters will increase TAN influence in promoting costly judicial tools.

(7) The substantive content of the relevant treaty will closely resemble TAN proposals.

**ALTERNATIVE EXPLANATIONS**

I compare the international legal crisis and TAN arguments with two alternative explanations. Informed by liberal institutionalism, the first explanation focuses on state incentives to signal credibility to other actors.\(^69\) A second, constructivist explanation examines the leadership role of liberal democratic states that are committed to the rule of law.\(^70\) Although neither focuses specifically on the creation of new sovereignty-constraining tools, both provide explanations about state participation in international institutions. Put briefly, the credible commitment theory argues that the innovation of judicial mechanisms is driven by states that are in search of new modes for “tying their hands” to demonstrate that they are and will remain committed to adhering to their legal obligations. The legalist argument contends that “legalist states,” defined as liberal democracies committed to the rule of law, seek to promote domestic accountability norms at the global level and will be the drivers of institutional change. These explanations can be viewed either as competing or complementary with one another and with the international legal crisis and TAN arguments.

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\(^{69}\) Abbot and Snidal 2001, 42.

\(^{70}\) Bass 2001.
Credible Commitment

Credible commitment theory begins from the premise that state leaders act rationally. Their participation in international institutions, including treaties, is motivated by the preference to obtain a specific objective and the need for outside assistance in doing so. Leaders who are committed to advancing their own agenda — such as assuring their reelection, establishing peace, or increasing economic growth — often require the support of other actors, be it their own citizens, other states, or foreign nationals. They secure this support by promising to reciprocate with some kind of benefit, such as a policy that caters to a specific constituency, a promise to abstain from military action, or a concession to grant access to domestic markets. To make their promise reliable, leaders need some mechanism that can help reassure those to whom they have made promises that they will not renege in the future. Institutions serve precisely this “hand-tying” function. They impose \textit{ex ante} costs for committing to a promise and \textit{ex post} costs if the promissor defects. The \textit{ex post} costs can take on different forms, including sanctions, international monitoring, condemnation, and prosecution.

Scholars have used the logic of credible commitment to explain leaders’ willingness to submit to peace settlements, fixed exchange rate regimes, environmental monitoring bodies, international lending institutions, and regional trade organizations. Douglas North and Barry Weingast provide one well-known example of this kind of argument.\footnote{North and Weingast 1989.} They trace the establishment of constitutional democracy to a strong credible commitment incentive. In the seventeenth century the English King granted judicial review and parliamentary supremacy in exchange for the right to tax his subjects and create a predictable stream of revenue. These institutions allowed the King to
make credible his promise to abandon prior monarchical practices, such as property confiscation and forced loans.

Some scholars have used the logic of credible commitment to explain state ratification of BITs and the Rome Statute establishing the ICC. Allison Danner and Beth Simmons, for example, contend that states joined the court in order to signal to domestic actors their intention not to return to repressive tactics or fall back into civil war. The court, in this account, acts as a “hand-tying” device, imposing significant *ex post* costs (possibility of prosecution) on those who violate their ICC obligations, as well as domestic audience costs for retrenching from their promise. Simmons and Danner argue that states with the greatest need to signal their reliability but with weak institutional capacity to do so will be most likely to join the court. Specifically, they expect and find support for the proposition that states with recent histories of civil war and weak institutions for securing accountability will be more likely than those with strong domestic accountability institutions to ratify the Rome Statute. Scholars have also applied a credible commitment explanation to explain state adoption of investment treaties. In *Competing for Capital*, Elkins, Guzman and Simmons propose a competitive diffusion argument about BITs adoption: states are more likely to adopt BITs if their competitors do so. They use the logic of credible commitment to explain why BITs became the vehicle of choice for competition, noting that with their strong enforcement provisions, BITs raise the *ex post* costs of violation.

Although widely used to explain state participation in and, more rarely, establishment of international institutions, scholars rarely extend the logic of credible commitment to the prior stage of institutional innovation. By logical extension, however, a credible commitment explanation

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72 Simmons and Danner 2010, 233-236.

73 Elkins, Guzman and Simmons 2006, 835.

74 There are some important exceptions. Political scientist Susan Hyde, for instance, proposes an argument about norm creation that distinguishes between the early and late adopters of election monitoring. While early
holds that innovation is more likely when states are in search of new ways to signal their reliability to other actors. Why would states need to create entirely new and unprecedented types of judicial mechanisms for signaling their credibility? One could point to the emergence of new conditions—for example, increasing political, economic or military insecurity, including in times of crisis, as triggering a need for states to reaffirm their credibility.

This signaling logic can also be extended to explain why some states emerge as innovators, endorsing or adopting the mechanisms before their peers. But here, rather than focus on changed conditions in general, what matters is the experiences of specific states, including the varying extent to which they are involved in or have contributed to increased regime insecurity.

I examine the credible commitment argument in the context of international investment, where it is a dominant explanation, and focus on legalism for the ICC. The following credible commitment propositions focus on the timing and identity of innovators. I do not analyze the content of innovation, because the credible commitment argument is consistent with a range of outcomes, from innovative treaties that drastically expand investor protections to treaties that dramatically limit them.

(8) Increasing regime insecurity will precede the innovation of sovereignty-constraining judicial tools.

(9) States that appear to be likely regime violators will emerge as innovators of sovereignty-constraining judicial tools.

**Legalist States**

adopterss invite election monitors in order to signal their (rule compliant) type, late adopters invite monitors in response to the spreading practice and expectation that they do so, and in attempt to reap the economic and reputational benefits of appearing to be a rule-compliant type. Hyde 2011.
Constructivists offer a very different account of state participation in international institutions. Ideational (norms, ideas, identity) rather than materialist factors and cost-benefit calculations shape state preferences and practices. The influence of ideational factors is arguably most salient in areas such as human rights, where states appear to act in ways that contradict or diverge from materialist or explicitly cost-sensitive conceptions of self-interest.

While much constructivist analysis focuses on human rights, scholars have also analyzed the influence of ideational factors on states preferences and behavior across the full spectrum of issues. In the security realm, for instance, Nina Tannenwald contends that states have refrained from using nuclear weapons due to the emergence of a nuclear taboo. Although strategic calculations are part of her analysis, they play a subordinate role. Martha Finnemore argues similarly that changing norms regarding appropriate causes for military intervention transformed state practice about whom to help (white Christians or non-white ‘heathens’) and how (unilaterally or multilaterally). In these accounts, norms lead to institutional change and alter state practice.

To explain the innovation of transnational and supranational judicial mechanisms, one strand of constructivism emphasizes the role of domestic legal norms, particularly those relating to sovereign accountability. It expects that innovation will be more likely when legalist states seek to project domestic legal norms about accountability to the international level. States project their domestic legal norms not simply to manage international problems, but because they are normatively committed to their domestic legal models. Gary Bass offers one version of this account in his argument about why states are willing to establish war crimes tribunals in some instances but not in others. Although he recognizes the importance of power and self-interest, Bass argues that the decision to prosecute alleged war criminals is a function primarily of the normative commitments of

75 Tannenwald 2008.
76 Finnemore 2004.
“legalist states” that uphold liberal-democratic and rule of law values. These states, comprised mainly of the US and European countries, push for prosecutions because they are “in the grip of a principled idea.”

Other scholars have similarly focused on the role of domestic legal norms in influencing state behavior and institutional change at the international level. Judith Kelly, for instance, argues that of the states that joined the ICC, those with a strong rule of law tradition were more likely than others to reject US pressure to sign a “non-surrender agreements.” These states, she contends, value the norm of keeping promises and adhering to legal obligations and will therefore refuse to enter into agreements that conflict with their commitment to the ICC.

In a similar vein Kathryn Sikkink argues that the individual criminal accountability norm emerged from domestic norms and legal models of criminal accountability. But she emphasizes the influential role Latin American countries rather than the US or European states have played in the evolution of this norm. In her account, human rights activists used this norm to prosecute domestic leaders and push for accountability in foreign countries. They promoted this norm at the international level too, which led ultimately to the establishment of the International Criminal Court (ICC).

Arguments about the role of legalist norms provide insight into the dynamics of innovation. I evaluate the legalist argument with respect to the innovation of the ICC in the aggregate (by all states), but not cross-nationally. I refrain from examining cross-national support for the ICC and the independent prosecutor mechanism partly due to the lack of space and partly because it has already received significant attention by a number of scholars. Because I do not examine

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78 Kelley 2007.
79 Sikkink 2011.
80 See, for e.g., Bendetti & Washburn 1999; Deitelhoff 2009; Glasius 2006; Schiff 2008; and Struett 2008.
innovators in the 1990s, I provide a particularly extensive analysis of their role in the 1950s attempt to create an ICC. Finally, because the legalist explanation does not offer clear expectations about the timing of the creation of the ICC, I do not evaluate it along this dimension.

(10) Legalist states will emerge as innovators of sovereignty-constraining judicial tools.

Competing or Complementary Explanations?

The credible commitment and legalist arguments can be viewed as either competing or complementary to the international legal crisis and TAN explanations as well as to one another.\textsuperscript{81} As competing explanations, they point to alternative logics driving innovation. Both the crisis and credible commitment explanations, for instance, focus on acute or increasing insecurity in an existing regime. The crisis argument, however, underlines the legal dimension of this insecurity. It argues that states turn to innovation of new types of sovereignty-constraining judicial mechanisms to strengthen existing legal rules. The credible commitment argument, by contrast, focuses on non-legal factors, like economic and political insecurity, and holds that states turn to innovation to signal their credibility. The two arguments focus on different conditions to explain the dynamics of innovation and offer different accounts of state motivations. It is possible that only one of the two arguments is correct.

It is also possible, however, that innovation results from a confluence of conditions, and that states are motivated by multiple logics. They may seek both to reaffirm legal rules and signal their credibility. International legal crises are inevitably accompanied by other forms of crisis (political,

\textsuperscript{81} Because I do not analyze the credible commitment and legalist explanations for the same cases, questions about their compatibility do not arise in the following chapters.
social, and economic), and it is likely that it is the multi-dimensional nature of crisis that motivates states to invent new transnational or supranational judicial mechanisms.

The crisis and credible commitment arguments may also be complementary if different states turn to innovation for different reasons. This is possible, for instance, when innovative treaties serve numerous but distinct ends, such as simultaneously affirming the status quo and signaling credibility. That states may be motivated by different incentives is most salient in the context of treaty adoption: the international legal crisis argument has little to say about why weak states emerge as the first adopters of treaties. The credible commitment argument may speculate that powerful states adopt treaties to secure commitments from other states, but this speculation is incomplete; as the crisis argument highlights, states are drawn to innovative mechanisms for reasons beyond pure efficacy – they include also strategy and legitimacy. Simmons and Danner put it nicely with respect to the ICC: “The Scandinavian and certain African countries will both support the Court, the former in the possible belief that it will in fact lead to peace and security in troubled areas in the world; the latter because it solves a credibility deficit that makes it difficult to begin to ratchet down local violence.”

The broader point about the compatibility of the two arguments applies to legalism as well. It may be that powerful states seek to protect the legal status quo from crisis for legalist reasons: they are committed to promoting and protecting an accountability norm on the global stage. If this is the case, then both crisis and legalism would help explain innovation of transnational and supranational judicial mechanisms.

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82 Simmons and Danner 2010, 236.

83 Alternatively, powerful states may seek to preserve these rules for more strategic reasons.
SUMMARY

Recapitulation

Table 2-1 summarizes the different theoretical expectations about innovation. I evaluate the crisis argument across three dimensions (timing, content and identity), the TAN and credibility arguments across two dimensions each, and the legalist argument only across one dimension. I explain the varied extent of the analysis as I present the arguments in the empirical chapters.
Table 2-1: Theoretical Expectations

<table>
<thead>
<tr>
<th>Identity of Innovators</th>
<th>Timing</th>
<th>Content</th>
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<tbody>
<tr>
<td><strong>International Legal Crisis</strong> and <strong>International Judicial Landscape</strong></td>
<td>International legal crisis will closely precede the creation of sovereignty-constraining judicial mechanisms</td>
<td>The substantive content of the relevant treaty will reaffirm the legal rules that are in crisis</td>
</tr>
<tr>
<td><strong>Transnational Advocacy Networks</strong></td>
<td>TAN mobilization will closely precede the creation of sovereignty-constraining judicial mechanisms</td>
<td>The substantive content of the relevant treaty will closely resemble TAN proposals</td>
</tr>
<tr>
<td><strong>Credible Commitment</strong></td>
<td>Increasing regime insecurity will closely precede the creation of sovereignty-constraining judicial mechanisms</td>
<td>N/A</td>
</tr>
<tr>
<td><strong>Legalist States</strong></td>
<td>N/A</td>
<td>N/A</td>
</tr>
</tbody>
</table>
Methodology and Case Selection

In this dissertation I seek to understand and explain the creation of two unusual judicial mechanisms within international investment and criminal law. My analysis offers a broad understanding of the century-long dynamics of continuity and change in two discrete legal domains. It also develops and tests different explanations of why governments took recourse to two judicial mechanisms in some of the twelve historical cases that I examine but not in others. Put differently, I do not explain the establishment of costly judicial mechanisms in general. Seeking instead to account for the specific dynamics leading to the creation of investor-state arbitration and the ICC and drawing out the observable implications of different analytical arguments, I conduct a qualitative, comparative analysis across six cases each within and across-case analysis of two very different issue areas.\(^8^4\) In addition I use statistical analysis to further explore the identity of innovators for investor-state arbitration. This project, therefore, engages in both theory development and theory testing within and across two legal domains.

In proposing and analyzing the crisis and TAN argument, I have used a combination of inductive and deductive methods. The crisis and TAN arguments are inductive, based on a preliminary understanding of the development of investor-state arbitration and the ICC, as well as theoretical insights about the role of crisis and non-state actors in facilitating political, legal and social change. The observable implications about the timing of the creation of judicial mechanisms, the content of the relevant treaty, and the identity of innovators are deductive and aim to provide a more rigorous test of my preliminary understanding of the factors driving the establishment of the

\(^8^4\) In proposing these observable implications, I follow the approach of Judith Kelley in her analysis of the rise of election-monitoring norms. Kelley 2008.
two sovereignty-constraining mechanisms. Because I draw freely on both induction and deduction I make a consistent effort to distinguish between findings that are consistent with my original expectations advanced in Chapter 2, and findings that are unexpected and revealed during the course of research and analysis.

For the qualitative analysis, I use either across-case analysis (for the timing dimension), within-case analysis (for the content dimension), or some combination of the two (for the identity of innovators). I identify the various instances in which the different arguments offer the same observable implication, making it difficult to draw conclusions about their analytical strengths and weaknesses. All of the arguments offer distinct observable implications on at least one dimension, however, and this allows me to disentangle, at least partly, the differing accounts.

Even though I analyze the chronology of events, I do not engage in process tracing in the sense of using historical micro-level analysis to identify causal mechanisms. My analysis of timing, while chronological, is primarily correlational. For instance, it examines whether crisis or TAN mobilization is present to see how closely it precedes the creation of the new-style judicial tools, not to gain insight into the underlying state motivations. Where my research does suggest the precise motives of governments and non-state actors, I report what I have found. For reasons of practicality, I leave to others the enormous task of providing more detailed historical research for the twelve cases spanning a century, which I present in the subsequent chapters.

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85 In specifying the observable implications, I draw on my knowledge of state preferences about traditional rules.

86 There are two such instances in Chapter 3 on investor-state arbitration. There, the crisis and credible commitment explanations point to the same observable implication for the timing of creation and the crisis and TAN arguments somewhat overlap in their predictions about the content of the relevant treaties. In Chapter 5, the crisis, TAN and legalist arguments also overlap somewhat on the content dimension. These shared predictions make it difficult to discern which dynamics driving the creation of these new mechanisms, at least without analysis of the other dimensions. For an example of an article that evaluates the certainty and distinction of its observable implications, see Kelley 2008.
For each of the two qualitative chapters, I selected six cases based on two main criteria. First, I adhered to the possibility principle which holds that the selection of cases should include only those cases in which the outcome of interest -- here the introduction of new sovereignty-constraining mechanisms -- had a plausible chance of occurring.87 Proposals for judicial mechanisms, after all, occur all the time but only some of them have a chance of seeing the light of day. To ensure plausibility I focus only on cases involving treaty drafting or treaty negotiations. This means I exclude, for example, low-profile NGOs that post proposals for innovative judicial mechanisms on their websites. I also exclude proposals submitted to states or international organizations (IOs) by high-profile NGOs and expert commissions if they are submitted when there are no negotiations underway. The establishment of transnational or supranational judicial mechanisms in these latter cases appears to be the most plausible of the “implausible” cases that I exclude, but as long as states or IOs choose not to hold negotiations or not to engage in treaty drafting, the creation of such judicial mechanisms is still impossible. Put differently, it is only once states or IOs have decided to engage in treaty drafting or have launched treaty negotiations that the adoption of sovereignty-constraining judicial mechanisms becomes plausible. Treaty drafting or negotiations are the key thresholds that must be crossed for the creation of supranational and transnational judicial mechanisms, and therefore provide the baseline for my case selection.

Second, in selecting cases I ensured that there existed adequate variation in the occurrence of new transnational or supranational judicial mechanism -- negotiations during which such a mechanism was: not proposed; proposed but not adopted; and proposed and adopted. I then confirmed that across the selected cases there existed at least some variation in the presence or absence of a legal crisis, TAN mobilization, and sparseness of the international judicial landscape. With the broad historical span of cases, adequate variation occurred naturally.

87 See Mahoney and Goertz 2004.
A methodology that relies on observable implications across multiple dimensions has important strengths even in the absence of an exhaustive study of micro-level historical research. Rather than simply ascertain that various actors and conditions are influential, an analysis across three very different dimensions helps identify more precisely how crisis, TANs, credibility and legalist incentives shape the creation of international law’s most sovereignty-constraining judicial tools.
CHAPTER 3

INVESTMENT VULNERABILITY AND THE TURN TO
INVESTOR-STATE ARBITRATION

The introduction of investor-state arbitration provisions marks a profound departure from traditional international law. When included in BITs, investor-state arbitration provisions grant foreign investors from one state (the “capital-exporting” state) legal standing to file arbitration claims in an international forum directly against the government of the other state (the “capital-importing” state).\(^1\) The scope of these provisions is sweeping. Because BITs define the term “investment” expansively, the treaties cover not only traditional forms of direct foreign investment but also intellectual property, sovereign debt, and stockholdings. Furthermore, almost all BITs relieve foreign investors of the obligation to first exhaust remedies in the capital-importing state. More than any other type of treaty, BITs elevate private actors to the legal status of states.

The creation of investor-state arbitration provisions can be explained primarily by the dynamics of power and international legal crisis. In the shadow of decolonization, developing countries began to expropriate on a substantial scale foreign property and to issue formal challenges to the traditional investment rules at the UN, triggering both \textit{de facto} and \textit{de jure} crises. In response, powerful states created new mechanisms granting private actors unprecedented authority to file arbitration claims directly against states. During this period of innovation, the investment regime lacked compulsory judicial mechanisms.

\(^1\) A typical modern BIT, for instance, includes a provision that relays the general idea that the capital-importing state “shall assent to any request on the part of such national or company to submit, for conciliation or arbitration, to the Centre established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March (1965) any disputes that may arise in connection with the investment.” Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Republic of the Philippines for the Promotion and Protection of Investments, Dec. 3, 1980.
Although they had been unable to persuade states to adopt their proposals during periods of legal stability, a transnational group of bankers, investors, and lawyers — an “investment TAN” — had invented and promoted the arbitration provisions at the global level, which powerful states then turned to once faced with a crisis situation. Beyond this, the investment TAN was important in ways that the legal crisis argument overlooks. Rather than simply reaffirm existing rules, states influenced by TAN proposals drastically expanded legal protections granted to foreign investors. This chapter yields two other important, unanticipated findings: the most powerful state may have divergent preferences from all others, and at times this can push new-style judicial mechanisms toward a bilateral form. Also, voluntary judicial mechanisms may serve as unintended stepping stones toward innovative compulsory ones.

Finally, although the analysis of timing is consistent with the credible commitment predictions, the analysis of the identity of innovators -- states that adopted hard BITs before their peers -- provides little if any support for the credibility argument: states most in need of signaling credibility were not legal trendsetters. Whatever its other merits, the credible commitment explanation simply does not help us understand why we get investor-state arbitration mechanisms in the first place.

I am not the first person to look to decolonization and what Jose Alvarez has described as “the crucible of North/South tensions” to understand the early history of BITs. Current scholarship focusing on the conflict between North and South, however, is imprecise. It attributes the origins of all kinds of BITs, with or without investor-state arbitration provisions, to the G-77’s resistance. Yet, the first BITs, which did not contain investor-state arbitration provisions, preceded the onset of crisis by almost a decade. These original “soft” BITs contained a traditional inter-state dispute-settlement provision (investing the ICJ with jurisdiction), and were the product of

\[^2\] Alvarez 2010, 610.
transnational and domestic pressure, not legal contestation.\textsuperscript{3} The introduction of “hard” BITs, those that contain investor-state arbitration provisions, and the slow spread of BITs, by contrast, was a response to the G-77 backlash against the foreign investment rules.

This chapter begins by surveying the six post-1945 cases in which the creation of investor-state arbitration was a plausible outcome. I then derive my theoretical expectations for international legal crisis, TAN, and credible commitment approaches, analyze these expectations according to the timing and content of hard BITs, as well as the identity of innovators, and discuss the 1998 Multilateral Agreement on Investment (MAI). I conclude by addressing some challenges to my argument.

**CASES**

Since the first proposal for an investor-state arbitration provision occurred only after WWII, I limit my analysis to the years 1945-2000.\textsuperscript{4} The six episodes I evaluate constitute the universe of cases in which states sought to negotiate an investment treaty at the international (as opposed to regional) level during the second half of the twentieth century.\textsuperscript{5} In each case, the creation of the investor-state arbitration provisions was a conceivable outcome.\textsuperscript{6} It was only in the fifth instance, beginning in the early 1970s, however, that states successfully established the first set of hard BITs.

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\textsuperscript{3} I take this terminology of “hard” and “soft” from Goldstein, Kahler, Keohane and Slaughter 2001.

\textsuperscript{4} States first attempted to negotiate a multilateral investment treaty during the interwar period, but at that point they did not contemplate including investor-state arbitration provisions. The League of Nations sponsored the negotiations on the International Convention on the Treatment of Foreigners (from November 5\textsuperscript{th} to December 4\textsuperscript{th} 1929). For a brief description, see Nwogugu 1965, 136-137.

\textsuperscript{5} Since the 1995 MAI negotiations there has been one additional, short-lived, attempt to establish a multilateral treaty, during the 2003 WTO Cancun meeting. There, WTO member states rejected the EU’s proposal for beginning negotiations. Although European and not US investors were the primary advocates of a multilateral agreement, this episode was consistent with the 1995 MAI case.

\textsuperscript{6} Of the six cases, the first case is the least plausible, given that TANs had not yet invented the idea. Since it is unlikely, though not impossible, that states would have proposed the mechanism on their own, I include the case here.
The first case is the 1948 Havana Charter, which would have established an International Trade Organization (ITO). The early drafts of the Charter did not contain any investment-related provisions. The final draft, however, contained two investment provisions which, in vague language, called for host-state autonomy and host-state receptivity toward foreign investment. At no point did states consider including an investor-state arbitration provision. Instead, Article 96 of the Charter included a provision granting the ICJ jurisdiction to resolve disputes about treaty interpretation. Because they viewed the investment provisions as diluting, not strengthening their rights abroad, foreign investors, particularly those in the US, opposed the treaty. Primarily for this reason, President Truman did not submit the treaty to Congress for ratification. The US decision not to sign the treaty discouraged other states from either signing or ratifying it.

The first decade of BITs, from 1959-1968, constitutes the second case. Although states had previously concluded some treaties with investment-related provisions, beginning in 1959 the treaties signed were the first to focus exclusively on investment. These inaugural BITs shared a core set of provisions that continue to be part of modern BITs. They prevented discrimination (most-favored nation (MFN) and national treatment); upheld international minimum standards of property protection; and guaranteed rights such as the repatriation of profits and due process for investors seeking compensation for expropriated property. These soft BITs contained a provision for settling inter-state disputes, but not for investor-state arbitration.

8 See Schill 2009, 33 stating that the Havana Charter merely set out an “unenforceable symbolic” provision.
9 Nwogugu 1965, 139.
10 Rubin 1956.
11 Because data on ratification dates are difficult to obtain, I follow the example of other scholars including Elkins, Guzman, and Simmons 2006, and Yackee 2007, and use date of signing instead. In contrast to Elkins, Guzman, and Simmons, Yackee includes only those BITs that eventually entered into force; I use his data, and thus the same applies for my analysis.
The third case is the OECD’s drafting, during the 1960s, of a multilateral investment treaty called the Draft Convention on the Protection of Foreign Property. In 1962 and 1967 the OECD released two almost identical drafts. Both contained 14 articles that covered a range of obligations relating to the treatment of foreign investment, expropriation and compensation, and the repatriation of profits. Both drafts included two arbitration provisions: one that was mandatory for inter-state use and another that was optional for investor-state disputes. The OECD never initiated negotiations. Instead it adopted a resolution in 1967 that endorsed the Draft Convention’s principles.

The fourth case centers on the 1965 adoption of the Convention establishing the International Center for the Settlement of Investment Disputes (ICSID). In contrast to the other treaties, the ICSID Convention does not include any substantive provisions regulating investment, such as defining what constitutes expropriation. Instead, it is purely procedural and provides a dispute-settlement framework. The Convention also does not include a compulsory dispute-settlement provision. Rather, it requires states to show some form of additional consent before the tribunal can assert jurisdiction, such as by signing a treaty, a contract, or as shown on a case-by-case

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13 They are identical in all but two places. First, the 1962 version requires states not to give judicial deference (under the act of state and sovereign immunity doctrines) to any country that violates the core provisions of the treaty, even if it has not signed the Convention. The 1967 version omits this requirement. Second, the 1967 version includes an additional clause ensuring that an investor’s right to file a claim in an arbitral tribunal does not prejudice its right to file claims in other forums. I concentrate primarily on the 1962 draft, since the OECD was most seriously considering adopting a Convention at that point. By the time it released the second draft in 1967, it had all but decided to abandon the idea of a multilateral treaty. This is probably the reason why the two drafts are nearly identical.


basis. Because of its non-compulsory nature, the creation of ICSID less puzzling than the compulsory judicial mechanisms that this dissertation seeks to understand.\textsuperscript{16}

The fifth case covers the first set of BITs to include an investor-state arbitration provision, those signed between 1969 and 1980. I use 1969 as the starting point since the first BIT to include an investor-state arbitration provision was signed in that year and was followed by another BIT with an investor-state arbitration provision in 1970. The first cluster of treaties with investor-state arbitration provisions emerged beginning in 1974; between 1974 and 1980, the 17 OECD states in my analysis signed 22 treaties with capital-importing countries that contained investor-state arbitration provisions.\textsuperscript{17} I use 1980 as the cut-off point since by that time state mobilization behind the idea of a NIEO, and the international legal crisis that emerged from this campaign, had abated. I refer to these and subsequent treaties containing investor-state arbitration provisions as “hard” BITs. Because this first cluster of hard BITs marks the first successful attempt at creating investor-state arbitration, I term the states that adopted them as “innovators.”

The final, sixth case is the OECD’s unsuccessful attempt, between 1995 and 1998, to establish a Multilateral Agreement on Investment (MAI).\textsuperscript{18} The proposed MAI would have been more expansive than BITs, regulating not only protection of investment but also securing pre-establishment rights, which grant foreign and domestic investors equal access to markets. In terms

\textsuperscript{16} The ICSID Convention does contain a number of innovations that are triggered once a dispute is heard. Most importantly, it holds that arbitration rulings are not reviewable, and it makes awards directly enforceable in the territories of states party to the Convention.

\textsuperscript{17} These numbers are taken from Yackee 2007 who limits his analysis to examining only those treaties that enter into force and are signed by one of 17 OECD states, including: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Italy, Japan, the Netherlands, Norway, Spain, Sweden, Switzerland, the UK and the US. Yackee also analyzes in his dissertation treaties signed by Singapore. I leave Singapore out of the sample as a capital-exporting state. During this early period (before 1981) Singapore signed BITs acting once as a capital exporter and seven times as a capital importer. For that reason I include Singapore as a capital-importer. This has the effect, however of excluding from my analysis the Singapore-Sri Lanka 1980 hard BIT.

of enforcement, it would have included a compulsory investor-state arbitration provision.\textsuperscript{19} OECD members had planned to open the treaty to ratification by any non-OECD members, and it therefore would have been the first global investment treaty to incorporate such a provision. Negotiations, however, stalled. Since 2000 some international investor groups have attempted to revive the idea within the context of the WTO. Developing countries have so far resisted all of these initiatives.

Table 3-1 summarizes the six cases in which states attempted to negotiate an international investment treaty between 1945 and 2000.

\textsuperscript{19} Other multilateral treaties that have contained investor-state arbitration provisions, such as the Energy Charter, have been open for adoption to only a subset of states.
Table 3-1: Investment Treaty Negotiations

<table>
<thead>
<tr>
<th>International Investment Treaty</th>
<th>Treaty Drafting/Negotiations</th>
</tr>
</thead>
<tbody>
<tr>
<td>1948 Havana Charter to establish the ITO</td>
<td>No investor-state arbitration provision proposed</td>
</tr>
<tr>
<td>1959-1969 first decade of BITs (soft)</td>
<td>Investor-state arbitration provision proposed, not incorporated into BITs</td>
</tr>
<tr>
<td>1960s OECD Draft Conventions on Protection of Foreign Property (1962; 1967)</td>
<td>Draft treaties contained an optional investor-state arbitration provision, but negotiations were never held</td>
</tr>
<tr>
<td>1965 ICSID Convention</td>
<td>No compulsory investor-state arbitration provision included in the ICSID Convention. Instead states need to give additional consent before an ICSID tribunal can assert jurisdiction</td>
</tr>
<tr>
<td>1970-1980s second decade of BITs (hard)</td>
<td>Mandatory investor-state arbitration provisions included in some BITs</td>
</tr>
<tr>
<td>1995-98 Multilateral Agreement on Investment (MAI)</td>
<td>Treaty contained a compulsory investor-state arbitration provision, but negotiations stalled</td>
</tr>
</tbody>
</table>

THEORETICAL EXPECTATIONS

International Legal Crisis

In the wake of decolonization G-77 countries began, slowly at first, a campaign asserting “sovereignty over natural resources” which entailed both expropriation of foreign property and resistance at the UN to the traditional foreign investment regime. Culminating in the mid-1970s, the expropriations and formal UN-based resistance, constituted de facto and de jure crises that motivated powerful, capital-exporting states to protect traditional investment rules with new judicial protections. States have long understood customary international law as granting them the right to
expropriate foreign-owned property in their territories. Over the course of the twentieth century, the US, UK and later other European states came to adhere to the formal position that under customary international law, expropriations must serve a public purpose, be non-discriminatory, and be accompanied by just or full compensation. Powerful states equated the “just compensation” standard with the “Hull rule,” stipulating that compensation be prompt, adequate, and effective. Yet, a wide gap separated the proclaimed, standard legal rule and the actual practice of compensation that almost always fell short. Because powerful states rarely demanded full compensation in practice, some scholars and state officials argued, and continue to hold now, that

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20 The Russian Revolution marked a foundational moment in the emergence of the traditional compensation rule. Partly in response to it, the US concluded in the 1920s twelve bilateral commercial treaties that contained a just compensation provision. It was the Mexican oil and land expropriations of the 1930s, however, that led the US to proclaim, in what is now referred to as the “Hull Rule,” that just compensation requires that payment be “prompt, adequate and effective.” Former US Secretary of State Cordell Hull responded to the Mexican government in a 1938 note declaring, “[u]nder every rule of law and equity, no government is entitled to expropriate private property, for whatever [purpose] without provision for prompt, adequate and effective payment thereof.” Foreign Relations of the United States Diplomatic Papers 1938, 674, 677 (also cited in Baade 1960, 809, note 49). The UK embraced this three pronged-standard soon thereafter. O’Connell 1955, 267, 272; See also White 1961, 139, noting that the UK adopted the classical position in its response to both the Eastern European nationalizations and the 1951 Iran nationalization of the Anglo-Iranian Oil Company. Other European states came to endorse it only later, beginning in the mid-1950s. I have thus far come across no primary or secondary evidence (in policy statements or court cases) that governments in Continental Europe embraced the Hull rule before the 1950s. As far as I know, they rarely if ever incorporated the Hull rule into their bilateral treaties at this time. Instead, they sometimes omitted any provision about expropriation and compensation. See O’Connor 1983 who includes references to the 1951 FCN Treaty between the UK and Oman. This treaty contrasts with the 1962 UK FCN that contains a detailed expropriation provision) and referred to a “national treatment” standard of compensation. See O’Connor 1983 citing for example, Article 4 of the 1950 FCN between Italy and France. For a clear discussion of the traditional rules regulating investment, see Sornarajah 1986, 173-193.

21 As Daniel Bodansky notes in passing, “prompt, adequate and effective compensation is held to be required by customary international law even though this formula has seldom, if ever, been applied by states in actual expropriation cases.” Bodansky 1995, 112. Other scholars have also recognized the standard to be illusory, at least in practice. As Seymour Rubin 1950, 461, puts it, “if the law has been fairly clear, the present practice is not.” Dawson and Burns 1962, 749, are harsher, stating that “appeals to the somewhat metaphysical standard of ‘prompt, adequate and effective’ compensation are not only unrealistic in this setting, but frustrate efforts to achieve at least minimum stability of interaction in a world of violation and radical change.” This said, there is evidence that states did adhere to the full compensation standard before World War I, when expropriations were narrowly targeted. Dawson and Weston 1962, 729-30, offer some telling examples of expropriations from this period: the taking of a British national’s land for the King of Greece’s royal gardens, the seizing of railroad properties in East Africa, and the taking of property of disbanded religious communities. See also White 1961, 246, citing Hertslet 1895, Vol. IX, 948. The gap between the principle and practice of full compensation became immediately apparent in the post-World War II period when Eastern European countries conducted sweeping nationalizations of foreign industries. Between 1945 and 1949, Bulgaria, Czechoslovakia, Hungary, Poland, Romania, and Yugoslavia nationalized a broad range of industries, including mines, financial, and insurance industries. Although the US and the UK reaffirmed that expropriations required full compensation, they accepted lump-sum settlements that fell short of the classical standard. See Doman 1948, 1128 note 11 (citing 16th Department of State Bulletin 1218 1947.
the Hull rule never gained international acceptance or obtained the status of customary international law. I adopt the perspective of powerful states because their view is central for understanding the dynamics of innovating sovereignty-constraining judicial mechanisms, and refer to their legal position that compensation be “just,” (meaning prompt, adequate and effective) as the “traditional” — although clearly contested — rule.

Even though the formal standard was not widely embraced – and perhaps because it was rarely enforced — the “just compensation” standard was relatively uncontroversial until the mid-1960s. During the wave of post-World War II nationalizations in Eastern Europe, for instance, socialist governments did not formally resist the standard, and in some cases, such as in Czechoslovakia, they even supported it, although their lump-sum settlements consistently fell short. A series of expropriations in the 1950s by Egypt, Iran, Indonesia, and Cuba did not threaten the just compensation standard either, even as the expropriating governments did not comply with it. States generally saw the Indonesian and Cuban refusals to compensate as anomalous because the expropriations were in specific retaliation against the states they expropriated. Rather than threatening the just compensation rule, the Egyptian and Iranian expropriations may have

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22 Sornarajah 1986; Guzman 1998.

23 The main exception to this involved nationalizations that targeted property belonging to Germany (or its nationals) or other Axis powers. These expropriations were not compensated. Herman, 1951, 507-509. In the case of the Czechoslovakian expropriations, Nicholas Doman 1948, 1145, writes that “general assurance was given that [it] would provide adequate and effective compensation to nationals of the United States.” See also Herman 1951, 504, note 19 (citing paragraph 7 of the US-Czech agreement, which states that the two governments “will make adequate and effective compensation to nationals of one country with respect to their rights or interests in properties which have been nationalized or requisitioned by the government of the other country.”). Hungary took extensive measures to protect foreigners from its nationalizations, including adopting legislative carve-outs within the nationalization legislation that protect foreign-owned property. Doman 1948, 1153. While these carve-outs were exceptional, other states also sometimes gave preferential treatment to foreigners. Doman 1948, 1141 citing Article 11 of the Hungarian Act of naturalization and Article 6 of the Romanian act. In contrast to the Soviet position, Samuel Herman 1951, 504-05, writes that there was no obligation to provide compensation: “Eastern European countries recognized the legal obligation to pay, but justified the failure to pay on the score of lack of capacity.”

24 The Indonesian expropriations were in response to Netherlands’ refusal to relinquish its claim of sovereignty over West New Guinea. See Akinsanya 1980, 169. The 1959-1960 Cuban expropriation was in retaliation for US reduction of Cuba’s sugar quotas.
contributed to its spread and consolidation; both expropriations attracted European support for the
general rule.\(^{25}\)

Following its formation in the mid-1960s, the G-77 began to resist, cautiously at first, the
classical compensation rule. The G-77 states’ resistance turned eventually into a broader
movement demanding a New International Economic Order (NIEO) that sought to overturn
classical international economic rules. The G-77 emerged in the context of decolonization, with
new states recognizing that political autonomy was no guarantee for economic growth. G-77 states
sought to revise and equalize policies across a broad range of economic issues, including technology,
regulation of foreign businesses, trade, industrialization, foreign aid and debt, commodity
agreements, and natural resources.\(^{26}\) In the area of investment they opposed classical rules
regulating expropriation, including the requirements that expropriation be for a public purpose, non-
discriminatory, and accompanied by full compensation. They held that the grounds that justified
expropriation, the decision to target only foreign-owned industries, and the amount of
compensation should be governed entirely by a state’s domestic law.

The international legal crisis was both \textit{de facto} and \textit{de jure}. In \textit{de facto} terms, capital-importing
states began to engage in large-scale expropriations at an unprecedented rate, and rarely complied
with traditional rules regulating expropriation. Their expropriations targeted foreign rather than
local property and provided, at best, partial compensation. G-77 states also formally opposed
traditional rules regulating expropriation, especially those concerned with compensation. Beginning
in the mid-1960s, they adopted a series of General Assembly (GA) resolutions that became

\(^{25}\) In their respective responses to Egypt’s and Indonesia’s expropriations, France and the Netherlands, for example,
proclaimed the just compensation standard to be international law. White 1961, 143.

\(^{26}\) K. Venkata Raman 1978, 26-48; at a more theoretical level, Gamble and Frankowska 1986, 259, summarize the NIEO
states’ agenda in terms of four broad objectives: (1) increasing their ability to control their “economic destiny,” (2)
increasing their economic growth rate, (3) tripling their share of global production by the year 2000, and (4) narrowing
the gap in per capita income between developing and developed states.
increasingly hostile to international law as the governing authority over foreign investment and natural resources, and culminated in a *de jure* crisis. This formal resistance was both inspired by and overlapped with OPEC’s unwillingness to adhere to traditional market economy rules; it created a full-blown international legal crisis in the 1970s.

The legal and political battles that emerged over the traditional standard of compensation are particularly striking given that the formal and just compensation standard existed more on the books than in practice. Developing countries’ resistance to the legal rule was not simply about reshaping the substantive obligations, but about challenging the very structure of legal authority regulating foreign investment. Put simply, the G-77 campaign aimed to shift rule-making and rule-enforcement authority from the international to the domestic realm.\(^\text{27}\)

To evaluate the argument that expropriations and resistance at the UN posed a *de facto* and *de jure* crisis that moved powerful states to establish investor-state arbitration provisions, I examine observable implications about the timing and content of the creation of hard BITs, as well as the identity of innovators. In terms of timing, the crisis argument expects both the *de facto* and the *de jure* crises to closely precede the period of institutional creation. To evaluate the *de facto* crisis, I examine the expropriation rate. For the *de jure* crisis, I use the UN GA resolutions as an indicator of developing countries’ formal opposition. A second observable implication about timing relates to the international judicial landscape: if the international legal crisis argument is correct, then the innovation of hard BITs will occur when the foreign investment regime lacks compulsory judicial mechanisms.

As I explain below, the crisis argument’s observable implications regarding timing overlap with the credibility argument, and offer only a first step toward deciphering the dynamics of creating

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\(^{27}\) This said, the *de facto* crisis was also important. Even if, as Bodansky 1995 suggests, expropriating states had rarely complied with the traditional compensation rules, the investment regime had never before (or after) experienced such sweeping and widespread violations.
sovereignty-constraining judicial mechanisms. For this reason I turn to the content of the hard BITs and the identity of innovators as providing more distinct, and therefore more useful, observable implications. If the logic of the crisis argument is correct — that capital exporters sought to protect existing customary rules — then hard BITs should reaffirm these rules rather than dilute them.

Also, states that are most susceptible to international legal crisis and lack access to compulsory judicial mechanisms will most likely emerge as innovators. To evaluate susceptibility to crisis, I focus on state involvement — or more precisely nationals’ (individuals and corporate) involvement — in extractive industries, specifically the percent of exports comprised of oil, ores, and minerals. The experience of World War II had underscored for both Europe and the US the importance of oil and other raw materials. Also, expropriations were concentrated in these very sectors.\(^{28}\) Almost a third of all expropriations during the 1970s occurred in extractive industries. The logic of this measure is that states that had high concentrations of exports in raw materials were more likely than others to have both individuals and corporate entities owning large investments in these sectors in foreign countries, and were therefore more likely to experience expropriation.\(^{29}\)

To examine access to compulsory judicial mechanisms, I create a yearly cumulative measure that counts the total number of investment-related treaties that include a compulsory dispute-resolution provision. The central expectation is that states with high susceptibility to expropriation and few treaties with compulsory judicial mechanisms are the most likely to emerge as innovators.

The four observable implications for the crisis argument follow:

(1) Rising expropriation rates and oppositional GA resolutions will closely precede the innovation of investor-state arbitration.

(2) At the time that states introduce investor-state arbitration, the investment regime will lack compulsory judicial mechanisms.

\(^{28}\) Minor 1994, 183.

\(^{29}\) A more valid measure would give a direct assessment of the concentration of domestic investment in foreign extractive industries; unfortunately data for this type of measure are not available.
Hard BITs will reaffirm the traditional investment rules.

Powerful states with high levels of investment in extractive industries and without access to compulsory judicial mechanisms will be innovators.

Transnational Advocacy Networks (TANs)

Transnational Advocacy Networks (TANs) are important for the creation of sovereignty-constraining judicial tools. During the late 1950s a transnational group of investors, bankers, and lawyers, mainly from Continental Europe and the UK, mobilized to strengthen and expand international legal protections for foreign investment. As part of this campaign, they drafted proposals for an investor-state arbitration provision. What I term the “investment TAN” circulated a series of draft multilateral investment conventions, most of which included an investor-state arbitration provision.

To evaluate the role of the investment TAN, I examine two of the three implications discussed in Chapter 2, which speak to the timing and content of innovating costly judicial tools. First, the TAN-based approach expects that TAN mobilization will closely precede the establishment of hard BITs. I use the circulation of the group’s draft conventions as a proxy for TAN mobilization. TAN influence might be conditioned by other TAN-related factors, however. I therefore examine the group’s access to key treaty drafters. Here, the unidirectional view expects that TAN mobilization will closely precede the establishment of hard BITs when TANs have access to treaty drafters; the reciprocal view asks the additional question of why TANs are able to gain access during some treaty drafting episodes and not others. Finally, if TANs are the main drivers of innovation, then they will also influence the substantive content of hard BITs, not just procedural enforcement mechanisms. The three TAN-based propositions follow:

TAN mobilization will closely precede the creation of investor-state arbitration mechanisms.

TAN access to treaty drafters will increase TAN influence promoting investor-state arbitration.
Credible Commitment

The leading explanation for state participation in the BITs regime focuses on the incentives of capital-importing states to signal their credibility to foreign investors; it is compatible with both the crisis and TAN arguments. Although it is clear that developing countries did not invent the investor-state arbitration provision, the credible commitment argument holds that they still played a crucial role. Capital-importing states were more likely during the 1960s and 1970s than at any time before or after to engage in outright expropriations of foreign property. Capital-exporting states were therefore reluctant investors. Capital-importing states needed a new, compelling way to signal their credibility to foreign investors, and thus turned to investor-state arbitration provisions. Without capital importers’ search for new ways to signal their credibility to foreign investors, the creation of investor-state arbitration would not have occurred.

The credible commitment argument leads to two expectations, one about the timing of innovating investor-state arbitration, and the second about the identity of innovators. First, prior to innovation of hard BITs, the expropriation rate should be on the rise. As already noted, this implication overlaps with the crisis argument. It is therefore most useful in discrediting arguments, not affirming or distinguishing them. If the expropriation surge occurs after states have begun to establish hard BITs, then the impetus for their innovation needs to be found not in de facto crises and credibility incentives but elsewhere. In contrast to the crisis explanation the credible commitment argument is unlikely to produce an observable implication about formal legal challenges to the

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30 Yackee 2007 argues that other mechanisms were available and effective, such as adopting national legislation or entering into contracts. Other scholars, however, have contended that investor-state arbitration is the most effective mechanism. Capital-importing states could enact legislation promising to submit to arbitration, but parliaments could easily rescind such legislation. States could also include investor-state arbitration provisions in their contracts with foreign investors; yet contracts can easily be violated as the Suez Canal case made clear.
investment rules. It does offer, however, an alternative logic linking the G-77’s opposition at the UN (the *de jure* crisis) to the establishment of hard BITs: as capital-importers begin to resist the norms of a multilateral regime, they are under increasing pressure to signal their credibility to capital exporters in bilateral settings. Consequently, the crisis and credibility arguments are also indistinguishable here in that both expect mounting formal challenges to the investment regime to precede the innovation of investor-state arbitration.

An analysis of the identity of innovators provides a better route for disentangling whether the creation of hard BITs is driven by the logics of crisis, credibility, or both. In the post-colonial period, two types of states were considered “likely expropriators:” states that were rich in mineral and oil resources and states that had recently gained independence.31 Both of these categories of states had higher expropriation rates than their peers. States with a recent track record of expropriations also appeared to be “likely expropriators.” A credible commitment explanation therefore expects these types of states to be the core innovators.

(8) *The rate of expropriation will be on the rise prior to the creation of investor-state arbitration.*

(9) *States with a high concentration of exports in the extractive industries, newly independent states, and states with recent expropriation track records, will be innovators.*

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Table 3-2: Theoretical Expectations about the Creation of Investor-State Arbitration

<table>
<thead>
<tr>
<th>Timing</th>
<th>Content of hard BITs</th>
<th>Identity of Innovators</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>International Legal Crisis and International Judicial Landscape</strong></td>
<td>Rising expropriation rates and oppositional GA resolutions will closely precede the creation of investor-state arbitration. At the time that states introduce investor-state arbitration provisions, the investment regime will lack compulsory judicial mechanisms.</td>
<td>Hard BITs will reaffirm the traditional investment rules.</td>
</tr>
<tr>
<td><strong>Transnational Advocacy Networks</strong></td>
<td>TAN mobilization will closely precede the introduction of hard BITs. TAN access to treaty drafters will increase TAN influence in promoting hard BITs.</td>
<td>Hard BITs will closely resemble the substantive content of the TAN-proposed treaties.</td>
</tr>
<tr>
<td><strong>Credible Commitment</strong></td>
<td>The rate of expropriation will be on the rise prior to the creation of investor-state arbitration.</td>
<td></td>
</tr>
</tbody>
</table>
ANALYSIS

Timing of Investor-State Arbitration

An analysis of the precise timing of the introduction of hard BITs is consistent with the legal crisis and credibility arguments. It shows that the surge in expropriation rates and the rise in G-77 formal challenges both preceded innovation. And, with respect to the crisis argument, that the judicial landscape was relatively sparse at the time that states created investor-state arbitration. A simple analysis of timing is unable to adjudicate whether crisis or credibility offers the better account or whether they are both relevant. It does, however, expose the unexpected importance of non-compulsory mechanisms for the establishment of compulsory ones. ICSID, proved a crucial though unintended stepping stone. Without the availability of ICSID states would not have begun including investor-state arbitration provisions in BITs. The most important finding on the timing dimension is with respect to TANs, which invented and mobilized behind investor-state provision a decade before states adopted them. This lag in timing suggests that while TANs had a large impact on the creation of investor-state arbitration, they did not influence its precise timing.

Crisis and Credibility. Both the credibility and crisis arguments expect – albeit for different reasons – expropriation rates to surge and formal opposition to increase just prior to the innovation of investor-state arbitration. I discuss expropriation only briefly and then turn to a more extensive analysis of the formal opposition at the UN. Although the 1950s saw some important expropriations, the 1960s marks the opening moment when developing countries began to view expropriations as a viable strategy for acquiring control over local economic sectors and for shaping their future economic growth. Table 3-3 shows the annual expropriation rate rising in the 1960s and peaking between 1970 and 1974 just prior to the first cluster of hard BITs.
Both crisis and credibility thus can explain the innovation of investor-state arbitration in terms of timing. The crisis argument holds that powerful states responded to the wave of expropriations by establishing unprecedented judicial mechanisms that would provide for robust enforcement of traditional rules. The credibility explanation claims that capital-importing states, facing an unprecedented pressure to demonstrate their reliability in a hostile investment climate, turned to investor-state arbitration to do so.

**Table 3-3: Expropriation Rates over Time**

<table>
<thead>
<tr>
<th>Period</th>
<th>Number of Acts</th>
<th>Percentage of Total</th>
<th>Avg. Number Acts/Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>1960-1964</td>
<td>55</td>
<td>9.6</td>
<td>11.0</td>
</tr>
<tr>
<td>1965-1969</td>
<td>81</td>
<td>14.1</td>
<td>16.2</td>
</tr>
<tr>
<td>1970-1974</td>
<td>336</td>
<td>58.4</td>
<td>56.0</td>
</tr>
<tr>
<td>1975-1979</td>
<td>87</td>
<td>15.1</td>
<td>21.8</td>
</tr>
<tr>
<td>1980-1985</td>
<td>15</td>
<td>2.6</td>
<td>2.5</td>
</tr>
<tr>
<td>1986-1992</td>
<td>1</td>
<td>0.2</td>
<td>0.2</td>
</tr>
<tr>
<td><strong>Total (1960-1992)</strong></td>
<td><strong>575</strong></td>
<td><strong>100</strong></td>
<td><strong>17.9</strong></td>
</tr>
</tbody>
</table>

*Source: Minor 1994, 182.*

De Jure and De Facto Crisis. Even prior to the first cluster of expropriations, states began to adopt GA resolutions relating to control over extractive resources. Yet it was not until the mid-1960s, after the first set of expropriations, that initial hints of formal resistance began to emerge. States adopted their first resolutions relating to sovereignty over natural resources in 1952.\(^32\) Introduced by Uruguay and Bolivia, and consisting of two brief paragraphs, the resolution declared the right of states to “freely use and exploit their natural wealth and resources” and called on other states to refrain from interfering with this right. Quite possibly, due to the brevity of this resolution, there is no mention of international law.

\(^{32}\) United Nations General Assembly Resolution 626 (VII), 21 December, 1952.
The next few resolutions reflected NIEO’s receptivity toward international law. In 1958 the GA adopted a resolution establishing a Sovereignty over Natural Resources Commission that would conduct a survey and produce recommendations for bolstering state sovereignty over extractive industries. While sympathetic to developing countries, the general sentiment of the resolution indicated the continuing relevance of traditional international rules. For instance, the resolution directs the Commission to give “due regard . . . to the rights and duties of States under international law. . . .”

While the Commission was conducting its survey in 1960, the GA again emphasized in a new resolution that sovereign rights to natural resources should be consistent with the requirements of international law; it “recommends further that the sovereign right to dispose of its wealth and its natural resources should be respected in conformity with the rights and duties of States under international law.”

Continuing this principled acceptance of international legal authority, states adopted in 1962 the first resolution to fall under the banner of “Permanent Sovereignty over Natural Resources.” While the 1962 Resolution embraced states’ sovereign rights to their natural resources and to regulate foreign investment more generally, it did so within the confines of traditional investment rules. For instance, it acknowledged that treatment of foreign investors should conform to both national and international standards: “In cases where authorization is granted, the capital imported and the earnings of that capital shall be governed by terms thereof, by the national legislation in force, and by international law.”

At this point some states had already begun to challenge the traditional investment regime. This is evident in the resolution’s specific wording regarding compensation. While it reaffirmed that

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33 United Nations General Assembly Resolution 1314 (XIII), 12 December, 1958, paragraph 1.
34 United Nations General Assembly Resolution 1515 (XV), 15 December, 1960, paragraph 5.
expropriations should be motivated by a public purpose, the resolution also stated that this should be accompanied by “[‘appropriate’ (rather than just or full) compensation that is consistent with the requirements of both national and international law].”\textsuperscript{36} The word “appropriate” was the product of a compromise between advocates of and opponents to the “full” international compensation standard. When the US proposed an amendment that clarified the terminology as requiring compensation to be “prompt, adequate, and effective,” some states objected. Socialist states were the most adamant, opposing any reference to international law.\textsuperscript{37} But a few non-socialist states also objected. Madagascar provided the most direct opposition, objecting to the “prompt” requirement, and stating that states should be given time to make payments, since they were usually unable to do so right away. The US and UK ultimately accepted the “appropriate” standard, but the US made a point of stating in its press release that it understood ‘appropriate’ to mean “prompt, adequate and effective.”\textsuperscript{38}

Despite pockets of non-socialist resistance to the traditional investment rules, most states still seemed to view international law as a legitimate authority regulating investment. Even in the example of the “appropriate” word choice, the resolution references both national and international law as relevant sources for determining compensation. As Garcia-Amador writes about the Resolution: “[i]t becomes clear that despite the general and vague language of the Resolution, this 1962 General Assembly declaration . . . reaffirms and incorporates the basic principles of international law.”\textsuperscript{39} While investors and capital-exporting states were, by this point, attuned to the

\begin{footnotes}
\item[37] As Hungary’s representative put it: “Any discussion relating to whether and how much compensation should be paid was essentially an internal affair of the state concerned, which was therefore the sole judge in the matter.” Schwebel 1963, 465.
\item[38] Schwebel 1963, 465, note 15.
\item[39] Garcia-Amador 1980, 23. But see Adede 1977, 183, who evaluates this language differently and views the phrase “in accordance with international law” as a desperate attempt at re-introduction of the traditional idea contained in just compensation.
\end{footnotes}
precariousness of existing rules, they had yet to recognize the extent to which the rules would soon be challenged more strongly.

The G-77 opposition became visible in resolutions that followed the 1962 Declaration. These resolutions increasingly aimed to replace international with national rules. Two years after the G-77 was established in 1966, the General Assembly adopted a resolution that “reaffirm[ed]” the 1962 Resolution but then referred exclusively to national rules in its brief mention of sovereignty over natural resources.\footnote{United Nations General Assembly Resolution 2158 (XXI), 25 November, 1966, paragraph 4 (confirm).} In 1970, the GA adopted another “permanent sovereignty” resolution, this time only “recalling” (i.e., not “reaffirming”) the 1962 Resolution and instead “reaffirming the rights of peoples and nations to permanent sovereignty over their natural wealth and resources.”\footnote{United Nations General Assembly Resolution 2692 (XXV), 11 December, 1970, paragraph 2.} Two years later, in 1972, the GA adopted a resolution that not only remained silent on the authority of international law, but revealed growing hostility towards foreign investors and their home states. It requested that the Secretary-General undertake a study of recent developments on the topic of sovereign control over natural resources, calling for him to take “into account the right of States to exercise permanent sovereignty . . . as well as the factors impeding States from exercising this right.”\footnote{United Nations General Assembly Resolution 3016 (XXVII), 18 December, 1972, paragraph 3.}

In 1973, the General Assembly adopted a resolution on Permanent Sovereignty over Natural Resources that represented its most radical break from traditional rules. Proposed by Algeria, Iraq, and Syria, the resolution echoed closely a resolution adopted by UNCTAD a year earlier.\footnote{Garcia-Amador 1980, 31.} There a group of Latin American countries submitted a resolution that declared that the expropriations of extractive industries are “acts of undeniable sovereignty within the exclusive competence and subject

\begin{itemize}
  \item United Nations General Assembly Resolution 2158 (XXI), 25 November, 1966, paragraph 4 (confirm).
  \item United Nations General Assembly Resolution 2692 (XXV), 11 December, 1970, paragraph 2.
  \item United Nations General Assembly Resolution 3016 (XXVII), 18 December, 1972, paragraph 3.
  \item Garcia-Amador 1980, 31.
\end{itemize}
to the sole decision of the State in which the resources are situated, in conformity with its national Constitution, laws and regulations.” The US representative proposed a series of amendments aimed at reincorporating references to international law and the 1962 Resolution. The UNCTAD draft sponsors agreed to reference the 1962 Resolution, but refused to reference international law more explicitly.

The 1973 GA Resolution went further than the UNCTAD draft. It deleted the reference to the 1962 Resolution and relegated all dispute settlement to the national level – what one scholar notes as a “complete and thoroughgoing abandonment” of the tradition of diplomatic protection.\(^45\) With respect to compensation, the resolution recognized only national rules as relevant for regulating expropriations, including questions about whether compensation should be provided, the amount of compensation, and settling relevant disputes: “[e]ach State is entitled to determine the amount of possible compensation and the mode of payment, and that any dispute which might arise should be settled in accordance with the national legislation of each State carrying out such measures.”\(^46\) Compensation, the resolution makes clear, was to be governed exclusively by national authorities and was no longer considered mandatory.

In 1974 the GA adopted the Charter on Economic Rights and Duties of States.\(^47\) This marks the culmination of the formal resistance to the investment regime and the onset of a full-blown \textit{de jure} crisis, or what one author describes as the “death blow” to the traditional investment rules.\(^48\) The Charter, which Mexico took the lead in drafting, expanded the permanent sovereignty concept to include not just natural resources but all economic activity, as described in Article 2(1):

\(^{44}\) Adede 1977, 185, citing UNCTAD Doc. TD/B/SR.330.

\(^{45}\) Adede 1977, 187.


\(^{47}\) United Nations General Assembly Resolution 3201 (S-VI), 1 May, 1974.

\(^{48}\) García-Amador 1980,
“Every State has and shall freely exercise, full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.” With respect to foreign investment, the Charter recognized the right of each state “to regulate and exercise authority . . . in accordance with its laws and regulations and in conformity with its national objectives and priorities.” As Table 3-4 reveals, the Charter’s departure from the earlier, more accommodating resolutions is striking. It made no mention of international law, including the traditional “public purpose and non-discriminations” requirement. It rendered compensation for expropriation entirely optional, and, if provided, governed exclusively by “national rules and regulations.”
Table 3-4: Resolutions and International Legal Crisis over Time

<table>
<thead>
<tr>
<th>Treatment of Foreign Investment</th>
<th>1962 Permanent Sovereignty Resolution</th>
<th>1974 Charter of Economic Rights and Duties of States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Motivation for expropriation</td>
<td>Both national and international rules apply</td>
<td>Only national rules apply</td>
</tr>
<tr>
<td>Application of expropriation</td>
<td>Must be for a public purpose</td>
<td>No requirements</td>
</tr>
<tr>
<td>Obligation to provide compensation</td>
<td>May not discriminate between nationals and foreigners</td>
<td>May discriminate between nationals and foreign investors</td>
</tr>
<tr>
<td>Standard of compensation</td>
<td>“appropriate” according to “rules in force in the State . . . and in accordance with international law”</td>
<td>“appropriate” taking into “account its [the state’s] relevant laws and regulations and all circumstances that the state considers pertinent.”</td>
</tr>
<tr>
<td>Dispute settlement over compensation</td>
<td>Both national and international rules apply</td>
<td>Only national rules apply</td>
</tr>
</tbody>
</table>

As one Argentinean delegate to the General Assembly put it, developing states were not simply revising the content of legal rules regulating expropriation, but sought “deep changes in the so far existing rules of the game.”

Garcia-Amador echoes this point, stating that the 1974 Charter represented a “complete repudiation of the traditional principles of international law governing compensation as well as other aspects of nationalization . . . not only in the letter but also in the spirit.”

At the time that the G-77 was formally challenging the investment regime at the UN and states were turning to investor-state arbitration, the international judicial landscape was – as the crisis argument expects – sparse. The only multilateral treaty that contained a compulsory dispute-settlement mechanism in the early 1970s was the optional clause of the ICJ Statute, in which states

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49 For a careful parsing of this language, see Garcia-Amador 1980.

50 Piper 1978, 293 and 303.

could voluntarily declare their acceptance of the Court’s compulsory jurisdiction. The ICJ would have been unlikely to inhibit the creation of hard BITs, however. The relative share of likely expropriators that had accepted the court’s compulsory jurisdiction was quite low. Only one-third of newly independent states had accepted the court’s automatic jurisdiction immediately prior to the crisis. In 1969, when the first hard BIT was established, 44 of 122 UN members had accepted the Court’s compulsory jurisdiction. Eight of twenty-three states that had gained independence since 1960, for instance, were among these acceptors. The two expropriation cases that the ICJ heard, moreover, underscored that the court was reluctant to intervene in such disputes.

At the bilateral level, a handful of capital-exporting states after World War II began to sign treaties that contained investment-related provisions, either Friendship Commerce and Navigation treaties (FCNs), which regulated investment along with other issues or, beginning in 1959, BITs. Both sets of treaties contained inter-state dispute-settlement clauses that granted compulsory jurisdiction to the ICJ. These treaties, however, were too few in number and limited in access to discourage the innovation of investor-state arbitration. By the late 1960s only four states had arguably developed significant treaty programs that contained provisions granting the ICJ

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52 Other multilateral treaties existed, such as the 1899 Hague Convention establishing the Permanent Court of Arbitration, but none of them provided for compulsory jurisdiction. They too would therefore not have discouraged states from creating a sovereignty-constraining judicial mechanism.


55 In the Anglo-Iranian Oil Co. case, the ICJ declined jurisdiction on grounds that Iran had not consented. Anglo-Iranian Oil Co. 1952. In Barcelona Traction, the ICJ declined jurisdiction on grounds that Belgium lacked standing. Barcelona Traction, Light and Power Company 1970. Regardless of whether these were the legally correct decisions, state officials viewed the ICJ refusal to hear the merits of the cases as strategic: the ICJ did not want to become entangled in such deeply divisive political and legal questions.

56 Although technically some interwar arbitration treaties “carried” over to the postwar era (and contained compulsory jurisdiction provisions), I have not encountered a single reference to them – by legal scholars, by transnational actors, or policy makers. For this reason, I believe that they were considered irrelevant, and I do not include them in this discussion.
jurisdiction: Germany and Switzerland, and, to a lesser extent, Japan and the US. The remaining states had minimal or no access to dispute-settlement mechanisms. The absence of compulsory mechanisms meant that states were primed for engaging in more far-reaching institutional change at the time of the legal crisis.

Although the crisis argument overlooks it, another feature of the international judicial landscape was also important: the *ad hoc* availability of the ICSID forum. ICSID proved to be an important, unintended stepping stone to the establishment of investor-state arbitration provisions in BITs. At the time that they created it, World Bank officials expected that states would grant ICSID jurisdiction through contracts, on a case by case basis, and not by treaty. Yet, it was the availability of ICSID that led states to view the unprecedented empowerment of private actors in treaties as not simply desirable but both conceivable and feasible.

In brief, an analysis of expropriations, the G-77’s formal challenges to the investment regime, and the judicial landscape provides considerable support for the crisis argument: expropriations and opposition at the UN preceded the innovation of investor-state arbitration and occurred when the judicial landscape was relatively empty. This said, the credible commitment argument also expects expropriations to precede the innovation of hard BITs. And it can use a credibility logic to explain how the G-77’s formal challenges inspired the creation of investor-state arbitration. With respect to the timing dimension, then, both arguments offer plausible accounts of the creation of investor-state arbitration provisions.

The preceding analysis raises two questions, the first applies to the crisis argument and the second is relevant for both explanations. First, why do powerful countries engage in innovation in response to some international legal crises but not others? The G-77 opposition of the 1960s was not, after all, the first time that traditional investment rules had been challenged. Russia between 1917 and 1920 and Mexico in the late 1930s had similarly rejected, both *de jure* and *de facto,*
investment rules governing expropriation. Eastern European states had expropriated foreign-owned property on a massive scale immediately after World War II, which led to a de facto international legal crisis. Why did the Russian, Mexican, and Eastern European cases not similarly motivate powerful states to engage in the creation of some form of sovereignty-constraining judicial tool?

One answer is simple; these earlier expropriations did not create international legal crises. Although the US and the UK appeared to have employed the just compensation standard at the international level, I have found no evidence that continental European states endorsed this standard before the mid-1950s. Legal rules governing expropriation simply did not exist at the global level during these years. Instead, legal rules developed only incrementally in response to these events. The Russian and Mexican expropriations inspired the US and UK to adopt fully the just compensation standard, while the Eastern European expropriations probably helped entrench the just compensation standard in Europe.

The second answer is compatible with the first, but highlights the important role of TANs, analyzed in more detail below. Even if the just compensation rule existed, innovation of investor-state arbitration would not have occurred because the TANs that invented new-style judicial mechanisms emerged only in the late 1950s. Without the invention and mobilization of transnational actors, states will respond to crises by creating traditional rather than new types of institutions. Indeed, following both the Russian and Eastern European nationalizations, the US moved to codify the just compensation rule in bilateral FCN treaties. The motive to strengthen existing rules was there, even though the means were different.

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57 Russia rejected the compensation requirement altogether, contending that property belonged to the state. Mexico, under the Calvo doctrine, rejected the applicability of international rules, including the espousal tradition of diplomatic protection, containing that only local officials had the authority to settle disputes related to expropriation. U.S. Congress 1963, 8-12.
The second question pertains to the continued adoption of investor-state arbitration provisions, even after the *de facto* and *de jure* crises and the acute need to signal credibility had passed.\(^{58}\) Here too, there are at least two explanations. First, although the number of outright expropriations began to decline sharply, they still occurred, albeit “more suavely than in the past,” as Detlev Vagts put it.\(^{59}\) Rather than rely on overt seizures of property, developing countries began to turn to more subtle measures, such as forcing sales, raising tax rates, and revoking operating licenses.\(^{60}\) Second, BITs may have assumed lives of their own. While international legal crisis or the surge in expropriations was needed to launch the creation of investor-state arbitration, once states began to incorporate the new enforcement mechanisms, they viewed them as useful and continued to incorporate them.

\(^{58}\) After the adoption of the Charter of Economic Rights and Duties of States, the G-77 states’ hostility began to decline and their focus shifted away from the issue of natural resources. The 1975 Lima Declaration, adopted by the Second Conference of the UN Industrial Development Organization, reflected this shift, and signaled the G-77’s growing attention to pragmatic and concrete economic goals. The Declaration focused primarily on industrialization and setting clear pro-development policy goals, such as promoting developing countries’ production so that it would constitute twenty-five percent of world output by the year 2000. The three Lomé Conventions (adopted in 1975, 1980, and 1985), regulating both trade and development aid, also reflected a turn away from concerns about state sovereignty and nationalizations. Concluded by the then-European Economic Community (EEC) and a group of African, Caribbean, and Pacific countries, the Conventions differed from the GA resolutions and NIEO Charter in that they focused on adopting clear policies to encourage trade and advance economic development in developing countries and not on eliminating or replacing the rules governing the international economy. Gamble and Frankowska 1986, 274, note 69. The first Convention provided for developing countries to export mineral and agricultural products to EEC countries free of any tariffs, and called on the EEC to commit three billion dollars of aid and investment. The second and third Conventions were more elaborate, outlining EEC financing of different development activities across a variety of issue areas, such as exports of commodities, extractive mining, industrial and agricultural cooperation, and financial and technical cooperation. In each of these areas, the Convention allocated specific funds to cover European aid commitments. As Gamble and Frankowska 1986, 274, write, the Conventions “obligate a large number of states to concrete NIEO-relevant conduct; the obligations are both firm and tangible.”

\(^{59}\) Vagts 1978, 17.

\(^{60}\) For a helpful survey of cases involving indirect (including creeping) expropriations, both before and under BITs, see Schreuer 2006. Already in the 1970s, investors were noting that their primary concern with developing countries was indirect, not direct expropriations. Interpreting the results of two polls of overseas investors, both of which indicated the decreasing concern about outright nationalizations, Rodman 1988, 94, writes “[t]he real threats to overseas operations came from other regulations in which the host state expropriates the profit rather than the property.” Thus, while outright expropriations nearly disappeared by the 1980s, the incentives of capital-importers to signal their credibility persisted.
TAN Mobilization. The TAN approach expects the mobilization of the TAN, lawyers, and investors from the UK and continental Europe to closely precede the timing of innovation of hard BITs; it receives little support in the following analysis. While TANs invented the investor-state mechanism, they did not determine whether and when states would adopt it. The first campaign for a multilateral treaty that contained an investor-state arbitration provision began in 1957, when the Abs group (a German group of bankers headed by the prominent Deutsche Bank chairman Herman Abs) released its inaugural draft investment treaty.\(^{61}\) The draft treaty granted investors a range of substantive rights, some of which were unprecedented in scope, such as a non-discrimination in establishment provision (requiring capital importers to accept all foreign investment) and a prohibition on expropriation for 30 years except during severe emergencies.\(^{62}\)

It also granted investors sweeping enforcement power, surpassing any proposal or resolution that had preceded it, and any treaty that has since been proposed. It called for the establishment of an independent international court in which both states and their nationals would have standing to bring claims against capital-importing governments; it required that the proposed Convention be given precedence over any conflicting national law, and be granted full effect by national courts; and it gave investors the right to choose the forum for litigation (national, foreign or international courts), without any requirement to first exhaust foreign remedies. Finally, the proposed Abs Convention called for the establishment of an international arbitration committee to decide compensation-related issues.\(^{63}\)

\(^{61}\) The convention received significant international attention when it was released. Miller 1959, 374, note 10. Other international private organizations had called for an investment code, but none of them proposed an investor-state arbitration provision. Two privately drafted Conventions proposed prior to the investment protection group’s original 1957 draft were the International Law Association’s 1948 Draft Statutes of the Arbitral Tribunal for Foreign Investment and the Foreign Investment Court and the International Chamber of Commerce’s 1949 International Code of Fair Treatment for Foreign Investments. Neither of these conventions included a mandatory investor-state arbitration provision.


\(^{63}\) Although its inclusion of an \textit{ex ante} compulsory investor-state arbitration provision as well as an international court provision was an undeniably radical break from the classical international law model, the Abs group made little of it. In
Soon after releasing its proposed treaty, the Abs group formed alliances across Continental Europe and with lawyers and bankers in the UK to promote the idea of a multilateral investment convention. In 1958, for instance, the Abs group and a group of Swiss bankers decided to collaborate on the issue. They named themselves the “International Association for the Promotion and Protection of Investment,” (APPI) and registered the organization in Geneva. They worked on multiple fronts, with the Swiss side focusing on drafting an international agreement on investment guarantees, and the Abs side continuing its efforts at gaining support for the idea of a multilateral investment treaty.

One manifestation of the continued Abs effort was the call by the European League for Economic Cooperation (ELEC) for a regional treaty in which the then six EEC members would adhere to a common policy on protecting foreign investment. In the introductory text to their proposal, the authors stated that the Convention should be founded on two principles: freedom to contract and compulsory recourse to conciliation and arbitration. Elaborating on a model first proposed (and termed) by Abs as the “Solidarity Convention,” the ELEC envisioned a Convention encompassing provisions such as full indemnification in case of expropriation, national treatment, freedom of transfer of earnings, and the elimination of local content requirements. The six states would adhere to these standards and then appeal to other capital-exporting countries to join their concerted effort. The convention would serve as, in the ELEC words, “an instrument of pressure

the commentary attached to the convention, the treaty drafters downplayed the change: “[i]t is an article implies a change against the general principles of international law. International law generally only applies between sovereign states . . . as a rule, only sovereign states, not individual persons, are the subjects of international law.” Convention for Protection of Mutual Private Property, 61.

64 European League for Economic Cooperation, Common Protection for Private International Investments 1958. Abs, who served as chairman of the German branch of the ELEC, had recommended that the group appoint a committee to draft a proposed convention. Comprised both of economic advisors to national banks (from France, Belgium, and Germany) and professors (from the Netherlands, the UK, Spain, France and Belgium), the committee released a report detailing its vision of such a convention, but without proposing specific treaty text.
for inducing third countries to accept ICC fair treatment provisions.” In terms of enforcement, the authors of the report called for an investor-state arbitration provision to be incorporated into the treaty or included in an annex to the Convention. Investors would not be required to exhaust foreign remedies, which, the drafters explained, would reduce waiting time for resolving the dispute and ensure third party neutrality.

Although the Abs vision of sweeping investor protections dominated the investment protection group’s campaign, a few other organizations offered more modest investment treaty proposals. For example, a group of British lawyers, headed by Hartley Shawcross, one of the chief British prosecutors at the Nuremberg Trials as well as the lawyer for the British government in the 1952 Anglo-Iranian Oil case, released a more conservative draft of an international investment treaty. The so-called Shawcross Convention consisted of six brief articles. It granted the ICJ jurisdiction over disputes, but did not include an investor-state arbitration provision.

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66 The text is ambiguous as to whether the drafters viewed arbitration as optional. The authors state that each state “would undertake to submit to disputes arising with investors” rather than simply proposing that states would “submit to disputes,” a distinction that would lead to significantly different legal obligations. Yet, this may have been an oversight, or the authors may have implicitly assumed that arbitration would be compulsory.

67 Common Protection for Private International Investments 1958. The envisioned treaty was most radical in its provisions regarding state response to violations. The drafters proposed an extensive set of punitive measures, including state refusals to grant the violating state new loans and state efforts to persuade or mandate that their investors and banks “blacklist” the violating state, withholding future investment or credit. The treaty would require member states to adopt a unitary policy of retaliation, and apply them against all violators, even states that had not signed the Convention. While the 1957 Abs Convention established the high watermark for granting investors sweeping legal authority against host states, the 1959 Solidarity Convention set the high bar for punitive action against treaty violators. Fatouros 1961, 89.

68 Although the investment protection group was the main transnational advocacy group mobilized on the investment protection issue, the International Law Association, an international non-governmental organization with consultative status at the UN, also took up the cause. In 1960, the ILA released a draft convention establishing a foreign investment court modeled after the ICJ, but open to private parties. The Committee that drafted the statute dropped the proposal in favor of a proposed arbitration tribunal. It released a draft proposal for an arbitration tribunal in 1961, but the organization never formally adopted it. Young 1965. The International Bar Association also endorsed the idea of a foreign investment court in 1962 that would include a provision for mixed-arbitration. But it never released a proposal for a draft Convention. For more information, see Nwogugu 1965, 257, 376.

69 For summary and excerpts of Convention, see Brandon 1959, 12-15.
In 1959 the Abs and Shawcross groups joined forces in a final effort to propose a Convention, referred to as the Abs-Shawcross Convention on Investment Abroad. This draft proved to be the most important for two reasons. First, Germany agreed to submit it for consideration to the OECD (at that time called the OEEC) in 1959. Second, it struck a middle ground between the extensive protections envisioned by the Abs model and the modest ones proposed by Shawcross. Most relevantly, the Abs-Shawcross draft placed the investor-state arbitration provision in an optional protocol, giving the states the option of submitting only to the substantive component of the treaty. The group used this maneuver, which I refer to as the “splitting strategy,” on the logic that states might be willing to adopt the substantive obligations if they were not accompanied by radical enforcement mechanisms. After states accepted the substantive rules, the Abs-Shawcross group must have calculated, states might also, eventually, agree to the innovative enforcement mechanisms.

70 The text of this Convention is printed in the Journal of Public Law, Volume 9, 1960, 116.

71 Nonetheless some legal academics still considered the Convention deeply biased toward investor interests. In the words of one critical scholar, the treaty read “like a statement of banker’s terms sought to be elevated to the dignity of law.” Snyder 1963, 1112, citing Proehl 1960, 362.
Table 3-5: Draft Conventions Proposed by the Investment TAN

<table>
<thead>
<tr>
<th>TAN group</th>
<th>Proposed Treaty</th>
<th>Nature of proposed enforcement mechanism</th>
</tr>
</thead>
<tbody>
<tr>
<td>1957 Germany Society to Advance the Protection of Foreign Investment (Abs group)</td>
<td>International Convention for the Mutual Protection of Private Property in Foreign Courts</td>
<td>Private standing in any court (domestic or foreign) against foreign governments; private standing in an international foreign investment court; mandatory investor-state arbitration provision for disputes about compensation.</td>
</tr>
<tr>
<td>1958 European League for Economic Cooperation (ELEC)</td>
<td>Solidarity Convention</td>
<td>Optional investor-state arbitration provision.</td>
</tr>
<tr>
<td>1958 Lord Shawcross and British lawyers group (Shawcross group)</td>
<td>Convention on Foreign Investment</td>
<td>No investor-state arbitration provision; treaty contained an inter-state dispute resolution provision granting jurisdiction to the ICJ.</td>
</tr>
</tbody>
</table>

While the investment TAN was crucial to the establishment of investor-state arbitration— it invented the mechanism — its influence on the timing of innovation was weak. The groups mobilized between 1957 and 1959, yet states did not begin to adopt the mechanisms until a decade later, once the legal crisis set in.

*The Irrelevance of Access.* The TAN approach might be able to explain the lack of a close chronological link between TAN mobilization and the creation of hard BITs in terms of the group’s access to treaty drafters. If it is the case that TAN’s ability to influence treaty drafting is conditional on access to treaty-making organizations, then the possibility remains that TANs are the driving force behind innovation when they have institutional access, making other factors, such as international legal crisis, potentially superfluous. In contrast to the reciprocal approach, the
unidirectional approach to access tends to slight the question of why TANs have access in some instances but not others.

During the late 1950s and 1960s the investment TAN had indirect access to OECD members and possibly direct access as well, yet it was unable to persuade the organization to host negotiations, much less adopt a treaty. Germany’s willingness to submit the Abs-Shawcross Draft Convention to the OECD provides evidence of an indirect channel of influence; without German sponsorship, it is unlikely that the OECD would have taken the initiative to draft a Convention on its own. It is also likely that the investment protection group enjoyed direct access to the OECD as a “corporate-friendly” forum. As Stephen Tully points out, corporations are granted an advisory status at OECD meetings, and OECD members are required to consider their submissions.\textsuperscript{72}

Despite these different avenues of TAN access, the OECD resisted the establishment of investor-state arbitration. This is evident not only in the abandonment of its draft convention in 1967, but in the nature of the draft itself. The OECD draft imposed two significant constraints on investors’ use of the arbitration provisions. First, it required that, before proceeding with their claims, investors request their governments to initiate on their behalf a claim against the violating state. Unless their government declared that they would not do so, the draft required investors to wait six months before filing their claims independently. Second, the draft allowed governments to file their own claims against the defendant state at any point, even after the investor had initiated arbitration. This provision would have had the effect of suspending the investor’s proceedings. The OECD included these constraints in order to ensure that states retained ultimate control over treaty

\textsuperscript{72} Tully 2000, 318.
enforcement and dispute settlement. Despite significant criticisms these constraints were retained in a second draft.\textsuperscript{73}

In contrast to their experience at the OECD, the investment TAN had no apparent access to treaty drafters at the World Bank, which was assigned the task of drafting the ICSID Convention. This was the result of the World Bank’s strategic decision to insulate itself from external pressures. The Bank adopted a two-pronged strategy, ensuring that the drafting process would remain both fragmented and confidential. First, rather than hold standard treaty negotiations – which are open and international — Bank officials held a series of regional meetings between 1963 and 1964 with legal experts – not government representatives — to solicit views on a proposed draft convention. This allowed Bank officials to prevent a negotiation deadlock; capital exporters could not dominate the negotiation process and capital importers would see no reason to walk out. Second, the World Bank kept the drafting process confidential until after the Board had adopted the treaty’s text. The notes of the meetings with regional experts, for example, were not released until after the Convention had been adopted and entered into force.\textsuperscript{74}

This brief juxtaposition of the OECD and World Bank suggests that the lack of TAN influence on the timing of the innovation of hard BITs cannot be explained by variation in TAN access: although TANs had greater access to OECD treaty drafters, they were no more successful in influencing innovation there than at the World Bank. Rather, OECD states acted as gatekeepers,

\textsuperscript{73} Many investors endorsed the draft Convention. For a brief mention of such endorsements, see Rights and Duties 1965, 413. But investors also expressed concerns about some provisions, particularly with respect to OECD’s decision to make the investor-state arbitration provision optional. \textit{Rights and Duties of Private Investors} (1965), 416 (stating that Council of Europe, American Bar Association the ICC and BIAC also expressed concern or criticism). The BIAC and Council of Europe proposed specific changes to the draft, some of which attempted to secure investor autonomy from their own governments for dispute settlement. \textit{Rights and Duties of Private Investors} 1965, 416. For instance, the BIAC proposal limited the OECD governments’ ability intervene in arbitration disputes after a certain period of time. But the OECD was not responsive; the 1967 Convention contained none of the proposed revisions. This is particularly striking given that the OECD was not committing to hosting negotiations; such revisions would therefore have been basically symbolic. The OECD in 1966 did ask the World Bank if it would consider using the treaty to build on investment protections, but the World Bank declined. Nelson and Rubin 1985, 77.

\textsuperscript{74} Broches 1966, 273, fn 2.
initially granting TANs organizational access, and then closing the door to the TAN campaign and abandoning the multilateral effort.

Given their blanket failure in securing a multilateral convention, the question arises: what triggers TAN mobilization in the first place and why do TANs push for some innovative mechanisms but not others? In the case of investor-state arbitration, the transnational investors and lawyers were initially responding to the painful experience of expropriations. German investors, for instance, had lost all of their property in the Eastern European nationalizations without any compensation. British lawyers and investors responded to Egypt’s shutting down of the Suez Canal, and the unwillingness of the ICJ to assert jurisdiction over subsequent legal claims. Although these events did not qualify as international legal crisis, they were costly enough to trigger investors’ search for new substantive and procedural legal protections. For reasons of efficacy and efficiency TANs preferred investor-state arbitration over other options such as a foreign investment court.

In the commentary to the original Abs Convention, for instance, the treaty drafters highlighted two key challenges of adjudication. Foreign courts would be biased. And the ICJ was ill-equipped to

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75 Other factors also influence TAN mobilization of course, such as the ideological and normative context, and the role of individual actors.

76 Herman 1951, 507-509.

77 As early as 1960 members of the International Law Association (ILA) noted the inefficacy of the ICJ as a forum for settling investment disputes. Although the international legal crisis had not yet set in, following Iran’s expropriation of AIOC and the Suez Canal expropriation, ILA members were acutely aware of the fact that judicial routes to resolving disputes were effectively non-existent. The British representative, Elihu Lauterpacht, highlighted the deficiency of the ICJ in protecting existing investment rules. In response to Russian Professor Khalfin’s claim that an international investment tribunal would be unnecessary since the ICJ could adjudicate investment-related disputes, Lauterpacht put it this way: “After all, every major taking of property since the Second World War - in Iran, Egypt, Cuba and Indonesia - has raised questions particularly appropriate for judicial settlement, and it is improbable that the jurisdiction of the Court would not have been involved it if had existed. The trouble is that though the procedures are available, relatively few States have accepted the Court’s jurisdiction in terms which cover the situation now under consideration. It is for this reason that we should perhaps treat with some reserve the observation made by Professor Khalfina to the effect that the existing structure is adequate. It might be adequate if it were given an appropriate opportunity to function, but that opportunity is rarely provided in this context.” Forty-ninth International Law Association Representative Conference 175 1960, 201.
“adjudicate the great number of litigations that are to be expected.”\textsuperscript{78} Arbitration, they claimed, would be better able to manage effectively the anticipated surge of investment-related claims. Likewise, TANs justified the elimination of a local exhaustion requirement (in which claimants were first obliged to advance their claim in foreign courts) in similarly functional terms. Because of the likely delays in litigation such a requirement would render investment protection “illusory.”\textsuperscript{79}

Furthermore, investment TANs selected mechanisms that state officials would be willing to adopt – nothing too constraining of sovereignty. As the reciprocal approach expects, TANs tailored their proposals to state interests. For instance, the Abs-Shawcross group dropped Abs’s proposal giving investors the choice of any forum, most likely because they expected that states would refuse to grant investors such sweeping legal authority. Similarly, in an effort to increase the likelihood that states would incorporate its provisions into treaties, the Abs-Shawcross group “split” the investor-state arbitration provision from the rest of this treaty. This type of strategic catering to state preferences suggests that the reciprocal TAN approach is more useful than the unidirectional one for understanding the role of TANs in the creation of hard BITs.

Another question makes us inquire into powerful states’ resistance to the TAN proposal for investor-state arbitration, particularly at the OECD where states imposed dual constraints on the provision. The sheer novelty of transferring final legal authority over investment disputes to private actors helps explain state reluctance.\textsuperscript{80} More importantly, the OECD’s reluctance to embrace the

\textsuperscript{78} \textit{Convention for Protection of Mutual Private Property}.

\textsuperscript{79} \textit{Convention for Protection of Mutual Private Property}.

\textsuperscript{80} As one author writes, “it can be readily seen that the drafters of this [investor-state arbitration] article wrestled with the traditional view that only states should proceed against state.” \textit{Rights and Duties of Private Investors Abroad}, 416. Another legal scholar, M.J. Boas, notes “one cannot help having the impression that authors of the Draft Convention were favorably inclined to this proposition [of private standing], but became fixed in traditional conceptions.” Boas 1963, 274.
proposed multilateral convention can be attributed to US opposition. For instance, when the OECD took over from the OEEC in 1960, US government representatives suggested that it drop the multilateral investment treaty project altogether. Bilateral treaties, the US argued, provide a more practical route for protecting foreign investment. In the words of one State Department official:

Efforts at general uniform arrangements tend to break down over the difference among individual countries and their varying legal systems and economies. Consequently, bilateral negotiations, during which adjustments can be made to take care of individual differences, may be expected to produce the best results as far as United States interests are concerned.

With its market power and political leverage the US government probably calculated that it would be better positioned to obtain strong investor protections on a bilateral basis. It was also unwilling, amidst the Cold War, to spend political capital corralling reluctant developing countries to join a treaty that they would likely resent, despite TAN pressure. In 1958, for example, the US cautioned that efforts to establish a treaty could backfire, inciting developing countries to become more assertive in claiming sovereignty over foreign-owned industries.

81 Although US opposition to a multilateral convention does not necessarily imply opposition to the investor-state arbitration provision, the two issues in this context were closely linked; both pushed the legal status quo in a pro-investor direction. See also, letter from State Department official cited in Rights and Duties of Private Investors Abroad 1965, 414, n. 36.

82 Rights and Duties of Private Investors Abroad 1965, 412.

83 Metzger 1960, 143. See also Snyder 1963, 1098, n. 46.

84 US reluctance at points transformed into outright refusal to prioritize investor interests over foreign policy concerns. In a dispute between the US company Aramco Oil and Saudi Arabia in the early 1950s, for instance, the US executive refused to push the Aramco line demanding compensation for Saudi Arabia’s new taxation policy. In a State Department memo, a government official explained that confronting the Saudi government was politically too costly. The US, the memo emphasized, needed to protect its security interest in both maintaining access to Saudi oil and in not inflaming pro-communist sentiments within the country by taking Aramco’s side. Rodman 1988, 145. Without executive support, Aramco was weakly positioned to continue to challenge the Saudi Arabian government and it consequently backed down. Rodman 1988, 147. Another example is a case involving expropriation claims between the US public utility company ITT and Brazil; President Kennedy refused investors’ demands that foreign aid to Brazil be suspended until full compensation was secured. Rodman 1988, 173.

85 Metzger 1960, 144. For more on US opposition to the multilateral treaty idea, see Nwogugu 1965, 157. The US government changed its position and announced support for the OECD treaty in 1963, probably due to lobbying by business groups. But already by 1964, it began to backtrack. See Ketcham 1965, 415-417.
To summarize, the TAN analysis reveals two important points. First, supporting the reciprocal view, the ability of TANs to influence the establishment of innovative treaties depends greatly on the interests states have in creating an innovative treaty in the first place. States ultimately decide whether to invite TANs into the treaty drafting process, and whether to make use of TAN proposals, modify them, or let them languish. Second, powerful states’ interest in establishing sovereignty constraining tools is not uniform. US opposition to the multilateral convention diverged from the European position and was shaped by its hegemonic status and the Cold War context.

Content of Hard BITs

An analysis of the substance of innovative treaties shows that, in line with the legal crisis argument, innovative BITs reaffirmed some of the traditional investment rules, including the “just compensation” rule. The investment TANs influenced the content of innovative BITs as well, specifically their most expansive, and now controversial, investor protections. Anecdotal evidence from the US and UK governments is consistent with this analysis and suggests that treaty drafters were concerned with both reaffirming traditional investment rules and responding to investor pressure.

To identify the sources influencing treaty content, I compare the consistency of the substantive treaty provisions in the 1970s innovative (or “hard”) BITs with two prior sources: investment rules under traditional customary international law and the Abs-Shawcross Convention. To reduce the possibility of spurious correlation, I examine also the potential influence of the post-WWII US Friendship Commerce and Navigation (FCN) treaties and the 1962 OECD Draft Convention. I focus first on the expropriation provision since this was a focal point of G-77 resistance, and then analyze the other substantive provisions.

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86 This allows me to evaluate the possibility that consistency between customary law and innovative BITs or between the Abs-Shawcross Convention and innovative BITs is being driven by other legal sources.
Table 3-6 shows that innovative BITs generally codified the traditional customary rule that expropriation should be for a public purpose, non-discriminatory and accompanied by just or full compensation. In its 1976 treaty with Malta, for example, France called for adequate compensation, which it defined as the “real value” of the property on the day of expropriation. Belgium and the UK similarly included full compensation provisions in their treaties. This consistency with the traditional rules does not necessarily affirm the crisis argument, however, since the Abs-Shawcross Draft Convention and the modern US FCNs also endorsed the just compensation standard. It is possible that states were motivated not by the incentive to strengthen existing rules (as claimed by the international legal crisis argument) but by pressure from the TAN groups or by US precedent.

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87 Countries varied somewhat in their specific terminology, but they overwhelmingly specified that compensation should be for the “the actual value,” “market value,” or “full value” – all considered to be equivalent terms – of the property immediately prior to expropriation. See Bring 1980, 117 who writes that “the same meaning is often given to the expressions 'full', 'fair' or 'just' compensation – some have specified market value.” Bring distinguishes these from “book value” or “updated book value,” which do not provide for discounted future value of concessions or intangible assets. (Bring 1980, 109). The 1967 OECD Draft Convention called for “just compensation” which it defined as the “genuine value” of the property affected. In commentary to the Convention, the treaty drafters noted that this would constitute “fair market value” and in certain cases may include lost profits. Muller 1981, 43. Preiswerk 1967, 191, disagrees, writing that the OECD “just” compensation standard is less demanding than the “full compensation” standard that some states subsequently incorporated into their bilateral treaties.

88 In its 1974 treaty with South Korea, Belgium called for full compensation, which it, too, defined as the actual value of the expropriated property. The UK in its 1975 treaty with Singapore called for prompt, adequate and effective compensation, which it stated meant the “market value” of the investment expropriated.

89 While US FCNs did not elaborate on the compensation standard, the Abs-Shawcross Convention stated that adequate compensation consisted of “the genuine value of the property affected.”
Table 3-6: Content of Hard BITs

<table>
<thead>
<tr>
<th></th>
<th>“Just” or “Full” Compensation</th>
<th>Freedom of Transfer</th>
<th>MFN/National Treatment</th>
<th>Indirect Taking</th>
<th>Umbrella Clause</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hard BITs*</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Potential Sources of Influence</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Customary international law</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Abs-Shawcross (1959) (the TAN argument)</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>OECD Convention (1962)</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>US post-war FCNs</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>

*Not every hard BIT included each provision, so this category should be understood as reflecting the content of the categories described as a whole.

A comparison of the other four substantive BIT provisions shows that states were influenced by multiple legal sources, and that their motivations in crafting BITs cannot be reduced to a single source. First, BITs dramatically expanded investor protections regarding expropriation in one key respect: they broadened the definition of expropriation to cover “indirect takings,” which are acts through which states intervene in the use of foreign property, but do not attempt to claim title to it. This more expansive definition of expropriation had neither been a part of customary law nor included in the US postwar FCN treaties. Instead, as Table 3-6 shows, it can be traced to Article 2 of the Abs-Shawcross Convention, and thus attests to the TAN influence over the substantive content of hard BITs.  

90 That TANs similarly influenced the substantive content of soft BITs, while unable to persuade states to include investor-state arbitration provisions, is consistent with their influence over hard BITs and not in tension with the TAN argument.
In a similarly sharp departure from customary international law and US FCNs, many of the innovative BITs in the 1970s contained an “umbrella clause,” which required capital-importers not only to comply with their BIT’s obligations, but also to uphold all contracts they had entered into with nationals of their BIT partner. The umbrella clause was particularly radical since it effectively grants investor standing for breaches of contract, even when states had upheld their treaty obligations. This provision can be traced to Article 3 of the Abs-Shawcross Convention.

Importantly, states’ decisions to incorporate unprecedented, expansive investor protection was not conditional on international legal crisis; states included them in soft BITs before the onset of the legal crisis.\footnote{For instance, Article 7 of the 1962 BIT between Switzerland and Niger covers both direct and indirect expropriation. Article 8 of the 1963 BIT between Germany and Malaysia contains an umbrella clause.} This contrasts with their willingness to include investor-state arbitration provision in the treaties only after the crisis began. The distinction suggests that international legal crisis is needed for the innovation of sovereignty-constraining judicial tools, but not for the creation of new types of substantive obligations.

BITs signed in the 1970s also contained Most Favored Nation (MFN) and “freedom of transfer” provisions, neither of which had been part of customary international law. The freedom of transfer provision allowed investors to transfer investment-related funds outside the host country. MFN required the capital-importing state to give equal treatment to foreign investors from different countries. These two provisions appear to have been taken from the post-war US FCN treaties.\footnote{The MFN in the post war US FCNs usually pertained to trade. For instance, the US FCN with Iran (signed in 1955) states in Article IX (2): “Nationals and companies of either high contracting party shall be accorded treatment no less favorable than that accorded nationals and companies of the other high contracting party, or of any third country, with respect to all matters relating to importation and exportation.” 284 UNTS 93 1957-1958.} The treaty comparison therefore does not offer unequivocal support for the argument that powerful states wanted to reaffirm traditional, customary rules. It instead indicates that states, in drafting
innovative BITs, were influenced by multiple factors: crisis, including TAN mobilization, and US precedent.

An analysis of the US and UK programs further suggests that treaty drafters sought both to strengthen customary rules as well as respond to investor pressure. This dual motivation is discussed by former State Department official Kenneth Vandevelde, who helped negotiate US BITs during the 1980s. In his authoritative analysis of US policy, Vandevelde recognizes that domestic politics mattered, but then writes that BITs were primarily motivated by legal concerns – the need to enforce traditional rules. For this reason US treaty negotiators refused to engage in a quid pro quo during treaty negotiations, such as supplying trade benefits for broader investor protections. As Vandevelde explains, the US government (and especially State Department lawyers) “wanted the BITs to reflect an authentic commitment to protecting and encouraging foreign investment rather than a concession grudgingly made to obtain benefits.” The traditional investment rules, it calculated, would be best protected by treaties that were the result of a genuine cooperation, not coercion or strategic bargaining.

The US attempt to strengthen existing rules is reflected also in its choice of BIT partners. Vandevelde writes that at least initially, the US State Department was only interested in signing BITs with developing countries that were already upholding customary rules and that had the capacity to protect investment. Discussing US FCNs (and presumably the BITs that replaced them), one former legal adviser to the US State Department makes a similar point: “In the case of the United States, many of these [treaties] are with developing nations. They contain provisions calling for compensation in terms equivalent to the traditional standard, although there are slight drafting variations. The history of these agreements indicates that the parties recognized that they were

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94 Ibid at 25.
thereby making the customary rule of international law explicit in the treaty language and reaffirming its effect.”

In the UK, the Foreign and Commonwealth office extensively debated the degree to which BITs should reflect rather than expand on investor protections as provided under customary international law. As Eileen Denza and Shelagh Brooks point out, government officials recognized that they would have to “sell” these treaties abroad and were therefore reluctant to incorporate new and expansive protections. Ultimately, treaty drafters struck a balance similar to the US, expanding investor protections in some instances and reinforcing them in others. As Denza and Brooks continue, “While British industry lobbied for sweeping protections on all issues, UK officials ensured that most salient and controversial provisions adhered to the traditional investment rules.”

In contrast to the US selectivity in terms of BITs partners, the UK was apparently eager to sign with any and all states. Prior to drafting its first model treaty, the government announced in a White Paper that it would seek to negotiate as many BITs as possible with developing countries.

In sum, while international legal crisis was the clear force dictating the timing of the innovation of hard BITs, the sources influencing treaty content were more complex: state leaders wanted to protect existing rules, but they also cared about responding to investor pressure. This influence of investors over treaty content is striking because it shows how complex the TAN-state interaction is: even if states determine the terms of TAN influence, TANs can exert a critical impact on states’ substantive policy once they gain a foot in the door. The role of TANs is sufficiently important that it needs to be coupled to the crisis argument to account for the empirical record. Although states appear to be primarily concerned with bolstering the status quo, they are also, as the

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95 Sornarajah 1986, 206, citing Robinson 1984, 78.
96 Denza and Brooks 1987, 911-912.
97 Denza and Brooks 1987, 910 note 3 (citing Cmnd. 4656).
inclusion of the indirect expropriation and umbrella clause in BITs makes clear, willing to radically expand it. Finally, it is worth pointing out that in deciding on the content of innovative treaties, states were influenced by a factor not proposed in chapter 2: the precedent of other, here US, treaties. They drew on provisions in the US FCNs in deciding to include at least one provision, the MFN, demonstrating that, to some degree, treaty negotiation and design occurred à la carte.

Innovators

Because both the crisis and credibility arguments can explain the timing, it is unclear whether both logics helped facilitate innovation of hard BITs or whether one of the two relationships was spurious. I turn to an examination of innovators to disentangle the two explanations. I define innovators as those states that adopted hard BITs between 1968 and 1980 – the period that is central to both the crisis and credibility explanations. I use 1968 as the starting point as that is the date when the first hard BIT was adopted. 1968 also marks the beginning of the G-77’s serious opposition to the formal legal rules and widespread expropriation of foreign property. Because the G-77 opposition had basically disappeared by 1980, I treat 1980 as the end point for analysis, and analyze alternative cut-off points in the next chapter. While the crisis and credibility arguments focus on different subsets of states, capital exporters and capital importers respectively, and are therefore compatible, it remains possible that only one of the two arguments is correct.

To evaluate both arguments, I compare innovators (states that sign BITs with investor-state arbitration provisions or hard BITs) with non-innovators (states that sign soft BITs, those without investor-state arbitration provisions) across a number of different indicators. To analyze the legal crisis expectation that innovators faced a higher risk of being expropriated than non-innovators, I

98 Because I am interested in the specific decision to incorporate the innovative arbitration provision rather than the prior decision of whether to sign a BIT in the first place, I do not examine states that choose not to sign a BIT.
examine the degree to which the two groups of states were invested in extractive industries, where expropriations were most common. Specifically, I compare the means of the two groups’ share of exports in extractive industries, expecting that innovators will have a higher mean. For access to dispute settlement, I compare the average number of hard treaties with compulsory jurisdiction signed by innovators and non-innovators prior to the innovation of hard BITs.

Finally, because the core expectation of the crisis argument is that states that faced a high risk of expropriation and had little access to dispute settlement were the most vulnerable and thus most likely to emerge as innovators, I create four groups and compare their mean value of adopting BITs with an investor-state arbitration provision: states that face a low expropriation risk and have signed either a high or low number of treaties (Groups 1 and 3) and states that face a high expropriation risk and have signed either a high or low number of treaties (Groups 2 and 4). I use the median point to break the groups into “high” and “low” and expect the group that faced a high expropriation risk and signed a low number of treaties (with compulsory judicial provisions), Group 4, to be innovators particularly susceptible to crisis and to be more likely to sign hard BITs.

To evaluate the credible commitment argument that likely expropriators will emerge as innovators, I compare the two groups across three different measures of “likely expropriator:” the number of expropriations executed in the previous five years; state independence gained in the prior decade; and percent of exports comprised of fuel and oil (taken from World Development

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100 I derive this measure from the Word Development Indicators. It is not ideal since percent of exports does not reflect perfectly the percent of production in “risky” economies, nor the actual amount of production (since some is presumably not exported). A better measure would be the percent of a country’s outward FDI that is located in foreign extractive industries. Data on the sectoral distribution of FDI are unfortunately not available for this time period.
Indicators (WDI).\textsuperscript{101} In each case the mean values of the “likely expropriator” indicator for innovators should exceed corresponding values for non-innovators.

The sample consists of dyads in which one country in the dyad was one of the 17 OECD capital-exporting states that signed between 1968 (the year before the first innovative BIT) and 1980.\textsuperscript{102} This leads to a total of 92 dyads; 69 (or 75\%) did not include an investor-state arbitration provision, 23 (or 25\%) did.

Table 3-7 reports the mean values across the different measures. The mean value for percent of exports that are in extractive industries is, consistent with the crisis argument, slightly larger for innovators than non-innovators. States that are more exposed to a \textit{de facto} crisis are innovators. Innovators, furthermore, have significantly fewer soft BITs than non-innovators (4.7 compared to 18.3 treaties), suggesting that states that have little access to judicial mechanisms are more likely than their counterparts to move toward investor-state arbitration.

Finally, and not documented by Table 3-7, a comparison across the four groups proves consistent with the crisis argument: states that faced a higher risk of being expropriated \textit{and} signed fewer soft BITs were more likely than the other three groups, both individually and on average, to be innovators. Group four, the susceptible states, had a mean probability of 0.54 of signing innovative hard BITs, more than three times larger than the 0.15 probability for the other three groups. States that faced a low expropriation risk and signed either a high (Group 1) or low (Group 3) number of treaties had means of 0.19 and 0.05 respectively; for states that faced a high expropriation risk and signed a high number of treaties (Group 2), the mean was 0.20.

\textsuperscript{101} Although the credible commitment theory would also expect OPEC members to be under more pressure to signal credibility, I do not evaluate this possibility. In contrast to what a credibility argument might expect, the only OPEC member to sign any kind of BIT (with or without an investor-state arbitration provision) during this period was Indonesia. It signed 5 BITs, one of which contained an investor-state arbitration provision. It should also be noted that only ten percent (or 9 of 92 states) of the capital importers gained independence in the prior decade.

\textsuperscript{102} The seventeen OECD states are those included in Yackee’s dataset minus Singapore. Yackee 2007.
Table 3-7: The Identity of Innovators

<table>
<thead>
<tr>
<th></th>
<th>Mean Value for Innovators (states that adopt BITs with investor-state arbitration provision)</th>
<th>Mean Value for Non-Innovators (states that adopt BIT without investor-state arbitration provision)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>International Legal Crisis</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Percent of exports in extractive industry</td>
<td>9.8</td>
<td>7.6</td>
</tr>
<tr>
<td>Total number of previously signed soft BITs.</td>
<td>4.7</td>
<td>18.3</td>
</tr>
<tr>
<td><strong>Credible Commitment</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number of expropriations in the previous five years</td>
<td>.83</td>
<td>1.84</td>
</tr>
<tr>
<td>Independence gained in the previous decade (Yes=1; No=0)</td>
<td>.04</td>
<td>.12</td>
</tr>
<tr>
<td>Percent of exports in extractive industries</td>
<td>.20</td>
<td>.27</td>
</tr>
</tbody>
</table>

By contrast, the data provide little support for the expectation that innovators were motivated by a need to signal reliability to foreign investors. Across all three measures, countries likely to expropriate have consistently lower average values (of joining treaties with innovative provisions) than non-innovators. Innovators expropriated less than non-innovators (0.83 compared to 1.84), were less likely to have gained independence in the previous decade (0.04 compared to 0.12) and had a slightly lower percentage of exports in extractive industries (0.20 compared to 0.27).
Although the rising expropriation rate preceded closely the timing of the creation of hard BITs, this analysis suggests that pressure to signal credibility was not an important factor.

Combined with the analysis of the capital-exporting states, an analysis of capital importers shows that states susceptible to expropriations were signing hard BITs, but not with the types of states where such treaties were most needed. Indeed, excluding the US, the limited evidence I have found about policies of selecting BIT partners suggests that there may have been, at this early period, no discernible strategy whatsoever. For instance, writing about the Belgian BITs program, one scholar states, “it is by the way surprising that the emphasis of Belgian exports is not located in countries where Belgium has concluded BITs . . . accidentally 23 of our 27 BITs are concluded with those countries of limited export importance . . . one cannot say there has been a deliberate strategy — quite often those BITs are simply negotiated and signed at the occasion of an official state visit in Belgium or abroad — part of a package deal.” And as I noted already, when Britain released its first model treaty in the early 1970s, the government announced that it would approach as many potential BIT partners as possible.

Who were the innovating states? On the capital-exporter side, the leading innovators were the colonizers – UK, France, Belgium — countries that had invested heavily in developing countries, and not the United States. On the capital-importing side, there exists no similar trio of

103 Although the US did not launch its BITs program until after the crisis period, Kenneth Vandevelde makes the important point that US incentives motivating the selection of BITs partners have changed over time. Initially the US signed BITs in the effort to protect investment and depoliticize investment disputes. By the late 1980s, during what he terms “the second wave” of BITs, the US government was employing these treaties “to accomplish a political objective” of establishing positive political relations with liberalizing states in Eastern Europe. Vandevelde 1992.

104 Van De Voorde 1991.

105 Denza and Brooks 1987, 910.

106 Italy also signed a hard BIT during this period with Chad.
states signing hard BITs. The leading signers, Egypt and Singapore, signed only three hard BITs each.\footnote{Other hard BITs signers on the capital-importing side are: Bangladesh, Cameroon, Chad, El Salvador, Indonesia, Jordan, Liberia, Malaysia, Paraguay, Senegal, South Korea, Sri Lanka, Sudan, and Syria.}

The main conclusion of this analysis is clear. There is little evidence that states in need of signaling their credibility were turning to investor-state arbitration provisions to do so, or to BITs more generally. On the contrary, states that posed the greatest risk to investment – oil rich states, states with an expropriation track record, and newly independent states – appear to have been the most resistant to signing such treaties. These states sought to increase their economic control and bolster their sovereignty against powerful states, not concede it.

**Explaining the Failed MAI (1990s)**

How does the crisis argument account for the two “book-end” cases of this historical evolution of BITs and their arbitration provisions – the failed 1948 ITO negotiations and the failed 1995-98 MAI negotiations? The creation of investor-state arbitration did not occur in 1948 because an investment TANs had not yet emerged, much less proposed the idea of investor-state arbitration. Even if they had, states would have not yet experienced an international legal crisis as some of the key investment rules, including the Hull rule of full compensation, were still in the early stages of being accepted cross-nationally.

The failed MAI case, however, warrants more attention. Even though a transnational group of investors had mobilized behind a multilateral agreement and the traditional compensation standard was widely embraced by capital-exporting states, investor-state arbitration provisions did not materialize. This transnational group was less unified than the 1960s investment protection groups. Nonetheless, investors and businesses clearly supported the initial idea of establishing a multilateral treaty that granted them “pre-establishment rights” in the form of access to foreign
markets, high levels of uniform investor protection, and a provision for investor-state arbitration.\footnote{For instance, there was a clear split between the US and the EU over the preferred venue for negotiations. The US preferred negotiations to occur at the OECD, the EU at the WTO. Investors supported negotiations because they had been disappointed with the results of the 1993 Uruguay round of trade negotiations, including the Agreement on Trade Related Measures (TRIMs) and the General Agreement on Trade in Services (GATs), which did not increase their access to emerging markets in East Asia and Latin America. Walter 2001, 13.} Investor groups moreover enjoyed significant access to MAI negotiators. Although the actual negotiation sessions were closed to non-parties,\footnote{Archer 2005, 123.} investor groups enjoyed a consultative status and were kept informed of developments during negotiations. Led by an affiliate of the International Chamber of Commerce, the US Council for International Business (USCIB), US-based investors in particular had access to treaty drafters.\footnote{Schittecatte 2001, 141. See also Walter 2001, 14.}

Given the initially high level of TAN involvement and support, why did states refrain from creating an investor-state arbitration provision? The absence of an international legal crisis and the plethora of dispute-settlement provisions already available in BITs provide a compelling answer. Neither states nor transnational investors had turned to the MAI out of insecurity or as a way to protect existing rules from being challenged. Rather they did so to expand investor access to foreign markets denied during the Uruguay Round of tariff negotiations. Reaching consensus among states about the substance of the convention was therefore exceedingly difficult. States were divided over key provisions, and in the absence of a crisis states had little incentive to compromise and cooperate with one another.\footnote{Some countries, like France, wanted to include a provision that would exclude cultural sectors from MAI regulation, a controversy that eventually became the final straw causing the suspension of negotiations. States also differed on more standard provisions including exceptions to the national and MFN treatment provisions and the inclusion of the investor-state arbitration provision. See Archer 2005, 130. Seven countries formally withheld support of the investor-state arbitration provision: Australia, Denmark, Finland, Hungary, Japan, Mexico and Austria. Part of this opposition may have been due to the MAI extending the application of this provision to pre-establishment related disputes, not just post-establishment. Schittecatte 2001, 127.} Even if a legal crisis had been present, however, the vast number of BITs with investor-state arbitration provisions would have dampened state enthusiasm for a new, global
investor-state arbitration mechanism. Though a global provision would have been novel, it probably would not have been viewed as an urgent necessity.

Investor support for the MAI and a multilateral arbitration provision, moreover, quickly evaporated once it became evident that states would not push for liberalization, the treaty would not regulate the taxation of foreign companies, and states were considering including a labor and environmental protection provision. With investor support on the decline and no legal crisis on the horizon, governments had little reason to persist with negotiations. As stated in an UNCTAD report, a combination of the election of politically liberal governments in some of the OECD countries (a factor not included in the crisis argument) and the absence of “compelling problems of investment protection . . . left little incentive for political leaders to push the negotiations forward.”

Although my crisis-based argument offers a plausible account for why states did not ultimately create the first truly global investor-state arbitration provision, it misses a crucial factor: by the mid-1990s a powerful transnational coalition of labor groups and environmental NGOs had emerged to oppose the MAI. Neither the crisis argument nor the unidirectional or reciprocal TAN arguments offer a clear theoretical account of the role of counter-TANs. Yet, in this case, the transnational anti-MAI coalition targeted much of its opposition against the investor-state arbitration and indirect expropriation provisions and proved a crucial barrier to successful negotiations. The anti-MAI NGOs argued that these provisions would expose capital-importing

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112 In response to news about the potential exclusion of tax issues from the agreement, and inclusion of provision on labor and the environment, the USCIB stated in a letter, “we reiterate our view that tax measures must be included in the MAI,” and “we will oppose any and all measure to create or even imply binding obligations for governments or businesses related to the environment or labour.” Schittecatte 2001, 142 (citing Inside US Trade, March 28, 1997, 4-5). See also United Nations Conference on Trade and Development 1999, 24.

113 Despite the web of BITs with similar substantive provisions, states were divided on some of the substantive provisions. Archer 2005, 130.

114 For an important exception, see the work of Susan Sell. Sell and Prakash 2004.
states to the prospect of facing arbitration claims if they enacted any type of regulation that interfered with investor operations or reduced their profits.\footnote{UNCTAD 1999, 18-19.} Support for the anti-MAI campaign was formidable. By 1997 an intense and widespread NGO campaign called the Preamble Collaborative had organized to protest the agreement.\footnote{Kobrin 1998, 97.} Even if conditions had been ripe for establishment of a global mechanism, the counter-TAN would have posed a formidable obstacle.

\section*{Conclusion}

International legal crisis was the critical factor driving the innovation of investor-state arbitration. It shaped the timing of innovation, the content of the treaty in reaffirming existing rules, and the identity of innovators as those most exposed to the crisis. But crisis was not the only important factor. TANs invented investor-state arbitration mechanisms. Although TANs did not influence the precise timing of innovation, they were responsible for some of the most revolutionary substantive provisions in the innovative BITs. It is because of the presence of TANS that powerful states, in turning to the creation of investor-state arbitration, not only reaffirmed but broadened the legal status quo. Furthermore, the analysis has offered little support for the credibility argument. Although the logic of signaling credibility is persuasive in the abstract, there is little, if any, evidence suggesting that it motivated the creation of investor-state arbitration provisions.

In addition to the expansion of the legal status quo, this chapter yields two unexpected findings which further enrich the crisis argument. First, voluntary judicial mechanism can be essential stepping stones towards the creation of new sovereignty-constraining enforcement mechanisms. Without the establishment of ICSID, states would not have begun to include investor-
state arbitration provisions in BITs. Here the story is not one of states becoming familiar with the investor-state model through experience; at the time that states created hard BITs, ICSID had not yet been put to use. Instead, it was the simple availability of an international forum with private access that inspired states to make use of it in their treaties.

Second, powerful states may have divergent preferences about the innovation of costly judicial tools, and this may shape the multilateral or bilateral form that such enforcement mechanisms take. During the 1960s and most of the 1970s, the US was not interested in, and at points was outright opposed to, a multilateral treaty that would have put implicit pressure on capital-importing states to join. If the US had been fully on board with the multilateral convention, the OECD might well have proceeded with its convention. The crisis argument’s foundational premise about power proves too simple.

One possible challenge to this chapter’s main argument holds that institutional form, not international legal crisis, was the primary driver of innovation. The reason for the failed multilateral attempts in the 1960s and 1990s and the successful bilateral attempt in the 1970s is simple: multilateral innovation was doomed from the start, whereas bilateral agreements were bound to be easier. Bilateral treaties allow states to negotiate their agreements according to their specific needs and preferences rather than require them to make massive concessions, as is the case with multilateral negotiations. The 1940s ITO and 1990s MAI stalemates attest to the strength of this argument. In those cases, negotiations stalled. Bilateralism not international legal crisis, this argument holds, was the main impetus for the creation of hard BITs.  

117 Other scholars have claimed that the G-77 backlash against investment rules led capital-exporting states to establish BITs (but not specifically the investor-state arbitration provisions). In their argument, this backlash was nothing new: it had prevented multilateral consensus at the International Trade Organization (ITO) negotiations in the 1940s, at the OECD in the 1960s, and would prevent it again at the negotiations for a Multilateral Agreement on Investment (MAI) in the 1990s. Schill 2009.
The obvious weakness with this argument is that the failure to reach consensus in three multilateral cases (1940s ITO, 1960s OECD, and 1990s MAI) does not explain why states turned to the bilateral form only in the 1970s and not before or after. Applied only to the 1967 OECD case, moreover, the argument about the challenges of multilateral negotiations appears to be correct, but for reasons that reaffirm the international legal crisis argument rather than undermine it. States turned to a bilateral form not to “tailor” each treaty to the needs of the negotiating parties, but to circumvent multilateral opposition that was the driving force of the *de jure* legal crisis. This is evident in the treaties themselves. If states turned to bilateralism to tailor provisions to different state needs, we should see variation across treaties. Yet, BITs were remarkably similar across key provisions.\(^{118}\)

The need to circumvent opposition was also an issue for the World Bank in 1965. This suggests that North-South ruptures had already begun to appear by the early 1960s, even if an acute international legal crisis was not yet evident. The World Bank responded not by resorting to bilateral form but by using an “unorthodox, innovative”\(^ {119}\) drafting process to establish the ICSID Convention. This fact further supports the argument that states used bilateralism to circumvent regime opposition in a time of incipient crisis rather than to respond to institutional needs. The decision to keep the ICSID drafting process fragmented was a purposeful attempt to avoid stalemate. The World Bank’s decision to focus only on procedure rather than substance, moreover, was motivated by the recognition that the substantive regime was too contested to allow for a multilateral agreement.\(^ {120}\) This is not to suggest that World Bank officials planned strategically a

\(^{118}\) Stephan Schill, writing about BITs generally rather than investor-state arbitration provisions specifically, makes this very point to show that since BITs provisions were originally formulated at the OECD, the investment regime – despite its bilateral form – was, from the start, a “multilateral endeavor.” Schill 2009, 40. He appears to be untroubled by the fact that “multilateral” influence over treaty content of BITs did not extend past the OECD states. Scholars have widely recognized that bilateral settings allow powerful states to make better use of bargaining asymmetry and pressure the other party to accept their demands.

\(^{119}\) Sutherland 1979, 375.

\(^{120}\) This is not to suggest that there were no functional reasons to focus on procedure. World Bank officials considered the lack of an arbitration apparatus to be a crucial gap in the investment regime – a lesson learned during the Suez Canal
piecemeal approach towards establishing investor-state arbitration. On the contrary, World Bank officials did not anticipate that states would use treaties, rather than contracts, to grant ICSID jurisdiction.\textsuperscript{121}

A different challenge to the international legal crisis argument claims that it was the establishment of ICSID rather than international legal crisis that motivated the innovation of hard BITs. Once an arbitration forum was created in 1965, it was only a matter of time before states would put it to use. This explains why Germany and Switzerland did not include arbitration provisions in their initial BITs, while the 1967 OECD draft Convention did. But if it were ICSID and not an international legal crisis that opened the door to the establishment of investor-state arbitration, we would expect Germany and Switzerland to be among the first states to begin to include provisions after the establishment of ICSID. They did not do so until the 1980s. We might also expect the first cluster of hard BITs to have emerged soon after ICSID, rather than almost a decade later.

This is not to suggest that ICSID did not matter. Rather, it was part of a confluence of factors that led to the emergence of investor-state arbitration provisions. Had the World Bank established ICSID in a context in which there was no resistance by the G-77 at the UN, no surge in expropriations, BITs would probably have remained “soft.” States would have granted ICSID jurisdiction only as the ICSID drafters originally envisioned – through contracts and on an \textit{ad hoc} basis. Emerging in the mid-1960s and culminating in the mid-1970s, it was instead an international legal crisis that motivated powerful states to search for new procedural mechanisms, heightened dispute, when it took on the role of mediator. Yet, Bank officials were adamant about avoiding substantive codification. Indeed, at one point after they had abandoned the effort to draft a Convention, OECD officials asked the Bank whether it would – after finishing the ICSID convention – use the OECD Convention as a template, and work on establishing a substantive multilateral treaty. The Bank refused. See Rubin 1985, 5.

\textsuperscript{121} ICSID drafters barely refer to the possibility at the time of drafting the Convention. There are a few exceptions. See History of the ICSID Convention, Documents concerning the Origin and the Formulation of the Convention, Volumes I-IV) 1968-1970, Volume II, 274, 400, 357.
TAN influence, and transformed ICSID from a forum for resolving individual contract breaches to a powerful mechanism providing for sweeping enforcement of investor protections.

The innovation of investor-state arbitration provisions was neither inevitable nor simply a functional, institutional response to resolve cooperation problems between states. Rather, at its origin, the investor-state arbitration provision was the product of a specific historical context and intersection of different factors. Capital-exporting states created the provision not only in the middle of a deep economic, ideological and most importantly, legal conflict, but also in response to it.
CHAPTER 4

THE COSTS OF CRISIS: WHY SOME STATES EMERGE AS INNOVATORS*

In this chapter I move from an analysis of the introduction of investor-state arbitration provisions in BITs at the international level to a systematic analysis of the identity of innovators. Chapter 3 examined why states collectively created investor-state arbitration; the unit of analysis was treaty drafting or treaty negotiations. At the end of that chapter I used the identity of innovators adopting hard BITs as one of the observable implications of the crisis argument. My examination supported the crisis rather than the credible commitment explanation. This chapter uses statistical analysis to examine more systematically the identity of innovators.

My main argument holds that, taken together, the legal crisis posed by the G-77 opposition and a relatively sparse international judicial landscape push capital-exporting, powerful states to become innovators. As in Chapter 3 I place states into one of four groups based on their susceptibility to crisis, defined as their exposure to the G-77 expropriations (“investment insecurity”) and their access to compulsory judicial mechanisms. I then make predictions about the likelihood that they will adopt hard BITs. I also examine the credible commitment explanation, on the chance that other factors obscured its relationship with the creation of investor-state arbitration in Chapter 3. To briefly preview the main findings: the statistical analysis in this chapter establishes that state susceptibility to legal crisis increases the likelihood of states becoming innovators, but only for states “most susceptible” to crisis. With one caveat, I find little evidence that the need to signal credibility motivated capital-importers to adopt hard BITs; states that appeared to be potential expropriators were no more likely than their peers to adopt BITs with investor-state arbitration provisions.

* I thank Alice Henriques for comments on and statistical assistance with this chapter.
In this chapter I introduce the international legal crisis and credible commitment arguments and extract specific propositions from each. I then present the data, test the propositions for the crisis period, and evaluate the robustness of the results. I conclude with a brief summary.

**Theoretical Expectations about the Motives of Innovators**

In this section I briefly introduce the definition of innovators and review the theoretical expectations proposed in Chapter 2. For each theoretical prediction I discuss relevant indicators. Because the incentives of capital exporters and capital importers differ, I discuss them in turn. The crisis argument explains the behavior of innovators among capital-exporting-states and is agnostic about the motives of capital importers. The credible commitment explanation applies to capital-importing states and is agnostic about the motives of capital exporters. It is compatible with both the assumption that capital exporters design the dispute-settlement provisions and that capital importers have some sway. The two arguments are therefore not mutually exclusive.

**Defining Innovators**

My analysis for the period of institutional innovation begins in 1968, the year before the first pair of states incorporated an investor-state arbitration provision into a BIT. I use an exogenous definition to identify the cut-off point for this period and define innovators as those states that adopted hard BITs. The exogenous definitional approach looks to external events to demarcate innovators from non-innovators. This approach is appropriate if one wants to examine if and how specific events shape the incentives of states to adopt a new treaty or mechanism. Since my focus is on the role of crisis in inducing the creation of investor-state arbitration, I use the end of 1980 as the cut-off point for the crisis period; by then the G-77’s resistance to traditional investment rules had faded and expropriation rates had dropped sharply. The crisis argument expects then that after 1980
the susceptibility and crisis logic should be less relevant in moving states to adopt investor-state arbitration provisions; different incentives should begin to matter more. This definition of innovators is therefore identical to that discussed in Chapter 3. Of the 92 BITs signed during this time period by the 17 main capital-exporting states, 23 (25%) were hard and 69 (75%) were soft.¹

The only scholarly work to disaggregate the proliferation of BITs over time uses a combination of endogenous and exogenous logics to propose three stages: 1970-1988 (in which states are rationally motivated to signal credibility); 1988-2000 (in which stats are driven by emulation and a norm cascade); and 2000-20007 (in which state incentives are shaped by the financial crisis in East Asia and the Argentine crisis).² Because the authors are not interested in the effects of the G-77 opposition and surge of expropriations on BITs signing (much less on the signing of hard BITs), the first period extends an additional nine years beyond the period I examine below. Nonetheless, the demarcation of different periods is important. According to my argument, the effects of crisis are historically specific and should be reflected in the statistical results reported below. I therefore devote most of the robustness tests reported below to reanalyzing the data using different, theoretically informed cut-off points.

Capital Exporters

*International Legal Crisis.* The creation of investor-state arbitration is more likely to occur at the intersection of a legal crisis and a sparse international judicial landscape, defined in terms of compulsory judicial mechanisms. I apply this argument at the state level and focus on two features to explain why some powerful states-- here the main capital-exporters -- emerge as innovators: state

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¹ These seventeen states are the ones identified by Jason Yackee 2008 based on historical FDI data analysis. He also includes Singapore in his analysis, which I exclude because Singapore more frequently acted as a capital importer.

² Jandhyala et al. 2011, 3.
susceptibility to crisis and state access to compulsory judicial mechanisms. Taken independently, the first expectation is that states that are more exposed to legal crises will be more inclined to adopt new-style judicial mechanisms, strengthening enforcement by shifting legal authority to private actors who are directly injured by treaty violations. The second expectation holds that states lacking access to compulsory judicial mechanisms will be more likely to emerge as innovators because there will be no existing judicial protections to discourage them from adopting new ones. Acute insecurity and the absence of inertia each therefore influence the identity of innovators.

The crux of the crisis argument is that the incentives to depart from the traditional inter-state dispute settlement model and become innovators are most powerful when both conditions obtain (Figure 4-1). States that are more crisis-prone and have less access to judicial mechanisms will be most likely to emerge as innovators (upper left quadrant). Compared to their peers these “most susceptible” states will have both an acute need for protection and eager to participate in institutional experimentation. In contrast, states that are more insulated from crisis and have greater access to international judicial mechanisms are least likely to emerge as innovators; they face neither the costs of crisis nor an incentive to depart from their existing, traditional enforcement mechanisms (lower right quadrant). Finally, the likelihood of emerging as an innovator should be at an intermediate level for states that are more susceptible to crisis but have more access to enforcement provisions (upper right quadrant) and for states that are less susceptible to crisis but have less access (lower left quadrant).
Figure 4-1: Crisis Predictions about Innovators

<table>
<thead>
<tr>
<th>Susceptibility to Legal Crisis</th>
<th>Less Access to Judicial Dispute Settlement</th>
<th>Greater Access to Judicial Dispute Settlement</th>
</tr>
</thead>
<tbody>
<tr>
<td>High</td>
<td>Most likely to adopt hard BITs</td>
<td>Less likely to adopt hard BITs</td>
</tr>
<tr>
<td>Low</td>
<td>Less likely to adopt hard BITs</td>
<td>Least likely to adopt hard BITs</td>
</tr>
</tbody>
</table>

Since it was a key source of investment insecurity during the early period, I focus on the risk of a state having the property of its individual or corporate “citizens” expropriated as the main measure for state susceptibility to crisis. While many factors contributed to capital-exporters’ risk of being expropriated, including host state regime type, bureaucratic capacity and level of development, I concentrate on one factor that was particularly important during the 1960s and 1970s: state involvement in extractive industries. As Table 4-1 shows, almost one third of all expropriations during the 1970s occurred in extractive industries, mainly mining and oil. In addition to their sheer frequency, capital-exporting states considered expropriation in these industries costly in terms of state security. World War II had underscored for both European states and the US the importance of securing access to oil and other raw materials.

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3 For a brief summary of this literature, see Li 2009, 1100.

4 The proportion of expropriations in manufacturing was also high, but these expropriations may have been considered less threatening for two reasons. First, according to the obsolescing bargaining model, investors in the manufacturing industry may have had more bargaining power with host governments than investors in the extractive industries since they can more easily transfer investment to safer locations. Second, and more importantly, from the perspective of state leaders, expropriations in manufacturing are less detrimental to state security and less disruptive to the economy than those in extractive sectors.

5 During the Cold War, US concern about access to foreign raw materials (oil from the Middle East, strategic minerals in Africa) was acute. During the 1970s other OECD countries were even more dependent on foreign strategic resources than the US. Krasner 1978, 9, notes that only 15 percent of the US critical nonfuel minerals came from abroad, whereas Western Europe and Japan relied on foreign resources for 70 and 90 percent of their respective supplies.
An ideal measure for the risk of being expropriated (which I will refer to as “expropriation risk” not to be confused with risk of conducting expropriations) would be the percent of a country’s outward foreign direct investment (FDI) located in foreign extractive industries. Unfortunately systematic data for the sectoral distribution of FDI does not exist for this time period. Instead, I use home state dependence on extractive industries as an indicator. I compile this information from the World Bank Development Indicators (WDI) which track the annual shares of states’ exports that are comprised of both “fuel” and “ores and metals.” I add these two components to create an aggregate measure of home state production in raw materials that serves as a proxy for expropriation risk. The expectation is that higher levels of production lead to a higher likelihood of foreign production and consequently a higher expropriation risk. This measure should therefore correlate positively with the adoption of hard BITs during this period.7

To evaluate access to compulsory judicial provisions, I create a cumulative measure that counts the total number of soft BITs (BITs with a compulsory ICJ provision, rather than an investor-state arbitration provision) that the state had signed in the preceding years, beginning in

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6 This measure is not ideal since not all investment in extractive industries occurred abroad, much less in developing countries, and not all of it was for export. Nonetheless it should capture to some extent the variation in capital-exporting state investment insecurity.

7 I thank Johannes Urpelainen for suggesting this measure.
1960 (one year after the first BIT was adopted). Because the judicial landscape argument holds that access to other forms of compulsory mechanisms will discourage states from creating new sovereignty-constraining tools, the cumulative measure should be negatively correlated with the adoption of hard BITs.

As in Chapter 3 I use these two indicators to create four categories of states, each one of which corresponds to one of the four quadrants identified in Figure 4-2. I use the median point to break the groups into “high” and “low,” and then interact the two dummy variables to place states into one of the four categories. Slightly over a quarter of the BITs signed (26%) involved capital-exporting states that fit the “most susceptible” category (Group 4). Groups 1-3 comprise 35%, 16% and 22%, respectively, of the distribution of BIT’s (and the capital-exporters that signed them).

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8 This is the first year in my data set. Although states did adopt Friendship Commerce and Navigation (FCN) treaties during the 1950s that included both investment-protection and ICJ provisions, and that in theory should act as some form of deterrent, the number of treaties were minimal, and treaties were often signed with other developed states.

9 I use the two dummy variables to create the interaction term rather than the original continuous variables. Dummy interactions better fit the proposed theory (of four categories of states) and are more easily interpreted. Interaction terms for continuous variables in non-linear models are difficult to interpret. See Ai and Norton 2003, 123.
As a preliminary evaluation of the international legal crisis argument, I offer some descriptive data analysis. First, I compare the likelihood that, conditional on the decision to sign a BIT, a given pair of states will sign a hard BIT based on these joint susceptibility measures. To do this, I compare the mean values of the likelihood of signing a hard BIT (coded as 1) of the four groups, for the crisis period (1968-1980). As Table 4-2 shows, with one exception the ordering of the means are consistent with Figure 4-2. Group 4 has the highest probability of signing a hard BIT (.54). Group 1 is the exception to the theoretical predictions. It has a higher probability than Group 3 of signing a hard BIT. A t-test comparing Groups 1-3 (collapsed into one category) and Group 4 suggests that the differences are statistically significant.
Table 4-2: Comparison of Means for the Adoption of Hard BITs

<table>
<thead>
<tr>
<th>Groups</th>
<th>1968-1980</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Group 1 (predicted least susceptible)</td>
<td>0.188</td>
<td>(34.8%)</td>
</tr>
<tr>
<td>Group 2</td>
<td>0.200</td>
<td>(16.3%)</td>
</tr>
<tr>
<td>Group 3</td>
<td>0.048</td>
<td>(22.8%)</td>
</tr>
<tr>
<td>Group 4 (predicted most susceptible)</td>
<td>0.541</td>
<td>(26.1%)</td>
</tr>
<tr>
<td>Number of BITs</td>
<td>90</td>
<td></td>
</tr>
<tr>
<td>p-value from t-test comparing Group 4 to others</td>
<td>0.0001</td>
<td></td>
</tr>
</tbody>
</table>

Notes: The dependent variable is dichotomous, with hard BIT=1; percentages in parentheses is the percent of all BITs.

To further explore the crisis argument during this period, I use the two susceptibility measures to create a scatter plot that charts state decisions to sign a soft or hard BIT. As Figure 4-3 shows, and consistent with the predictions of the crisis argument, hard BITs (=1) are concentrated in the upper left quadrant.
The concentration of hard BITs in the upper-left quadrant is consistent with the central expectation of the crisis argument. However, the existing literature suggests that beyond crisis, a range of other factors also affect states’ propensity to sign BITs. It is thus possible that unobserved factors, correlated with the dependent and explanatory variables, are responsible for the observed relationships. Below I attempt to control for potential confounding variables through regression analysis. Before doing so, I introduce the credible commitment explanation and other theoretical arguments and their empirical predictions for hard BITs. These arguments are interesting on their own; they also suggest important control variables for further tests of the crisis argument.
Capital Importers

Credible Commitment. The credible commitment approach focuses on the incentives of capital importers. It expects two types of states to become innovators, “risky states” and “transitional states.” Both types of states are under heightened pressure to signal credibility, but for somewhat different reasons. The first category of states consists of those that are perceived as “likely violators” of investment obligations based on some shared feature. The expectation is that these states will be under particular pressure to demonstrate their intention to adhere to investment rules despite their “risk profile” and will therefore be more likely to emerge as innovators. The second category, transitional states, consists of states that are considered potentially “good players” but are in, or emerging from, economic transition and thus seek to consolidate institutional change. For these cases the credible commitment explanation holds that states will be particularly motivated to take measures that “lock-in” economic change and therefore will be more likely to adopt hard BITs before other states. I discuss these two categories of states in turn.

A number of scholars have used the logic, although not the terminology, of “risky states” to identify which states will be more likely to adopt BITs (and by extension, BITs that include an investor-state arbitration provision). Writing specifically about the decolonization and expropriation periods of the 1960s and 1970s, Ryan Bubb and Susan Rose-Ackerman propose a model that expects exactly these states to emerge as likely adopters of BITs. In their model newly-independent states first engage in mass expropriation of property, and after reaping the windfall then turn to BITs to signal to investors their intention to adhere to investment rules from that point forward. Writing about a longer time period, 1959-2000, Elkins, Guzman and Simmons also expect that risky states may be under more pressure to signal credibility and therefore are more likely to adopt BITs.

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10 Bubb and Rose-Ackerman 2007. Their main objective is to show that newly independent states may not have been structurally pressured into adopting BITs, as Guzman 1998 in particular has suggested, but rather may have voluntarily done so based on a series of strategic choices.
They focus on the perceived capacity of state institutions to protect foreign investment and expect that states that have weak domestic institutions will be more inclined than others to demonstrate their credibility by adopting BITs. They use three indicators for institutional weakness: perceptions of host country corruption, perception of law and order, and type of legal institution (with civil law considered less protective of property rights). Allee and Peinhardt similarly examine the role of weak institutions in influencing state participation in the BIT regime. Their indicators are rule of law, regime durability and executive constraints. Finally and most recently, Jandhyala and her co-authors measure the credibility of capital-importers by the extent to which the executive branch of government is institutionally constrained and by regime type.

To evaluate whether an incentive to signal credibility among risky states motivates capital importing states to be innovators, I focus on states that were deemed likely expropriators and thus the main source of investment insecurity. I use three different measures to evaluate the impact of expropriation risk on influencing innovators. First, I create a measure that counts the total number of expropriations a state has conducted in the past five years. Following the logic of Bubb and Rose-Ackerman, states that have expropriated frequently in the past should be expropriators in the future and should therefore be under more pressure to signal their credibility by adopting hard BITs. I use expropriation data coded and provided by Quan Li and originally collected by Steve Kobrin.

Second, because expropriations were concentrated in the extractive industries, I include a variable that focuses on state dependence on raw materials as a percent of exports. I use an indicator

11 Elkins, Guzman and Simmons 2006.
12 Allee and Peinhardt 2010.
13 Jandhyala et al. 2011.
14 Another measure of “risky state” that is not specific to expropriation and has been used frequently to test the credible commitment explanation is the law and order variable of the Political Risk Services (PRS) group. Since this variable is available only after 1984 I do not include it in my analyses.
15 Li 2009 uses this data in his analysis of expropriations.
created and provided by Elkins Guzman and Simmons. Relying on WDI data they combine the share of “fuel” and “ores and metals” as a percent of a country’s exports. The expectation is that states with high percentages of raw material exports will be more likely expropriators and thus more likely innovators. This measure corresponds therefore with the extractive industries variable for capital-exporting states. But while for capital exporters the measure is a proxy for the risk of being expropriated, for capital-importers it an indicator of the likelihood of expropriating.

In addition to oil and metal producing states, newly independent states are also more likely than others to expropriate foreign property.\textsuperscript{16} This holds in particular for states that gained independence as part of the decolonization movement and that joined the G-77. Starting with the year 1960 I create an indicator for whether or not the capital-importing country gained independence in the prior decade. The expectation is that new states will be under more pressure to signal their credibility and therefore will be more likely to emerge as innovators.\textsuperscript{17} I use Jana von Stein’s data for coding this measure.\textsuperscript{18}

The second category of states that are expected to emerge as innovators is comprised of “transitional” states that seek to lock-in economic or institutional change. They differ from “risky” states in that they have neither a notably poor track record of investment treatment nor specifically weak institutions. Rather, transitional states are leaving behind semi-autarchic economic policies or are experiencing political and economic changes that increase their incentive to signal credibility. I focus on transitional states because recent analyses of treaty ratification in other issue areas, such as

\textsuperscript{16} Li 2009, 1119.

\textsuperscript{17} Other scholars, not focused primarily on expropriation proclivity, have expected that newly independent states will be more protective of their sovereignty and therefore less likely to adopt BITs, or include an ICSID arbitration provision. Allee and Peinhardt 2010, 12 cite Kahler 2000 for the logic of protecting sovereignty. Their analysis yields strong support for this claim.

\textsuperscript{18} Jana von Stein, available at: \url{http://www-personal.umich.edu/~janavs/data-etc.html} (last accessed April 6, 2013).
international criminal and human rights law, have found empirical support for the credible
commitment argument when applied to transitional states.\(^\text{19}\)

In the context of BITs it is widely recognized that much of the surge in the early 1990s was
created by former socialist states seeking to consolidate their shift to open market economies.
During the 1970s, however, socialist states were generally unreceptive to investment from western
economies and less interested in the BITs regime. To evaluate whether transitional states were more
likely participants in the BITs regime during this early period, and specifically more likely to include
an investor-state arbitration provision, I therefore focus on two indicators of economic change:
growth in GDP per capita and change in the rate of inward FDI. Consistent with the credible
commitment argument about transitional democracies and human rights treaties, I expect that states
experiencing increasing rates of economic growth or increasing rates of inward FDI are more likely
than others to emerge as innovators.\(^\text{20}\) I use the Elkins, Guzman and Simmons WDI measure for
economic growth. To construct a change in inward FDI measure, I use Elkins, Guzman and
Simmons lagged FDI variable, also taken from WDI.\(^\text{21}\) Because their variable is given as a
percentage of GDP, I calculate change as the percentage point change between two years.

\(^{19}\) In her work on human rights treaties, for example, Beth Simmons finds that states that have recently transitioned to
democratic regimes are more likely to ratify specific human rights treaties. Simmons 2009, 86. In earlier work, Andrew
Moravcsik proposes that newly-democratic states turn to international institutions in order to “lock-in” transitions and
tie the hands of subsequent governments. Moravcsik 2000. Similarly, in their work on the International Criminal Court,
Simmons and Allison Danner argue that states emerging from civil war and lacking domestic accountability mechanisms
have both a stronger interest and more institutional need to signal their commitment to “locking-in” peace, and are
therefore more likely than others to join the Court. Simmons and Danner 2010.

\(^{20}\) Allee and Peinhardt 2010 propose the exact opposite in their test of the credible commitment explanation.
They expect capital-importing states with declining economic growth to be more likely to signal credibility
because they are under more pressure to attract FDI.

\(^{21}\) I use Elkins, Guzman and Simmons 2006 data because they impute missing values and therefore have a more
comprehensive data set than the original source. Using the same data also allows for a better comparison
between their findings and those from an analysis of the early period.
Controls

Finally, I include four control measures. The first three have proved important in other studies of state participation in BITs; the fourth seems particularly relevant for an analysis that is focused on investor-state arbitration. First, I include a measure that evaluates possible coercion as a determinant of BITs signing, a dichotomous indicator for whether the capital-importing state received an IMF loan during the year of BIT signing. The logic informing this measure holds that states dependent on IMF assistance will be pressured, implicitly or explicitly, to adopt hard BITs. Second, I use a measure of capital-importing state’s “diplomatic capacity,” which is the total number of its embassies located abroad. Here the expectation is that states with a higher capacity will hold diplomatic meetings more frequently and therefore have more opportunities to negotiate BITs. I extend this logic to questions about treaty enforcement and examine its relationship to adopting specifically hard BITs. I use Elkins, Guzman and Simmons’ variables for both measures. I also include a dichotomous variable for whether the BITs dyad has colonial ties with the expectation of a positive correlation; ex-colonies typically maintain strong economic exchanges and political ties with former metropoles. Finally, I include a dichotomous variable for whether a capital-importing state has ratified the ICSID Convention. States that have already taken a step in the direction of investor-state arbitration should be more inclined to adopt hard BITs; I therefore expect a positive correlation.
Table 4-3: Summary Statistics

<table>
<thead>
<tr>
<th>Explanatory Variables</th>
<th>N</th>
<th>Mean</th>
<th>SD</th>
<th>Min</th>
<th>Max</th>
</tr>
</thead>
<tbody>
<tr>
<td>Extractive Industries/Exports</td>
<td>92</td>
<td>8.178</td>
<td>5.021</td>
<td>1.361</td>
<td>24.43</td>
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<tr>
<td>Previous Soft BITs</td>
<td>92</td>
<td>14.93</td>
<td>13.64</td>
<td>1</td>
<td>45</td>
</tr>
<tr>
<td>Group 1 (more soft BITs, lower expropriation risk)</td>
<td>92</td>
<td>0.348</td>
<td>0.479</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Group 2 (more soft BITs, higher expropriation risk)</td>
<td>92</td>
<td>0.163</td>
<td>0.371</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Group 3 (fewer soft BITs, lower expropriation risk)</td>
<td>92</td>
<td>0.228</td>
<td>0.422</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Group 4 (fewer soft BITs, higher expropriation risk)</td>
<td>92</td>
<td>0.261</td>
<td>0.442</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Host Extractive/Exports</td>
<td>90</td>
<td>25.27</td>
<td>23.60</td>
<td>0.00369</td>
<td>90.17</td>
</tr>
<tr>
<td>Expropriation Track Record</td>
<td>92</td>
<td>1.587</td>
<td>3.468</td>
<td>0</td>
<td>16</td>
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<tr>
<td>Recent Independence</td>
<td>92</td>
<td>0.0978</td>
<td>0.299</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>IMF Loan</td>
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<td>0.689</td>
<td>0.466</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Diplomatic Capacity</td>
<td>90</td>
<td>57.73</td>
<td>32.80</td>
<td>11</td>
<td>118</td>
</tr>
<tr>
<td>Change in Inward FDI</td>
<td>90</td>
<td>-0.0107</td>
<td>0.760</td>
<td>-3.129</td>
<td>2.925</td>
</tr>
<tr>
<td>GDP Growth</td>
<td>90</td>
<td>6.829</td>
<td>5.519</td>
<td>-5.071</td>
<td>24.31</td>
</tr>
<tr>
<td>ICSID Ratification</td>
<td>92</td>
<td>0.717</td>
<td>0.453</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Colonial Ties</td>
<td>92</td>
<td>0.0761</td>
<td>0.267</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>

**DEPENDENT VARIABLE, SAMPLES AND STATISTICAL MODELS**

To evaluate the crisis and credible commitment propositions about the identity of innovators, and the effects of the controls, I examine the probability that a pair of states will incorporate an investor-state arbitration provision into a BIT during the exogenously defined crisis period (1968-1980). The main dependent variable is whether a pair of states that signs a BIT chooses to include a compulsory investor-state arbitration provision in the treaty, i.e. a “hard” BIT. I include only those BITs that have entered into force. Because some BITs contain arbitration provisions that are not compulsory, I first classify the treaties according to whether they include a
legally binding arbitration provision.\textsuperscript{22} I use Jason Yackee’s coding of investor-state arbitration provisions for this classification.\textsuperscript{23} He places BITs into one of four categories: (1) those that do not contain investor-state arbitration provisions;\textsuperscript{24} (2) those that include “promissory” investor-state arbitration provisions (which are non-binding); (3) those containing “limited” investor-state arbitration provisions (meaning the capital-importing state agreed to arbitration for only a few provisions); and (4) those including unlimited investor-state arbitration provisions, (in which no additional consent to arbitration is required, and the provision applies to the full treaty).\textsuperscript{25} I convert Yackee’s ordinal scale (from 0 to 4) into a dichotomous variable, coding treaties as “1” if they contain an unlimited compulsory investor-state arbitration provision waiver (which I refer to as an investor-state arbitration provision), and “0” if they do not (all other categories). I use the dichotomous measure because Yackee’s two other categories impose a much narrower constraint on state sovereignty; promissory BITs are not legally binding, and the limited investor-state arbitration provisions significantly restrict the availability of investor-state arbitration.

I restrict my analysis to a group of 17 OECD states, the main capital exporters during the early period as it is only for these states that Yackee has coded BITs dispute settlement provisions. I examine only BITs in which one (and only one) party was one of these 17 states.\textsuperscript{26} Although non-

\textsuperscript{22} BITs vary in terms of the locations they specify for arbitration. Some require arbitration at the ICSID, others allow for claims to be heard at a number of standing tribunals, or for the ad-hoc establishment of such tribunals. Since forum choice does not affect the legality of the arbitration provisions, I do not distinguish between them.

\textsuperscript{23} Yackee 2007. This coding scheme is consistent with the interpretation of the treaty’s language by leading legal experts (Oxford Handbook of International Investment Law 2008, 836) and lawyers involved in investment arbitration during the 1970s and 1980s, including the main author of the ICSID Convention. See Broches 1995, Chapter 6; Liebeskind 2002, 47.

\textsuperscript{24} These “soft” treaties were used during the 1960s, and often did contain an inter-state dispute provision.

\textsuperscript{25} In Yackee’s (2007) classification scheme these categories are labeled “comprehensive effective pre-consent,” “limited effective pre-consent” and “no pre-consent” respectively.

\textsuperscript{26} The sample is limited since these are the treaties coded by Yackee (2007). It includes the following capital-exporters: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Italy, Japan, Netherlands, Norway, Spain, Sweden, Switzerland, the UK and the US. Yackee also includes Singapore in his analysis of
OECD states did sign BITs with each other, this practice was very rare during the 1970s and 1980s.27

I use two models to evaluate the probability that a pair of states will incorporate an investor-state arbitration provision during the early period. The first is a probit model. I limit the sample to dyads that have signed a BIT. This analysis addresses the question: conditional on the decision to sign a BIT, why do some dyads include investor-state arbitration provisions during the early period. (I refer to this as the “signing sample.”) My dependent variable is dichotomous, with hard BITs (=1). For the crisis period, 1968-1980, the sample consists of 92 BITs, 69 (75%) of which are soft, 23 (25%) of which are hard. Unsurprisingly, this is a relatively small sample. By definition, the introduction of hard BITs is rare, and only a small number of states are innovators. During this period, 13 of the 17 states in the sample were BITs signers, but three of these states signed only one BIT each. Four of the 13 states were hard BITs signers, but one of these (Italy) signed a hard BIT only once. This means that the three “innovator” states during the legal crisis period were France, Belgium and the UK.28

One concern with using a simple probit estimation to analyze the choice between soft and hard BITs is that the results may be affected by sample selection. If one analyzes only the second stage, the possibility remains that the apparent relationship between the explanatory variables and the inclusion of an investor-state arbitration provision will actually be driven by decisions made at the prior stage about whether or not to sign a BIT at all. For the second model I therefore use a

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27 For the 1980 sample, the limitation to OECD capital-exporting states excludes a maximum of ten dyads. For the 1992 sample, it excludes an additional estimated 56 treaties that had entered into force (of the estimated 86 non-OECD treaties signed during that period). (These numbers are based on Allee and Peinhardt’s 2010 data as well as UNCTAD reported averages of percent of treaties not entered into force).

28 Although the number of innovators is small, I obtain generally similar results when the sample is expanded to include other states, as I will discuss below when I present the results of various robustness tests.
two-stage Heckman selection model that evaluates and ideally accounts for the presence of selection bias at the second stage. This model includes a random selection of dyads that were eligible but did not sign BITs during the early period, and therefore contains a more expansive sample. I discuss this model and the random sample in more detail below.29

**FINDINGS: LEGAL CRISIS PERIOD**

Probit Estimation for the Crisis Period (1968-1980)

Table 4-4 reports the findings from the probit analysis of hard BITs adoption during the crisis period, 1968 to 1980. To account for the effects of potential serial correlation of standard errors, I cluster the standard errors by capital-exporting country, because these countries appear most frequently in the analysis and because the crisis argument applies to them. I include in the analysis a dummy variable for every five-year period. I use five-year rather than annual dummies because the inclusion of annual dummies leads to a 22% reduction in the number of observations (from 90 to 71) in the sample.30 I include in the Appendix (Table 1), the same specification but with

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29 The probit and Heckman selection models share an important assumption: states approach the negotiation of BITs in two stages. The alternative is to assume that states approach the BITs negotiation process in one step (with some capital exporters choosing between signing a hard BIT or not, and some capital-importers choosing between no BIT or soft BIT). Since the inclusion of investor-state arbitration provisions was not yet universal, I use the two-stage approach because it better reflects the BITs negotiation process during the periods I examine. Particularly during 1970s, and also into the 1980s, states usually agreed to sign a BIT without certainty of whether it would encompass an investor-state arbitration provision. This is evident in the “signing patterns” of each state. With only a few exceptions, all of the 17 capital-exporters that I analyze signed at least one soft BIT after having entered into their first hard BIT. The United States is an important exception; it refused to sign any soft BITs, evident both in its track record (all hard BITs) and its negotiating history. For capital importers the two exceptions are China and some Eastern European states (Romania, Russia and Hungary). During the pre-diffusion period, they clearly had a “one-step” policy of signing a soft BIT or refusing to sign. The overwhelming majority of states, however, appeared to have approached BITs negotiations in two steps, which suggests that the probit and Heckman models are appropriate.

30 This reduction occurs because for certain years in my analysis, states did not sign any hard BITs. This makes the annual dummies generate perfect predictions and forces elimination of the observation for those years.
annual dummies; in cases where the results differ, it is because the statistical significance increases with the inclusion of yearly dummies. I also analyze the same specification, clustering standard errors by capital-importing country, and here too including yearly dummies instead (See Appendix, Table 2). Because many of the capital-importing variables lose statistical significance in this specification, usually due to the alternative clustering of standard errors, I highlight in bold all coefficients in Table 4-4 that are robust to both forms of clustering and to the substitution of yearly for the 5-year period dummies.

I analyze four permutations of the crisis argument. The first, reported in Column 1, includes the original state susceptibility measures (risk of citizens’ property being expropriated and the cumulative number of soft BITs). The second variant, reported in Column 2, includes the two dummy variables for these measures, coded as 1 for states that faced a higher than the median risk of being expropriated and as 1 for states that signed a higher than the median number of soft BITs. The third permutation includes the interactions of these two dummy variables which thus creates the four groups identified in Figures 4-1 and 4-2 above. I use Group 4 (high expropriation risk and few soft BITs), which is expected to be the group most susceptible to the crisis and thus most likely to adopt a hard BIT, as the baseline dummy variable (against which the other groups are interpreted), and exclude it from the analysis. In each case the expectation is that a shift from Group 4 to any of the other groups should reduce the probability of signing a hard BIT, and the three sets of coefficients for the three other groups of states should therefore be negative.

I also re-estimate the same model leaving out Group 1 instead; the estimates are in Column 4. While the model is exactly the same as in Column 3, this specification facilitates direct comparisons of the effects of the other group variables. In this specification, since the least vulnerable group (low expropriation risk and more soft BITs) is excluded, I expect the coefficients of Groups 2-4 to be positively correlated with signing a hard BIT.
To briefly preview the results, the state susceptibility variable is consistently correlated with the decision to sign hard BITs for the group of “most susceptible” states, but not for the others. While all three groups are less likely to adopt a hard BIT when compared to the excluded “most susceptible” Group 4, the reverse does not hold when compared to the “least susceptible” group. Only the most susceptible group of states is more likely than the least to adopt a hard BIT. When applied to “risky states,” the credible commitment explanation receives minimal support. Across all three measures, I find no evidence that risky states are more likely to sign hard BITs. When applied to “transitional states,” only one of the two credible commitment measures is consistent with the proposed expectation, providing, at best, mixed evidence in support of the proposition that the incentive to signal credibility motivates the adoption of hard BITs. I discuss these findings in more detail below. For the important findings, furthermore, I also describe the substantive effects using predicted probability estimates.31

When included separately in the analysis (Column 1) the two susceptibility measures, risk of being expropriated and access to compulsory judicial mechanisms, are in the expected direction but only the latter is statistically significant at conventional levels. States that have signed higher numbers of soft BITs are less likely to sign a hard BIT. The risk of being expropriated, in contrast, does not affect the probability of signing a hard BIT.

When these measures are included as dummy variables instead, reported in Column 2, (with “above median risk” and “above median number of treaties” coded as 1), the coefficient for expropriation risk increases in size and is statistically significant at the 10 percent level. The

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31 Except for the group variables, all predicted probabilities are estimated using the first specification, which contains the original two measures.
coefficient for the previous soft BITs variable also increases in size, but has a higher p-value than the original measure.\footnote{I also considered but found no support for the possibility that the relationship between the susceptibility measures and adopting hard BITs was non-linear.}

When states are divided into the four groups based on where they fall along the two measures (above or below the median), reported in Columns 3 and 4, the crisis expectation about state susceptibility receives support: each of the three groups are less likely than the excluded group of “most susceptible states” to include an investor-state arbitration provision and the correlations are statistically significant.\footnote{The statistical significance of these variables increases when yearly dummies are included. See Appendix, Table 1.} But this predicted relationship between susceptibility and hard BITs does not hold for the relative likelihood of signing a hard BIT among the other groups. As shown in Column 4, which reports the results when the “least susceptible” group is excluded, the sign of the coefficient is positive in only one of the two cases and is not statistically significant at conventional levels. Expropriation risk and the lack of soft BITs appears to exert an impact only on a subset of states – the top 26 percent of “susceptible” states. This suggests that a specific threshold must be passed before the degree of susceptibility begins to influence the adoption of hard BITs.

Beyond this threshold, the substantive effect for this group appears to be strong. Since the magnitudes of probit coefficients are difficult to interpret directly, I use the estimates from the model to compute predicted probabilities for each of the four groups. I calculate these probabilities with all other dichotomous variables at their modes, and all continuous variables in the model at their means.\footnote{Long and Freese 2006.} The predicted probability of signing a hard BIT is highest for the states in Group 4: 0.55. Predicted values for Groups 1, 2, and 3 are 0.07, 0.20, and 0.06, respectively. The differences between Group 4 and the others are thus not only statistically significant, but also large in
magnitude. For example, all else equal, a shift from Group 2 to Group 4 would increase a state’s likelihood of adopting a hard BIT by about 35 percentage points.

Turning to capital-importing states, the analysis finds no evidence of a credible commitment incentive for risky states. The first specification (Column 1) is the most comprehensive (because it includes continuous variables for soft BITs and expropriation risk). Accordingly, I focus on its results for evaluating the credible commitment explanations. For instance, contrary to expectations, resource rich capital importers (those with a high percent of their exports in the extractive industries) were less likely than others to include an investor-state arbitration provision; this result is significant at the 1 percent level. The substantive impact of the variable, however, is small: going from the 25th to 75th percentile in dependence on extractive industries decreases the probability of including an investor-state arbitration provision only by 8 percentage points. Similarly, neither the independence nor expropriation track record coefficients are in the direction predicted by the credible commitment theory. In some cases states that acquired independence in the previous decade and expropriated frequently are significantly less likely than other capital importers to include an investor-state arbitration provision. These results are not robust to alternative specifications. The three variables consistently suggest that risky states are no more likely than their less risky counterparts to include an investor-state arbitration provision in their BITs.
<table>
<thead>
<tr>
<th>Explanatory Variables</th>
<th>(1)</th>
<th>(2)</th>
<th>(3)</th>
<th>(4)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>International Legal Crisis</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Crisis and Judicial Access</td>
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<tr>
<td>Home Extract. Industries/Export (+)</td>
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</tr>
<tr>
<td>(0.06)</td>
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<tr>
<td>Previous Soft BITs (-)</td>
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<td>(0.12)</td>
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<td><strong>Extract. Median Dummy (+)</strong></td>
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<tr>
<td><strong>Soft BITs Median Dummy (-)</strong></td>
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<td></td>
</tr>
<tr>
<td>(0.69)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>State Susceptibility Groups</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Group 1 (-)</td>
<td>-1.63**</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(0.82)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Group 2 (-)/(+)</td>
<td>-0.96**</td>
<td>0.66</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(0.48)</td>
<td>(0.58)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Group 3 (-)/ (+)</td>
<td>-1.67*</td>
<td>-0.04</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(0.90)</td>
<td>(0.46)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Group 4 (+)</td>
<td>1.63**</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(0.82)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Credible Commitment</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Risky States</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Host Extractive/Exports (+)</td>
<td>-0.03***</td>
<td>-0.03***</td>
<td>-0.03***</td>
<td>-0.03***</td>
</tr>
<tr>
<td>(0.01)</td>
<td>(0.00)</td>
<td>(0.00)</td>
<td>(0.00)</td>
<td></td>
</tr>
<tr>
<td>Recent Independence (+)</td>
<td>-1.94**</td>
<td>-1.24**</td>
<td>-1.17*</td>
<td>-1.17*</td>
</tr>
<tr>
<td>(0.95)</td>
<td>(0.63)</td>
<td>(0.65)</td>
<td>(0.65)</td>
<td></td>
</tr>
<tr>
<td>Expropriation Track Record (+)</td>
<td>-0.11***</td>
<td>-0.09*</td>
<td>-0.08*</td>
<td>-0.08*</td>
</tr>
<tr>
<td>(0.02)</td>
<td>(0.05)</td>
<td>(0.05)</td>
<td>(0.05)</td>
<td></td>
</tr>
<tr>
<td>Transitional States</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>GDP Growth (+)</td>
<td>0.14***</td>
<td>0.09***</td>
<td>0.09***</td>
<td>0.09***</td>
</tr>
<tr>
<td>(0.05)</td>
<td>(0.02)</td>
<td>(0.02)</td>
<td>(0.02)</td>
<td></td>
</tr>
<tr>
<td>Change in Inward FDI (+)</td>
<td>-0.43**</td>
<td>-0.04</td>
<td>-0.01</td>
<td>-0.01</td>
</tr>
<tr>
<td>(0.18)</td>
<td>(0.14)</td>
<td>(0.12)</td>
<td>(0.12)</td>
<td></td>
</tr>
<tr>
<td><strong>Controls</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Colonial Ties (+)</td>
<td>1.41</td>
<td>1.79*</td>
<td>1.65*</td>
<td>1.65*</td>
</tr>
<tr>
<td>(0.92)</td>
<td>(1.00)</td>
<td>(0.99)</td>
<td>(0.99)</td>
<td></td>
</tr>
<tr>
<td>IMF Loan (+)</td>
<td>0.72</td>
<td>0.21</td>
<td>0.17</td>
<td>0.17</td>
</tr>
<tr>
<td>(0.62)</td>
<td>(0.30)</td>
<td>(0.30)</td>
<td>(0.30)</td>
<td></td>
</tr>
<tr>
<td>ICSID ratification (+)</td>
<td>0.14</td>
<td>0.55***</td>
<td>0.59***</td>
<td>0.59***</td>
</tr>
<tr>
<td>(0.28)</td>
<td>(0.17)</td>
<td>(0.17)</td>
<td>(0.17)</td>
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</tr>
<tr>
<td>Diplomatic Capacity (+)</td>
<td>-0.03***</td>
<td>-0.01***</td>
<td>-0.01***</td>
<td>-0.01***</td>
</tr>
<tr>
<td>(0.01)</td>
<td>(0.01)</td>
<td>(0.01)</td>
<td>(0.01)</td>
<td></td>
</tr>
<tr>
<td>5 year-period dummies</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Number of BITs</td>
<td>90</td>
<td>90</td>
<td>90</td>
<td>90</td>
</tr>
</tbody>
</table>

Notes: Hypothesized effects are in parentheses; clustered standard errors are in parentheses; *** p<0.01, ** p<0.05, * p<0.10; Bolded numbers indicate that findings are robust to clustering standard errors by capital-importing state and substituting the period dummies for yearly ones.
In contrast to the analysis of risky states, there appears to be some, but limited, support for the credible commitment expectation when applied to “transitional states.” As predicted, states that experience high rates of economic growth are more likely than their peers to include an investor-state arbitration provision with statistically notable effect. An increase in the rate of economic growth by one standard deviation increases the likelihood of including an investor-state arbitration provision by 14 percent. In contrast, states that are experiencing increasing rates of inward FDI are in the initial regression (Column 1) less likely to include an investor-state arbitration provision; this finding leaves unresolved the question whether transitional states are drawn toward BITs in order to lock in change.

In the original specification, neither colonial ties nor ICSID ratification, as control variables, have a noticeable influence on state decisions to sign hard BITs. The diplomatic capacity variable exerts an impact opposite to what is predicted: states with more embassies located in foreign countries are less likely to include an investor-state arbitration provision. Going from the 25th to 75th percentile in the number of embassies abroad decreases the probability of including an arbitration provision by 15 percent.

Two-Stage Heckman Selection Model

It is possible that the probit estimation of states decisions to include investor-state arbitration provisions are being driven not by their incentives to include a new type of enforcement mechanism in BITs but by the prior decision about whether or not to sign a BIT at all. For example, the observed positive correlation between colonial ties and hard BITs discussed above may be due to the fact that former colonies were recipients of high levels of inward investment and thus

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35 The colonial ties variable gains significance when yearly dummies are included. See Appendix, Table 1.
were much more likely than other capital-importing countries to enter into BITs. The key variable driving the decision to include hard BITs is inward FDI rather than colonial ties. More generally, the risk of analyzing only the second stage is to leave open the possibility that the apparent relationship between the explanatory variables and decisions to sign a hard BIT will actually be driven by decisions at the prior stage about whether or not to sign a BIT in the first place.

To evaluate whether sample selection may be producing biased estimates, I use a two-stage Heckman selection model, also referred to as a probit model with sample selection. This form of selection model is appropriate when the variable of interest (here, the decision to include an investor-state arbitration provision) is observed for only a subset of cases (here, states that choose to sign a BIT).

The sample that I use for conducting the two-stage analyses is comprised of two groups. The first group consists of all dyads that signed a BIT (hard or soft) between 1968 and 1980, and in which the capital-exporting states belong to the previously identified 17 OECD states. The second group includes one observation for each dyad that could have but did not sign a BIT between 1968 and 1980, with the year of observation randomly selected from a distribution of potential years weighted by the percentages of global BITs that were signed each year. The resulting sample size is 1,858 dyads, 90 of which signed BITs during the early (exogenously defined) period. I include all explanatory variables from the probit model in both the outcome (hard or soft BIT) and selection (BIT or no BIT) equations.

36 I drop from this enlarged sample all dyads that signed a BIT before 1968 (for a total of 69 dyads) since these states were not “at risk” of signing a BIT at the point at which my analysis begins.

37 I follow Allee and Peinhardt’s (2010, 21, note 36) example in using this method of random sampling.

38 Using this method, the full sample size should be 2,304 dyads, but it is reduced due to the exclusion of 17 countries from Elkins et al. 2006 dataset (most of which are also missing from the Allee and Peinhardt 2010 dataset, suggesting that systematic data on them is lacking).
In addition, I add two variables to the selection equation that Allee and Peinhardt have identified as exogenous to the second stage and employed in their two-stage ordered probit model with sample selection.\textsuperscript{39} First, I include an indicator for whether at least one of the two countries had some form of diplomatic representation in the territory of the other (taken from the Correlates of War data set). Second, I include a measure of the capital-importing state’s level of democracy using Polity IV scores.\textsuperscript{40} As with Allee and Peinhardt’s analysis, the motivation for the first variable is that diplomatic representation increases the probability that a pair of states will sign a BIT. Here, the logic is either liberal (the frequency of home-host diplomatic interaction makes the signing of a treaty more likely) or statist (diplomatic capacity).\textsuperscript{41} About 72 percent of dyads had some form of diplomatic representation with one another.

With respect to the second exogenous variable, the level of democracy of capital importing states, my expectation -- which diverges from Allee and Peinhardt’s analysis -- is that host state democracies will be less likely to sign BITs.\textsuperscript{42} The logic is one of credible commitment: democracies will be under less pressure than non-democracies to signal their credibility because they are viewed generally as adhering to the rule of law. Although results from the simple probit model for the second stage provide little evidence in support of the credible commitment model, there are reasons

\textsuperscript{39} See Allee and Peinhardt 2010, 21. They employ this estimation in their robustness checks; their primary model is an ordered probit model. In addition to the embassy and host democracy variables, they include home democracy and a measure of the geographic distance between home and host. I do not include the former since there is little variation in the degree of democracy among the 17 OECD states. I do not include the latter because it turns out not to affect decisions to sign a BIT in the specifications I analyze using the Heckman two-stage model.

\textsuperscript{40} Allee and Peinhardt 2010, 21.

\textsuperscript{41} The variable is distinct from the diplomatic count variable that is included the actual regression, which is a cumulative measure of total number of embassies located abroad.

\textsuperscript{42} Since the samples differ completely, both in terms of years covered and dyads included, this inconsistency may make sense.
to expect that it may apply at the first stage (BIT vs no BIT). This is evident in the discussion below about the first-stage results.

Admittedly, theoretical arguments could be provided to cast doubt on the validity of these two instrumental variables. I use them not because of the strength of their theoretical justification, but because there is some evidence that they in fact “work” as exogenous variables, and because BIT's scholars have yet to identify more effective instruments.\(^43\) Since we lack to date formal tests for analyzing exogeneity of instruments for a sample selection model, I evaluate their exogeneity by including the two variables in both the first and second stage (in the actual analysis they should be and are included only at the first stage). If exogenous, the two variables should be significant at the first stage, but not at the second. As reported in the Appendix, Table 3, both variables are shown to exert an impact in the expected direction at the first stage, and are statistically significant. Neither of the two variables are shown to be statistically significant at the second stage.\(^44\) This suggests that both variables may be useful in helping to identify the impact of selection on the outcome equation.

Turning now to the results of the two-stage analysis, I focus on the model that includes the three groups of states with differential degrees of susceptibility to crisis. As reported in Table 4-5, the two exogenous variables, level of host state democracy and diplomatic representation, exert an impact in the predicted directions and are statistically significant at the 5 percent level. Importantly, the estimate of rho, the correlation in the unobservables across the two stages, is not statistically significant. This suggests that the decision to include an investor-state arbitration provision can be evaluated independently of the decision to sign a BIT in the first place.

\(^{43}\) Allee and Peinhardt 2010, 21.

\(^{44}\) This proves to be the case also when I analyze the two variables in a simple second stage probit analysis.
Nevertheless, it is worth noting that the findings are broadly consistent with the results from the simple probit, including directions, magnitudes, and patterns of statistical significance. The only exception is that the colonial ties variable is not statistically significant in the two-stage model. The general consistency in results across the two models further suggests that selection bias is not responsible for the results in the baseline probit analyses of whether states choose to sign a hard or soft BIT.
Table 4-5: Two-Stage Probit Model with Sample Selection (1968-1980)

<table>
<thead>
<tr>
<th>Variable</th>
<th>Estimate (Clustered S.E.)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Outcome: Including an Investor-State Arbitration Provision</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Capital-Exporter Variables</strong></td>
<td></td>
</tr>
<tr>
<td>Group 1</td>
<td>-1.76 (.79)**</td>
</tr>
<tr>
<td>Group 2</td>
<td>-.94 (.48)**</td>
</tr>
<tr>
<td>Group 3</td>
<td>-1.78 (.80)**</td>
</tr>
<tr>
<td><strong>Capital-Importer Variables</strong></td>
<td></td>
</tr>
<tr>
<td>Extractive Industries/Exports</td>
<td>-.03 (.00)***</td>
</tr>
<tr>
<td>Recent Independence</td>
<td>-1.17 (.63)*</td>
</tr>
<tr>
<td>Recent Expropriations</td>
<td>-.08 (.04)*</td>
</tr>
<tr>
<td>Economic GDP Growth</td>
<td>.08 (.03)**</td>
</tr>
<tr>
<td>Change in Inward FDI</td>
<td>-.00 (.13)</td>
</tr>
<tr>
<td><strong>Controls</strong></td>
<td></td>
</tr>
<tr>
<td>Colonial Ties</td>
<td>1.56 (.87)*</td>
</tr>
<tr>
<td>Diplomatic Capacity</td>
<td>-.02 (.00)**</td>
</tr>
<tr>
<td>IMF Credits</td>
<td>.14 (.30)</td>
</tr>
<tr>
<td>ICSID Ratification</td>
<td>.45 (.43)</td>
</tr>
<tr>
<td><strong>Selection: Signing a BIT</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Capital-Exporter Variables</strong></td>
<td></td>
</tr>
<tr>
<td>Group 1</td>
<td>1.06 (.26)***</td>
</tr>
<tr>
<td>Group 2</td>
<td>-.06 (.29)</td>
</tr>
<tr>
<td>Group 3</td>
<td>.99 (.29)***</td>
</tr>
<tr>
<td><strong>Capital-Importer Variables</strong></td>
<td></td>
</tr>
<tr>
<td>Extractive Industries/Exports</td>
<td>-.00 (.00)**</td>
</tr>
<tr>
<td>Recent Independence</td>
<td>.29 (.10)**</td>
</tr>
<tr>
<td>Recent Expropriations</td>
<td>.02 (.02)</td>
</tr>
<tr>
<td>Economic GDP Growth</td>
<td>.03 (.00)***</td>
</tr>
<tr>
<td>Change in Inward FDI</td>
<td>-.00 (.05)</td>
</tr>
<tr>
<td><strong>Controls</strong></td>
<td></td>
</tr>
<tr>
<td>Colonial Ties</td>
<td>.43 (.26)*</td>
</tr>
<tr>
<td>Diplomatic Capacity</td>
<td>.01 (.00)***</td>
</tr>
<tr>
<td>IMF Credits</td>
<td>.12 (.16)</td>
</tr>
<tr>
<td>ICSID Ratification</td>
<td>1.00 (.13)***</td>
</tr>
<tr>
<td><strong>Exogenous Variables</strong></td>
<td></td>
</tr>
<tr>
<td>Diplomatic Representation</td>
<td>.48 (.21)**</td>
</tr>
<tr>
<td>Host Democracy</td>
<td>-.03 (.00)***</td>
</tr>
<tr>
<td>Rho(S.E):</td>
<td>-.19 (.68)</td>
</tr>
<tr>
<td>N(2nd stage)</td>
<td>1858 (90)</td>
</tr>
</tbody>
</table>

Notes: Clustered standard errors are in parentheses; *** p<0.01, ** p<0.05, * p<0.10; Both stages include 5-year dummy variables.
Although the primary focus of this chapter is on this second stage, I discuss here briefly the findings of the first stage (factors influencing state decisions to sign a BIT). Of the nine variables that are statistically significant at or below the 10 percent level at the second stage, three – colonial ties, resource rich states, and economic growth -- are similarly correlated with the first stage (in the same direction) and retain statistical significance, although with smaller coefficients. One of the “risky states” variables, recent independence, exerts the opposite impact at the first stage, indicating that states that recently gained independence are more likely to sign a BIT. This positive relationship is consistent with the negative association between the democracy instrumental variable and decision to sign a BIT at the first stage. Thus, two of the five credibility measures are consistent with the credible commitment expectations about state decisions to sign a BIT at the first stage, and one of the five is consistent with the decision to include an investor-state arbitration provision at the second stage. These results fall considerably short of offering strong support for the credible commitment explanation. The diplomatic representation variable also works in the opposite direction from its effect at the second stage, and is statistically significant, suggesting that states with strong diplomatic capacity were more likely to sign a BIT even as they were less likely to include an investor-state arbitration provision.

Finally, the three susceptibility group variables look strikingly different at the first stage when compared to the second stage. Whereas the expectation is that the variables will be negatively correlated with hard BITs at the second stage, two of the groups are positively correlated with signing a BIT at the first stage. This should come as no surprise, however. The logic of the crisis argument, and specifically the measure for access to compulsory judicial mechanisms, applies only to the second stage. This logic, to recap, is that states that have signed more soft BITs are less likely to adopt the investor-state arbitration provision because they are deterred by inertia. But inertia is not a factor at the first stage, since these states can still use their old legal templates if they decide to sign.
a BIT. While interesting to note, it is premature to place too much weight on these associations, since the first stage warrants independent analysis and perhaps a broader set of control variables.

**ROBUSTNESS CHECKS**

In this section, I evaluate the robustness of the preceding analysis, particularly the core finding that states most susceptible to crisis are more likely than others to emerge as innovators during the crisis period. I begin by rerunning the analysis using various random sampling methods and adding controls.

The bulk of the robustness analysis involves reanalyzing the data using different cut-off points for the innovation period. The legal crisis argument defines the innovation period exogenously, with reference to the G-77’s rebellion against the investment regime, and therefore uses 1980 as a cut-off point. By then, outright expropriations of foreign property had basically stopped. But there are alternative logics for defining the innovation period, including those which distinguish the innovation and post-innovation period based on internal adoption patterns among states rather than external events. Using this approach, I identify two cut-off points, 1989 and 1992, which extend the post-crisis analysis by nine and twelve years respectively. Since by then the legal crisis had long disappeared, the crisis argument expects that state susceptibility should have a weaker association with innovation than in the main analysis; states will no longer turn to investor-state arbitration out of investment insecurity. The key finding in the following analysis is that the

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45 In theory the crisis argument would expect the opposite outcome with regard to soft BITs: states that have previously signed more soft BITs are more likely than others to sign a BIT (soft). Its prediction for expropriation risk would stay the same, however: states that face higher expropriation rates should be correlated with signing a BIT over no BIT. This would lead to the expectation that Group 3 – states that have signed few soft BITs and face low expropriation risk -- will be the least likely to sign a BIT. But there is little support for this in the reported results; Group 3 is positively correlated with the first stage and statistically significant. The inconsistency suggests that the crisis argument has limited applicability: it may apply to institutional design choices, but other factors appear to be more important to capital-exporting states when making the initial decision to sign a BIT in the first place.
correlation between the “most susceptible” states and the adoption of hard BITs persists until 1988/89, loses statistical significance at that point and weakens over time.

**Random Sampling and Additional Controls**

In order to analyze the signing of hard BITs in a two-stage model, my main approach follows Allee and Peinhardt’s method of random sampling and uses the weighted distribution of BITs per year to randomly select observations of non-signing dyads. This leads to a skewed sample, however, with 1,858 non-signing dyads, 90 signing dyads, and 23 hard BITs. To ensure that the sampling method is not influencing results, I also analyze the main model using a “one to one match” in which a randomly selected non-signing dyad is included for every signing dyad, leading to a balanced dataset of 186 dyads. The results for both samples are consistent with the main two-stage findings.

I also include in the main models two additional control variables that have proven important in other BITs studies to see if they affect the main findings regarding the susceptibility groups. First, I add one of the three Elkins, Guzman and Simmons’ measures of competition, a spatial lag for export market competitors. Second, I include in the analysis an indicator for the ratio of the logged GDP of capital-exporter to capital-importer. Allee and Peinhardt use this measure as a proxy for power asymmetry and find that it is a strong determinant of forum selection provisions in BITs. Both the competition and power asymmetry variables are positively correlated with signing a hard BIT, and are statistically significant during the legal crisis period. More importantly for my purposes, their inclusion does not change the core results for the susceptibility groups.

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46 All results discussed in this section are available upon request.
Cut-Off Points

Because the adoption of investor-state arbitration provisions spans five decades and continues, I distinguish the innovators from non-innovators based on identifying the “tipping point,” defined as the point at which the number of states that adopt a treaty, norm or new institution begins to rise dramatically. To determine the tipping point, I use both informal and formal techniques on Elkins, Guzman and Simmons’ and Yackee’s data to see if there are any identifiable surges in the rate of adoption of BITs, including BITs with investor-state arbitration provisions.\(^47\) I use both sets of data to evaluate whether the “tipping point” in Yackee’s data differs sharply from that in Elkins et al. Informally, I scan the signing patterns shown in Table 4-6 and Figures 4-1 and 4-2 to compare the tipping points across the two datasets. In Elkin’s et al dataset, 1992 appears to be the year before an apparent structural break in the time series of BITs’ signings. In Yackee’s dataset it is 1989.\(^48\)

I also employed more formal techniques to test for structural breaks with unknown break points, to let the data suggest the timing (if any) of the structural break in the BITs series. First, I estimate a series of regression models relating the number of annual BITs before and after a given year T, defining a variable “tipping” to be 1 for all years after year T. Thus for T=1980, “tipping” would equal 1 for all BITs signed after 1980 and 0 for all prior years. I re-run this for all possible structural break points (T=1961 to 1999). I collect t-statistics on the tipping variable across each of these models (which estimate the difference in the number of BITs before and after a given candidate break point) and define the structural break point to be the value of T that maximizes the

\(^{47}\) These datasets are quite distinct. Elkins, Guzman and Simmons 2006 examine all BITs between 1959 and 2000, whether or not they entered into force and do not distinguish between soft and hard treaties. Yackee 2008 examines only those BITs signed with one of 18 OECD states, only those that entered into force and does distinguish between soft and hard treaties.

\(^{48}\) Although Elkins et al. 2006 do not code BITs for whether they were soft or hard, we can infer from both Yackee’s 2006 data and UNCTAD reports that the majority of BITs in their analysis after the mid-to late 1980s contained an investor-state arbitration provision.
test statistic. These models reveal a structural break in 1992 for the Elkins et al BITs series \( (t=17.3; \ p<.0001) \), and in 1988 for the Yackee series \( (t=12.2; \ p<.0001) \). As a robustness check, I also computed Zivot-Andrews tests for structural breaks, which suggest breaks at 1992 and 1989 respectively.\(^49\) These two formal tests confirm the intuition based on the graphs.

Figure 4-4: Tipping Point, All BITs, Elkins et al Dataset

Figure 4-5: Tipping Point, hard BITs, Yackee’s dataset
Table 4-6: Tipping Point Across Datasets

<table>
<thead>
<tr>
<th>Year</th>
<th>EGS Data&lt;sup&gt;50&lt;/sup&gt;</th>
<th>Yackee Total&lt;sup&gt;51&lt;/sup&gt;</th>
<th>Hard BITs</th>
</tr>
</thead>
<tbody>
<tr>
<td>1960</td>
<td>1</td>
<td>4</td>
<td>0</td>
</tr>
<tr>
<td>1961</td>
<td>4</td>
<td>11</td>
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</tr>
<tr>
<td>1962</td>
<td>5</td>
<td>9</td>
<td>0</td>
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<tr>
<td>1963</td>
<td>9</td>
<td>10</td>
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<td>1964</td>
<td>6</td>
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<td>1970</td>
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<td>1971</td>
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<td>1972</td>
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<tr>
<td>2000</td>
<td>102</td>
<td>21</td>
<td>21</td>
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</table>

<sup>50</sup> Ekins, Guzman and Simmons 2006. These number reflect an updated, post-publication dataset.

<sup>51</sup> Yackee 2008.
In the following analysis, I reanalyze the data using both 1989 and 1992 as cut-off points. For the 1989 cut-off point, the sample consist of 241 BITs, 130 (53.9%) of which are soft and 111 which are hard (46.0%). For the 1992 cut-off point, the sample consists of 384 BITs, 149 (38.8%) of which are soft and 235 (61.2%) which are hard.

In this analysis I include a final control variable, created by Allee and Peinhardt, which measures domestic political pressure. The authors use data from *Forbes* magazines’ yearly list of the world’s largest MNCs and create a standardized indicator of the percent of the world’s largest multinationals that have headquarters in each capital-exporting country. The expectation is that states with powerful investor constituencies will be more likely than others to emerge as innovators, adopting hard BITs before their peers. I excluded this variable from the main analysis (1968-1980) because Forbes began collecting data for this measure only in 1980.

Before moving to the analysis, I re-examine descriptively whether the mean values of adopting hard BITs vary across the four susceptibility groups in the two new samples. The crisis argument expects that the crisis-period mean should be higher than the means for the two extended samples, and statistically significant. Table 4-7 shows a decreasing mean for Group 4 over time, but not the sharp drop-off that the crisis argument expects after 1980. In all three samples Group 4 has a higher mean, a surprising finding given that the states that chose to sign hard BITs in the late 1980s are different (and more diverse) than during the crisis period, and since crisis of outright

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52 I report only the results from the 1989 sample, but the 1988 results are consistent.

53 Allee and Peinhardt 2010.

54 To be sure, this measure is not ideal. For instance, it does not adjust for GDP or state size. States with a small percentage of the world’s MNCs may nonetheless be small themselves, and more susceptible to MNC influence than states with a large percent of MNCs that also have other powerful interest groups, such as strong trade unions.

55 Chapter 3 offers preliminary support for this expectation. The investment TAN had its origin in Germany, and then Switzerland, and these were the first two capital-exporting states to launch their BITs programs in 1959 and 1961 respectively.
expropriations had long since abated. This said, the difference between the means for Groups 1-3 and Group 4 for the 1989 and 1992 periods are smaller than for the crisis period and lose statistical significance by 1992. The descriptive analysis offers mixed support then for the crisis argument: states susceptibility to crisis appears to be associated with signing a hard BIT, surprisingly even once the crisis period ends; as expected the relationship weakens over time.

### Table 4-7: Comparison of Means over Time

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Group 1 (predicted least vulnerable)</td>
<td>.1875 (34.8%)</td>
<td>.3375 (33.2%)</td>
<td>.5172 (30.2%)</td>
</tr>
<tr>
<td>Group 2</td>
<td>.2000 (16.3%)</td>
<td>.4250 (16.6%)</td>
<td>.6790 (21.1%)</td>
</tr>
<tr>
<td>Group 3</td>
<td>.0476 (22.8%)</td>
<td>.3333 (19.2%)</td>
<td>.5802 (21.1%)</td>
</tr>
<tr>
<td>Group 4 (predicted most vulnerable)</td>
<td>.5417 (26.1%)</td>
<td>.6986 (30.29%)</td>
<td>.6887 (27.6%)</td>
</tr>
<tr>
<td>Number of BITs</td>
<td>90</td>
<td>241</td>
<td>384</td>
</tr>
<tr>
<td>p-value from t-test of differences between Groups 1-3 and Group 4*</td>
<td>0.0001</td>
<td>.0000</td>
<td>0.0835</td>
</tr>
</tbody>
</table>

*Notes: The dependent variable is dichotomous, with hard BIT=1; percentages in parentheses are the percent of all BITs in a given cohort accounted for by each group.

Moving to the full analysis of the two extended periods (1989 and 1992), I report the results using the Heckman model with the group susceptibility measures. I focus on the Heckman model rather than the simple probit because, for both the 1989 and 1992 periods, rho is statistically significant, at the 10 and 5 percent level respectively. This indicates that the two stages may be dependent, and that an analysis that attempts to correct for sample bias is more appropriate than a
simple probit. Nonetheless, I also analyze the final specification of the main model using a probit model and report the findings in the Appendix (Table 5).

I use here exactly the same specifications as for the crisis period, but with an added control for MNC influence. For the sake of comparison with earlier results, I continue to include the 5-period dummies in the main specifications and cluster standard errors by capital-exporting country. State susceptibility should no longer be a major motivator for signing hard BITs; because the legal crisis had abated by the early 1980s, my expectation is that other factors become more important.

Using the same sampling method as before, the inclusion of non-signing dyads yields a sample of 2,066 dyads for the 1989 period and 2,183 dyads for the 1992 period. Before conducting the two-stage analysis, I re-evaluate the exogeneity of the two instruments, diplomatic representation and degree of democracy for capital importers. (For the 1992 sample, see Appendix, Table 4. The results are consistent for the 1989 sample). In this analysis the level of democracy variable is positively correlated with the decision to include an investor-state arbitration provision at the second stage. I therefore use only the diplomatic representation variable as an instrument. The exogenous variable, diplomatic representation, is still significant at only the first stage, and may therefore useful for disentangling the two stages.

Tables 4-8 and 4-9 report the results for the 1989 and 1992 samples respectively. For both samples, in the second stage results, the three group susceptibility variables continue to be negatively correlated with signing a hard BIT, but, as the crisis argument predicts, are no longer statistical significant. Yet, in an analysis using 1988, rather than 1989, as the cut-off point, (results not

56 Using this sampling method the original sample size should be 2886 dyads, but due to the exclusion of 17 countries, the sample used here is smaller.

57 The findings from the first-stage suggest that the susceptibility group and control variables are, to varying degrees, correlated with the decision to sign a BIT. Although these results are only preliminary and need to be further analyzed with additional controls, many of the variables are in the expected direction and statistically significant. Two of the group variables are significant and in the opposite direction of what was predicted for
reported here) the group variables retain significance at the second stage, contrary to the crisis expectations (and rho is not statistically significant.)

the second stage. To reiterate, this is not surprising given that state susceptibility to crisis is specific to the decision about whether or not to include a investor-state provision.
<table>
<thead>
<tr>
<th>Variable</th>
<th>Estimate (Clustered S.E.)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Outcome: Including an Investor-State Arbitration Provision</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Capital-Exporter Variables</strong></td>
<td></td>
</tr>
<tr>
<td>Group 1</td>
<td>-.64 (.55)</td>
</tr>
<tr>
<td>Group 2</td>
<td>-.51 (.39)</td>
</tr>
<tr>
<td>Group 3</td>
<td>-.43 (.66)</td>
</tr>
<tr>
<td>MNC</td>
<td>3.54 (1.86)</td>
</tr>
<tr>
<td><strong>Capital-Importer Variables</strong></td>
<td></td>
</tr>
<tr>
<td>Extractive Industries/Exports</td>
<td>-.00 (.00)</td>
</tr>
<tr>
<td>Recent Independence</td>
<td>-.74 (.44)*</td>
</tr>
<tr>
<td>Recent Expropriations</td>
<td>-.04 (.04)</td>
</tr>
<tr>
<td>Economic GDP Growth</td>
<td>.07 (.02)***</td>
</tr>
<tr>
<td>Change in Inward FDI</td>
<td>- .04 (.06)</td>
</tr>
<tr>
<td><strong>Controls</strong></td>
<td></td>
</tr>
<tr>
<td>Colonial Ties</td>
<td>.87 (.45)*</td>
</tr>
<tr>
<td>Diplomatic Capacity</td>
<td>-.01 (.00)</td>
</tr>
<tr>
<td>IMF Credits</td>
<td>.42 (.21)**</td>
</tr>
<tr>
<td>ICSID Ratification</td>
<td>.54 (.19)**</td>
</tr>
<tr>
<td><strong>Selection: Signing a BIT</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Capital-Exporter Variables</strong></td>
<td></td>
</tr>
<tr>
<td>Group 1</td>
<td>.68 (.27)**</td>
</tr>
<tr>
<td>Group 2</td>
<td>-.01 (.24)</td>
</tr>
<tr>
<td>Group 3</td>
<td>.86 (.25)***</td>
</tr>
<tr>
<td>MNC</td>
<td>.17 (1.02)</td>
</tr>
<tr>
<td><strong>Capital-Importer Variables</strong></td>
<td></td>
</tr>
<tr>
<td>Extractive Industries/Exports</td>
<td>-.00 (.00)***</td>
</tr>
<tr>
<td>Recent Independence</td>
<td>.26 (.09)***</td>
</tr>
<tr>
<td>Recent Expropriations</td>
<td>-.01 (.01)</td>
</tr>
<tr>
<td>Economic GDP Growth</td>
<td>.02 (.01)***</td>
</tr>
<tr>
<td>Change in Inward FDI</td>
<td>-.04 (.06)</td>
</tr>
<tr>
<td><strong>Controls</strong></td>
<td></td>
</tr>
<tr>
<td>Colonial Ties</td>
<td>.63 (.22)**</td>
</tr>
<tr>
<td>Diplomatic Capacity</td>
<td>.01 (.00)***</td>
</tr>
<tr>
<td>IMF Credits</td>
<td>.10 (.08)</td>
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<td>ICSID Ratification</td>
<td>.51 (.08)***</td>
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<tr>
<td><strong>Exogenous Variables</strong></td>
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<tr>
<td>Diplomatic Representation</td>
<td>.62 (.10)***</td>
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<tr>
<td><strong>Rho(S.E):</strong></td>
<td>.80 (.07)*</td>
</tr>
<tr>
<td><strong>N(2nd stage):</strong></td>
<td>2066 (232)</td>
</tr>
</tbody>
</table>

Notes: Clustered standard errors are in brackets; *** p<0.01, ** p<0.05, * p<0.10; Both stages include 5-year dummy variables.
Table 4-9: Two-Stage Probit Model with Sample Selection (1968-1992)

<table>
<thead>
<tr>
<th>Variable</th>
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</thead>
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<tr>
<td><strong>Outcome: Including an Investor-State Arbitration Provision</strong></td>
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<tr>
<td><strong>Capital-Exporter Variables</strong></td>
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<td>Group 1</td>
<td>-.48 (.55)</td>
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<tr>
<td>Group 2</td>
<td>-.28 (.48)</td>
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<td>Group 3</td>
<td>-.06 (.50)</td>
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<tr>
<td>MNC</td>
<td>3.48 (2.35)</td>
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<td><strong>Capital-Importer Variables</strong></td>
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<tr>
<td>Extractive Industries/Exports</td>
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<tr>
<td>Recent Independence</td>
<td>-.75 (.42)*</td>
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<tr>
<td>Recent Expropriations</td>
<td>-.03 (.03)</td>
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<tr>
<td>Economic GDP Growth</td>
<td>.02 (.01)</td>
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<tr>
<td>Change in Inward FDI</td>
<td>-.00 (.04)</td>
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<td><strong>Controls</strong></td>
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<tr>
<td>Colonial Ties</td>
<td>.36 (.35)</td>
</tr>
<tr>
<td>Diplomatic Capacity</td>
<td>.00 (.00)</td>
</tr>
<tr>
<td>IMF Credits</td>
<td>.24 (.15)</td>
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<td>ICSID Ratification</td>
<td>.22 (.12)*</td>
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<td><strong>Selection: Signing a BIT</strong></td>
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<tr>
<td><strong>Capital-Exporter Variables</strong></td>
<td></td>
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<tr>
<td>Group 1</td>
<td>.58 (.23)**</td>
</tr>
<tr>
<td>Group 2</td>
<td>.00 (.20)</td>
</tr>
<tr>
<td>Group 3</td>
<td>.69 (.23)**</td>
</tr>
<tr>
<td>MNC</td>
<td>-.29 (1.09)</td>
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<td><strong>Capital-Importer Variables</strong></td>
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<tr>
<td>Recent Independence</td>
<td>.20 (.11)*</td>
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<tr>
<td>Recent Expropriations</td>
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<tr>
<td>Economic GDP Growth</td>
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<tr>
<td>Change in Inward FDI</td>
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</tr>
<tr>
<td><strong>Controls</strong></td>
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<tr>
<td>Colonial Ties</td>
<td>.63 (.22)**</td>
</tr>
<tr>
<td>Diplomatic Capacity</td>
<td>.01 (.00)***</td>
</tr>
<tr>
<td>IMF Credits</td>
<td>.00 (.08)</td>
</tr>
<tr>
<td>ICSID Ratification</td>
<td>.36 (.06)***</td>
</tr>
<tr>
<td><strong>Exogenous Variables</strong></td>
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</tr>
<tr>
<td>Diplomatic Representation</td>
<td>.69 (.08)***</td>
</tr>
<tr>
<td><strong>Rho(S.E.):</strong></td>
<td>.66 (.05)**</td>
</tr>
<tr>
<td>N(2\textsuperscript{nd} stage)</td>
<td>2183 (331)</td>
</tr>
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</table>

Notes: Clustered standard errors are in brackets;*** p<0.01, ** p<0.05, * p<0.10;
Both stages include 5-year dummy variables.
Taking a step back, a comparison of findings across the three samples (1980, 1989 and 1992 cutoffs) analyzed with the Heckman model suggests that the correlation between high levels of susceptibility and hard BITs outlasts the legal crisis period, but fades with time. The persistent effect of the group variables until 1988 undermines the expectation that the impact of expropriation risk on adopting hard BITs will disappear in tandem with the abating of the G-77 opposition.

Assuming these results are correct and robust, then the persistent correlation might be explained in two ways. First, although outright expropriations dropped sharply in the 1980s, capital-importing states turned to indirect expropriation, which involves interfering with the use of foreign property even without claiming title to it. This was particularly acute, moreover, in extractive industries where capital-importing states had significant leverage over foreign investors. Susceptibility to indirect expropriation may have replaced susceptibility to outright expropriations, thus maintaining for awhile the incentive to sign hard BITs. Second, and following the logic of inertia used to explain the role of soft BITs in discouraging the creation of hard BITs, it is very possible that once the most susceptible states began to use the hard BIT template, they simply adhered to it and remained frequent hard BITs signers.

Finally, it is interesting to note that the significance of rho in the two-stage models increases over time from being insignificant in the 1980 sample to being significant at the 10% and 5% levels in the 1989 and 1992 samples respectively. This increasing significance is consistent with what we know about the convergence of all BITs towards the inclusion of an investor-state arbitration provision. As the popularity of investor-state arbitration provisions increase to the point that they are now nearly universal, we would expect the factors influencing the first and second stages to become increasingly intertwined.58

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58 This trend is consistent with many of the variables losing significance at the second stage in the 1992 sample. It may be that as states converged on the hard BIT template over the course of the 1980s, the variables expected to influence their decisions about whether to sign a hard or soft BIT simply became less relevant. That is, as the option of soft BITs
CONCLUSION

International investment law is unique in granting private actors the *ex ante* legal authority to file claims in international forums directly against foreign states without any requirement of exhausting local remedies. Chapters 3 and 4 are, to my knowledge, the first analyses to provide both a systematic examination of the origins of investor-state arbitration provisions and give primary attention to the incentives of capital-exporting states. At the center of the crisis argument is the claim that the introduction of hard BITs occurs when the legal regime protecting the interests of powerful states is seriously threatened. In the case of investor-state arbitration the argument holds that capital-exporting states turned to hard BITs as sovereignty-constraining mechanisms amidst legal and political turmoil over the traditional investment rules that followed the wave of decolonization. Across different episodes of treaty negotiations, Chapter 3 found substantial support for this claim at the global level.

Applying the argument cross-nationally, Chapter 4 offers additional insight. The role of legal crisis in moving states to become the first adopters of investor-state arbitration provisions holds only for the most susceptible set of capital-exporting states. A specific threshold of exposure to an investment crisis and lack of access to judicial mechanisms needs to be passed before insecurity motivates states to become innovators.

Consistent with the analysis in Chapter 3, I find in this chapter minimal evidence that capital-importing states agreed to investor-state arbitration provisions in order to signal their credibility. Only one measure – GDP growth rate – is consistently positively correlated with signing hard BITs; as an indicator of economic transition, this measure is, at best, of dubious validity.

became less common, factors that previously influenced state decisions to include an investor-state arbitration provision became less important. In contrast, as the popularity of hard BITs spread, decisions about investor-state arbitration forums may have become more salient.
The lack of support for the credibility commitment argument is not surprising. Although the assumption is widely held that BITs signal credible commitments, two of the three most important studies that inquire into the determinants of BITs adoption find either no or only very limited evidence of a credibility motive. In *Competing for Capital*, Elkins, Guzman and Simmons argue that competition between capital-importing states for FDI explains the diffusion of all types of BITs between 1960 and 2004. Although they argue that states, driven by this competitive logic, use BITs as signaling devices, their statistical analysis offers little direct evidence for, and at times even contradicts, a credible commitment explanation. States that were rich in extractive industries were significantly less likely to sign BITs, while states with strong rule of law were significantly more likely. Their analysis shows that democratic states, moreover, were not significantly more or less likely to sign BITs. In *Delegating Differences*, moreover, Allee and Peinhardt examine factors influencing state decisions to delegate dispute settlement to ICSID.\(^59\) In their analysis none of the three measures for credibility – rule of law, regime durability, and constraints on the executive – correlate significantly with delegation decisions.

Only one of the three studies that examines the impact of credibility incentives on the adoption of BITs lends support to the credibility argument, and it is rather limited. In *Three Waves of BITs*, Jandhyala and her co-authors analyze the changing motives of BITs adoption across three stages.\(^60\) Consistent with organizational theory, they establish that rationalist incentives to signal credibility are influential initially while normative incentives matter more later on.\(^61\)

\(^59\) Although their core assumption (that exclusive delegation to ICSID imposes higher sovereignty costs than non-exclusive delegation) is problematic, the relevant point is that their credibility measures are not correlated either negatively or positively with forum choice.

\(^60\) Jandhyala et al. 2011.

\(^61\) Rationalist motives are relevant at the third stage as well, which the authors attribute to the onset of financial crises.
Their analysis can be reconciled with my findings in two ways. First, Jandhyala et al examine the adoption of BITs rather than investor-state arbitration provisions. In addition, they use different measures of credibility. Whereas I focus on the likelihood of expropriating foreign property, proxied by a country's expropriation track record, rich endowment in natural resources, and the establishment of independent statehood, they calculate the absolute difference between capital exporting and capital importing BITs partners across two measures: constraints on the executive and regime type. They find that both measures are positively correlated with BITs adoption, although the former is significant only at the 10 percent level. For the second period, both measures are negatively and significantly correlated, indicating that states with low credibility were significantly less likely to sign BITs.

A final finding of this chapter is a simple one: state motives for adopting hard BITs are both historically contingent and change over time. The correlation between state susceptibility and hard BITs is strongest at the origins and appears to fade with time, although not as quickly as the crisis argument anticipates. Analyses that treat state adoption of BITs, including hard BITs, as static or independent of international economic and political context, miss a very important dynamic in world politics.
### Table 1: Probit Results for Decision to Sign a Hard BIT (1968-1980), with Year Dummies

<table>
<thead>
<tr>
<th>Explanatory Variables</th>
<th>(1)</th>
<th>(2)</th>
<th>(3)</th>
<th>(4)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>International Legal Crisis</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Crisis and Judicial Access</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Home Extractive Industries/Exports (+)</td>
<td>0.01</td>
<td>(0.09)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Previous Soft BITs (-)</td>
<td>-0.59***</td>
<td>(0.13)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Extract. Median Dummy (+)</td>
<td>0.54*</td>
<td>(0.32)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Soft BITs Median Dummy (-)</td>
<td>-1.65***</td>
<td>(0.63)</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>State Susceptibility Groups</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Group 1 (-)</td>
<td>-1.87**</td>
<td>(0.75)</td>
<td></td>
<td></td>
</tr>
<tr>
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<td>-1.49***</td>
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<td>0.38</td>
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<tr>
<td>Group 3 (-)/(+)</td>
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<td>-0.98**</td>
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<tr>
<td>Host Extractive/Exports (+)</td>
<td>-0.06***</td>
<td>-0.04***</td>
<td>-0.04***</td>
<td>-0.04***</td>
</tr>
<tr>
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<td>-1.05</td>
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<td>-0.13***</td>
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<tr>
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<tr>
<td>GDP Growth (+)</td>
<td>0.17***</td>
<td>0.10***</td>
<td>0.10***</td>
<td>0.10***</td>
</tr>
<tr>
<td>Change in Inward FDI (+)</td>
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<tr>
<td>Colonial Ties (+)</td>
<td>2.45***</td>
<td>2.85***</td>
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<td>2.80**</td>
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<td>-0.94**</td>
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<td>1.35***</td>
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<td>1.40***</td>
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<td>Yes</td>
<td>Yes</td>
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**Notes:** Hypothesized effects are in parentheses; Clustered Standard errors are in parentheses; *** p<0.01, ** p<0.05, * p<0.10.
Table 2: Probit Results (1968-1980), with standard errors clustered by Capital Importers

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<td>Previous Soft BITs (-)</td>
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<td><strong>State Susceptibility Groups</strong></td>
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<td></td>
</tr>
<tr>
<td>Group 1 (-)</td>
<td>-1.87***</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Group 2 (-)</td>
<td>-1.49**</td>
<td>0.38</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Group 3 (-)</td>
<td>-2.85**</td>
<td>-0.98</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Group 4 (+)</td>
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<td></td>
<td></td>
<td>1.87***</td>
</tr>
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<tr>
<td><strong>Risky States</strong></td>
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<tr>
<td>Host Extractive/Exports (+)</td>
<td>-0.06**</td>
<td>-0.04***</td>
<td>-0.04***</td>
<td>-0.04***</td>
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<td>-0.13</td>
<td>-0.13</td>
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</tr>
<tr>
<td>GDP Growth (+)</td>
<td>0.17**</td>
<td>0.10**</td>
<td>0.10**</td>
<td>0.10**</td>
</tr>
<tr>
<td>Change in Inward FDI (+)</td>
<td>-0.47</td>
<td>0.24</td>
<td>0.30</td>
<td>0.30</td>
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<tr>
<td><strong>Controls</strong></td>
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<td></td>
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<tr>
<td>Colonial Ties (+)</td>
<td>2.45**</td>
<td>2.85***</td>
<td>2.80***</td>
<td>2.80***</td>
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<tr>
<td>IMF Loan (+)</td>
<td>0.26</td>
<td>-0.78</td>
<td>-0.94</td>
<td>-0.94</td>
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<td>1.40*</td>
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<td>-0.02***</td>
<td>-0.02**</td>
<td>-0.02**</td>
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Notes: Hypothesized effects are in parentheses; Clustered standard errors are in parentheses; *** p<0.01, ** p<0.05, * p<0.10.
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<thead>
<tr>
<th>Variable</th>
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<td><strong>Outcome: Including an Investor-State Arbitration Provision</strong></td>
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<tr>
<td>Group 1</td>
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<tr>
<td>Group 2</td>
<td>-.93 (.64)**</td>
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<tr>
<td>Group 3</td>
<td>-1.78 (.47)**</td>
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<tr>
<td><strong>Capital-Importer Variables</strong></td>
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</tr>
<tr>
<td>Extractive Industries/Exports</td>
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</tr>
<tr>
<td>Recent Independence</td>
<td>-1.17 (.66)*</td>
</tr>
<tr>
<td>Recent Expropriations</td>
<td>-.08 (.04)*</td>
</tr>
<tr>
<td>Economic GDP Growth</td>
<td>.08 (.03)**</td>
</tr>
<tr>
<td>Change in Inward FDI</td>
<td>.00 (.13)</td>
</tr>
<tr>
<td><strong>Controls</strong></td>
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<tr>
<td>Colonial Ties</td>
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</tr>
<tr>
<td>Diplomatic Capacity</td>
<td>-.02 (.00)***</td>
</tr>
<tr>
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<td>ICSID Ratification</td>
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<tr>
<td><strong>Exogenous Variables</strong></td>
<td></td>
</tr>
<tr>
<td>Host Democracy</td>
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<tr>
<td>Diplomatic Representation</td>
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<td>Group 3</td>
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<td><strong>Capital-Importer Variables</strong></td>
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</tr>
<tr>
<td>Extractive Industries/Exports</td>
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</tr>
<tr>
<td>Recent Independence</td>
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<tr>
<td>Recent Expropriations</td>
<td>.02 (.02)</td>
</tr>
<tr>
<td>Economic GDP Growth</td>
<td>.03 (.00)***</td>
</tr>
<tr>
<td>Change in Inward FDI</td>
<td>-.00 (.05)</td>
</tr>
<tr>
<td><strong>Controls</strong></td>
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<tr>
<td>Colonial Ties</td>
<td>.43 (.26)*</td>
</tr>
<tr>
<td>Diplomatic Capacity</td>
<td>.01 (.00)***</td>
</tr>
<tr>
<td>IMF Credits</td>
<td>.12 (.16)</td>
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<td>ICSID Ratification</td>
<td>1.00 (.13)***</td>
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<tr>
<td><strong>Exogenous Variables</strong></td>
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<tr>
<td>Diplomatic Representation</td>
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<td>Host Democracy</td>
<td>-.03 (.00)***</td>
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<tr>
<td>Rho(S.E):</td>
<td>-.21 (.52)</td>
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<tr>
<td>N(2nd stage)</td>
<td>1858 (90)</td>
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</tbody>
</table>

**Notes:** Clustered standard errors are in parentheses; *** p<0.01, ** p<0.05, * p<0.10; Both stages include 5-year dummy variables.
Table 4: Testing Instruments in 2-Stage Probit Model with Sample Selection (1968-1992)

<table>
<thead>
<tr>
<th>Variable</th>
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<td><strong>Outcome: Including an Investor-State Arbitration Provision</strong></td>
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<tr>
<td><strong>Capital-Exporter Variables</strong></td>
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<tr>
<td>Group 1</td>
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<tr>
<td>Group 2</td>
<td>-.35 (.44)</td>
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<tr>
<td>Group 3</td>
<td>-.53 (.52)</td>
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<tr>
<td>MNC</td>
<td>4.36 (2.33)*</td>
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<tr>
<td><strong>Capital-Importer Variables</strong></td>
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</tr>
<tr>
<td>Extractive Industries/Exports</td>
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</tr>
<tr>
<td>Recent Independence</td>
<td>-1.31 (.58)**</td>
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<tr>
<td>Recent Expropriations</td>
<td>-.03 (.04)</td>
</tr>
<tr>
<td>Economic GDP Growth</td>
<td>.03 (.02)*</td>
</tr>
<tr>
<td>Change in Inward FDI</td>
<td>.02 (.04)</td>
</tr>
<tr>
<td><strong>Controls</strong></td>
<td></td>
</tr>
<tr>
<td>Colonial Ties</td>
<td>.19 (.71)</td>
</tr>
<tr>
<td>Diplomatic Capacity</td>
<td>-.02 (.01)**</td>
</tr>
<tr>
<td>IMF Credits</td>
<td>.27 (.13)**</td>
</tr>
<tr>
<td>ICSID Ratification</td>
<td>.02 (.30)</td>
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<td><strong>Exogenous Variables</strong></td>
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</tr>
<tr>
<td>Host Democracy</td>
<td>.05 (.02)**</td>
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<tr>
<td>Group 2</td>
<td>.01 (.20)</td>
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<td>Group 3</td>
<td>.71 (.24) ***</td>
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<td>Recent Independence</td>
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<td><strong>Controls</strong></td>
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<td>Colonial Ties</td>
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<td>N(2nd stage)</td>
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**Notes:** Clustered standard errors are in parentheses; *** p<0.01, ** p<0.05, * p<0.10; Both stages include 5-year dummy variables.
Table 5: Legal Crisis and Hard BITs over time

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<tr>
<td>Group 2 (-)</td>
<td>-0.96**</td>
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<td>-0.39</td>
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<td>(0.33)</td>
<td>(0.44)</td>
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<tr>
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<td>-0.51</td>
<td>(0.90)</td>
<td>(0.42)</td>
<td>(0.39)</td>
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<td>4.74***</td>
<td>4.32**</td>
<td>(1.84)</td>
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<tr>
<td><strong>Risky States</strong></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Host Extractive/Exports (+)</td>
<td>-0.03***</td>
<td>-0.00</td>
<td>-0.00</td>
<td>(0.00)</td>
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<td>(0.00)</td>
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<tr>
<td>Recent Independence (+)</td>
<td>-1.17*</td>
<td>-1.12**</td>
<td>-0.95**</td>
<td>(0.65)</td>
<td>(0.47)</td>
<td>(0.43)</td>
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<td>(0.05)</td>
<td>(0.04)</td>
<td>(0.03)</td>
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</tr>
<tr>
<td>GDP Growth (+)</td>
<td>0.09***</td>
<td>0.08***</td>
<td>0.02</td>
<td>(0.02)</td>
<td>(0.02)</td>
<td>(0.02)</td>
</tr>
<tr>
<td>Change in Inward FDI (+)</td>
<td>-0.01</td>
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<td>-0.00</td>
<td>(0.12)</td>
<td>(0.03)</td>
<td>(0.03)</td>
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</tr>
<tr>
<td>Colonial Ties (+)</td>
<td>1.65*</td>
<td>0.73</td>
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<td>(0.99)</td>
<td>(0.60)</td>
<td>(0.47)</td>
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<td>(0.14)</td>
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<td>331</td>
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**Notes:** Hypothesized effects are in parentheses; Clustered standard errors are in brackets; *** p<0.01, ** p<0.05, * p<0.10;
CHAPTER 5

TERRITORIAL INSECURITY, MASS ATROCITY, AND THE ICC

Moving from international economic to criminal law this chapter explores whether, why, and how legal crisis led to the establishment of the international criminal court with its independent prosecutor. A first attempt occurred in the early 1950s when states negotiated but ultimately abandoned a criminal court statute. The first draft statute of the 1950s court would have placed decision-making authority about prosecutions into the collective hands of the UN General Assembly rather than leaving it with individual states. Almost half a century later, the 1998 Rome Statute negotiations were a second attempt. This one succeeded in establishing the first permanent International Criminal Court (ICC). The ICC’s most sovereignty-constraining feature is the granting of authority to an independent prosecutor to launch investigations on his or her own, without state or Security Council consent.

As with BITs, I argue that powerful states turned to a new mechanism in response to the combined effect of international legal crisis, a relatively sparse judicial landscape, and TAN mobilization. The attempt in the 1950s came in the aftermath of Germany’s territorial aggression which created a de facto crisis for the territorial integrity principle. Although conditions were prime for creating a new costly enforcement mechanism, states abandoned the effort with the onset of the Cold War. The case suggests that when the most powerful state is reluctant or opposed outright to strengthening a legal rule or regime, the creation of costly enforcement mechanisms becomes less likely. In the 1990s, violence in the former Yugoslavia and Rwanda posed a de facto crisis for the human rights regime which, combined with a sparse judicial landscape, facilitated the establishment of the ICC. In direct contrast to the 1950s, however, the US withdrawal of support from the Rome Statute toward the very end of negotiations did not doom the attempt. Although the absence of
agreement among powerful states makes the creation of sovereignty-constraining judicial tools more challenging, it does not preclude it altogether.

Consistent with the BIT's analysis, TANs are important for the creation of new sovereignty-constraining mechanisms, but do not guarantee success. In both the 1950s and 1990s, the relationship between TANs and states was reciprocal. Finally, analysis of the innovators in the 1950s offers some support for the legalist explanation; because many legalist states had also been invaded by Germany during World War II, however, it is difficult to disentangle legalism from the crisis effects, and identify which feature was the more important force influencing their decisions.

The analysis of the 1950s and 1990s yields three unanticipated findings that reinforce those in Chapter 3. First, limited (and thus non-compulsory) jurisdiction mechanisms play an important part in facilitating the creation of compulsory ones. Second, in response to legal crisis, states not only reaffirm the substantive status quo but expand it. Finally, even by simply withholding its support, the hegemonic state may not only shape the form of new mechanisms (as in Chapter 3), but exercise a veto over their introduction. Whether its veto is effective depends on the timing of its opposition and the support of the proposed mechanism by a group of powerful states.

Besides providing insight into the dynamics of creating new judicial mechanisms, this chapter makes one other contribution. Contemporary views of the ICC attribute its earliest roots to the brutality of the Holocaust.¹ This is wrong. It was the experience of territorial aggression in the 1930s and 1940s that turned states in the 1950s toward new procedural mechanisms. At its roots, the criminal court was a tool to bolster territorial security and state sovereignty, and not the expression of a new-found commitment to protect human rights.

The chapter begins by introducing the two main attempts to establish a criminal court, as well as four minor episodes (the drafting of the 1920 PCIJ Statute, the 1937 Anti-Terrorism

¹ See Lee 1999, 1.
Convention, the 1948 Genocide Convention and the 1949 Geneva Conventions). It then specifies the main expectations of the different arguments, and evaluates these expectations along three dimensions: timing, content of new judicial mechanisms and the identity of innovators. The chapter concludes with a brief summary of the main expected and unexpected findings.

**CASES**

I discuss six cases of treaty negotiations, each of which might have plausibly incorporated a provision or statute establishing a criminal court: the 1920s League of Nations’ drafting a statute to establish the Permanent Court of International Justice (PCIJ), the 1937 Anti-Terrorism Convention and Terrorism Court Statute drafting, the 1948 Genocide Convention negotiations, the 1949 Geneva Convention negotiations, the 1950-1954 drafting of a Code of Offenses and criminal court statute, and the 1990’s Rome Statute negotiations establishing the ICC.

The first negotiations occurred in 1920, when the Advisory Committee of Jurists to the League of Nations began to draft a treaty to establish the PCIJ. A member of the committee, the Belgian lawyer Edouard Descamps, proposed that it create a tripartite judicial structure, which would include a Permanent Court of Arbitration, a Permanent Court of International Justice, and a criminal court. Although the proposal was rejected, it mobilized during the 1920s a transnational group of lawyers and academics, which I refer to as the “interwar group,” to promote the establishment of a criminal court. By the end of the decade, however, the campaign lost momentum as states rejected or simply ignored a number of draft proposals.

In response to the assassination of the King of Yugoslavia and the French Minister of Foreign Affairs by members of Ustasa in 1934, a fascist group of Croatian separatists, the interwar
group revived its attempt to create a criminal court. Some of the group’s members served on a state-appointed Committee for the International Repression of Terrorism and proposed a draft text for an Anti-Terrorism Convention and Terrorism Court Statute. The Anti-Terrorism Convention provided for, but did not require, state use of the international court to prosecute individuals for crimes outlined in the anti-terrorism convention. These crimes included, among others: attempts or acts causing death or harm to heads of state, their spouses or persons charged with public functions (if victimized in their public role); willful acts calculated to endanger life; and the manufacture, supply or possession of arms or explosives with a view to committing such offenses. Twenty-three states signed the Anti-Terrorism Convention and twelve of those states signed the accompanying convention creating a terrorism court. India was the only country that ratified the Convention; no state ratified the Terrorism Court Statute.

The third case is the 1948 Genocide Convention negotiations which criminalized genocide and attempts or conspiracy to commit genocide. Article VII of the Convention contains a non-automatic reference to an “international penal tribunal” (meaning additional consent would be required in order for the tribunal to assert jurisdiction). The first draft of the Convention included in its annex a provision that would have created either an ad hoc or a permanent criminal court. States strongly opposed the idea, and the Ad Hoc committee charged with proposing a second draft dropped the criminal court proposal.

The 1949 Geneva Convention codifying the rules of armed conflict, including the treatment of prisoners of war and the protection of civilians, constitutes the fourth case. Red Cross officials

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2 See Hudson 1938.


4 See Hudson 1938 552–53.

5 See Lewis 2008, 204 n.1, 206 (noting that only India ratified the anti-terrorism convention).
drafted the initial template for the Convention. The draft required that grave breaches, the most serious violations of the laws of war, be prosecuted in national courts or by an international criminal tribunal or court. In contrast to the Genocide Convention, the Red Cross treaty drafters did not contemplate creating a criminal tribunal, but supported the idea of granting such a court jurisdiction. At the Diplomatic Conference, however, states opposed the reference to an international criminal tribunal. Instead, they chose to empower only domestic courts with the authority to prosecute those who violated the regime governing grave breaches.

In the early 1950s, states attempted to draft a Code of Offenses against the Peace and Security of Mankind (hereafter “Code of Offenses”) and a criminal court statute, an effort which marks the first significant multilateral attempt at the creation of a criminal court. These two treaties were, respectively, substantive and procedural. Even though they proceeded on separate negotiation tracks, most states considered them inextricably linked. Since states viewed the Code of Offenses

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6 In commentary attached to the proposed text, the authors stated that an international tribunal would “be best qualified” to evaluate allegation of grave breaches. Danner 2006, 13 (citing Pictet 1952).

7 As Allison Danner writes, “states went to great lengths to ensure that the new enforcement scheme would not form part of any broader effort to develop international criminal law” and eliminated every reference to the ICJ. Danner 2006, 13.

8 During the 1950s, states considered three versions of the Code of Offenses and then a fourth in 1995, although that too was never adopted. Although the three 1950s versions vary in some details, they criminalized the same broad spectrum of conduct – acts deemed to threaten international peace, war crimes, and genocide.

9 As early as 1950 the majority of state representatives on the Sixth (Legal) Committee of the General Assembly assumed that the two projects were connected, and urged that consideration of the criminal court follow the completion of the Code of Offenses, rather than proceed in the abstract. Ferencz 1980, Vol. 2, 306-11. Members of the ILC also considered the two projects inextricably connected. For instance, in discussions of the first Code of Offenses, one of the two rapporteurs assigned to produce a report on the possibility of establishing a Criminal Court noted that the Criminal Court and Code of Offenses were “inseparable.” The rapporteur’s statement continues, “the Code was indispensable in an international system for suppression of crime... There was no point in possessing a criminal code if persons guilty of the crimes define therein were not tried by an international court.” Ferencz 1980, Vol. 2, 208. Further illustrating the interdependence of two treaties, when states delegates decided to postpone the negotiations of the Code of Offenses (until they could agree on a definition for the crime of aggression), the ILC representatives and states delegates decided to delay drafting the criminal court statute as well. They planned to resume the drafting only once states revived the negotiations of the Code of Offenses. Ferencz 1980, Vol. 2, 200. State delegates likely decided to split the two treaties in order to enhance their chances of adoption. I refer to this as a “splitting strategy” and it is one that states and TANs have used repeatedly. The logic behind the splitting strategy is that in postponing issues about content (for procedural treaties) or enforcement (for substantive treaties), states are more likely to support a given treaty.
and criminal court statute as connected, I treat them as one case, and focus primarily on the procedural component. The 1951 criminal court statute granted the General Assembly the authority to initiate legal proceedings; states never adopted the treaty. The 1953 draft statute narrowed the General Assembly’s authority by empowering it only with the authority to block state-initiated proceedings rather than initiate them itself.\(^\text{10}\)

The sixth and final case is the 1998 Rome Statute negotiations that culminated in the establishment of the ICC. The innovative provision in Article 13 empowers the Court’s prosecutor to initiate investigations, absent state consent or Security Council approval. I refer to this as the independent prosecutor provision. As in the 1950s, the Rome Statute breaks new ground because it marks the first-time, successful establishment of a non-traditional judicial mechanism. Because of the existence of a rich literature on this case, I analyze it more briefly than the 1950s case, and focus on the precise timing and content of Rome Statute/prosecutor provision, rather than the identity of the innovators.

**Table 5-1: Treaty Negotiations**

<table>
<thead>
<tr>
<th>Treaty Negotiation Cases</th>
<th>Criminal Court?</th>
</tr>
</thead>
<tbody>
<tr>
<td>1920 League of Nations</td>
<td>No (proposal rejected)</td>
</tr>
<tr>
<td>1937 Anti-Terrorism Convention</td>
<td>No (negotiated, adopted, never entered into force)</td>
</tr>
<tr>
<td>1948 Genocide Convention</td>
<td>No (proposal rejected)</td>
</tr>
<tr>
<td>1949 Geneva Conventions</td>
<td>No (not proposed)</td>
</tr>
<tr>
<td>1950-54 Draft Code and Criminal Court Statute</td>
<td>No (negotiated, not adopted)</td>
</tr>
<tr>
<td>1998 Rome Statute</td>
<td>Yes</td>
</tr>
</tbody>
</table>

\(^{10}\) Ferencz 1980, Vol. 2, 256.
THEORETICAL EXPECTATIONS

International Legal Crisis

Applied to the international criminal arena, the crisis argument focuses on two legal crises, the territorial aggression of Germany beginning in the mid-1930s and the mass atrocities committed in the former Yugoslavia and Rwanda during the 1990s. Germany’s expansionist campaign posed a de facto legal crisis for the territoriality regime, specifically the territorial integrity principle. The mass atrocities posed a de facto legal crisis for the human rights regime, specifically the concept of a fundamental, non-derogable right to life.

The territorial integrity principle prohibits states from threatening or using force in any attempt to gain foreign territory or alter inter-state borders. Although its roots go back to the middle of the nineteenth century, World War I marks, in the words of legal scholar Sharon Korman, the “moral turning point” in state treatment and professed commitment to the territorial integrity principle, at least as applied to non-colonies. In contrast to earlier wars, the principle of self-determination and sovereignty over territory prevailed over the long-standing practice of victors’ annexation of foreign land.

During the interwar period state leaders, primarily from continental Europe, began to institutionalize the territorial integrity principle while, in a pragmatic attempt to preserve regional

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11 Korman 1996,135. Most states increasingly supported the territorial integrity principle in the first half of the twentieth century, with the obvious exception that they did not feel an obligation to apply it to their colonial territories. Because it would lead the entire analysis onto a very different, admittedly vitally important, analytical terrain, in the discussion that follows, when I refer to the principle of territorial integrity, I take this gaping hole as given.

12 To be sure, the victorious powers applied the principle selectively, and the Treaty of Versailles involved territorial concessions. But the Versailles land transfers were significantly more modest than territorial transfers that had accompanied prior wars. For a discussion of the selective enforcement of the non-annexation principle after World War I, see Korman 1996, 140-149.
stability, they also tolerated its violation. This nascent institutionalization is reflected in state efforts to codify the principle during the 1920s and 1930s, and overlapped with (but is distinct from) state efforts to criminalize aggression at the same time. The League of Nations Covenant reflects this overlap. Article 10 of the Covenant states that “Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League.” The 1933 Montevideo Convention on Rights and Duties of States also addressed territorial integrity and diplomatic or military aggression. It recognized the inviolability of state territory and required states to refrain from recognizing transfers gained through military and diplomatic force. Most famously, the 1928 Kellogg-Briand Pact prohibits recourse to war as a foreign policy tool thus helping to further strengthen the territorial integrity principle.

The codification of the territorial integrity principle, as well as the core threat to it, the crime of aggression, was in its nascent stages during the interwar period. This meant that the status of aggression as a crime under international law remained open to debate as late as 1944 when states were already drafting the Nuremberg Charter. Furthermore the relationship between the principles of territorial integrity and aggression during this period was paradoxical: at the same time that states

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13 The Covenant of the League of Nations 1919. The 1931 Stimson Doctrine, although not a treaty, can also be considered part of this nascent trend. It refused to recognize the acquisition of title through the use of force. Zacher 2001, 220.

14 See Article 11, Montevideo Convention on the Rights and Duties of States 1933. In the effort to prevent war, other regional treaties also called for the sanctity of territorial boundaries. See, for instance, the 1923 Gondra Treaty, the 1925 Treaty of Locarno, and the 1933 Saavendra Lamas Pact. For a comprehensive list of treaties that sought to criminalize aggression in the attempt to prevent the outbreak of war during the interwar period, see Bassiouni 1987, 360-363.

15 Kellogg-Briand Pact, 1928.

16 As legal scholar William Schabas writes, “during the inter-war years, much progress was made in the prohibition of aggressive war, the benchmark being the Kellogg-Briand Pact of 1928. Yet even when the war broke out in 1939 it was hard to argue that the law had changed significantly over twenty years, and certainly not with respect to individual criminal accountability.” Schabas 2004, 22. The decision of the allied powers to include “crimes against the peace” in the Charter, and the Nuremberg rulings on aggressive war as “the Supreme Crime,” clarified the status of this crime in customary and codified law. At the time the territorial regime was in crisis, rules prohibiting aggression existed, but had not been enforced; their status was contested.
were taking measures to codify the territorial integrity principle, they were also refusing to confront
directly (either militarily or politically) the expansionist territorial campaigns of the three Axis
powers. This seemingly contradictory trend — the institutionalization of the territorial integrity
principle and the refusal to respond to blatant violations of it during the 1930s — was driven by the
same incentive: preventing another global war. The devastating experience of World War I
motivated states both to codify the principle of territorial integrity as well as to undermine it by
turning a blind eye to its violations.

The second legal rule centers on the “inherent right to life.” In its modern form it emerged
with the creation of the United Nations after the end of World War II. Article 3 of the Universal
Declaration of Human Rights (UDHR) enshrines this norm as a right, “Everyone has the right to
life, liberty and security of person.” The first foundational human rights treaty, the International
Covenant on Civil and Political Rights (ICCPR), adopted almost two decades later, codifies the
norm as a right in Article 6(1): “Every human being has the inherent right to life. This right shall be
protected by law. No one shall be arbitrarily deprived of his life;” Article 4 identifies this right as
non-derogable. The inherent right to life concept has been used to challenge state conduct (or its
absence) across a number of spheres, from imposing the death penalty to not providing citizens with
adequate health care. I focus on its most fundamental form as a *jus cogens* norm — the right to be
protected from campaigns of mass violence including genocide, crimes against humanity, and war
crimes.

Both the territorial integrity principle and the right to life norm experienced *de facto* crises
that moved powerful states to attempt to turn to the creation of costly, innovative judicial
mechanisms. In the case of the territorial integrity principle, the uninhibited aggression of the Axis
powers posed the main crisis. Before the rise of fascism, western industrialized democracies as the
main shapers of the international legal system had experienced only relatively moderate forms of
Beginning in the late 1930s, however, Germany’s revisionist territorial campaign changed all of this. In contrast to the *de jure* legal crisis that occurred in the international investment arena, Germany and the other Axis powers did not challenge formally the rules of territoriality; instead they ignored them altogether. This *de facto* crisis was devastating for the international and political order. By the end of World War II, Germany had invaded, annexed, or occupied most of continental Europe. Leaders of these states saw contestation over territorial control as only one step removed from the outbreak of war and worried that the absence of codification and an effective enforcement mechanism would invite future aggression. The legal crisis thus made states more willing than ever before to consider adopting new forms of legal enforcement tools.

Although they played a less central role than Germany’s territorial aggression in WWII, the 1990s mass atrocities committed in the former Yugoslavia and Rwanda posed a very different *de facto* crisis for the right to life that reopened the door to a new-style compulsory judicial mechanisms in the form of the ICC. This crisis began in 1991 with Serbia’s attacks on Slovenia and Croatia as they claimed independence from Yugoslavia. These attacks included the bombardment of Dubrovnik and the Srebenica and Vukovar massacres. A year later, Serbia began a campaign of ethnic cleansing, targeting Bosnian Muslims and Croats, which by July 1992 had led to the displacement of 1.1 million refugees. The increasing salience of the violence in Yugoslavia can be attributed to increased NGO and media attention. In 1992 Human Rights Watch issued a report calling for an international criminal tribunal to prosecute those responsible. US media released some of its first photographs of emaciated Bosnian prisoners behind barbed wire, reminiscent of the Nazi concentrations camps half a century earlier. Bass 2000, 210.

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17 Territorial conquest was acceptable and taken as given outside of Western Europe. In Europe, however, states shared the assumption, not always adhered to, that colonial powers would respect established territorial borders.

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the International Criminal Tribunal for Yugoslavia (ICTY). The crisis continued even after the tribunal had become operational.20

Almost a year later, in early April 1994, following the assassination of Hutu leader Juvenal Habyarimana, the Hutu regime in Rwanda began systematically killing Tutsi civilians. The genocide ended when the Rwanda Patriotic Front, a Tutsi-based party established in Uganda, was able to assert control over the country. In the span of a few months, an estimated 800,000 Tutsi were killed. In November 1994 the Security Council adopted a Statute establishing the International Criminal Tribunal of Rwanda (ICTR).

Taken together, the mass atrocities of the former Yugoslavia and Rwanda posed an acute de facto crisis.21 The violence revealed the inherent right to life to be illusory and undermined the legitimacy of the human rights regime. This loss of legitimacy is reflected in the statements of regret issued by both UN and US officials once the mass atrocities had ended. In the words of UN Secretary General Boutros Boutros-Ghali, “What is involved here is, as I have said, a bitter failure, not only for the United Nations, but for the international community as a whole. We are all responsible for this failure. . .”22 It is also evident in calls for prosecution. Writing about Yugoslavia, Theodor Meron, future judge at the ICTY, proclaimed in the opening sentence of his Foreign Affairs article, the “credibility of international law demands prosecution.”23 For reasons of efficacy and legitimacy, powerful states had a stake in protecting the human rights regime.

20 In 1995, the Bosnian Serb army killed over 8,000 Bosnian Muslims in the UN designated “safe haven” of Srebrenica. In March 1998, Serbia initiated its attacks against the Kosovo Liberation Army as well as the civilian population; NATO’s bombing campaign against Serbia began a year later. Stone 2012, 557-558.

21 As is typical of de facto crises, state officials denied the on-going mass crimes. Most strikingly, the UN and US State Department officials attempted to deny the violence in the Rwandan case. Because they could not deny the fact of violence, the officials refused instead to recognize its legal status as constituting genocide, with one official famously describing the violence as “acts of genocide” rather than simply “genocide.” Ghosts of Rwanda 1994, PBS Frontline (2004).

22 Dorn and Matloff, 1999, 39.

23 Meron 1993, 122.
To evaluate the role of crisis and the international judicial landscape, I analyze observable implications about the timing of creation of the criminal court, the substantive content of the relevant treaty and the identity of innovators. The logic of the crisis argument makes us expect that both de facto crises should closely precede the 1950s and 1990s attempts to establish criminal courts. At the time of the negotiations, moreover, the international judicial landscapes should lack compulsory mechanisms.

Even if the timing proves as expected, states can be motivated by a number of different logics that may have little to do with crisis and incentives to protect the status quo. To evaluate whether the logic of the crisis argument is correct, I therefore focus on the substantive content of the relevant treaties. If powerful states turn to new costly judicial tools to reaffirm existing legal rules then relevant treaties should contain provisions bolstering the rules, not diluting them. Finally, I examine the identity of innovators. Powerful states that are most susceptible to a legal crisis and without access to compulsory judicial mechanisms are likely to emerge as innovators, advocating for the criminal court before their peers. In evaluating this implication, I focus on the 1950s attempt, and define innovators as those states that were the first and most consistent supporters of non-traditional judicial mechanisms. The crisis argument expects that the experience of aggression, occupation or annexation during World War II made states more inclined to support novel sovereignty-constraining proposals than states with a less calamitous history. The four observable implications of the international legal crisis argument follow:

1. The de facto crises of Germany’s aggression and the mass violence in the former Yugoslavia and Rwanda will closely precede the creation of a new-style criminal court.

2. At the time of the court’s creation, the international judicial landscape will lack compulsory judicial mechanisms.

3. The relevant treaties will reaffirm threatened substantive rules, specifically territorial integrity and the fundamental rights to life.

4. Powerful states most susceptible to crisis and without access to compulsory judicial mechanism will be innovators.
Transnational Advocacy Networks (TANs)

While they differed vastly in size and composition, two transnational advocacy groups provided the crucial impetus for the creation of a criminal court in the 1950s and 1990s: the interwar group, a transnational group of lawyers, judges, government representatives, and academics, and the self-named Coalition for an International Criminal Court (CICC), a transnational coalition of human rights and other NGOs that joined forces in the 1990s. As discussed in Chapter 2, if the TAN argument is correct, then the timing of TAN mobilization in each case should closely precede the creation of a criminal court. I look at the circulation of TAN draft conventions as an indicator of mobilization. Because TAN influence may be conditioned by access to treaty drafters, I also consider TAN access in arguments stressing its unidirectional and reciprocal form. Finally, the TAN argument leads to the expectation that, beyond the new-style judicial mechanism, transnational groups influence treaty content. I therefore examine the similarity between the substantive provisions in TAN-proposed treaties and those that states ultimately adopted. The three TAN propositions follow:

(5) TAN mobilization will closely precede the creation of a criminal court.

(6) TAN access to treaty drafters will increase TAN influence in promoting a criminal court.

(7) The Code of Offenses and Rome Statute will closely resemble the substantive content of the TAN-proposed treaties.

Legalism

The legalist theory focuses on the international impact of state identity and domestic legal norms. In *Stay the Hand of Vengeance*, Gary Bass offers a leading account and attributes war crimes prosecutions to the influence of “legalist” states which he defines as liberal democracies committed

to both universal rights and the rule of law. In his account, states create war crimes tribunals because they are normatively committed to the idea of accountability. As Bass argues, legalism is a product of domestic rather than international norms. “Liberal states are legalist: they put war criminals on trial in rough accordance with their domestic norms.” Bass fully recognizes that this commitment is influenced by self-interest, including whether prosecutions put their soldiers at risk and whether war crimes have been committed against their citizens. There is, Bass states, “a distinctly self-serving undertone to liberal campaigns for international justice.” Self-interest, however, does not detract from his constructivist argument which draws a hard and fast line between liberal, democratic and illiberal, non-democratic states.

If the legalist argument is correct, then the treaty establishing the criminal court should, in some respects at least, reflect the domestic legal norms of liberal states. A problem with evaluating this expectation is that innovative criminal court treaties have typically codified crimes that, at the time of treaty establishment, were not part of the domestic laws of any state, liberal or non-legalist. I therefore focus only on the identity of innovators. If the legalist argument is correct, then the following should hold:

\[(8) \text{Legalist states will emerge as innovators.}\]

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25 Similarly, Judith Kelley argues that states committed to the domestic rule of law were more willing than others to adhere to their legal commitments to the Rome Statute rather than cave into US pressure to sign a Bilateral Immunity Agreement. These states “emphasized the moral value of the court” and provide support for the argument that state behavior with respect to human rights treaties is “partly normative.” Kelley 2007, 573. In contrast, Kathryn Sikkink offers an alternative, constructivist account. Norms are crucial to the creation of the ICC, but not necessarily legalist norms. Sikkink 2011. She emphasizes the rise of a norm of individual criminal accountability in helping to establish the ICC. This norm emerged first at the domestic level, in states transitioning away from repressive dictatorships that prosecuted former dictators and military officials, and not in the long-standing liberal democracies that Bass emphasizes. Sikkink’s account differs from Bass also in that she treats TANs as central. TANs are the creators and transporters of the norm. For this reason, I associate Sikkink’s rather than Bass’s approach with the TAN argument.


Table 5-2: Theoretical Expectations about the Creation of Criminal Courts

<table>
<thead>
<tr>
<th>Identity of Innovators</th>
<th>Timing of Innovation</th>
<th>Content of Innovation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>International Legal Crisis and International Judicial Landscape</strong></td>
<td>The <em>de facto</em> crises of Germany’s aggression and mass violence in the former Yugoslavia and Rwanda will closely precede the creation of a criminal court. At the time the court’s creation, the legal rules that have been in crisis will lack compulsory judicial mechanisms.</td>
<td>The Code of Offenses and Rome Statute will reaffirm threatened substantive rules, specifically territorial integrity and right to life.</td>
</tr>
<tr>
<td><strong>Transnational Advocacy Networks</strong></td>
<td>TAN mobilization will closely precede the creation of a criminal court. TAN access to treaty drafters will increase TAN influence.</td>
<td>The Code of Offenses and Rome Statute will closely resemble the substantive content of TAN proposals.</td>
</tr>
<tr>
<td><strong>Legalism</strong></td>
<td>N/A</td>
<td>N/A</td>
</tr>
</tbody>
</table>
ANALYSIS

The 1950s Criminal Court and Its Antecedents

Timing

An analysis of the attempt to create a criminal court in the 1950s provides mixed support for both the crisis and TAN arguments. As the legal crisis argument expects, Germany’s territorial aggression, combined with a sparse judicial landscape, created a de facto crisis for the territorial integrity principle, which moved states to turn to the establishment of a criminal court. And consistent with the findings about the investment TAN in Chapter 3, the analysis suggests that TANs pushed for the criminal court but did not influence the timing of when states adopted it. The evidence supporting the crisis argument is mixed for one simple reason. Although conditions were conducive to the creation of a criminal court, states ultimately abandoned the effort due to the politics of the Cold War. Consistent with Chapter 3’s recognition of the need for a more nuanced account of power, the following analysis suggests that even when a hegemonic power does not actively oppose a new mechanism, its disinterest can have a veto effect.

International Legal Crisis. Beginning in the mid-to late 1930s, Germany’s aggression posed an international legal crisis for the territorial integrity principle, and was the primary force behind the attempt to create criminal court in the early 1950s. This argument departs from the typical account that points to Germany’s genocide as triggering the attempt to create the court. Since they occurred simultaneously, a simple analysis of timing cannot disentangle whether it was the experience of genocide or aggression that moved states towards criminal judicialization. I attempt to disentangle the potential motivates later by analyzing the substantive content of the treaties.
Because the temporal proximity of Germany’s aggression (and genocide) to the attempt to create a criminal court in the 1950s is straightforward, I focus here on the second component of the legal crisis argument, the nature of the international judicial landscape. At the time that states launched their project for a Code of Offense and Criminal Court Statute, only one multilateral treaty existed that clearly provided for compulsory dispute settlement, the International Court of Justice (ICJ) Statute. Article 37 of the ICJ Statute transfers the Permanent Court of International Justice’s jurisdiction – as granted by states through treaties — to the ICJ, conditional on the relevant states having already ratified the ICJ Statute.28 To evaluate the presence of compulsory judicial mechanisms, I therefore examine first multilateral treaties that “carried over” from the interwar period and then those treaties signed between 1945 and 1954. Neither set, it turns out, was sufficient to foster inertia and discourage the attempt at establishing the world’s first criminal court.29

None of the multilateral “carry-over treaties” codifying the territorial integrity principle contained a compulsory judicial mechanism. The Kellogg-Briand Pact, for instance, which famously called for the prohibition of war, did not refer to any judicial mechanisms, much less ones that were compulsory. The Locarno Pact did contain a compulsory judicial mechanism for five states (Germany, Belgium, France, Great Britain, and Italy); it was, however, no longer in effect after World War II.30 The 1928 Revised General Act for the Pacific Settlement of Disputes, which was revised and reopened for ratification in 1949, required parties to submit legal disputes to the ICJ or to an arbitral tribunal, subject to reservations states may have filed regarding the Court’s

28 “Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.” Statute of the International Court of Justice 1946.

29 Although there were some bilateral interwar treaties that contained compulsory jurisdiction provisions, these were too rare to be a potential deterrent to establishing a criminal court; therefore I do not consider them here. I have come across no references to these treaties both during the negotiations and treaty drafting sessions, and in the scholarship written during this period.

In theory, this Pact could have inhibited the attempt to create a court. By the end of 1954, however, only four states (Belgium, Norway, Sweden, and Denmark) had ratified it.\footnote{General Act for the Pacific Settlement of International Disputes 1928, Article 17.}

The final multilateral treaty with a compulsory judicial mechanism to settle disputes, including territorial ones, is the “optional clause” of the ICJ Statute in which states choose to submit a declaration accepting the Court’s automatic jurisdiction. At the time of the criminal court’s drafting, in 1952, only thirty-six states had accepted the Statute, seventeen of which were “carry-overs” from the PCIJ Statute and faced imminent expiration dates.\footnote{Wilson 1931, 480.} Because it was accepted by only a minority of states, the Article 36 “optional clause” declarations were probably not comprehensive enough to be considered a powerful inhibitor of states’ turn to a criminal court.

While the sparseness of the judicial landscape provides support for the crisis argument, it does not address the influence of the non-compulsory (more precisely the limited jurisdiction) mechanisms of the Nuremberg and Tokyo Tribunals. Yet supporters of the criminal court pointed to the tribunals as evidence that a permanent court was both desirable and feasible. Advocating for a criminal court, ILC rapporteur Ricardo Alfaro affirmed in his report “the fact that an international criminal jurisdiction has already operated in the world and that its feasibility has been demonstrated.” He then identified the main criticisms leveled at the two tribunals, including that they were simply “victor’s justice;” and he discussed how a permanent criminal court would “eliminate” this and other criticisms.\footnote{Ferencz 1980, Vol. 2, 247.} Opponents of the criminal court responded that the conditions enabling the successful Nuremberg and Tokyo tribunals were anomalous. The second rapporteur, Emil Sandstrom, described the Nuremberg tribunal as resulting from “an extraordinarily...
complete defeat and in complete agreement between the victors on the questions involved in the trial.” Both of these features, total victory and complete consensus, would be difficult to reproduce and any proposed court, in his view, would prove therefore problematic.\textsuperscript{35} In subsequent discussions about the two reports, members of the sixth committee echoed these arguments, pointing to the Nuremberg and Tokyo tribunals to show the plausibility or impossibility of creating a permanent criminal court.\textsuperscript{36} State delegates who supported the creation of a court had powerful evidence suggesting the project was feasible; opponents of the court were put on the defensive.

Although conditions — crisis, empty landscape, and limited jurisdiction mechanisms — were ripe for establishment of a criminal court, in the end states walked away from the project. The onset of the Cold War chilled states’ interest in creating a court with jurisdiction over aggression, particularly that of the US.\textsuperscript{37} The US was worried that the Soviet Union would use the court as a political tool in the unfolding Cold War.\textsuperscript{38} In the words of Benjmain Ferencz, the Cold War put the project into “deep freeze.”\textsuperscript{39}

The argument that Germany’s aggression triggered the attempt at creating a criminal court, yet was no guarantee of success, raises a number of questions. Why would states try to create new types of mechanisms in response to Germany’s aggression but not other international legal crises? Why, for instance, did states not push for a criminal court after World War I, which also witnessed

\begin{itemize}
\item \textsuperscript{35} Ferencz 1980, Vol. 2, 264.
\item \textsuperscript{36} See, for example, Ferencz 1980, Vol. 2, 270, 283, 291.
\item \textsuperscript{38} Struett 2008, 59 (pointing to a 1953 New York Times article that reported US delegates worrying over the possibility of the Soviet bloc using the Code to accuse the US of violating the treaty) (citing Rosenthal 1953). States may have also abandoned the project because the idea was too novel. States, after all, had not yet experienced decades of participation in the UN and other international institutions, and the traditional sovereignty norm was still powerful. This is consistent with the linear argument about institutionalization proposed by Cooper and his co-authors. Cooper et al. 2008. For a compelling discussion of this argument, see Struett 2008, 49-66.
\item \textsuperscript{39} Ferencz 1980, Vol. 2, 48.
\end{itemize}
territorial aggression? Alternatively, given that war crimes were pervasive during World War II, and arguably constituted a different legal crisis, why did states not attempt to create a war crimes court at the Geneva Conventions?

The lack of state interest in a criminal court after World War I is due to the absence of a legal regime: the principle of territorial integrity and the legal acts that constituted violations of it, such as aggression, did not yet exist in 1914. State conduct during the war therefore posed a security and political crisis, not a legal one. The absence of the territorial integrity principle and crime of aggression is evident in a number of discussions that followed World War I. In response to British calls for prosecuting the Kaiser for violating the neutrality of Belgium, for instance, President Woodrow Wilson suggested that although the territorial violation constituted some form of crime, it was not yet established as a legal one: “It is certainly a crime, but for which no sanction has been provided, because there is no legal precedent for it. We are founding today the regime of the League of Nations from which will emerge the new rules and the new formulas of international law. But today we are obligated to create the principle and the punishment.”

In its report on violations of “the laws of war,” the “laws of humanity,” and “conspiracy to wage aggressive war,” a commission appointed by the League of Nations called for the prosecution only of the first two crimes. Aggression, the commission held, was not yet established as a crime. Similarly, when Baron Descamps, a Belgian international lawyer, proposed the establishment of a criminal court during the drafting of the Permanent Court of International Justice in 1920, the

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40 Willis 1982, 80 (citing Council of Four meeting, 8 April 1919, at 3 p.m., Proceedings of the Council of Four, pp.144-51).

41 This commission, called the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties was comprised of a group of fifteen European and US lawyers appointed by allied states.

42 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties 1919, 118. The US dissented from the report on grounds that no “laws of humanity” existed, and that the concept was a moral not legal one. The Treaty of Versailles dropped the terminology.
drafting committee rejected the idea, claiming that state leaders needed first to define the international crimes that the Court would enforce.\textsuperscript{43}

Indeed, rather than be threatened by World War I, the principle of territorial integrity and the crime of aggression initially developed in response to it.\textsuperscript{44} As Mark Zacher writes, “Among the Western industrialized states, the association of territorial revisionism with major wars was the central driving force that led these states after World Wars I and II to advocate a prohibition of coercive territorial revisionism.”\textsuperscript{45}

This explanation for the absence of an attempt to create a criminal court after World War I mirrors developments in the investment case discussed in Chapter 3 — specifically why states introduced the innovative investor-state arbitration provisions after the G-77 expropriations in the 1970s but not after the Eastern European nationalizations in the 1940s. In the investment case, the traditional compensation rule had not been widely accepted by the late 1940s. It gained adherents only in response to the actions by Eastern European states. It took a second crisis, the G-77 wave of expropriations and formal resistance at the UN, to convince capital exporters to turn to the creation of sovereignty-constraining judicial mechanisms. Similarly, it took the experience of World War I to move states to begin to create and codify the territorial integrity principle. Here too, it was the second

\textsuperscript{43} The meeting notes report that the Belgian delegate, for instance, “thought it was impossible [to create an international court] since there was no defined notion of international crimes and no international penal law.” The drafting committee ultimately rejected the proposal stating “there is not yet any international penal law recognized by all nations.” Ferencz 1980, Vol. 1, 38. See also the statement by the Third Committee, “The Committee is of the opinion that it would be useless to establish side by side with the Court of International Justice another Criminal Court. . . . If crimes of this kind should in future [sic] be brought within the scope of international penal law, a criminal department might be set up in the Court of International Justice. In any case, consideration of this problem is, at the moment, premature.” Ferencz 1980, Vol. 2, 244.

\textsuperscript{44} The principle grew out of a de facto norm of territorial integrity among western powers.

\textsuperscript{45} Zacher 2001, 238. Although territorial revisionism was not the primary cause of World War I, Germany, for example, did develop expansive territorial aims after the onset of war; in the case of Nazi Germany territorial revisionism was a major cause of World War II. After 1945 states thus viewed codifying the principle as a crucial means for protecting inter-state peace.
crisis, accompanying World War II, which moved states towards creating an unprecedented judicial mechanism.\textsuperscript{46}

The absence of any attempt to create a criminal court during the Geneva Convention negotiations requires a different explanation. In that case the laws of war existed and had been massively violated during World War II, posing a \textit{de facto} crisis for the laws of war regime. In this instance, however, the relevant TAN, the International Red Cross, had not mobilized behind the idea of a war crimes court.\textsuperscript{47} Without TAN mobilization, state delegates were unlikely, on their own initiative, to propose much less actually set up a war crimes court.\textsuperscript{48}

\textit{TAN Mobilization}. The TAN that first mobilized for the permanent criminal court did so in reaction to World War I. A group of continental European lawyers and academics, referred to as the interwar group, campaigned to establish a criminal court to prosecute states and state officials for crimes that, at least initially, included aggression and disturbing the peace among states. Consistent with the findings of Chapter 3, the interwar group invented and promoted the idea of a criminal court, but it did not influence the timing of when state decided to pursue it. The analysis also shows that the relationship between states and transnational advocates was reciprocal. In the most extreme

\textsuperscript{46} One response to this argument could be that the creation of a sovereignty-constraining judicial mechanism should have followed World War I at least for the laws of war, since that legal regime was in place when war broke out, both in customary law and codified under the 1899 and 1907 Hague Conventions. But transnational actors had not yet mobilized behind the idea of a criminal court – not by the time the war broke out and not by 1920, when Descamps presented his proposal for a court. Transnational advocates began to mobilize only after the League of Nations rejected Descamps’ idea, and they did so in response two factors: the clear signal that state delegates would be more receptive to the idea if there was a clear body of law that the court would apply, and the growing evidence from the Leipzig trials, that domestic courts were unlikely to hold their nationals accountable for war crimes.

\textsuperscript{47} The Red Cross did initially include a provision that would have granted jurisdiction to an international criminal court or tribunal, but it did not seek to create such a court. The lack of involvement in the criminal court project can be attributed to the self-defined role of the Red Cross. Danner 2006, 13. It was and continues to be purposefully prudent in its proposals, preferring to accept the current legal order as is rather than challenge it, and to be viewed as a neutral monitoring organization. The interwar group, in contrast, sought as its primary objective to transform the international criminal law landscape.

\textsuperscript{48} Even if the Red Cross had proposed a criminal court, it is unclear whether states could have been brought on board. The UK would have undoubtedly rejected the proposal, and much would have therefore depended on whether the US would have supported it. Although the Cold War had not yet set in, there were already hints of the US pulling back somewhat from ambitious institution building.
example, the interwar group relinquished its core objective of state accountability in order to win the support of states in setting up a court.

The interwar group first mobilized behind the idea of an international criminal court in the early 1920s, in response to the League of Nation’s rejecting the first proposal for a Court in 1920. As early as 1920, before the group had even organized itself, Belgian jurist Edouard Descamps proposed, on his own initiative, attaching a criminal court to the Permanent Court of International Justice, the treaty of which was then being drafted. League officials rejected the idea, claiming that states needed first to create a body of international law that the Court would enforce. In 1923 the interwar group formed to promote the development of international criminal law as well as a criminal court. As members of the group saw it, they needed to codify the substantive rules that the court would apply, draft a precise blueprint for the court, and ensure that the treaty would be palatable to states that were protective of their sovereignty. Drawn mainly from continental Europe, the interwar group was motivated by experiencing first-hand the devastation of World War I. Members of the group also had witnessed the Leipzig war crimes trials of German military officials, what one Belgian official called a “travesty of justice.”

During the 1920s the group produced three draft conventions. In the attempt to secure state approval, it made each draft treaty successively narrower in the substantive obligations it imposed on states. In 1925 an unofficial organization comprised of members of about forty national parliaments, the Inter-Parliamentary Union (IPU), adopted a resolution calling for a criminal court to prosecute aggressive wars, and attached an appendix outlining an extensive list of “Fundamental Principles” that the court was to apply. Drafted under the leadership of Vespasien Pella, a Romanian Professor and member of Parliament who would become the leader of the

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50 Willis 1982, 135.
criminal court campaign, it focused primarily on war-related issues (rather than peace-time violations such as piracy) and contained two extensive lists of crimes and sanctions, one for states and the other for individuals.  

Hugh H.L. Bellot, a British lawyer, working under the direction of the International Law Association (ILA), also proposed a draft treaty establishing a criminal court. His 1926 statute envisioned a court which would be attached to the Permanent Court of International Justice, and was to have had jurisdiction over individuals, states, and state officials for three categories of offenses: (i) crimes committed by citizens of one state against other states or foreign citizens, (ii) violations by states of treaties regulating wartime conduct, and (iii) violations of the “laws and customs of war accepted as binding by civilized nations.” Reminiscent of the Abs-Shawcross group’s decision to eliminate many of the original Abs group proposals, Bellot apparently purposefully chose to exclude the crime of aggression from the court’s jurisdiction, anticipating that an attempt to criminalize aggression would doom the project.  

Finally, with French Professor Donnedieu de Vabres and a few others, Pella drafted a Convention in 1928 under the direction of the International Association for Penal Law, a group of about two thousand criminal lawyers and law professors. This version was in some sense the greatest retreat from the initial draft and also from the organization’s own resolution that only two years earlier had called explicitly for a criminal court that would prosecute unjust aggressive war.  

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51 Resolution of the Inter-Parliamentary Union on the Criminality of Wars of Aggression and the Organization of International Repressive Measures 1925. For instance, among the crimes Pella included in his code with respect to states were: the international crime of aggressive war; violation of demilitarized zones; non-fulfillment of the obligation to submit serious disputes to the PCIJ; military, naval, air, industrial, and economic mobilization in the event of a dispute; aiding or abetting bands of evil-doers making raids on the territories of other states; and interference by one state into the internal political struggles of another by supplying grants of money or giving support of any kind to political parties.  

52 Draft Statute of the International Penal Court as Amended by the Permanent International Criminal Court Committee of the International Law Association 1927.  

53 Lewis 2008, 10, 166  

54 Lewis 2008, 179.
In its outlines for enforcement, access to the court, and the degree of independence from the
League of Nations, the 1928 draft was also purposefully less ambitious than earlier ones.55 Most
importantly, the interwar group “split” the treaty and gave states the option of treating it as an
exclusively procedural convention. States could renounce the treaty’s substantive component that
provided for jurisdiction over crimes committed during peacetime “likely to endanger the peaceful
relations of States,” as well as crimes committed during war.56 If they did so, then the court would
have jurisdiction only over international criminal treaties that states concluded in the future.

As a reciprocal TAN approach expects, the interwar group calculated that, despite the
League’s call for the development of substantive criminal law in 1920, it would be more likely to
garner League support for the proposed court if it “split” – or more precisely, gave states the option
of splitting — substance from procedure. This splitting strategy mirrors the strategy of the Abs-
Shawcross group in Chapter 3. In the interest of eliciting state support, the investment TAN gave
states a similar choice, but made the innovative procedural component, rather than the substantive
provisions, optional.57 Table 5-3 tracks the interwar group’s proposed conventions during the
1920s.

56 Historical Survey of the Question of International Criminal Jurisdiction 1949, Art. 36, 82-83.
57 Project de Statut pour la creation d’une Chambre Criminelle au Sein de la Cour Permanente de Justice Internationales
1928, 265-292.
Table 5-3: Interwar Group’s Proposed Conventions (1920s)

<table>
<thead>
<tr>
<th>TAN Group</th>
<th>Proposed Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>1920 Edouard Descamps Proposal(^{58})</td>
<td>Proposal for a non-permanent international criminal court at the Hague. Jurisdiction over crimes “against the public order and universal law of nations”</td>
</tr>
<tr>
<td>1925 Inter-Parliamentary Union Resolution (drafted under leadership of Vespasian P Pella)(^{59})</td>
<td>Proposal for a permanent international criminal court attached to the PCIJ Jurisdiction over a full range of acts committed by states, heads of states and individuals, primarily concerned with causes of war, including crime of aggression, violation of demilitarized zones, but also violations of the laws of war</td>
</tr>
<tr>
<td>1926 Draft Statute adopted by the International Law Association at the Vienna Conference (drafted under leadership of Hugh Bellot)(^{60})</td>
<td>Draft treaty for a permanent international criminal court attached to the PCIJ Jurisdiction over three offenses: (1) international penal crimes committed by citizens of one state against other states or foreign citizens (2) violations by states of treaties regulating wartime conduct and (3) violations of law customs of war “generally accepted as binding by civilized nations”</td>
</tr>
<tr>
<td>1928 International Penal Law Association (drafted under leadership of Pella)(^{61})</td>
<td>Draft Statute for a Criminal Chamber attached to the PCIJ Jurisdiction over future criminal law treaties; jurisdiction also provided for war crimes and “acts that disturb peaceful relations between nations,” but that states could “denounce by convention”</td>
</tr>
</tbody>
</table>

Despite the group’s intense mobilization during the 1920s, it was unable to convince states to even consider its proposals. In 1928 Carton de Wiart, a former Belgian Minister of Justice and President of the International Penal Law Association, submitted a draft text to the League Secretariat, which refused to pass it on to the Council. That same year, Pella, who had been

\(^{58}\) Historical Survey of the Question of International Criminal Jurisdiction 1949, 9.

\(^{59}\) Historical Survey of the Question of International Criminal Jurisdiction 1949, 72-73.

\(^{60}\) Historical Survey of the Question of International Criminal Jurisdiction 1949, 65.

\(^{61}\) Historical Survey of the Question of International Criminal Jurisdiction 1949, 82-83.
appointed as Romania’s Delegate to the League in 1927, resubmitted the proposal. It appeared dead on arrival, and with it, or so it seemed, the ICC project.62

However, the story did not end there. On March 9, 1934, the Croatian Ustasa, a fascist group comprised of anti-Yugoslavia separatists, assassinated the King of Yugoslavia and the French foreign minister. The interwar group saw a new opportunity to promote its criminal court idea. Compared to its prior efforts, there was a key difference. Its refurbished report now stated that the new court would prosecute terrorists, not states and state officials.63 The interwar group members had calculated that state leaders would be more receptive to a court that could be used to bolster state security rather than one that would undermine state sovereignty.

The group thus shifted its agenda entirely — from prosecuting sovereign actors as a way to promote state accountability to prosecuting alleged terrorists in service of state sovereignty. Going beyond even what the reciprocal view might expect, the interwar group did not simply tailor its objectives strategically to what it deemed to be reasonable given state preferences, but instead abandoned wholesale its objective of creating a court to prosecute states and state officials. To a limited extent the group’s strategic calculations were correct. States signed the dual treaties. But they did not ratify them and the treaties never entered into force.64 By the mid-1930s, states were preoccupied with the increasing likelihood of another European war, and the problem of terrorism seemed relatively unimportant.65

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62 Lewis 2008, 185.

63 Lewis 2008, 220. Eight years prior to the 1934 assassinations, Pella had mentioned in 1927 the possibility of establishing a court for terrorists.

64 Twenty-three states signed the Convention for the Prevention and Punishment of Terrorism, and 12 of those states signed the accompanying Convention for the Creation of an International Criminal Court. India was the only country that ratified the Terrorism Convention and no state ratified the Terrorism Court Statute.

65 See Dubin 1993 for a close analysis of the politics of treaty negotiations and reasons for its failure.
The crisis argument explains the 1928 “dead upon arrival” proposal and the stillborn terrorism court in terms of the absence of a legal crisis. In the 1920s the acute insecurity that would have necessitated state willingness to consider creating an unprecedented court simply was absent. The League explained its refusal to consider Pella’s proposal not in terms of the absence of crisis, however, but for the same reasons as in 1920: the body of criminal law that would be applied was too nascent, and the project was thus premature.66

States moved to reconsider the interwar group’s proposals only after the experience of Germany’s territorial aggression, once World War II had ended. If these templates had not been in place, states would not have attempted to establish a criminal court in the early 1950s. This is not a case, however, of TANs exploiting a legal crisis as a window of opportunity to advance their agendas. Rather, states decided on their own to create a court, and then turned to prior draft conventions for a template.

*The Irrelevance of Access.* The lack of TAN influence over the timing of the attempt to create the criminal court might be due to the absence of TAN access to treaty drafters rather than the absence of a legal crisis. I therefore examine whether TAN access conditioned its influence on state efforts. The following analysis suggests that access to treaty-makers does not shed new light on the timing of the attempt to create the court.

To begin, the interwar group did have access to the drafters of the Code of Offenses and criminal court statute in the 1950s, and yet that effort ultimately stalled. Pella submitted to the International Law Commission (ILC) a revised draft of the 1928 criminal court statute in 1947, and

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66 There were other reasons too, unrelated to crisis or “premature” timing. The interwar group may not have built a sufficiently strong coalition (for instance forming connections with US and UK groups and with government representatives). Also, the League was preoccupied with other matters, particularly soliciting US support for the organization. The goal of securing individual and state criminality may have seemed largely irrelevant to the main political concerns of League officials. Lewis 2008, 137.
ILC members stated that this draft served as their most important template. Similarly, Pella and other members of the interwar group as well as Ralf Lemkin, the Polish lawyer who both invented the word and led the effort to criminalize genocide, were directly involved in the initial drafting of the Terrorism Court Statute that states failed to ratify. Pella, three other members of the interwar group, and Lemkin also helped write the first draft of the Genocide Convention, “the Secretariat draft,” and attached two proposals for a criminal court. States, however, designated the Economic and Social Council (ECOSOC) at the UN to take over soon thereafter, and the Ad Hoc Committee assigned with redrafting the Convention discarded both proposals. This string of examples makes clear that the impact of TANs on the attempt to create a criminal court was not simply a function of their access to treaty drafters. As the reciprocal view holds, states act as gatekeepers, both inviting TANs to participate in institution building and then limiting, sometimes severely, TAN influence.

**Content of the Hard BITs**

Although states ultimately abandoned the criminal court project, the 1950s draft conventions can still provide insight into the logic motivating their attempt. Consistent with the findings relating to investor-state arbitration, the following analysis shows that states not only reaffirmed the

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67 Historical Survey of the Question of International Criminal Jurisdiction 1949, 15. Consisting of thirty-five members elected by the GA, the ILC was established by the UN in 1948 with the task of helping the development and codification of international law. Until his death in 1952 Pella also served as an informal advisor to the committee drafting the Code of Offenses. In the ILC discussions that followed the circulation of the first Code of Offenses in 1951, the rapporteur reported that he had met with Pella during a visit to the US, and invited Pella to submit a memorandum that listed the set of international crimes (hereafter, “Pella’s memo”) to be included in the code. Ferencz 1980, Vol. 2, 221. Although Pella did not officially participate in the drafting of the code, he did have both informal and indirect access to treaty drafters.

68 See Dubin 1993, 7–8.

69 One proposal was for a permanent court and the other for an ad hoc tribunal. Despite their direct involvement in the treaty drafting process, states expressed strong opposition to these criminal court proposals. The Ad Hoc Committee that was appointed to work on a second draft discarded both versions. Historical Survey of the Question of International Criminal Jurisdiction 1949, 33.

territorial integrity principle but also expanded the rules protecting it, following TAN proposals. Yet, as the reciprocal approach expects, states also determined the terms of TAN influence. On the issue of which types of entities could be prosecuted, states rejected the TAN provision for state criminality. Although the interwar group had clearly incorporated such a provision into its draft treaties and viewed it as indispensable, states dismissed the idea. The analysis is interesting also for what it does not reveal: there is no evidence that states viewed the court as providing a foundation for a new human rights regime.

Before conducting a comparative analysis of the different sources that may have influenced the relevant treaty, the Code of Offenses, in the 1950s, I begin by introducing in more detail its substantive obligations. The Code of Offenses is overwhelmingly concerned with territorial insecurity, as the crisis argument would expect. States sought to reaffirm the territorial integrity principle not by codifying and elaborating it (for example, by including a provision that calls for states to respect the territorial integrity of other states) but by proscribing behavior that violates it.

As Table 5-4 shows, the majority of the Code’s provisions are concerned with territorial challenges that increased the risk of war, a focus which contrasts with both the Genocide and the Geneva Conventions. The text of the Code therefore calls into question the assumption that attempts to create a criminal court were part of a new effort to build a human rights regime, and instead reflects a desire to bolster state security. For instance, five of the nine crimes listed in the 1950s Code of Offenses address territorial violations; two of the remaining crimes address indirect triggers of war. The final two crimes do prohibit genocide and war crimes and mirror the provisions in the Genocide and Geneva Conventions. Because these provisions are not geared toward

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71 The 1920 draft is an exception, since the criminality provision was left ambiguous. Historical Survey of the Question of International Criminal Jurisdiction 1949, 9 (stating “Since the proposal made no specific statement on the nature of the crimes to be punished, Lord Phillimore wondered if the offenders tried were to be states or individuals.”). The remaining three draft proposals recognized state criminality. Historical Survey of the Question of International Criminal Jurisdiction 1949, 65, 72-73, 82-83.
bolstering territorial integrity and preventing the outbreak of war, the crisis argument does not anticipate their inclusion. States likely included them because, with the door now already open to the creation of a sovereignty-constraining judicial mechanism, they were more willing to engage in additional, expansive codification. This inclination is consistent with state willingness to adopt TAN proposals that expand the status quo.  

72 The treaty drafters recognized that the inclusion of the war crimes provision was outside the scope of the treaty’s task of preventing war, and justified its inclusions as consistent with nascent law. As the Special Rapporteur Spiropoulos stated, “it really does not affect the peace and security of mankind from a purely theoretical point of view, but has been in the Nuremberg principles. It is only on the account of this connection that we suggest its inclusion in the draft code.” Yearbook of the International Law Commission 1950, para.67.
Table 5-4 – Crimes included in Draft Code of Offences (1950)

<table>
<thead>
<tr>
<th>Acts prohibited by the 1950 Draft Code of Offences</th>
<th></th>
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<tbody>
<tr>
<td>Crime No. I</td>
<td>The use of armed force in violation of international law and in particular the waging of aggressive war</td>
</tr>
<tr>
<td>Crime No. II</td>
<td>The invasion by armed gangs of the territory of another State</td>
</tr>
<tr>
<td>Crime No. III</td>
<td>The fomenting, by whatever means, of civil strife in another State</td>
</tr>
<tr>
<td>Crime No. IV</td>
<td>Organized terroristic activities carried out in another State</td>
</tr>
<tr>
<td>Crime No. V</td>
<td>Manufacture, trafficking and possession of weapons the use of which is prohibited by international agreements</td>
</tr>
<tr>
<td>Crime No. VI</td>
<td>The violation of military clauses of international treaties defining the war potential of a State</td>
</tr>
<tr>
<td>Crime No. VII</td>
<td>The annexation of territories in violation of international law</td>
</tr>
<tr>
<td>Crime No. VIII</td>
<td>Prohibition on genocide</td>
</tr>
<tr>
<td>Crime No. IX</td>
<td>Violations of the laws or customs of war</td>
</tr>
</tbody>
</table>

To evaluate whether crisis, TANs, or other factors influenced the treaty’s content, I compare the consistency of the Code of Offenses’ substantive obligations with the traditional rules (codified and customary) protecting territorial integrity and with the 1925 IPU and 1928 Penal Law Association Convention, drafted, respectively, under the leadership of Bellot and Pella. I also include in the comparative analysis two other potential sources of influence, the United Nations War Crimes Commission’s (UNWCC) proposed Criminal Court Statute and the Nuremberg Principles. Comprised of seventeen representatives from allied states, the UNWCC first convened in 1943 to prepare a draft convention for the establishment of a criminal court and submitted the completed

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73 Ferencz, 1980 Vol. 2, 189. With two exceptions, these crimes are taken verbatim from the proposed convention. For purposes of space, I did not include the full treaty text for crimes VI and VIII. The 1950 and subsequent drafts codes during this decade are almost identical in terms of substantive crimes. One exception is that the 1954 draft eliminates the nexus requirement for the provision banning crimes against humanity and includes an extra provision prohibiting “intervention by authorities...in affairs of another State, by means of coercive measures of an economic or political character,” which was clearly a reflection of Cold War developments. Draft Code of Offences against the Peace and Security of Mankind 1954, Article 2(9).

74 I include both drafts since they vary in their key substantive obligations.
draft in September 1944.\textsuperscript{75} The Nuremberg Principles, in contrast, were a set of guidelines that affirmed key aspects of the Nuremberg Charter and rulings and were adopted by the ILC in 1950.\textsuperscript{76}

Table 5-5 tracks the similarity of provisions across the different potential sources of influence. A comparison of non-territorial based crimes shows the diversity of legal sources influencing the substantive provisions. The crimes against humanity provision, for instance, can be traced exclusively to the Nuremberg principles, whereas the Genocide provision was lifted verbatim from the Genocide Convention (not included in Table 5-5). The provision on the laws of war is consistent with all four potential legal sources, and thus provides no guidance for determining which sources were most influential.

In terms of territorial-based crimes, the “lower-level” territorial intrusions provisions can be traced to only one potential source, the 1925 IPU proposal (with Pella’s attached annex). Although some treaty violations were already part of customary international law, there was no case law, multilateral resolutions, executive statements, or national legislation explicitly prohibiting states from many of the enlisted acts, such as instigating “civil strife” in foreign territory or organizing terrorist activities. As is true of the BITs case, TANs expanded substantive legal rules. Whereas in BITs the expansion was innovative, radical, and favorable to investors, in this case the expansion was modest, making more precise what most states were already, without a sense of legal duty, practicing.

In contrast, the crime of aggression provision can be traced to four potential sources: the 1925 IPU proposal, the interwar group’s 1928 draft Convention, customary international law (including the weakly codified interwar treaties), and the Nuremberg Principles. As in the case of

\textsuperscript{75} For a description of the debate that occurred within the UNWCC on whether to include aggression in the draft statute, see Schabas 2004, 22-27.

\textsuperscript{76} I include these two sources to reduce the possibility of misattributing influence over the substantive content of the Code of Offenses to state susceptibility or TAN activism.
investor-state arbitration, further analysis is therefore needed to disentangle which of the four sources influenced the aggression provision or if all were influential. The more important point is that, as Table 5-5 shows, the substantive content of the Code of Offenses cannot be reduced to a single source, or even a few. States were influenced by the interwar group, by an incentive to preserve the traditional rules, by the Nuremberg Principles, and more.
Table 5-5: Sources Influencing the Draft Code of Offenses

<table>
<thead>
<tr>
<th>Sources</th>
<th>Territorial Violations</th>
<th>Crime of Aggression</th>
<th>Genocide</th>
<th>Crimes against Humanity</th>
<th>Laws and Customs of War</th>
</tr>
</thead>
<tbody>
<tr>
<td>Code of Offenses (1950-1954, all drafts)</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

**Sources**

<table>
<thead>
<tr>
<th>Traditional rules (codified or customary) prior to legal crisis (mid-1930s)</th>
<th>No (generally)</th>
<th>Yes, weakly codified prior to crisis</th>
<th>No</th>
<th>No&lt;sup&gt;77&lt;/sup&gt;</th>
<th>Yes, codified and part of customary law</th>
</tr>
</thead>
<tbody>
<tr>
<td>1925 IPU Resolution (Pella’s annex)</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Yes*</td>
</tr>
<tr>
<td>1928 International Penal Law Association Draft</td>
<td>No</td>
<td>Probably, language is ambiguous*</td>
<td>No</td>
<td>No</td>
<td>Yes*</td>
</tr>
<tr>
<td>UNWCC</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No&lt;sup&gt;78&lt;/sup&gt;</td>
<td>Yes</td>
</tr>
<tr>
<td>Nuremberg Principles</td>
<td>No</td>
<td>Yes&lt;sup&gt;79&lt;/sup&gt;</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

*States could choose to opt out of international jurisdiction for these crimes, which they referred to using different terminology

To further explore the sources of influence, I turn to the drafting history, with a specific focus on the origins of the criminal court statute and Code of Offenses. If the international legal crisis argument is correct, then treaty drafters should be primarily concerned with preventing future war, not other objectives such as protecting human rights, including from genocide. If the TAN

<sup>77</sup> Matas 1989, 94.

<sup>78</sup> Article 18(c) directs the court to apply the “principles of the laws of nations, derived from the usages established among civilized peoples, from the laws of humanity, and form dictates of public conscience.” Because this article identifies the sources of law to be applied, as opposed to the substantive crimes over which the Court has jurisdiction, I do not interpret the “law of humanity” clause as providing for jurisdiction over the crimes against humanity.

<sup>79</sup>This was referred to as “crimes against the peace.”
argument is correct then there should be at least some explicit references to the interwar group and its proposed treaties.

The view that a criminal court would help deter future war is pervasive in the early drafting documents, as ILC members and state delegates debated the merits of such a project.\(^{80}\) The first rapporteur for the ILC, Ricardo Alfaro, a proponent of the court, stressed its deterrent potential in the section of his report assessing its desirability. As he colorfully put it, a court would “be received by the peoples of the earth as a new ray of hope in their quest for peace and security, as a pledge by the United Nations that it will not allow another catastrophe to befall humanity.”\(^{81}\) Although “catastrophe” certainly encompasses future genocide, the central focus was on deterring war. Aware that readers of the report would be less optimistic about the court’s potential efficacy, he elaborated:

> The cynic and the skeptic will surely remark that wars are not stopped by means of international tribunals and penal codes. Perhaps that is true, up to a certain point. In the municipal organization it may be observed also that there are murderers and thieves despite the fact that there are criminal courts and penal codes, but only God knows how many murders and robberies are not committed precisely because there are judges and penalties.\(^{82}\)

The rapporteur continued, “when an individual head of state, government official or any commander knows that the planning and waging of war is a crime for which he may be personally tried by an international tribunal and sentenced if he is found guilty, he will surely be deterred by that consideration . . . .”\(^{83}\) The degree to which the rapporteur grounded his support for the court in

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\(^{80}\) This is not to say that all states were drawn toward the international criminal court due to its deterrent potential. Indeed, at the time that the US proposed a resolution calling for a criminal court, the GA had not yet directed the ILC to begin the process of drafting a Code of Offenses, so the potential deterrent impact was not yet on the table. US support for the court was probably not a response to TAN pressure since the US, in contrast to continental European states, had little interaction with the interwar group. Rather US support was probably an attempt to provide an enforcement mechanism for the Genocide Convention and also a part of its broader agenda of establishing a new multilateral order.

\(^{81}\) Ferencz 1980, Vol. 2, 255 para 120.


the logic of deterrence is striking. Even the report’s final paragraph discusses the court almost exclusively in terms of prevention.\footnote{Ferencz 1980, Vol. 2, 257 para 136.}

The second rapporteur, Emil Sandstrom, also focused on the court’s deterrent potential, but reached a negative assessment; his arguments were fundamentally practical. A criminal court’s legitimacy and efficacy, he stated, rests on its prosecution and punishment authority. An international court would have no supporting competent body to arrest and transfer the accused to the court; a state whose leaders face criminal charges would surely refuse to comply with extradition requests. The court’s improbability of detaining the accused would therefore eliminate its potential to deter future crimes. Rather, the rapporteur writes:

\[\text{[it] will be a show which at best will in a solemn form proclaim the culpability of the accused and the disapproval of the community, but will not constitute for the culprit or other prospective perpetrators of crime a strong inducement to abstain there from.}\footnote{Ferencz 1980, Vol. 2, 262 para 22.}

In a “summing up” section, the rapporteur reiterated his assessment that the inability of the court to detain the accused in a consistent manner will make the court look like it is exercising “arbitrary” and “haphazard” jurisdiction. As he put it, “its deterring effect will thus be very doubtful, if any.”\footnote{Ferencz 1980, Vol. 2, 263 para 34.}

Although they differed in their assessments, both rapporteurs focused on the potential of the court to deter war, and not on other factors, such as its potential efficacy for protecting human rights.\footnote{The origins of the Code of Offenses similarly reveal a dominant concern with deterring aggressive war. Some of the earliest calls for establishing a code of offenses were grounded in the language of deterrence. In support of a proposed code, for example, the UN General Secretary stated early on: “In the interests of peace and in order to protect humanity against the risks of new wars, it is essential to integrate as soon as possible the principles, which were applied at the Nuremberg Trial.” U.N. Secretary General 1946, 699. The first rapporteur that analyzed the possibility and potential impact of a code also noted its deterrent role. Conceding that it would be unrealistic to expect that a state waging aggressive war would surrender its officials or that the Court would be able to detain such officials against their will, he rested his support for the court in its capacity to deter: “We must take into account that the existence of an international criminal court might have also preventive effects. As a matter of fact, as long as a government is not determined to commit through its
An analysis of the rapporteur reports and subsequent discussions about the reports in the Sixth Committee also reveal the influence of the interwar group, particularly when deciding which crimes to include in the draft statute. The ILC, for example, requested that Pella send in a proposed list of crimes to be included in the Code of Offenses, since, as the ILC chairman put it, Pella’s list “served a very useful purpose in clarifying the Commission’s views.” The ILC delegates considered Pella’s list closely. Having drawn on earlier draft conventions, also authored by Pella, the committee had already incorporated most of it into the Code. In the preface to their report, the treaty drafters state in their lists of sources that “from the non-officials texts we should like to mention “plan for a World Criminal Code,”” drawn up by Mr. V.P. Pella.” They also referred to the work of de Vabres, who had urged that the Code of Offenses deal exclusively with interstate crimes rather than basic crimes that involved an international dimension – a recommendation they adopted.

To be sure, states did not accept all of the interwar group’s proposals. The most significant proposal they rejected concerned which entities could be held legally accountable. From the earliest days, the interwar group had envisioned that both states and individuals would be held criminally liable. With the exception of one proposal that was ambiguous, each of the treaty proposals and reports was premised, either explicitly or implicitly, on the notion that states could and do commit organs or private persons, acts prohibited by the Code of Offenses, the fear of a trial before an international organ, even in absentia will not remain without effect.” Spiropoulos 1950, para. 161 (italics in original).

89 Spiropoulos 1950 para. 135.
90 In addition to the Code of Offenses, the interwar group also influenced the criminal court Statute. In the 1951 report accompanying the Statute, for instance, one of the two rapporteurs listed the different statutes that had been formulated since WWI, stating “that of all these drafts, I consider as the most complete and up to date, the one prepared in 1926 by the international association of penal law by professor Pella, and revised in 1946.” Alfaro1950.
crimes and therefore could and should be prosecuted.\footnote{Historical Survey of the Question of International Criminal Jurisdiction 1949, 65, 72-73, 82-83.} In the 1925 IPU annex, Pella detailed two tracks of sanctions according to whether the entity prosecuted was a state or an individual.\footnote{Historical Survey of the Question of International Criminal Jurisdiction1949, 71-72.} For individuals, sanctions included warnings, fines, admonition, prohibition of residence, incapacity in the future to hold diplomatic functions abroad, imprisonment, and exile. For states, Pella classified sanctions as diplomatic, legal, and economic. Pella’s 1946 revised criminal court statute similarly provided in Article 36 for state criminality.\footnote{Historical Survey of the Question of International Criminal Jurisdiction1949, 71-72.}

States, however, rejected that idea. The primary moment of rejection occurred during the Genocide Convention negotiations rather than the drafting of the Code of Offenses and criminal court statute. At the negotiations, states debated two related issues: whether the idea of state criminality was practical or even possible, and whether the Genocide Convention should incorporate a provision for state liability. The amendment, proposed by Belgium and the UK, initially was worded in terms of “state criminal responsibility,” and created much confusion about the meaning of that term. Many states argued that the concept was legally impossible.

Without further elaboration Brazil, for instance, opposed the amendment since it “gave the impression that a State could be held guilty of the commission of a crime.”\footnote{The Genocide Convention: The Travaux Préparatoires 1948, 1662.} The delegation from Panama also expressed skepticism, stating that “the convention was a document of criminal law not of civil law . . . the UK delegate should explain the purpose of its amendment as precisely as possible.”\footnote{Ibid, 1650, 1654.} The French delegate stated: “While such entities could have financial responsibility, they could not be held criminally responsible.”\footnote{Ibid, 1648.} Belgium and the UK clarified – but more likely
modified — their original position in response. They recognized that “states could not be criminally responsible,” but urged that the Convention provide for some type of state accountability in addition to individual criminal accountability.97

By the time states began drafting the Code of Offenses and criminal court statute, just a few years later, the door was basically shut to the TAN proposal for state criminality. In the initial 1950 report discussing the Code, Rapporteur Spiropoulos noted that “in theory the question [of state criminal responsibility] has been much debated. International practice, on the other hand, provides no precedent for such responsibility.”98 After outlining the recent history of international criminal law beginning with the 1943 Moscow Conference, Spiropoulos proclaimed that international precedent exclusively established individual accountability, and concluded the discussion with the famous proclamation by the Nuremberg judges, “Crimes against international law are committed by men, not abstract entities.”99 At their meeting to discuss the report, ILC members briefly discussed the concept of state criminal responsibility and quickly rejected it. Once again, at the threshold of creating a costly judicial mechanism, states were the final gatekeepers.

Innovators

Because it failed, scholars have almost entirely ignored the 1950s attempt to set up a criminal court. This is unfortunate, for a failed attempt can provide substantial insight into the dynamics of institutional creation, including why some states become legal trendsetters. I use two avenues here to identify the innovators, one that focuses on the crisis argument and the other that focuses

97 Ibid, 1658, 1659. The UK delegate clarified that its proposal should be read as providing for only civil liability. He explained, “While it is true that States and Governments could not be made criminally responsible, they could have to answer to an international court for their actions under ordinary law . . . it was impossible to put blame on any particular individual actions for which whole governments or states were responsible. The latter could certainly act as separate entities.” Ibid, 1659.

98 Ferencz 1980, 189 para. 53

99 Ferencz 1980, 481.
primarily on legalism. The first entails a brief qualitative analysis of five powerful states’ positions on the proposal for a criminal tribunal during the Genocide Convention negotiations in 1948, the first time such a proposal received formal state consideration. I use the Genocide Convention discussions for two reasons. First, with the exception of the US, powerful states’ support for or opposition to the proposed genocide tribunal foreshadowed their subsequent positions on creating a permanent international criminal court. Second, because there is more data about state positions during the Genocide Convention, I rely on those discussions as the primary source for analyzing powerful state innovators. For each of the five states, however, I discuss briefly, in footnotes, how its position was consistent with (or in the US case inconsistent with) its positions during the drafting of the Code of Offenses and Criminal Court Statute. The main drawback of this analysis is the fact that all five states are legalist by Bass’ definition; this makes it impossible to test the legalist argument. For that reason I also examine the consistency of state support for proposals backing the criminal court in the early 1950s, focusing on a wider cross-section of states.

Beginning with the first analysis the crisis argument expects that of the five powerful states, the three that were invaded by Germany — France, Belgium, and the Netherlands – to be innovators. With an important exception, the following analysis supports this expectation: although the US was never at risk of invasion, it was, at this early post-war moment, also a supporter of the creation of a genocide tribunal.

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100 The fact that the innovator states supported the proposed genocide tribunal is not inconsistent with the legal crisis argument, which does not rule out the possibility that at least some states will support a criminal court even in the absence of a legal crisis. Rather the crisis argument claims that in the absence of a crisis, the creation of novel forms of sovereignty-constraining judicial mechanisms is unlikely. Support for the proposed genocide tribunal does, however, suggest that there may be a spillover effect that the legal crisis argument overlooks: in the aftermath of crisis, innovator states may be much more willing to create costly mechanisms that can be broadly applied rather than insist on or selectively carve out support only for the precise legal rules that were in crisis. Indeed this spillover effect is consistent with the decision to include in the Code of Offenses a provision prohibiting violations of the laws of war even though the code is geared specifically toward regulating the opposite: peacetime rather than wartime conduct. The spillover effect is also arguably consistent with state willingness to expand the legal status quo rather than merely reaffirm it.

101 I do not examine access to compulsory judicial mechanisms. The ICJ statute was the only treaty that provided for compulsory jurisdiction, and was granted jurisdiction over the Genocide Convention only once the Convention was adopted.
France. Consistent with the crisis argument France, fully occupied by Germany beginning in 1942, was the leading advocate for the establishment of a criminal court, both during the Genocide Convention negotiations and the drafting of the Code of Offenses and criminal court statute. From the earliest days of the Genocide Convention negotiations, the French government insisted that genocide inevitably involves state participation and that domestic courts would not prosecute their own rulers.102 As one of the French delegates to the negotiations stated, “It was inconceivable . . . that a crime committed by or with the complicity of the governing authorities should be dealt with by national judicial bodies.” He continued, “No State would commit its governing authorities to its own courts.”103 An international tribunal was therefore badly needed for ensuring accountability. In another key statement that captured France’s position, the French delegate Mr. Spanien claimed: “Genocide was committed only through the criminal intervention of public authorities; that was what distinguished it from murder pure and simple. The purpose of the Convention . . . was not to punish individual murders, but to ensure the prevention and punishment of crimes committed by rulers. To that end it was necessary to have recourse to effective means, namely, to an international criminal court.”104

The French government included a statute establishing a strong international criminal court (with an independent prosecutor) in the draft Genocide Convention it submitted to the UN. For each subsequent draft that was circulated, moreover, the French delegates argued for returning to the prior, more ambitious version. In written comments responding to the initial and most ambitious official draft, the French government stated, “this draft is too much concerned with introducing anti-genocide clauses into the body of domestic law of each State — clauses that would

103 Genocide Convention Travaux Prepartoires 1948, 783.
seem to be of no more than relative value since this crime can be committed only with the complicity of Governments.” Instead, it argued, prosecutions should be “restricted to rulers, the agents themselves to be prosecuted and punished by international courts (since the courts of their own countries take no action).” In 1948, when the ad hoc committee circulated a revised draft which eliminated the statute establishing a court and contained only a reference to a potential future international tribunal, France urged that states return to the original version, where a statute delineating the details of the court would be included. When states voted to delete the international tribunal reference, the French delegate condemned the vote, requesting that its statement of disapproval be included in the official record: “Just as it has taken twenty-five years for collective security to triumph, penal jurisdiction will inevitably come into existence . . . By rejecting all international measures for punishing the crime, the Committee has rendered the draft convention on genocide purposeless.” France’s call for an international tribunal to prosecute genocide was a parcel of its broader policy supporting a criminal court with expansive jurisdiction.

Belgium and the Netherlands. Occupied by Germany during World War II, the Netherlands and Belgium, with only one exception, consistently supported efforts to create an international criminal court. The exception occurred early on, when the Belgian delegate initially opposed the inclusion of

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105 Ibid.


107 As early as May 1947, the French government had submitted a memo with a draft proposal for the establishment of an international court. Ferencz 1980, Vol. 2, 130 note 2. When the Sixth Committee confronted the question of whether to pursue the project of establishing an international criminal court, the French delegate was a strong proponent of the idea. The French government participated in the August 1951 drafting Committee meetings. Ferencz 1980, Vol. 2, 27. When states responded with written comments on the 1951 draft proposal, the French government offered a detailed memo about revisions (suggesting an expansion in jurisdiction) as well as its general support for the idea. Ferencz 1980, Vol. 2, 37, 367. In September 1952, at the Sixth Committee meeting on the “desirability and feasibility of a court,” the French delegate urged that the court be established. Responding to the UK’s written opposition that the court would be unable to proceed in practice since governments of the accused would refuse to cooperate, the French delegate opened its statement with examples of how the court required state consent “and there was a whole series of concrete cases in which it was not inconceivable that consent would be given,” (Ferencz 1980, Vol. 2, 383), including under Security Council threat of military action, following war, after an internal revolution or a change of government. Even as support for the court among other powerful states during the early 1950s waned, the French government continued to express its view of the need for a court.
a reference to a possible future international penal tribunal in the Genocide Convention. In contrast to the UK, discussed below, it pointed to legal grounds to explain its opposition, and not the impracticality of the endeavor: it had “no intention of signing a convention which purported to punish the dreadful crime of genocide by the mere mention of a non-existent international criminal court. Nor could it agree in advance to submit to the jurisdiction of a court about whose statute, composition and procedure it knew nothing.” In further contrast to the UK, Belgium went to considerable lengths to insist that its opposition was based on the specific text rather than the very idea of establishing the tribunal.

During the Genocide Convention negotiations the Netherlands adamantly supported the court from its earliest vote. During the November 9th meeting, for instance, the Dutch delegate stated that he considered the “manner in which the punishment of genocide was to be organized as one of the most important questions which arose in connection with the whole problem; unless the punishment was assured the Convention would have no real value.” Throughout the negotiations, the Netherlands, like the US and France, was one of the leading supporters of including a reference to an international tribunal in the statute.

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109 In casting its vote for deleting the tribunal reference, the Belgian delegate stated that “it would be erroneous to interpret the vote as implying a decision for or against an international penal court. . . . The vote on the Netherlands amendment (calling for the proposal of appointing a committee to pursue the idea) would show the position of the deletion with regard to the principle.” Ferencz 1980, Vol. 2, 166. Indeed during the hiatus that preceded the final round of negotiations, Belgium joined France and the US in sponsoring the proposal to reincorporate the tribunal reference in Article VI. During the Sixth Committee debate about whether to establish a committee to consider creating an international criminal court, moreover, the Belgian delegate was supportive. Quoting a Swiss professor, he stated that without a criminal court, “the world would continue to live in anarchy under the rule of violence and injustice, with the risk of disaster.” Ferencz 1980, Vol. 2, 29.


111 At the ILC discussions regarding the establishment of a court in 1950, the Dutch representative both expressed clear support for the idea and acknowledged that obtaining state consent would be difficult. To make the project more feasible, the delegate suggested that states consider developing courts on a regional basis. That said, the delegate noted the Netherlands’ readiness to vote in support of a Convention calling for a committee to take up the study of an international criminal court. Ferencz 1980, Vol. 2, 288. When the first draft of the criminal court statute was presented in 1951, the Dutch government, in its submitted comments, came out supporting it: “the question arises whether, in
United States. Defying the expectation of the crisis argument, the US was an important early advocate for some kind of penal tribunal even though it had not experienced itself territorial insecurity as had the states of continental Europe. When the initial “Secretariat’s” draft of the Convention was circulated in August 1947, the US delegate expressed its support for the two draft criminal court statutes contained in the appendix, stating “that where genocide is committed by or with the connivance of the State, the accused individuals should be tried by an international court.” Other states resisted the attached proposals. Rather than attempt to garner their support, the US proposed that the ILC take up the idea of establishing a criminal court as an independent project. As part of the Ad Hoc drafting committee, moreover, the US led the effort to have the provision requiring that individuals accused of genocide be tried in national courts also include the phrase, or “by a competent international tribunal.” The mere reference to such a tribunal provoked fierce debate and was initially deleted. But the US worked hard behind closed doors to ensure that the reference was included in the final version. The US also was supportive, although only initially, of the 1950s proposal for the Code of Offenses and criminal court statute.

view of the present state of international criminal law, an international criminal court will be able to function satisfactorily. The government believes that the question should be answered in the affirmative.” Ferencz 1980, Vol. 2, 373.

112 Ibid.

113 The US was apparently concerned that insisting on a tribunal would jeopardize the Convention’s adoption.

114 The US took up the mantel during the two weeks preceding the final round of negotiations so that the provision had sufficient state support when the final round of negotiations resumed. Responding to Britain’s unrelenting opposition, the US delegate stated, “the most important method of punishment would be lost if the final phrase of Article VII were deleted.” Ferencz 1980, Vol. 2, 164.

115 Although some scholars dismiss the US support during this period as mere “lip service,” the US support in the late 1940s was probably genuine. For one, it joined the Netherlands and other states to propose a resolution directing the ILC to study the possibility of establishing a criminal court, while other states (including the UK) attempted to block the ILC from pursuing the project. Ferencz 1980, Vol. 2, 15. During the Legal Committee debate on establishing a Court in November 1950, moreover, the US delegate stated that the committee studying the issue should be given wide discretion, and that it should be free to propose a convention or multiple conventions, a document on state obligations or whatever else it deemed useful or necessary. Ferencz 1980, Vol. 2, 294. As the Cold War set in, however, the US support for the court waned.
**United Kingdom.** Having faced the imminent threat of invasion during the war, but never actually experiencing it, the UK became one of the most vocal opponents of the proposed international tribunal at the Genocide Convention negotiations. Even after the proposal was dropped, it remained a leading critic of the *Ad Hoc* Committee’s draft treaty, including the US proposal to incorporate a reference to an international tribunal. The British Delegate to the negotiations, Gerald Fitzmaurice, justified this opposition on the ground that inclusion of the reference was futile:

“In the opinion of the United Kingdom delegation . . . the mention of a competent international tribunal – which could only be an international court – was useless since such a tribunal did not exist. Even if it did exist, it would be of as little use as national courts, for it was to be anticipated that culprits would not be handed over to it and that unless armed force were used it would be impossible to bring perpetrators of an act of genocide to trial by that court.”

After resisting the tribunal reference throughout the negotiations, the UK ultimately abstained rather than vote against it when the reference was re-introduced by the US during the final days of negotiation. The UK may have deemed it too unpalatable to vote against the court and find itself aligned with the Soviet bloc. With its empire challenged by national liberation movements and

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118 The UK opposed proposals for sovereignty-intrusive institutions across all post World War II negotiations including the Genocide Conventions, the Geneva Conventions the Code of Offenses/criminal court statute. When the Sixth Committee debated the initial ILC proposal to pursue the idea of a criminal court in 1950, for instance, the UK representative said it would vote against the idea, as it could “see no need for it at the present and doubted whether it was desirable in existing circumstances.” Ferencz 1980, Vol. 2, 210. Desirability, it elaborated, was a function of a court’s feasibility: “However desirable anything might be in theory, if it was not a practical possibility, the attempt to create it could only result in failure and therefore, in the realistic as opposed to the idealistic sense, the project was not in the circumstances desirable.” See Ferencz 1980, Vol. 2, 273. In written response to the first draft convention for a criminal court, the British government repeated its argument that the project was hallucinatory. War crimes are too rare, it argued, to warrant the establishment of a permanent international criminal court, and adequate alternatives already exist to adjudicate in these instances (such as military or *ad hoc* tribunals). Ferencz 1980, Vol. 2, 378. In terms of prosecuting individuals for peace-time crimes, it continued, state consent to international jurisdiction was unlikely to be forthcoming. These crimes, it explained, necessarily entail some form of state complicity, making consent to jurisdiction – i.e., a “self-surrender” — unlikely. Having delineated its observations, it continued, the “United Kingdom Government, for its part, can see no warrant for the establishment, on a permanent basis, [of] a court the effective
growing demands for independence, the UK had strong incentives to resist institutions that threatened to undermine further its grip on power. The crisis argument needs modification not simply in terms of distinguishing hegemons from other powerful states, but also distinguishing rising from declining hegemons.

In sum, with the admittedly important exception of the US, the analysis of powerful states as innovators is largely consistent with the crisis argument. And although early support for the criminal court by the US does not conform to the crisis argument, it also does not support a simple hegemon argument: US support was insufficient to see a tribunal created, although it managed to convince states to incorporate a reference to one. The US position arguably conforms to a legalist account, but also exposes the limits of legalism as a motive for state action. As the Cold War loomed on the horizon, the US began to hedge on establishing institutions that could meaningfully constrain its sovereignty.

Although the position of states is consistent with the crisis argument, this analysis offers no direct evidence that states were seeking to protect the territorial integrity principle. Indeed, state support for the criminal court could also be attributed to their legalist identity, with the UK being the one state that contradicts the legalist account. To further disentangle the two explanations, I therefore analyze which states were the most consistent supporters of the criminal court proposal. Specifically, I examined which states satisfied all of the following four requirements: (1) they voted against the 1948 proposal to delete the reference to the international penal tribunal in the Genocide Convention;119 (2) they were among the eleven states that submitted comments in response to the 1951 draft statute for a criminal court, and those comments were supportive;120 (3) they consistently

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professed support for the Court during the Sixth Committee discussions of the first criminal court statute (November 7-17th, 1952); and (4) they voted against the 1951 proposal to delay the ILC’s work on the project by one year. If the legalist explanation is correct, then innovators should be liberal democratic states; if the crisis argument is correct, they should be states that experienced territorial violations during the war.

Table 5-6 lists a handful of states that meet all four criteria of supporting the court and thus qualify as innovators. It also lists their “legalism” (polity2) score and the type of territorial intrusion they experienced, if any. In general, following the legalist argument, the majority of innovators — Australia, Canada, France, and the Netherlands — are liberal democracies. There are two exceptions: China and Pakistan. Both countries were avid supporters of the criminal court. China not only voted in favor of the court, but for creating a court that would be independent of the Security Council and the General Assembly. Pakistan was particularly vocal in its support for the Court during the Sixth Assembly meetings. The legalist explanation is hard pressed to explain these two innovators.


122 Ferencz 1980, Vol. 2, 422 (Nineteen for postponing, fifteen against, with seven abstaining). The proposal for postponing was justified in terms of giving states an additional year to submit comments before the ILC continued its efforts. Although some states probably genuinely thought that more feedback from states would be useful for building the Court, most states that supported postponing likely saw this as a good delaying tactic. Since not all UN members have representatives on the Committee, these votes probably suffer from some form of selection bias. Even if it is non-random, it is not clear whether such bias would work in favor or against the legalist explanation.

123 It should be noted that for two reasons votes are not ideal measures of state support. First, because they entail few costs, state votes may be simply cheap talk. This is particularly a risk when votes cannot be cross-checked against subsequent treaty ratification, as is the case here. Second, even if they are not simply cheap talk, equating one vote with a state’s position (for or against a criminal court) is problematic, since states can vote in favor (or against) a proposal for different and contradictory reasons. For instance, the UK voted against the proposal to delay the ILC’s work on a criminal court statute not because it wanted to expedite the process of creating a court, but because it wanted to avoid “fruitless repetition” and see a quick end to the debate. Ferencz 1980, Vol. 2, para. 45. Haiti, in contrast, abstained from the vote without comment, even though it had been a leading supporter of the ILC continuing its work on the project. Most problematically, states may vote against a proposal because it is not innovative or ambitious enough, precisely the opposite of what the coding might reflect.
The crisis explanation, in contrast, is able to offer an explanation for China’s and Pakistan’s support, as well as that of Belgium and France, but is unable to explain Australia’s and Canada’s support. China was occupied by Japan and that experience probably informed its support for a criminal court. Belgium and France, moreover, were invaded and occupied by Germany. Created in 1948, Pakistan’s territorial trauma associated with partition postdates World War II, but it was traumatic nonetheless, and more recent than the territorial invasions suffered by its peers in World War II. Canada’s and Australia’s support, on the other hand, are inexplicable from a crisis perspective.

<table>
<thead>
<tr>
<th>Country</th>
<th>Polity2</th>
<th>Territorial Insecurity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>10</td>
<td>No territorial intrusion</td>
</tr>
<tr>
<td>Canada</td>
<td>10</td>
<td>Occupied</td>
</tr>
<tr>
<td>China</td>
<td>-8</td>
<td>Invaded</td>
</tr>
<tr>
<td>France</td>
<td>10</td>
<td>Occupied</td>
</tr>
<tr>
<td>Netherlands</td>
<td>10</td>
<td>Occupied</td>
</tr>
<tr>
<td>Pakistan</td>
<td>4</td>
<td>N/A</td>
</tr>
</tbody>
</table>

The preceding analysis of innovators offers three insights. First, supporting the crisis argument, powerful states that were susceptible to territorial aggression emerged as innovators: Belgium, France, and the Netherlands were leading supporters of a court during the Genocide Convention negotiations and the drafting of a criminal court statute that followed, and the latter two also appear among the six innovators based on four criteria. This logic moreover extends to two

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124 Belgium does not make the list. It had voted to delete the reference to an international penal tribunal because the tribunal was purely hypothetical. Here, and for one vote only, its legalist inclinations prevailed over wanting to create an institution that would presumably help deter future aggression.
states not included in the category of powerful states that I defined in Chapter 2, China and Pakistan.

With the US and the UK not included on this list, the analysis of the top six innovators points, once again, to the need to modify the power argument: it is the middle powers – not the most powerful states – that are the main supporters of creating some form of a criminal court. The US and UK were motivated by distinct preferences and capacities. As the new hegemon, the US supported the creation of some form of a criminal tribunal in 1948. After the outbreak of the Korean War and with the Cold War a reality, the US switched roles and became a follower rather than a leader of the effort to establish a criminal court. The US did not expressly oppose the court. It did not have to. For as a declining hegemon, the UK emerged as the leading opponent of the court among Western states. Unlike the Eastern European states and the Soviet Union, it couched its opposition in terms of practicality and feasibility rather than the language of sovereignty. But its opposition to the creation of any costly judicial mechanism in these years was unwavering, including during the drafting of the Code of Offenses and criminal court statute and during the Geneva Conventions negotiations. Finally, having been spared the experience of invasion and occupation, Australia and Canada acted as innovators for reasons that remain here unexplained unless we draw on legalist arguments. Without further analysis, the possibility remains that states were motivated by both territorial insecurity and legalism.

**THE 1998 ROME STATUTE**

**Timing**

The timing of the Rome statute negotiation supports both the crisis and TAN arguments. The mass atrocities in the former Yugoslavia and Rwanda posed a legal crisis for the human rights
regime that played an important — but it turns out, indirect — role in facilitating state efforts to
create the ICC. The judicial landscape was similarly conducive: compulsory judicial mechanisms
were generally absent and, as was true of the investment and 1950s territorial integrity cases, limited
jurisdiction tribunals provided an unintended stepping stone toward a full-fledged court. TANs also
mattered. In addition to being the first to propose the independent prosecutor provision, TANs
were central in garnering state support for the court in the run-up to and during the treaty
negotiations.

International Legal Crisis. In the 1990s, violence in the former Yugoslavia and Rwanda
constituted an international legal crisis for the human rights regime and was the primary albeit
indirect force behind the creation of the ICC. Although the end of the Cold War was an enabling
condition for the creation of the ICC, it did not guarantee it; an international legal crisis was also
needed. The timing of the violence, preceding the creation of the ICC, does not require much
discussion: the crisis occurred in the mid-1990s, the court was established in 1998. Yet one point
deserves mention at the outset. States first proposed reviving the attempt to create a criminal court,
specifically a narcotics trafficking court, in 1989, before the onset of Yugoslavian violence. The
1990s violence thus did not trigger states’ initial move toward setting up the ICC. This, however, is
not problematic for the crisis argument as the 1989 proposal did not contain an independent
prosecutor provision. States would not have accepted such a provision in the early 1990s, absent the
sweeping violations of human rights. Indeed, in the early 1990s there was no guarantee that states
would have followed through even on the initially modest and still state-centric proposal for a
court.125

125 Marlies Glasius, for instance, notes that the drafting of the criminal court treaty could have stalled “in the rarefied
atmosphere of the ILC, far from the political limelight, where years were sometimes spent on the definition of a legal
clause.” But, in the words of Glasius, “the ethnic cleansing in Yugoslavia and the genocide in Rwanda, and the
subsequent Security Council decisions to establish ad hoc tribunals for Yugoslavia and Rwanda, changed all this.” Glasius
Although it is widely recognized that the violence of the 1990s contributed to the establishment of the ICC, an account that centers on the mass atrocities of former Yugoslavia and Rwanda needs to answer three additional questions. First, why did human rights violations displace territorial aggression as the main force pushing the creation of the ICC to the point that the Rome Statute left the crime of aggression undefined and excluded it as a ground for prosecution? There are at least two crisis-based explanations for the displacement of territorial aggression by the 1990s. First, consistent with the power-based premise of the crisis argument, the main proponents of the ICC (the leaders of the Like-Minded Group, such as Germany and Canada) did not think that territorial aggression posed a vital threat at the end of the twentieth century, one that could create a legal crisis. They were thus supportive of, but not adamant about, including aggression during treaty negotiations. The US (and other Security Council members), moreover, opposed incorporating aggression into the Rome Statute; doing so, they feared, would dilute Security Council control over the determination of when aggression had occurred.

A second explanation emphasizes that aggression had lost its status as a salient international crime during the latter half of the twentieth century, just as the territorial integrity norm had gained significant strength during the same period. The crime of aggression was at its highest level of global salience immediately following the Nuremberg trials. Although there was a brief interlude in the 1970s when states were able to reach a consensus on a definition, the US and UK opposed efforts to develop the crime of aggression in the post-World War II era. The Security Council generally avoided declaring that states had committed aggression (including when Iraq invaded

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2006, 11. The 1990s mass atrocities and subsequent *ad hoc* tribunals not only lent new urgency to the idea of establishing a criminal court but also strengthened the support for a court that would not be beholden to Security Council control.

126 See, for example, Glasius 2006.

127 Roach 2006, 122.

128 Ferencz 1975.
Kuwait in 1990) for fear that it would establish a precedent it might be unable to control. During the second half of the twentieth century no state was prosecuted for aggression, and the crime of aggression was not codified in any treaty.

During this same period, moreover, and despite some marked exceptions, the territorial integrity norm generally gained strength. Mark Zacher, for instance, argues that this norm underwent three stages of development: emergence after World War I, acceptance between the end of World War II and the mid-1970s, and institutionalization from the mid-1970s onward. Before 1945, he writes, approximately eighty percent of all wars were accompanied by the transfer of territory between states, whereas after 1945, war-based territorial transfers dropped to thirty percent. Although there have been some unsuccessful attempts, since 1976 there has not been a single major case of successful territorial aggrandizement. Similarly, Tanisha Fazal argues that a norm against conquest developed during the second half of the twentieth century. Of the sixty-six state “deaths” (defined as losing sovereignty to another state) between 1816 and 2000, only eleven occurred after 1945. This argument suggests that the territorial integrity principle was simply not vulnerable in the way that it had been in the early 1950s, thus eliminating the perceived need to create something as bold as an independent prosecutor to protect it.

An explanation for state willingness to create the ICC has to answer two other questions: first, what was the role of powerful state in pushing for court’s establishment? Under President Bill Clinton the US was a leading advocate for the Court, and welcomed the 1994 ILC draft treaty. But


130 Zacher 2001, 237. For an article challenging Zacher's analysis and findings, see Hensel, Allison, and Khannani 2009. They argue that forcible attempts to acquire territory should be considered violations of the territorial integrity principle, irrespective of whether or not these attempts are successful. Using this indicator, they find no evidence that territorial integrity norm strengthened during the second half of the twentieth century.

131 Fazal 2007, 17.

132 Fazal 2007, 27.
during the next few years, as the CICC and other states began to call for an increasingly innovative 
court, the Clinton administration became cautious.\textsuperscript{133} In the end the US was one of only seven 
states to vote against the court. As was true with the OECD’s draft convention on investment, and 
the abandonment of the criminal court in the 1950s, the US held a singular position among the 
powerful states I identify in Chapter 2. Canada and Germany, for example, were early although not 
the first supporters of the independent prosecutor provision. Following the election of Prime 
Minister Tony Blair, in December 1997 Britain became the first Security Council member to join the 
Like-Minded Group\textsuperscript{134}, an important turning point during the lead up to negotiations.\textsuperscript{135}

Finally, how precisely did mass violence in the 1990s lead to the creation of the ICC with its 
independent prosecutor provision? In the immediate aftermath of the crisis, most states — 
including powerful ones — did not suddenly endorse the proposal for an independent prosecutor. 
As late as 1996, the majority of states were still reluctant to support it.\textsuperscript{136} The timing of state support 
for the independent prosecutor provision shows, therefore, that crisis was unable, on its own, to 
trigger the creation of a sovereignty-constraining mechanism. The judicial landscape and TANs 
built the bridge between crisis and the creation of the ICC.

While the crisis posed by Rwanda and the former Yugoslavia provided an initial impetus for 
states to take seriously the possibility of creating a permanent court with an independent prosecutor, 
the international judicial landscape was also of great importance, and in ways not anticipated by the 

\textsuperscript{133} Busby 2010, 216 (noting that the Clinton Administration professed support for the court but faced domestic 
opposition, from both Congress and the military).

\textsuperscript{134} The Like-Minded Group was a group of states that worked with and towards the goals of the CICC.

\textsuperscript{135} France withheld support until the final days of negotiations. Busby 2010, 217. For a thoughtful discussion of the 
British and French positions, see Busby 2010, 233-238 (identifying a range of causes for early British and late French 
support, including the fact that Prime Minister Tony Blair had a legal background and was married to a human rights 
lawyer, while French president Jacque Chirac came from a military background).

\textsuperscript{136} See Deitelhoff 2009, 49-50.
crisis argument. Similar to the unsuccessful attempt of the 1950s, there existed few relevant compulsory judicial mechanisms at the time that the 1990s violence occurred. The Geneva Conventions and the 1977 Additional Protocols did not provide for international jurisdiction, either criminal or civil.\textsuperscript{137} Crimes against humanity (and aggression) had not been codified in a “core treaty” and were without compulsory judicial mechanisms. Only the crime of genocide was clearly covered by an international judicial provision. Article IX the Genocide Convention requires states to refer disputes to the ICJ; this provision, however, was not sufficiently powerful or broad to discourage states from creating a criminal court.\textsuperscript{138}

Admittedly, two \textit{ad hoc} tribunals, the International Criminal Tribunal for Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) were important, unplanned stepping stones to the ICC. This is true even though the tribunals had issued only one ruling by the time the Rome Statute negotiations began.\textsuperscript{139} The two tribunals provided evidence that international criminal prosecutions, particularly those conducted by an independent prosecutor, would not be the death knell of state sovereignty. As William Schabas writes, the tribunals did more than “simply set legal precedent to guide drafters. They provided a reassuring model of what an ICC might look like. This was particularly important concerning the role of the prosecutor.”\textsuperscript{140} The tribunals also

\textsuperscript{137} States deleted any references to international court or tribunals early on in the negotiations of the 1949 Geneva Conventions. Instead, the Conventions require state parties either to prosecute or extradite individuals accused of committing grave breaches, a sub-category of violations deemed the most serious. Since then states have been very reluctant to prosecute or extradite any individuals – their own citizens or foreign nationals. The grave breaches regime, in the words of one scholar, proved “a noble innovation which has achieved almost nothing.” Danner 2006, 18. Despite the abysmal enforcement of the 1949 Conventions, states almost unanimously agreed that the 1977 additional protocols should not include a provision granting jurisdiction to an international court. Danner 2006, 17 (citing Bothe et al., note 58).

\textsuperscript{138} Furthermore, when the treaty drafting process began this provision had never been used. This changed in 1993 when Bosnia filed a case at the ICJ claiming that Serbia had violated the Convention. But the ICJ did not reach a ruling on the merits until 2007, providing therefore little evidence that the ICJ was a viable enforcement mechanism. Application of the Convention on the Prevention and Punishment of the Crime of Genocide 2007.

\textsuperscript{139} Prosecutor v. Akayesu 1998.

\textsuperscript{140} Schabas 2011, 14.
exemplified the feasibility of the idea of an independent prosecutor and court more generally. Benedetti and Washburn explain that the tribunals “constituted a psychological, political and legal breakthrough for the international criminal court proposal and for the concept of international accountability of individuals for gross and massive crimes.”\textsuperscript{141}

Finally, the shortcomings of the tribunals were important for motivating states to support proposals for an independent prosecutor provision. International human rights lawyers and especially weaker states recognized that the future of international criminal law contained two enforcement options: the continued resort to \textit{ad hoc} criminal tribunals, in which the Security Council would retain all decision-making power about which crimes would be prosecuted, or a permanent international criminal court which, especially with the independent prosecutor provision, would be less controlled by the Security Council. Weaker states were partly drawn to the criminal court because it would loosen the grip of the Security Council in controlling prosecutions.\textsuperscript{142} Power politics therefore played more than one role. It moved powerful states, in the face of legal crisis, to push for the ICC. Confronted with the alternative of Security Council control, power politics moved weaker states to ultimately support the effort.

\textit{TAN Mobilization.} TAN mobilization in the 1990s preceded the proposal for the independent prosecutor provision thus supporting the explanation highlighting the significance of TANs. They first began to form a well-organized coalition in the fall of 1994, when six NGOs recognized that they had been unable to influence states during the discussion of the Criminal Court in the Sixth Committee. This recognition inspired NGOs to hold a first meeting in New York of what was to become the Coalition for an International Criminal Court (CICC).\textsuperscript{143} The CICC’s

\textsuperscript{141} Benedetti and Washburn 1999, 3.

\textsuperscript{142} I thank Jens Ohlin for bringing this point to my attention. See also Busby 2010, 230.

\textsuperscript{143} Glasius 2006, 26.
mobilization comprised a broad range of activities. As Marlies Glasius writes, the group lobbied both domestic governments and conference delegates, produced “expert documents” with policy and position proposals, released proposed text, distributed information, and coordinated delegates’ negotiating positions, particularly those from weaker states.\textsuperscript{144} Other scholars emphasize that the CICC’s main contribution was in shaping the discourse of negotiations, thus helping to move state positions in the direction of supporting an independent court.\textsuperscript{145}

The CICC was the first to propose the inclusion of a prosecutorial trigger and eventually made the proposal a central focus of its campaign.\textsuperscript{146} In the 1994 ILC draft treaty, only state parties and the Security Council could initiate court proceedings. In a report released in 1994, Amnesty International issued the first call for the establishment of a provision that authorized the prosecutor to initiate investigations.\textsuperscript{147} Although this was not a centerpiece of Amnesty’s proposal, it was important in putting the idea on the table. Other NGOs also began to issue expert reports calling for an independent court, and most of these supported the proposal for an independent prosecutor.\textsuperscript{148}

State support for the independent prosecutor provision grew slowly. The first set of innovator states — Austria, Greece, Netherlands, Norway, and Switzerland — announced their support for the idea in August 1995.\textsuperscript{149} As late as 1996 state support for the provision remained relatively weak.\textsuperscript{150} During 1997 states began to shift their position, inspired in part by their

\textsuperscript{144} Glasius 2006, 37.
\textsuperscript{145} Deitelhoff 2009; Struett 2008.
\textsuperscript{146} Glasius writes that the prosecutor provision was “the single biggest issue on their agenda.” Glasius 2002, 153.
\textsuperscript{147} Glasius 2006, 49.
\textsuperscript{148} Glasius 2006, 50.
\textsuperscript{149} Glasius 2006, 49.
\textsuperscript{150} Glasius 2002, 154.
experience with the *ad hoc* criminal tribunals. This was reinforced by Argentina’s proposal that a pre-trial chamber would be required to review the prosecutor’s self-initiated investigations.\(^{151}\) Also important was the fact that the Like-Minded Group sponsored a series of regional meetings — comparable to what Word Bank officials did in their strategic (and classified) drafting of the ICSID Convention discussed in Chapter 3.\(^{152}\)

Nonetheless, the independent prosecutor provision remained a critical point of contention going into the Rome Treaty negotiations a year later. Over the course of negotiations and into the final days, the CICC, and specifically Human Rights Watch, Amnesty International, and the Lawyers Committee for Human Rights, in the attempt of garnering state support, consistently promoted the proposal and arranged meetings with “swing” delegations. This stands in contrast to the experiences of the investment TAN and interwar group, which both mobilized before the legal crisis not during the treaty drafting and negotiations. Here, however, TAN mobilization and an active lobbying campaign for the adoption of a prosecutorial trigger was crucial to its inclusion in the treaty.

Like the interwar group, however, the CICC was strategic in pushing its agenda and in a way that the reciprocal approach is better able to capture than the unidirectional one. Rather than simply shape its objectives according to what states might accept, one CICC member reports a different strategy. In the attempt to make some of their proposals appear relatively moderate, NGOs proposed some options that they knew would be too radical for states to accept. While CICC members expected states to reject the proposal that NGOs and victims be granted the authority to initiate legal proceedings, they proposed it anyway, calculating that it would make their proposal for

\(^{151}\) Glasius 2006, 50-51.

\(^{152}\) Deitchhoff 2009.
an independent prosecutor appear reasonable and thus attract more state support. If accurate, the account reaffirms that the TAN-state interactions are reciprocal and strategic.

The Relevance of TAN Access. In contrast to the investor-state arbitration and 1950s ICC cases, the influential role of TANs was greatly shaped by unprecedented access to treaty drafters. Of the approximately 800 organizations that were part of the CICC by the time the 1998 negotiations started, 236 sent at least one delegate with observer status to the conference. And many of these CICC delegates had well-established relations with state delegations. In some cases CICC delegates also served during negotiations as state delegates and/or IGO officials. Glasius diagrams a number of individuals who played such “crossover” roles. Cherif Bassiouni, for instance, served as President of the Association de International de Droit Penale, as Chair of the UN commission of Inquiry into Crimes Committed in Yugoslavia, and as leader of the Egyptian delegation to the Conference. Andrew Clapham had served as Amnesty International’s representative to the UN from 1991-1997 and subsequently as a member of the Solomon Island’s team of delegates. These examples of “dual capacity” roles show that the CICC did not simply have access to state delegates; in several cases, they were the delegates.

Antecedent Conditions and Limitations of the Crisis and TAN argument. The crisis and TAN arguments raise two important questions. First, if the mass atrocities of the former Yugoslavia and Rwanda served as the legal crisis precipitating the creation of the ICC, why did previous episodes of mass atrocities, such as those committed by the Khmer Rouge in the 1970s, not similarly facilitate the establishment of a sovereignty-constraining judicial mechanism? One answer points to the

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154 Glasius 2002, 144-145.
absence of state incentives and the lack of a perceived legal crisis. A second and related answer points to the absence of TAN mobilization. By the 1970s, the interwar group’s draft conventions had become relics of a different era. It was not until after the Cold War that TANs launched their campaign to create a court. TAN mobilization was partly inspired by shifts in geopolitics and their own calculations about the prospect for creating highly sovereignty-constraining judicial tool. TAN mobilization thus shaped state perceptions of legal crisis and was shaped by the changing constellation of powerful state interest after the Cold War.

A second question concerns why the proposal for a new mechanism succeeded in the 1990s and failed in the 1950s. Both episodes were characterized by TAN mobilization, an international legal crisis, an empty judicial landscape and, by the end of the drafting or negotiations, lack of support by the hegemon. Why the divergent outcomes? First, with the end of the Cold War, states were simply more willing to cooperate and reaching a consensus was therefore much easier than it had been five decades earlier. Second, US opposition to the treaty emerged very late during the Rome Statute negotiations, too late to halt or reverse the snowballing momentum of the negotiations. Finally, norms about sovereignty were less rigid than in the 1950s. By the late 1990s states had developed a track record of participating in numerous international institutions that constrained – albeit to lesser degrees – their sovereignty; the international judicial landscape argument overlooks this important fact. Finally, the norm of individual criminal accountability

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155 This mirrors the question posed by the 1950s cases about why states did not attempt to create a criminal court for aggression after World War I and for war crimes after World War II. In the 1970s powerful states, particularly the US, prioritized Cold War politics over protecting human rights and did not view the Cambodian violence as a legal crisis. Because of the Khmer Rouge’s defeat in Vietnam and at least the US’ indirect complicity in helping pave the Khmer Rouge’s way to power, the US was unlikely to support the creation of new and robust accountability mechanisms. US support was especially unlikely if it were to exacerbate political relations with Asian countries.

156 Wedgwood 1998. Until the very end, the US team of delegates had been supportive of creating a court, expecting that the Security Council would retain ultimate control over prosecutor’s investigations.

157 Cooper et al. 2008, in contrast, advance exactly this argument.
had also gained traction domestically, and this had spillover effects for how states viewed head of state immunity.\textsuperscript{158}

**Content of the Rome Statute**

Turning to treaty content, as was true of investor-state arbitration and the 1950s attempt to establish a criminal court, states both reaffirmed the existing rules and expanded some of them, partly in response to TAN mobilization. In contrast to the other two cases, however, states expanded the existing rules not simply by cherry picking among various statutes but, more commonly, by bargaining over various sources and interpretations. Some states pushed for broadening or developing existing rules, others for constricting or maintaining them. The final provision was often the product of a compromise between the two sides, usually moderately rather than radically, expansive.\textsuperscript{159} Taken as a whole, multiple sources influenced the content of the Rome Statute: incentives to protect the traditional human rights regime, CICC mobilization, and bargaining between states.

The reaffirmation of the crime of genocide is self-explanatory; states replicated the Genocide Convention’s definition of genocide almost verbatim in Article VI of the Rome Statute, clearly seeking to maintain the status quo.\textsuperscript{160} The sources influencing the crimes against humanity and war crimes provisions are more complex, partly because several statutes, including those setting

\textsuperscript{158} Sikkink 2011.

\textsuperscript{159} For example, with respect to crimes against humanity, one author writes that the Rome Statute provided “the most detailed definition to date of crimes against humanity. It represents both a ‘codification’ and, to a small degree, a ‘progressive development’ of international law as those terms are understood in the UN Charter.” Clark 2011, 22. Another author sees the Rome Statute as significantly expanding the scope of crimes against humanity, writing that it “built on previous codifications, but at the same time also marked a rupture” compared to prior codifications. Sluiter 2011, 107.

\textsuperscript{160} Only a few states offered proposals to amend the definition. Egypt proposed the most radical change of expanding the definition to cover political and social groups. Von Hebel and Robinson 1999, 80 n. 37
up the ICTY and ICTR, contained inconsistent definitions.\textsuperscript{161} On some of the most controversial definitional questions, states opted to follow more recent legal developments. They disagreed, however, on whether, by doing so, they were reaffirming (as supporters argued) or expanding (as opponents claimed) customary international law. For instance, states eliminated the requirement that crimes against humanity be connected to armed conflict, referred to as the “nexus requirement.” Although the Nuremberg, Tokyo, and ICTY statutes contained this requirement, most states interpreted customary international law as no longer containing this requirement.\textsuperscript{162} In addition, states codified the recent use of the disjunctive test (requiring that the attacks be systematic “or” widespread) rather than conjunctive test (systematic “and” widespread). Here too states that supported the disjunctive test justified the codification as consistent with customary international law (including the ICTR statute and ICTY case law).\textsuperscript{163}

States managed to codify these more expansive readings by bargaining and raising the threshold for crimes in other respects. For instance, the final definition of crimes against humanity requires that attacks consist of “multiple acts” and be part of a “state or organizational policy.” NGOs criticized the inclusion of a policy requirement, arguing that there was no precedent in international law. While some delegates argued that customary international law contained this requirement, the main reason for including it was the need for consensus between the more

\textsuperscript{161} Von Hebel and Robinson 1999, 90. As Van den Heirk states, “Legal ingredients, such as the requirements of a nexus to armed conflict, a widespread and/or systematic attack against any civilian population, or discriminatory grounds, have been swapped back and forth in a cacophony of definitions.” Van den Herik 2010, 80.

\textsuperscript{162} Von Hebel and Robinson 1999, 93. In support of their argument that customary international law no longer demanded a nexus to armed conflict, many delegates reference the ICTY’s ruling in Tadić that stated that nexus was not required by customary international law.

\textsuperscript{163} Von Hebel and Robinson 1999, 94.
expansive and conservative camps. As Herman von Hebel and Daryl Robinson write, “[E]xplicit recognition of this policy element was essential to the compromise on crimes against humanity.”

In defining other “inhumane acts” that constituted crimes against humanity, states not only reaffirmed but also, to varying degrees, expanded the status quo, incorporating new crimes or broadening the scope of existing ones. State willingness to expand the status quo is arguably most evident in the treatment of gender-based crimes, which applies to both the crimes against humanity and war crimes provisions. In addition to rape, states recognized other forms of sexual violence, including sexual slavery, forced pregnancy and enforced sterilization. As I demonstrate below, TANs played an essential role in ensuring this expansion. And yet, they were not the only actors influencing states to broaden the legal status quo. Some states that sought to constrain some of the substantive provisions supported the expansion of others. For instance, at the urging of African and Latin American states, the definition of crime against humanity, expanding on customary international law, encompasses apartheid and enforced disappearance.

In contrast to crimes against humanity, by the time of the Rome Statute negotiations war crimes had been extensively codified, including in the 1907 Hague Conventions, the 1949 Geneva Conventions and the 1977 Additional Protocols. Nonetheless, there were still numerous areas of contention. For example, states debated the inclusion of a “threshold” requirement. The US proposed that the court have jurisdiction over war crimes “only when committed as part of a plan or policy or as part of a large-scale commission of such crimes.” The majority of states opposed any

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164 Von Hebel and Robinson 1999, 95, 97.
165 Von Hebel and Robinson 1999, 116-117. For war crimes, the list appears in art 8(2)(b).
166 Von Hebel and Robinson 1999, 99-100.
167 Von Hebel and Robinson 1999,102 n. 75.
168 Von Hebel and Robinson 1999,108 (italics in original)
threshold requirement.\textsuperscript{169} The final version was the product of compromise, and not, for example, of TAN mobilization. The ICC is granted jurisdiction over war crimes “\textit{in particular} when committed as a part of a plan. . . .”\textsuperscript{170} In terms of applicability, states decided to extend the Rome Statute to internal armed conflicts.\textsuperscript{171}

The CICC significantly shaped some of the substantive provisions. Drawing extensively on the analysis of Marlies Glasius, I highlight the CICC role in drafting the gender-based crimes and juxtapose it with its inability to influence the prohibition of weapons of mass destruction.\textsuperscript{172} Gender-based crimes were criminalized before the 1990s mass atrocities, but they were not included in the category of grave breaches. For instance, the 1949 Geneva Conventions and the 1977 Additional Protocols criminalized rape, forced prostitutions, and indecent assault as war crimes, but classified them as “attacks against honor,” and “crimes of humiliating and degrading treatment” and not as “crimes of violence” that belong to the grave breaches regime.\textsuperscript{173} More broadly, these statutes did not recognize gender-based crimes as a component of other crimes, such as torture, enslavement, and genocide.\textsuperscript{174} The Rome Statute, in contrast, includes rape and other forms of sexual violence as part of the grave breaches regime. The Statute’s treatment of gender-based crimes has been described along the spectrum of simply clarifying existing law to being “revolutionary in its approach.”\textsuperscript{175}

\textsuperscript{169} Von Hebel and Robinson 1999,107.
\textsuperscript{170} Von Hebel and Robinson 1999,108 (italics in original)
\textsuperscript{171} Von Hebel and Robinson 1999, 120.
\textsuperscript{172} Glasius discusses these two issue areas in chapters 5 and 6 respectively. Glasius 2006.
\textsuperscript{173} Copelon 1994, 250.
\textsuperscript{174} Copelon 2000, 234.
\textsuperscript{175} Copelon 2000, 237.
The CICC and more specifically a subgroup called the Women’s Caucus for Gender Justice were key in ensuring the inclusion of a broader spectrum of gender-based crimes. Formed initially in 1997, the Women’s Caucus grew by the time of the Rome Statute negotiations to be a “coalition within a coalition, with hundreds of member organizations.” Among its most important objectives, the Caucus sought to include rape and other sexually violent crimes within the Grave Breaches provision, and to have the statute recognize the concept of gender-based crimes as constituting a form of established serious crimes, such as torture. The Caucus had between twelve and fifteen representatives present at all times during the negotiations. They formed alliances with delegates from the group of “Like-Minded Group,” and women delegates from other countries. Two of the Caucus’ members became part of the state delegations of Canada and Costa Rica. As the adopted statute makes evident, the Women’s Caucus was generally successful in its goals.

Even though the Peace Caucus had mobilized behind the issue, in contrast to the treatment of gender states resisted proposals to ban weapons of mass destruction (WMDs). At the time of the ICC negotiations, the 1972 Biological Weapons Convention and the 1993 Chemical Weapons Convention were the core treaties banning the use, development, production, and stockpiling of such weapons. During the negotiations states considered three main proposals for WMDs: a US-proposed short list of weapons that cause “superfluous injury or unnecessary suffering,” a longer list which included nuclear weapons and added “inherently indiscriminate” weapons to the general prohibition, and a Red Cross proposal that would place a general ban on both categories.

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176 Glasius 2006, 80.
177 Glasius 2006, 81.
178 Although no similar treaty existed banning the use of nuclear weapons, the ICJ in 1996 issued an Advisory Opinion in which it held that the use of nuclear weapons needed to be consistent with existing rules and principles of the laws of war as well as specific treaties. Glasius 2006, 95.
unnecessary suffering and inherently indiscriminate). The final statute adopted bans of four categories of weapons: positioned weapons, asphyxiating gases and other liquids, bullets that expand or flatten in the body, and weapons “which cause superfluous injury” and are inherently indiscriminate. States eliminated nuclear weapons from the list, and in response to the resulting complaints that the banned weapons were biased against weaker states, also dropped biological and chemical weapons. Ultimately, the weapons provisions neither expanded nor even affirmed the legal status quo.

What explains states’ conservative approach to this issue, which Glasius terms, “a great disappointment”? Focusing on the unidirectional impact of TANs on states, one explanation holds that, in contrast to the mobilized and cohesive Women’s Caucus, the CICC Peace Caucus was relatively weak. It consisted of nine or ten groups and did not secure the support of the main CICC organizations, such as Amnesty International or Human Rights Watch.

A reciprocal view attributes the group’s failure to its lack of strategic calculation. In contrast to the other TANs examined in this dissertation, the Peace Caucus appears not to have framed its objectives according to what it expected states would actually be willing to consider. The US had no incentive to eliminate or limit the use of nuclear weapons. It called the proposal to ban nuclear weapons “a non-starter,” and adhered strictly to this position throughout the negotiations. Other Security Council members were similarly opposed.

In sum, this analysis of treaty content supports the view that in times of crisis, powerful states reaffirm the substantive status quo, including the territorial integrity principle in the 1950s and

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179 Glasius 2006, 103.
180 Glasius 2006, 104.
182 Glasius 2006, 102.
the rules governing *jus cogens* crimes in the 1990s. Powerful states also, however, become receptive to other sources of influence, particularly TANs. In the 1950s states incorporated the rules TANs had proposed regulating territorial violations; and in the 1990s they broadened the spectrum of crimes. At the same time, powerful states in both cases acted as gatekeepers, limiting the extent of TAN influence, for instance by rejecting TAN proposals for state criminality in the 1950s and for the prohibition of nuclear weapons in the 1990s. Finally, states also shaped the content of the Rome Statute based on sources that have little do with crisis or TANs. In contrast to hard BITs, the ICC negotiations were characterized more by multilateral bargaining over substantive provisions than by “cherry-picking” from other treaties.

**Conclusion**

International legal crises, combined with relatively sparse judicial landscapes, pushed powerful states to attempt to create criminal courts in both the 1950s and 1990s, although only the latter attempt proved successful. In the 1950s, crisis conditions directly triggered the attempt; in the 1990s legal crisis had an indirect effect by creating two *ad hoc* international criminal tribunals. In both cases, moreover, international legal crisis helped shape the content of the relevant treaties, the Code of Offenses and Rome Statute. They prompted states to reaffirm rules that were threatened. Even though the Cold War ultimately halted the process in the 1950s, the traumatic experience of territorial invasion motivated states to become innovators. These states tended to be legalist as well, and so it is not clear whether domestic legalist norms or state insecurity was the main force behind their support of a criminal court. Although not analyzed here, legalism sheds light on the innovators in the 1990s as well. Legalist states were the first and most ardent proponents of the independent prosecutor provision.
TANs were also important and so were their reciprocal relations with states. In addition to proposing a criminal court and the independent prosecutor provision, they shaped some of the substantive obligations incorporated into both the 1950s Code of Offenses and the Rome Statute. In doing so, they sought, with varying degrees of success, a strategic balance between catering to state interest and pushing for the expansion of legal rules. Other factors not related to TANs also shaped treaty content: the Nuremberg Principles in the 1950s and old-fashioned political bargaining in the 1990s are just two examples.

Mirroring the investor-state arbitration procedures discussed in Chapter 3, the analysis of the two cases yields a related set of unanticipated findings. As before, the presence of non-compulsory judicial mechanisms helped facilitate the creation of compulsory ones. The Nuremberg and Tokyo International Military Tribunals as well as the International Criminal Tribunals for Yugoslavia and Rwanda (ICTY and ICTR) served as indispensable though unplanned stepping stones towards the efforts to create more permanent and global criminal courts. They illustrated that non-traditional mechanisms offered reasonable and feasible alternatives to the traditional state-centric model. Furthermore, states not only reaffirmed the status quo but expanded it. In the 1950s, states codified new territorial-based crimes that had been proposed by a transnational group during the interwar period. In the 1990s, they expanded the scope of existing provisions defining crimes against humanity and war crimes. TANs were the main but not the only forces behind these expansive moves. The crisis argument needs an amendment: at moment of institutional creation, states turn out to be, simultaneously, conservative and progressive, reaffirming some rules while expanding others.

183 Since the tribunals may assert jurisdiction only over nationals and state officials from the designated, human-rights violating state, I refer to them as “non-compulsory.”
Finally, disinterest in new judicial mechanisms by the most powerful state can not only shape its form, bilateral rather than multilateral as in BITs; it can inhibit the creation of costly judicial mechanisms entirely. In the 1950s, the lack of US interest effectively vetoed the project. And yet, in the 1990s, hegemonic preferences proved not to be all-determinative. Other powerful states, sufficiently committed, made the establishment of the ICC possible.
CHAPTER 6
CONCLUSION

This dissertation offers a new vantage point from which to engage one of the central and enduring questions in international law and international relations: why are states willing to relinquish their sovereignty? I have answered that question with specific reference to investor-state arbitration and the ICC. In combining three features, both mechanisms pose fundamental constraints on state sovereignty. They are judicial, transferring the authority to issue legally-binding decisions to a third actor. They are compulsory, depriving states of the decision to submit to third-party jurisdiction on a case by case basis. And they are either transnational or supranational, empowering non-state actors with the right to initiate judicial proceedings against states. Despite these similarities, investor-state arbitration provisions and the ICC are rarely, if ever, examined together. This dissertation is a first effort to bring the two mechanisms, normally treated in isolation, into one analytical frame. In the concluding chapter I summarize the main findings, use the crisis argument as a basis to reflect on two prominent theoretical approaches in international relations scholarship, and draw out some broader implications of this study.

RECAPITULATION

The dissertation revolves around one central claim. Powerful states -- unexpectedly, however, not the hegemonic state -- turned to new sovereignty-constraining judicial mechanisms, specifically investor-state arbitration provisions and the ICC, in response to international legal crises that occur in a sparse international judicial landscape. Legal crises violate a legal rule or regime, are sudden and severe, and have cross-regional impacts. Ultimately, however, legal crises are in the eye
of the beholder. This dissertation has adopted the vantage point of powerful states since only they have the capacity to create sovereignty-constraining mechanisms at the global level. Powerful states are drawn to the creation of judicial mechanisms for strategic, legitimacy and efficacy reasons. The bilateral or multilateral form that they ultimately take, depends largely on whether the legal crisis is *de jure* or *de facto*. In *de jure* crises some states formally challenge traditional rules, rendering multilateral cooperation almost impossible. In *de facto* crises states and/or non-state actors engage in sweeping violations of legal rules without formally renouncing the rules’ validity. Multilateral cooperation and treaties therefore remain viable political options.

TANs rather than states invent new sovereignty-constraining judicial mechanisms and place them on the global agenda as potential enforcement tools. During periods of legal stability, TANs are unable to persuade states to adopt the new tools; on their own, they lack sufficient clout. Once a crisis sets in, however, TAN proposals move center stage and influence how powerful states choose to respond. The interaction between TANs and states is both reciprocal and strategic. TANs influence (but do not dictate) state receptivity to their innovative proposals; states determine the contours of TAN influence, inviting them into, or excluding them from, treaty negotiations. In anticipation of this dynamic, TANs shape their own agendas according to what states seem willing to accept. States incorporate TAN proposals selectively rather than wholesale.

The analysis of investor-state arbitration in Chapter 3 illustrates these dynamics, including the reciprocal relation between TANs and states. Soon after the establishment of the United Nations Conference on Trade and Development (UNCTAD) and the emergence of the G-77, developing countries began to resist the traditional rules governing the international economy, including customary international rules regulating foreign investment. Spurred partly by OPEC’s decision to raise dramatically the price of oil, and the spreading notion of “resource power,” developing countries started to expropriate foreign assets, granting at most partial compensation.
Through GA resolutions, developing countries also formally rebelled against existing investment rules. Expropriations and formal resistance snowballed into a full-scale *de facto* and *de jure* legal crisis in the early 1970s which unfolded in an international judicial landscape that lacked compulsory judicial mechanisms.

Powerful states turned to investor-state arbitration provisions in response, as a strategy to protect the traditional investment regime. To be sure, weak states accepted the costly judicial provisions. Powerful states, however, were the drivers of this development. They drafted the provisions and took the initiative of including them in bilateral treaties once it became clear that a multilateral treaty would be unobtainable. The importance of crisis is evident not only in the timing and content of the first hard BITs, but also in examining the identity of innovators: powerful states that were most susceptible to having their nationals’ property expropriated adopted investor-state arbitration provisions before their peers.

TANs, particularly a group of Continental European investors, bankers, and lawyers, were critical to the creation of investor-state arbitration. The investment TAN invented the arbitration mechanism and promoted it on a global scale. It did so in response to the post-World War II Eastern European expropriations and a handful of expropriations in the 1950s, including the Suez Canal. But it took the full-fledged legal crisis of the 1970s for powerful states to become receptive to their proposals. Although TANs did not influence the precise timing of the introduction of hard BITs, without their mobilization, hard BITs would not have emerged.

A similar dynamic occurred in the creation of the ICC. In both the 1950s and 1990s powerful states, excluding the US hegemon, responded to an international legal crisis by turning to the creation of a new type of judicial mechanism; they failed in the 1950s and succeeded in the 1990s. Contrary to the assumption that the roots of the 1990s ICC can be traced to the holocaust, it was Germany’s territorial aggression of the late 1930s, combined with a sparse international judicial
landscape that moved states in the 1950s to attempt, but ultimately abandon, the creation of the world’s first criminal court. Violence in the former Yugoslavia and Rwanda in the 1990s posed a de facto crisis for the human rights regime which, combined with a sparse international judicial landscape, indirectly facilitated the successful establishment of the ICC and the independent prosecutor provision.

A number of factors help explain the difference between early failure and subsequent success. Most importantly, the 1990s effort occurred on the heels of the end of the Cold War and the rise of the individual criminal accountability norm. Furthermore, the US supported the court until the final days of negotiations. In sharp contrast, in the 1950s the outbreak of the Cold War and US disinterest proved ultimately to be insurmountable barriers to the effort to establish a criminal court. Even though it did not lead to the creation of a criminal court, the crisis triggered by Germany’s aggression influenced the content of the 1950s treaties, with powerful states reaffirming some of the traditional rules bolstering territorial integrity. And, as expected by the crisis argument, many of the states backing the proposed court in the 1950s had been particularly susceptible to German aggression and occupation before and during World War II.

Consistent with their role in shaping investor-state arbitration, TANs were important for establishing the ICC without being able to guarantee it. During the interwar years a group of lawyers and academics from continental Europe proposed and pushed for the creation of an international criminal court. But it took the legal crisis created by Germany’s territorial aggression to make states receptive to their proposals. That receptivity faded as the Cold War set in. In the 1990s a confluence of enabling conditions allowed TANs to play an especially important role in pushing an innovative agenda, including their overwhelming presence at the actual negotiations. In both the 1950s and the 1990s, the relationship between TANs and states was strategic and reciprocal: TANs shaped state preferences on both substantive and procedural provisions, and state preferences
influenced which objectives TANs chose to pursue in the first place. Ultimately, however, states were the final decision-makers, selectively incorporating parts of the TAN proposals.

The crisis argument explains the emergence of international law’s most sovereignty-constraining judicial mechanisms at the global level — why powerful states, as a group, are drawn toward enforcement tools designed specifically to transfer authority from state to non-state actors. If the aggregate-level dynamics of institutional creation are the sum of their parts, one would expect the crisis logic to prevail also at the state level, explaining why some states are innovators, adopting—in this case—hard BITs before their peers. Chapter 4 examines therefore cross-national variation in the adoption of hard BITs during the crisis period. It yields results that affirm the crisis argument, but only for powerful states that were most susceptible to the 

de facto

crisis of the 1970s — states with high investment insecurity and limited access to compulsory judicial mechanisms. This finding suggests that a specific threshold of susceptibility to crisis had to be crossed before states were moved to adopt investor-state arbitration provisions.

Although the crisis argument offers powerful insight into the dynamics of sovereignty-constraining judicial mechanisms at both the aggregate and state levels, it remains incomplete. The analysis of both investor-state arbitration and the ICC yields three unanticipated findings. First, voluntary or limited jurisdiction mechanisms served as important albeit unintended stepping stones toward the creation of new-style, compulsory ones. In the investment case the creation of a new center for investment disputes, ICISD, made the idea of investor-state arbitration both conceivable and feasible. In the criminal court cases, the Nuremberg and Tokyo Tribunals and the ICTY and ICTR showed that international prosecution, including by an independent prosecutor, was not only feasible but desirable. Compared to the 

ad hoc

tribunals, an independent court would be insulated from criticisms of victor’s justice and would not serve simply as a tool of the Security Council.
Furthermore, the two *ad hoc* tribunals demonstrated to hesitant states that a court with an independent prosecutor would not be the death knell of sovereignty.

Second, in response to legal crisis, states not only reaffirmed the substantive status quo but expanded it. The initial impulse of states was conservative: both the hard BITs and the Rome Statute bolstered traditional rules. Yet, once states decided to create such costly mechanisms, they also became receptive to other, more expansive substantive proposals. For instance, states included a provision for indirect expropriation in BITs, and they broadened the category of gender-based crimes in the Rome Statute. Although the substantive content of both BITs and the ICC was influenced by a range of legal sources, including prior US treaties and the give-and-take of bargains and compromise, TANs were responsible for the most expansive and, in some cases, controversial provisions.

Finally, we have learned that not all powerful states are the same. Once a legal crisis sets in, the most powerful or hegemonic state may have a distinct agenda. As the US became increasingly concerned that an international criminal court would evolve into a tool of Cold War animosity in the 1950s, its support waned. Reluctant to alienate its Cold War allies in the 1960s the US did not support, and at points actively resisted, European moves toward establishing a multilateral investment convention. Based in part on the concern that its active role in peacekeeping would make the US military vulnerable to “political” prosecutions, in the 1990s the US ultimately opposed the ICC.

US disinterest and at times explicit opposition to the creation of new costly judicial mechanisms did not have uniform effects. In the 1950s attempt to create a criminal court, US disinterest had a veto effect. In the investment case, during the 1960s, US resistance did not veto the investor-state arbitration but deflected it away from multilateralism towards bilateralism. In the 1990s US opposition at the 11th hour in the end did not pose an insurmountable barrier for the
creation of the ICC. The overwhelming majority of states voted for an independent court, clapping and cheering as the US delegation left the room in defeat.\(^1\) It is thus difficult to extract from the historical record a hard and fast rule about the impact of a hegemon’s opposition to the creation of sovereignty-constraining judicial tools. That record does, however, support another generalization: it was the medium-powers rather than the most powerful state that were the main drivers of the creation of investor-state arbitration and the ICC.

The analysis of the creation of investor-state arbitration provisions at both the aggregate and state levels offers little if any support for the credible commitment argument. Although the timing of their creation conforms to its expectation, the identity of innovators provides no indication that credibility was an important motive; states that were most in need of signaling their reliability — newly independent states, resource-rich states, and states with expropriation track records — steered clear of them.

Since credible commitment is the reigning and most preferred explanation for the proliferation of BITs, how can we account for its poor record? One possibility is that this dissertation’s focus differs from most BITs studies in two respects. First, it concentrates on the distinction between hard and soft BITs rather than BITs and no BITs. It may be that credibility incentives matter for the latter choice, but become less important for the decision about which type of treaty to sign. Chapter 4 offers preliminary insight into the first stage determinants of BIT signing, however, and finds still little evidence of a credibility incentive. Second, the dissertation focuses only on the creation of new judicial mechanisms, whereas the extant scholarship, with one exception, does not distinguish between different stages of institutional development. Credibility incentives may matter in the later stages of BITs proliferation, once the treaty begins to spread globally. This argument, however, flies in the face of the dominant theory of organizational change:

\(^1\) Benedetti and Washburn 1999, 26-27.
rationalist efficacy motives supposedly matter more in the early stages, and social, normative ones more in the late stages.  

Alternatively, the lack of evidence supporting the credibility argument may not be puzzling after all. Despite the pervasive assumption that BITs serve a signaling function, two of the three most relevant statistical studies looking at the determinants of BITs adoption find no evidence of a credibility motive.  

In his dissertation, Lauge Poulsen offers a compelling qualitative analysis suggesting that capital-importing states did not realize what they were signing up for, and that BITs could not have served as a signaling mechanism.  

This view is consistent with my evidence, which, albeit limited, suggests that developed countries were signing BITs with any state that was receptive rather than targeting those with little credibility.  

A final defense of the credible commitment argument holds that states lack credibility in different ways, and that incentives to adopt BITs or investor-state arbitration provisions will depend on the factors that make a state look untrustworthy. If states lack credibility for reasons that relate directly to legal crises, they may very well be among the least inclined to submit to BITs and investor-state arbitration. In the obverse case, states may be motivated to sign BITs precisely to show that, despite the existence of a legal crisis, they are trustworthy. This might explain the results of the analysis by Jandhayala and coauthors, which support the credibility argument. Even if this is the case, my analysis of BITs points to the point that state incentives for signing BITs do not simply change overtime; at any given moment they are complex. The adoption of a single BIT may entail

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2 DiMaggio and Powell 1983.

3 Elkins, Guzman and Simmonds 2006 (finding that resource-rich states, states with weak rule of law and non-democracies are no more likely to adopt BITs than their peers, and in the first two cases are significantly less likely; Allee and Peinhardt 2010 (finding no correlation between rule of law, regime durability, and constraints on the executive and delegation to ICSID).

4 Poulsen 2011. See also, Poulsen and Aisbett 2013, and Poulsen 2013.
different incentives about whether or not to sign, what type of BIT to sign, and with which state to sign.

With fewer behavioral implications than the credible commitment explanation, the legalist argument received somewhat stronger support in the analysis of the ICC. In the 1950s the innovator states were largely legalist. Complicating the picture is the fact that many of these innovators had experienced invasion and occupation in the 1930s and 1940s; their support is therefore also consistent with the crisis argument. Without further and more detailed analysis, it is difficult to know whether legalism, crisis, or both were driving the policies in support of the creation of a criminal court. Although I do not analyze legalism in the 1990s, the evidence is clear: the main innovators were legalist states. They were the first to support the independent prosecutor provision in 1995. By 1996, the main supporters of the independent prosecutor provision were Denmark, Germany, South Korea, Switzerland, Trinidad and Tobago, all of which were legalist.

While legalism explains the identity of innovators, it has no clear account of the timing of the creation of the ICC. For instance, it has no satisfactory answer to the question why legalist states pushed for a criminal court only in response to wars rather than during periods of peace. Legalism is also hard-pressed to explain the substantive content of the relevant treaties. Prior to their introduction at the international level, genocide, crimes against humanity and war crimes were not part of domestic legal systems. For these reasons legalism offers no more than partial insight into the creation of the ICC.

5 Glasius 2006, 49 (listing Austria, Greece, Netherlands, Norway and Switzerland), and New Zealand (personal correspondence with Nicole Deitelhoff, 4/23/2013, on file with the author).

6 Opposed were Algeria, France, Jamaica, Japan, Israel, Singapore, Iran, Malaysia, Mexico, Russia, Slovenia, USA, Vietnam, and UK (personal correspondence with Nicole Deitelhoff, 4/23/2013, on file with the author).

7 Legalism can, however, shed light on due process rights guaranteed the accused, and may also help explain why states were adamant about including a provision for individual criminal liability but resisted an analogous provision for state criminal responsibility.
REFLECTIONS ON EXISTING SCHOLARSHIP

Although the crisis argument and TAN analysis is geared towards explaining the introduction of investor-state arbitration and the ICC, it speaks to broader issues of international institutional change addressed by two prominent areas of IR scholarship: Rational Institutional Design (RID) and transnational advocacy.

The foundational premise of the RID literature holds that states use institutions to solve inter-state cooperation problems, and that they make institutional design choices based on the specific type of problems they confront.8 This premise has led some scholars to identify RID as “functionalist.”9 In the original symposium volume introducing RID, the authors focused on the impact of six types of cooperation dilemmas (such as distribution and enforcement problems), and connected them to state decisions about five institutional design features (membership, scope, centralization, control, and flexibility). In doing so, the RID literature remains groundbreaking for offering a coherent analytical framework that can be applied to institutional design choices across a broad spectrum of issues.

A central problem with the RID approach, however, is that it treats state decisions about institutional design as independent of state decisions to create international institutions in the first place. RID scholars take as given that states want to create an institution to solve a cooperation problem and focus exclusively on the subsequent design choices. As leading RID scholar Barbara Koremenos explains, states “are assumed to have an interest in cooperation; why this is so is outside

8 See Koremenos, Lipson and Snidal 2001.

9 In the words of Barbara Koremenos, “we cannot understand institutional design and compare across institutions without understanding the cooperation problem that the institutions are trying to solve.” Koremenos 2007, 192. Koremenos and Nau 2010, 86.
the scope of rational design . . . instead of asking why states cooperate, the relevant question in the
Rational Design framework is why states cooperate the way they do.”

The crisis argument shows instead that states’ preferences about design are sometimes linked to and influenced by their desire to create an institution in the first place – a desire that may not be shaped by the cooperation dilemmas detailed by RID scholars. The compartmentalization of state decision to create institutions from the subsequent institutional design means that some of the propositions about the relationship between types of cooperation problem and design feature are either spurious or entirely wrong. For instance, the RID approach expects that states will increase membership as the severity of the “distribution problem” and uncertainty about preferences increase. In the case of hard BITs, however, the severity of the distribution problem produced the opposite effect: it forced powerful states to decrease membership and resort to bilateralism.

More important than severity, the nature of the distribution problem explained the treaty’s bilateral form. In general terms, the BITs analysis suggests that when the distribution problem is the result of formal *de jure* opposition to legal rules, multilateral agreements become nearly impossible. When the distribution problem results from *de facto* violations, multilateral consensus remains within reach. Uncertainty about preferences, moreover, does not explain the bilateral form of hard BITs. If anything, it was the certainty of state preferences that informed the distributional problem, leading to bilateralism.

The crisis argument casts doubt on other RID conjectures about treaty design. RID scholars, for example, expect that the scope of the treaty increases with greater heterogeneity and larger number of actors because states engage in issue linkage. The core of the crisis argument holds instead that scope is influenced by state incentives to reaffirm existing rules. Scope is not simply a

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10 Koremenos 2013, 69.

11 Koremenos, Lipson and Snidal 2001, 783.
design choice but a fundamental motivation for launching treaty negotiations in the first place. In the ICC case, moreover, states self-consciously limited the scope to only four *jus cogens* crimes to ensure consensus among a diverse and large set of actors. To the extent that the rules regulating these crimes were expanded, TAN mobilization more than issue linkage or “gains from trade” was key. The conjecture that flexibility increases with the severity of the distribution problem is also unfounded in the cases explored here. When powerful states want to protect threatened legal rules, they design treaties to be automatic and rigid, particularly when the treaties are, in practice, asymmetric.

Finally, the RID volume proposes conjectures that are in fundamental tension with one another. For instance, RID holds simultaneously that when enforcement problems are severe, membership is restricted and when distributional problems are severe, membership is expanded. Recognizing this tension, Koremenos and her co-authors acknowledge that their framework “cannot capture more complex interactions.” This is a very significant concession since this type of complexity characterizes most cooperation problems.

The point is not that the crisis argument proves the RID conjectures to be entirely wrong, but rather that the RID approach would be more compelling if it did not assume away questions about why states want to create institutions in the first place. If this proposal seems unwieldy and to detract too much from the parsimony of the approach, the RID approach could still be improved.

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12 The RID approach suffers from two other limitations. First, it is indeterminate: although states confront cooperation problems frequently, they resolve them by selecting a specific design feature only in some instances. What accounts for variation of response for a given cooperation problem? In the case of investment, for example, the RID approach is hard pressed to explain why investor-state arbitration emerged for issues like expropriation but not for other problems also marked by asymmetric enforcement, like intellectual property rights violations or sovereign defaults on private loans. Similarly, cooperation problems can be alleviated through a variety of design choices; the rational design approaches do not explain why states settle on one type of feature when another appears to be equally effective.

13 Aside from the tension between these two conjectures, the analysis of BITs points to the possibility that enforcement and distributional problems move in tandem. State opposition to the traditional investment rules (distributional problem) led to violation of investment rules (enforcement problems).

14 Koremenos, Lipson and Snidal 2001,795.
This dissertation’s focus on treaties with sovereignty-constraining mechanisms suggests that RID would be more compelling if it recognized that all treaties are not the same. When it comes to challenges to sovereignty, the Rome Statute differs from the International Telecom Convention. As it now stands, the RID approach treats the two as equivalent.

Along these lines, the RID approach could be made more persuasive if it distinguished among first-time and replicative treaties. The first set of BITs to include investor-state arbitration was more radical and costly than the 1000th-plus BIT that was established two decades later; the forces shaping hard BITs surely differed from those shaping replicative BITs. A functionalist approach that offers insight into iterated design choices is less useful for analyzing what are likely to be politically-charged choices — infrequent, first-time decisions of states to concede significant legal authority. Recognizing the singularity of first time treaties has the added benefit of correcting for another important limitation of the RID approach: it takes the menu of potential institutional design options as given. It does not inquire into why new design features become available while others go out of fashion. The crisis argument thus can usefully complement and strengthen the RID approach.

As much as TAN scholarship has become more nuanced since the foundational volume that Keck and Sikkink edited in 1998, it too has tended to ignore important prior questions – here, about the factors that influence TANs. Instead, TAN scholars have focused primarily on TANs’ role in effecting social and normative change.15 This focus is beginning to change. Charli Carpenter has explored extensively the agenda setting and issue adoption stages of TAN campaigns.16 James Ron and his co-authors have concentrated on a related, but slightly different issue, exploring the factors that influence Amnesty International’s press releases and reports.17

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15 Keck and Sikkink 1998.
This dissertation contributes in two ways to this more recent strand of TAN literature. First, the TAN analysis illustrates the basic point that TAN campaigns are historically contingent. Both the investment TAN campaign for investment protection and the interwar group’s mobilization for a criminal court emerged at the initiative of TANs from continental Europe, in response to their experiences of World War II. The TAN responses to war, moreover, were shaped by their normative and legal context, as were state responses to the TAN campaigns. In the investment case, German investors and bankers, the Abs group, first mobilized following World War II, in response to the seizure of German assets in Eastern Europe. The Eastern European expropriations signaled the supremacy of the state over the private sector rather than a rising rebellion against the foreign investment regime as was the case with the G-77 expropriations two decades later. The Abs group tried, but failed, to frame the 1940s and 1950s expropriations, including that of the Suez Canal, as posing a global threat.\(^{18}\)

In the criminal court case, lawyers first began to push for a court after having witnessed the atrocities of World War I. But the legal context was not conducive: territorial aggression in World War I differed from territorial aggression in World War II not simply in that it was less severe, but also in that it did not pose a legal threat; the territorial integrity principle was not yet in place. Despite the persistent attempts by TANs to create a criminal court during the interwar period, states argued that a judicial mechanism could not be created to enforce a legal rule that did not yet exist.

Historical analysis of TANs illuminates a number of other features of transnational advocacy that current TAN scholarship, with its largely contemporary focus, overlooks. First, the widely-recognized proliferation of non-state actors during the twentieth century has led to

\[^{18}\text{Herman Abs, for instance, opens his “reflections” on the Suez crisis with the following observation: “The Suez incident has again clearly revealed the abyss of moral and legal disintegration on the brink of which we are now standing. It has opened the eyes of many people, although unfortunately of only a minority among the responsible politicians and statesmen of the free world, to the magnitude of the dangers which threaten the positions of the West . . . .” Abs 1956, 51.}\]
networks, the core focus of some of Carpenter’s work, replacing individuals as the central leaders promoting legal change. This, however, is a relatively recent phenomenon. In the 1930s and 1950s TAN campaigns were led by key individuals – such as Herman Abs, Hartley Shawcross, Vespasian Pella, and Henry de Vabres. It is much harder to identify leaders of comparable stature in the 1990s who headed the CICC or the anti-MAI coalition. This changing form of leadership has implications for the efficacy and nature of TAN campaigns. Most obviously, when individuals die contemporary TANs are at less risk of losing influence or momentum. Had Pella not died in 1952, it is at least possible that states would have continued to work towards creating the ICC. Pella might have persuaded them to proceed in creating a court, or some form of ad hoc tribunal, even without US participation or an agreement on a Code of Offenses.

The proliferation of TANs has two other implications: rather than appearing and disappearing sporadically, transnational advocacy has evolved into a permanent feature of world politics. The constancy of TAN presence has implications for TAN efficacy. When crises occur or “windows of opportunity” emerge, the start-up costs for TANs are much lower. The proliferation of TANs has also meant, however, more inter-TAN competition and conflict, including over substantive goals.\footnote{For an analysis of competition over resources, see Ron and Cooley 2002. For normative conflict, see Bob 2010. In the ICC case, for instance, women’s rights groups battled with religious groups on the issue of forced sterilization. Glasius 2006. Transnational business advocacy groups influenced states to launch the MAI negotiations in 1995; environmental and labor groups made negotiations stall three years later. Schittecatte 2001. Such divisions were not an inherent feature of TAN advocacy in earlier decades.}

This dissertation also illuminates the strategic interaction between TANs and states. TANs have long been recognized as strategic actors, and TAN attempts to tailor their agendas to state preferences are not surprising. Scholars have directed less attention, however, to the iterated and reciprocal relationship between TANs and states. I highlight “splitting” and “gate-keeping” as two characteristics of strategic TAN-state interaction.
In both the investment and criminal court cases, TANs tried to win state support by splitting the substantive and procedural components of their agenda. TANs reasoned that states would be more receptive to substantive obligations that were not accompanied by costly new-style judicial mechanisms, and more welcoming of such mechanisms if they were not required to accept substantive obligations at the same time. For instance, in the attempt to garner state support for a criminal court, the interwar group narrowed the substantive provisions of its proposed criminal court treaty and ultimately made the substantive component optional in the final draft that it submitted to the League in 1928.  

The investment group also employed a splitting strategy. Although the initial Abs Convention had included mandatory provisions for investor-state arbitration, the group ultimately made the procedural component optional in the version that Germany submitted to the OEEC in 1959.  

Even as TANs split their proposals and frequently tailored their agendas to attract state support, states were selective in granting TANs influence. They acted as both literal gatekeepers – determining when TANs could participate in treaty negotiation – and metaphorical ones, cherry-picking among TAN proposals. This gate-keeping role was evident when TAN members were asked to propose the first (Secretariat) draft of the Genocide Convention, and then were replaced by state delegates who produced a second, more conservative draft. In drafting the Code of Offenses, state delegates requested that Pella submit a list of possible crimes to include in the draft Code of Offenses and then incorporated selectively from that list. Most importantly, state delegates rejected

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20 Even though it did not lead to the creation of a criminal court, the splitting strategy was smart. States themselves deployed it when they decided to divorce the Genocide Convention negotiations from the question of setting up a criminal tribunal and separated the drafting of the Code of Offenses from the drafting of the criminal court statute. For the Rome Statute, states decided to integrate substantive and procedural components into one treaty and were able to do this by ensuring that the treaty codified only the most egregious crimes.

21 Even though the Abs-Shawcross Convention was not adopted, the group was on the right track; the World Bank’s rejection of the OECD’s request that it build on the ICSID Convention by creating a substantive treaty made clear that integrating substantive investment obligations with costly judicial mechanisms would be a non-starter.
TAN proposals for state criminality – a central component of the TAN agenda. Today, most lawyers and scholars take it for granted that the concept is impractical if not impossible. Yet, at least until the Nuremberg trials, many European lawyers considered the concept of state criminality to be the logical counterpart to individual liability. Finally and most recently, even with the overwhelming presence of NGOs at the Rome Statute negotiations, states were the final decision makers, accepting some proposals (such as gender-based war crimes) and rejecting others (such as a prohibition of nuclear weapons).

**Broader Implications**

When it comes to international judicial mechanisms, investor-state arbitration and the ICC are outliers. They combine judicial, compulsory and transnational or supranational features, each of which limits sovereignty. Other global mechanisms, such as the WTO Dispute Settlement Body or the International Tribunal for the Law of the Sea, share some of these characteristics, but none combine all three. Outliers are important in that they reveal institutional dynamics that routine cases often obscure. The crisis argument points to conditions that in the future might lead to the creation of other sovereignty-constraining judicial mechanisms. For instance, there exists now a small but growing campaign for the creation of an environmental court.\(^2\) This dissertation suggests that the greatest likelihood of that happening would be some kind of crisis threatening environmental legal rules that powerful states want to protect. A BP 2010-type disaster, a Bhopal, or a Chernobyl with effects experienced first-hand in the US or Europe might create the kind of upheaval that could move powerful states to take current proposals more seriously. Equally important, the crisis argument provides insight into why in the future some attempts to create an unusually costly judicial

\(^2\) See Kalas 2002.
mechanism might succeed while others fail. Crises, TAN mobilization and the support by powerful states increase the likelihood of success; the absence of one of these conditions risks dooming new initiatives.  

Furthermore, an analysis of outliers suggests other, broader insights into the creation of sovereignty-constraining enforcement tools. For instance, since the confluence of these three conditions is rare, transnational advocates may need to develop different strategies if they want to push an innovative procedural agenda. Building on the insight about the importance of limited or voluntary jurisdiction mechanisms as stepping stones, one possibility might be to propose an innovative mechanism as an alternative to a more traditional form of enforcement and leave states with a choice between the two. If some powerful states accept the innovative mechanism, then it is quite possible that other states will eventually follow.

Ultimately, though, outliers remain what they are – exceptions, not the rule. By definition, they diverge from the typical dynamics of institutional creation. A power-based approach is too simple for understanding the creation of many judicial institutions. When it comes to institutions that impose dramatic constraints on sovereignty, this dissertation suggests that powerful states – even if not the hegemon – have been, and will continue to be, the ultimate deciders.

And yet, although powerful states created investor-state arbitration and the ICC, they cannot dictate when or how the innovations are utilized. The features that make these two

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23 For instance, the failed IMF attempt to create some form of sovereign debt tribunal can be explained in terms of the absence of a crisis, and, at least for awhile, IMF officials seemed prepared to do it differently in the future. Immediately after the demise of its plan, the IMF legal department “claimed that the concept would remain in IMF’s drawers and would be taken out again once the next crisis appeared.” Ibid. 19. As Christoph Paulus writes, “[i]t sounds more cynical than it is meant to be, but here, too, the motto should be: never waste a solid crisis.” Paulus 2012, 5. Yet even in crisis, US opposition would have likely stood as an insurmountable barrier. As Jürgen Kaiser points out, “Since 2003, however, the staff toned down considerably and recently even declared that the IMF had learnt its lesson and would not burn its fingers again. And indeed, since the outbreak of the financial crisis, the IMF’s role has been to mobilise resources to an enormous extent; in no way has it opened any drawers to pull something out, which would resemble a kind of comprehensive debt restructuring process. Obviously, Ms. Krueger took the drawer keys with her when she left the IMF in 2006.” Kaiser 2010, 19.
mechanisms outliers also ensure that they will have profound transformative effects, both on the
development of substantive legal rules and on our understanding of state sovereignty. The shift of
cjudicial authority to private and non-state actors is costly for developing states and powerful states
alike, albeit to different degrees. In investment law, developing countries have faced many more
claims than their powerful counterparts; yet even the US has sought to narrow the scope of hard
BITs for fear of having its own sovereignty significantly constrained. While the ICC has proved
most costly for violent dictators, the US was nervous enough to launch a program of securing
bilateral non-surrender agreements with as many states as possible. 24 The greatest costs these
mechanisms pose for powerful states comes not from the observable constraints on state conduct,
but the more subtle loss of legal authority over rule-making and rule-interpretation.

In the end we are left with a paradoxical finding. Powerful states bring about novel judicial
mechanisms to protect the status quo. And by doing so, unwittingly, they launch a process of
profound change.

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